



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION 295 OF 2008

REPUBLICAPPLICANT

VERSUS

NATIONAL ENVIRONMENT TRIBUNALRESPONDENT

EX PARTE: SILVERCREST ENTERPRISES LIMITED

JOEL LESALE.....1ST INTERESTED PARTY

DONATCO FONSECA2ND INTERESTED PARTY

MRS. BETH WAMBUI MUGO3RD INTERESTED PARTY

JOHN MBUVI4TH INTERESTED PARTY

MANGA MUGWE5TH INTERESTED PARTY

EUGENE CHERNEL6TH INTERESTED PARTY

NICK MUGO.....7TH INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA)8TH INTERESTED PARTY

RULING

Pursuant to leave given by this court on 24th July 2008, Silvercrest Enterprises Ltd., the exparte applicant herein, took out the Notice of Motion dated 7th August 2008 under Order LIII rules 1 (1) – (4) and 4 of the civil Procedure Rules and Pursuant to Section 8 of the Law Reform Act. In the aforesaid motion the exparte applicant sought for the following orders:

1. That an Order of Prohibition be granted and/or issued directed to and prohibiting the National Environment Tribunal, its members, or agents from proceeding, hearing and/or otherwise further hearing the *Tribunal Appeal No. NET 23.2007 of 2007 at Nairobi, Mrs. Beth Wambui Mugo, Nick Mugo, Joel Lesale, Donatco Fonseca, John Mbuvi, Eugene Chernel, and Munga Mugwe =versus=*

Director General NEMA and Silvercrest Enterprises Limited in its present form or in any variation thereof akin to the Appeal arising from or in connection with the same subject matter plot No. MN/1/5672.

2. That an Order of Certiorari be granted and/or issued to remove into the High Court and quash the proceedings in the National Environment Tribunal No. NET.23 of 2007 at Nairobi, between Mrs. Beth Wambui Mugo, Nick Mugo, Joel Lesale, Donatco Fonseca, John Mbuvi, Eugene Chernel and Munga Mugwe versus Director General, NEMA and Silvercrest Enterprises Limited and all the proceedings therein and/or Rulings of the National Environment Tribunal in the said Appeal.

3. That the costs of this application be provided for.

The motion is accompanied by a statutory statement and verified by the affidavit of George Atetwe sworn on 7th August 2008 and by a verifying affidavit of Ashford Murithi Mugwuku sworn on 11.12.08. When served with the motion, the National Environmental Tribunal hereinafter referred to as the “tribunal”, the Respondent herein and the National Environmental Management Authority hereinafter referred to as ‘NEMA’, the 8th Interested Party filed the replying affidavits of Donald Kaniaru sworn on 17th November 2008 and 3rd December 2008 respectively to oppose the same. On the other hand, Joel Lesale, Donatco Fonseca, Hon. Mrs. Beth Wambui Mugo, John Mbuvi, Munga Mugwe, Eugene Chernel and Nick Mugo being the 1st – 7th Interested parties filed the notice of motion dated 9th September 2008 in which they applied for the following orders:

1. That the exparte leave granted to Silvercrest Enterprises Limited on 24th July 2008 to apply for an order of prohibition and an order of certiorari as set out in the Chamber Summons of 7th July, 2008 be set aside.

2. That the order that the said leave do operate as a stay of the proceedings before the National Environment Tribunal, NET/23/2007 be discharged.

3. That the chamber Summons dated 7th July 2008 be dismissed with costs.

The aforesaid motion is supported by the affidavit of Amb. Nick Mugo sworn on 9.9.08. The exparte applicant filed the replying affidavit of George Atetwe sworn on 8th December 2008 to oppose the motion dated 9th September 2008. The Respondent (‘Tribunal’) and the 8th Interested Party (NEMA) filed the replying affidavit of Donald Kaniaru sworn on 17th November 2008 to support the motion dated 9th September 2008. The two motions were ordered to be argued together.

When the motions came up for interpartes hearing, learned advocates appearing in this dispute consented with the approval of this court to file skeleton written submissions. Learned advocates later appeared before this court to make brief oral highlights over their skeleton arguments. Mr. Muriuki, learned advocate for Silvercrest Enterprises Ltd., the Exparte applicant herein, urged this court to grant the orders sought in the Notice of Motion dated 7th August 2008 and to dismiss the motion dated 9th September 2008. Mr. Muriuki was of the view that the Tribunal (Respondent) had no jurisdiction to hear and determine issues relating to ownership and title to land. It is his submission that the tribunal purported to exercise jurisdiction or entertained the aforesaid issues in total disregard of the law. The tribunal has been accused of entertaining claims on appeal by the Interested Parties relating to the following issues:

(i) The challenge of the applicant’s title to land,

(ii) Approval for the construction by the Physical Planning Department of the Municipal council of Mombasa, Ministry of Lands and the approval and grant of an Environmental Impact Assessment by the 8th Interested Party.

(iii) The project having been completed, it is said the tribunal has no authority to entertain the aforesaid appeal, so that there is nothing to deal with thereafter. It is also argued that the tribunal had no jurisdiction to extend time to appeal. Mr. Muriuki further argued that the tribunal was biased and that it acted unreasonably.

This court was urged to find that it was inappropriate for the tribunal's chairman to file a replying affidavit. This in itself manifested bias on the tribunal's part. Mr. Muriuki further attacked the affidavit of Hon. Mrs. Beth Mugo, stating that she had no authority to swear an affidavit on behalf of others without a written authority. The learned advocate was of the view that the ex parte applicant was not guilty of material non-disclosure as alleged in the Notice of Motion dated 9th September 2008. Mr. Mogaka, learned advocate appeared alongside Mr. Muriuki as representing the ex parte applicant on 18th December 2008 when the applications came up for further hearing. Mr. Mogaka urged this court to hold that the mere existence of an alternative remedy is no bar to one taking up judicial review proceedings. It is Mr. Mogaka's view that the entire proceedings before the tribunal were a nullity hence they cannot be maintained. The argument that the decision was challenged after the lapse of 6 months was discounted on the basis that proceedings were ordered stayed on 24th July 2008. It is said that the Notice of Motion dated 9.9.08 should be struck out as having been overtaken by events upon the filing of the substantive motion.

Mr. Wanyonyi, learned advocate for the Respondent argued against the motion dated 7th August 2008 and in support of the motion dated 9th September 2008. It is the submission of Mr. Wanyonyi that the applicant did not serve the statutory notice under order LIII rule 1(3) of the Civil Procedure rules upon the Deputy Registrar thus the motion dated 7th August 2008 is rendered fatally defective. Mr. Wanyonyi further urged this court to find that the motion dated 7th August 2008 is incompetent in that it seeks to have a decision made more than 6 months to be quashed. It is said the decision complained of was made on 20th December 2007 yet leave to institute judicial review proceedings in the nature of certiorari was obtained on 24th July 2008. By then, more than 6 months had lapsed. Mr. Wanyonyi further attacked the motion dated 7.8.08 on the ground that the tribunal could only be sued through its designated offices unlike in this case where the tribunal is sued as an entity. It is argued that the motion has no merit because the tribunal had the discretion to extend time to appeal under S.129(2) of the Environmental Management and Coordination Act. The Respondent denied any bias on its part.

Mrs. Shaw, learned advocate for the 1st – 7th Interested Parties, urged this court to dismiss the motion dated 7th August 2008 and to allow the motion dated 9th September 2008. The learned advocate adopted the submissions of her colleague Mr. Wanyonyi. It is her submission that the applicant did not comply with the provisions of Order LIII rule 1 (3) of the Civil Procedure Rules. It is said that the applicant did not even apply to be excused from giving the notice nor did it apply for the extension of time to give the notice. Mrs. Shaw also pointed out that the applicant is guilty of material non-disclosure. It is further argued that the applicant did not disclose that it had an alternative remedy of appeal. It is argued that the motion was time-barred and that there was no evidence of bias on the part of the Respondent. It is said that the tribunal restricted its proceedings to the project and did not deal with the issues relating to ownership of land.

I have considered the material placed before this court. I have also considered both the written and oral submissions made by learned counsels. From the aforesaid pleadings and submissions two preliminary issues arose which must be determined before delving deeper into the merits of the dispute.

First, is whether or not the motion dated 7th August 2008 is time-barred.

Two, whether or not the applicant complied with the provisions of order LIII rule 1(3) of the Civil

procedure rules. If not what is the effect? I propose to begin with the last issue. The ex parte applicant does not dispute the fact that it did not give notice to the Deputy Registrar of this court pursuant to the provisions of Order LIII rule 1(3) of the Civil procedure rules. It does not also dispute the fact that it neither applied for the period to issue such a notice to be extended nor did it apply to be excused for failure to file the notice of the application. In order to appreciate the import of the provisions of sub-rule 3 it is necessary to reproduce the same on this page as follows:

“(3) The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits:

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown.”

It is now well settled that where a party does not comply with the provisions of order LIII rule 1(3) of the Civil Procedure Rules, the ex parte summons and the subsequent motion will be rendered fatally defective and incompetent. I am convinced that the ex parte applicant herein did not comply with the aforesaid sub-rule hence its ex parte summons and Notice of Motion must be struck out. It has been argued that the substantive motion having been filed, then the ex parte order of leave having been issued cannot be challenged. The submission cannot be sustained because, the ex parte order of leave is a provisional order which can be challenged. Such an issue was raised before the court in **The matter of An application by Samuel M. W. Njuguna & 6 others and in the matter of the Minister for Agriculture and in the matter of the Tea Act (Cap 343 L.O.K.) and the Tea (Elections) Regulations 2000, Civil Appeal No. 144 of 2000 (unreported)** whereupon the court of Appeal stated as follows:

“It cannot be denied that leave should be granted, if on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave – see Halsbury’s Laws of England, 4th Edition. Volume 1 (1) para. 167 at page 276.”

It is therefore obvious that the interested parties were perfectly right to take out the motion dated 9th September 2008.

Having disposed of the second issue let me now revisit the first preliminary point, that is to say whether the motion is time-barred. There is no doubt that what provoked the ex parte applicant to take out these proceedings, is the decision by the National Environmental Tribunal, to extend time limited to file an appeal. In its ruling of 20th December 2007, the Respondent (Tribunal) delivered its opinion and reasons why it extended the time for filing the appeal now known as **NET Appeal No. 23 of 2007**. The applicant sought for and obtained leave to institute Judicial Review proceedings in the nature of prohibition and certiorari on the 24th day of July 2008. At the time of seeking for leave, the ex parte applicant did not possess a copy of the proceedings it sought to be quashed. The applicant seeks in prayer 2 of the motion dated 7/8/2008 to have all the proceedings and or rulings of the National Environmental Tribunal in the aforesaid Appeal to be quashed. A copy of the proceedings of 20th December 2007 is annexed to the verifying affidavit of Ashford Muriuki Mugwuku sworn on 11th December 2008. It is clearly stated that the Respondent had no jurisdiction to extend time to appeal. The decision to extend time to appeal was made on 20.12.2007. That is the decision the ex parte Applicant now seeks to quash by an order of certiorari. Under Order LIII rule 2 of the Civil Procedure Rules, no leave shall be granted to institute judicial review proceedings in the nature of certiorari unless the application is made not later than six (6) months after the date of the proceedings against which it is sought to be quashed. There is no doubt that the decision sought to be quashed by an order of certiorari was made more than six months. Again I find the motion dated 9/9/08 to have merit. Had the proceedings been annexed to verifying affidavit which was placed before the court at the ex parte leave stage, I do not think this court would have granted leave in view of the express provisions of the law.

Having disposed of the preliminary issues, let me now consider one issue on merit. It is the exparte applicant's view that the Respondent acted without jurisdiction when it extended time to appeal. It is also said that the Respondent was biased because the Tribunal's chairman swore an affidavit to oppose the motion. It is further argued that the Respondent acted unreasonably in arriving at its decision. I have considered the learned advocates' submissions over the above issues. Let me address my mind on the issues regarding bias and unreasonableness. I have carefully perused the proceedings which before the Respondent. It is apparent that the tribunal considered the issues raised before it and determined the same accordingly. There is no evidence that the tribunal chairman was biased. There is also no evidence that the tribunal introduced extraneous matters so as one can say that the Respondent acted unreasonably and with bias. The exparte applicant has alleged that the tribunal determined issues touching on ownership to land. It is argued that the Respondent did not have jurisdiction to extend time to appeal. I do not find any merit in those submissions. It is quite clear that the tribunal did not determine issues touching on title to land. I agree with the submissions of Mrs. Shaw that the tribunal only restricted itself to the issues touching on the project. The law is very clear that the Tribunal has the discretion to extend time to appeal as it appears to it as just and expedient under Rule 7 of the Tribunal Rules of Procedure (Legal Notice No. 191 of 2003).

In the final analysis and on the basis of the aforesaid reasons, the motion dated 7th August 2008 is ordered struck out and dismissed with costs to the Respondent and the Interested Parties. The motion dated 9th September 2008 is allowed as prayed.

Dated and delivered at Mombasa this 19th day of May 2009.

J.K. SERGON

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