REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1222 of 2005

REPUBLIC …….....…….…….…….… APPLICANT

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)..... RESPONDENT

AND

RICHARD MICHAEL ASHLEY…..…. INTERESTED PARTY

R U L I N G

On 16-08-2005, my brother the Hon. Mr. Justice Kubo granted the Original applicant Hardy Projects Limited leave to file an application in the nature of Judicial Review for orders of Certiorari and Prohibition against the decisions of the National Environment Management Authority ***(NEMA***) regarding the original Applicants developments in the up-market Karen-Langata residential district of Nairobi.

Being concerned with the said order, the Applicant herein Richard Michael Ashley, by an application brought under a Certificate of Urgency dated and filed on 6-10-2005, sought and was granted orders by this court to be joined as an Interested party on that date. Having been so joined, the Interested Party, by a further Application dated and filed on 12-10-2005 also brought under a Certificate of Urgency and sought the orders following:-

(1) that the application be certified as urgent and be heard ex parte in the first instance,

(2) that the court discharge and/or set aside the ex-parte order of 16-08-2005 granting leave to the applicant for order of certiorari and prohibition.

(3) that the court do strike out the proceedings in this cause and any consequential orders arising therefrom;

(4) that the costs of this application be in the cause;

The Interested Party's application is supported by the Affidavit of Richard Michael Ashley, the Interested Party himself, sworn and filed with the application on 12-10-2005. The application was also supported by the grounds following-

(1) *that the Ex-parte application dated 12-08-2005 for orders of Certiorari and Prohibition*

misrepresented the facts to the court;

(2) ***that the said application disregarded the applicable provisions of the Environment and Co-ordination Act 1999.***

(3) ***that the proceedings herein are otherwise an abuse of the process of the court.***

(4) ***that the Interested Party's entitlement to a clean and healthy environment has been contravened and continues to be contravened by the Applicant's on-going construction activities on L.R. No. 2327/31.***

(5) ***that the Applicant has been further prejudiced since his H.C.C.C. No. 1088 of 2005 has been stayed pending the conclusion of the proceedings herein.***

In response to these grounds and the Interested Party's supporting Affidavit, the original applicant (ex-parte Hardy Projects Ltd), had a Replying Affidavit sworn on 9-11-2005, by its Director Wainaina Kinyanjui and filed on 10-11-2005. In essence, the deponent disputes all of the averments by the Interested Party, and specifically that-

(a) (the Ex-parte Applicant failed to disclose to the court material facts concerning the application *(paragraph 3****).***

(b) the applicant ought to have filed an appeal to the National Environmental Tribunal if it was dissatisfied with the decision of the Respondent the National Environment authority (paragraph 7 (ii) & (iii).

When the matter was urged before me on 1-12-2005, Mr. Morara, learned Counsel for the Interested Party relied upon the grounds, and the Supporting Affidavit of Interested Party. On his part, Mr. Angima, learned Counsel for the Applicant relied upon the Replying Affidavit of Mr. Wainaina Kinyanjui referred to above.

Mr. Morara attacked the orders of court granted on 16-08-2005 on the following broad grounds as to why the orders should be discharged and set aside. Mr. Morara submitted that the said orders granting leave to the Applicant should be discharged and set aside because they failed to satisfy the grounds for granting orders for judicial review, namely-

(1) Procedural fairness, protected interest and the legitimate expectation of the Interested Party.

On this ground, Counsel submitted that the National Environment Authority acted with fairness. It sent out a Notice dated 4-08-2005 signed by its Director General Prof. Ratemo W. Michieka stopping further development of the Applicant's project without meeting **NEMA's** requirements namely an Environment Impact Assessment Report. In Counsel's view and that of the Interested Party, NEMA being the body entrusted with matters concerning the environment, it was legitimate for it to issue the ***stop*** order.

(2) CONSIDERATION OF IRRELEVANT MATTERS AND ILLEGALITY.

Mr. Morara submitted that the Notice to cease further development is based upon the Environmental Coordination and Management Act **(EMCA**), and there was no issue of consideration of irrelevant matters or illegality.

(3). UNREASONABLENESS AND BIAS, ABUSE OF POWER, BAD FAITH AND PROCEDURAL IRREGULARITY

Counsel for the Interested Party submitted that the Notice by **NEMA** was clear that the construction stop pending the submission of the Environment Impact Assessment Report **(EIA Report),** and that this was

all in accordance with the provisions of Sections 58, 59, 61-64 (inclusive of EMCA).

(4). LEGITIMATE EXPECTATION AND PROTECTED INTEREST

Mr. Morara submitted that when the Applicant breached the law, that is, (the EMCA), it expected **NEMA** to react, which was to require that an EIA Report be made. The notice does not deal with any issue concerning the demolition of the project structures.

(5). DUTY TO ACT FAIRLY

Mr. Morara submitted that the Notice gives reasons, and that this was evidence of acting fairly.

In conclusion on the above grounds, Mr. Morara, learned Counsel for the Interested Party submitted that those grounds do not warrant the filing of an application for judicial review.

The next line of argument by Mr. Morara was comprised in two propositions, firstly, whether the stop order by **NEMA** is subject of appeal to the **NEMA** Tribunal or to judicial review, and secondly what was the intention of Parliament under Section 130 of the **EMCA** providing for an appeal to the High Court against decisions of the **NEMA** Tribunal.

Learned Counsel for the Interested Party answered both of these propositions in one breath. The EMCA has laid out in Sections 125 (a), 126, 127, 129 (3) and 130, the composition of NEMA, the procedure, the power to award damages, to issue injunctive orders, and the High Court is granted supervisory powers to confirm, reverse or vary the decisions of the tribunal. If the tribunal is by-passed as it had happened by the application herein, then the intention of Parliament in creating the tribunal would be entirely defeated.

On the Applicant's Replying Affidavit that its project was nearly 90% or more complete, the Interested Party's Counsel submitted that this was really immaterial because under Section 58 (1) of EMCA projects falling within Schedule II of the said Act, are subject to an E.I.A Report, and it does not matter that other relevant authorities had approved the project. Without such a report, no project so covered or subject to such a report could proceed or continue.

Counsel therefore concluded that the judicial review proceedings commenced herein not only contravened but also continue to contravene the Interested Party's entitlement to a clean and healthy environment as guaranteed by Section 3 of the EMCA. What was worse was also the fact that the Interested Party's suit in H.C.C.C. No. 1088 of 2005 had also been stayed pending the conclusion of this judicial review application. For all these reasons the Interested Party's Counsel prayed that the Judicial Review Proceedings filed herein should be terminated by granting the Interested Party's prayers in terms of the application of 12-10-2005.

For all these submissions, Mr. Morara relied upon the case of **Republic –vs- The Attorney General** and the Registrar of Societies Ex-parte (1) Smith Waswa (2) Joseph Ogada Achuodho and (3) Joseph Maingi H.C. Misc. Application No. 769 of 2004.

Mr. Morara also relied upon the case of the **Republic ex-parte (1) The Land Disputes Tribunal Naivasha District** and **(2) the Senior Resident Magistrate Naivasha** (H.C. Misc. Application No. 935 of 1999).

The first case sets out the major principles applicable in judicial review case. It does not unfortunately set out the grounds upon which this court may set aside or discharge an order for leave or permission to file an application for judicial review, or indeed the considerations for granting such leave or permission. The latter case is in fact against the Interested Party's case. It decided that an applicant has a right to bring an action for judicial review even where there is an avenue for an appeal against such a decision. In that case, the Land Disputes Tribunal purported to determine the issue of ownership of Land which it did not have under the Land Disputes Tribunal Act. The applicant therein was entitled to come to court by way of judicial review, despite the existence of an appeal mechanism. What was the position here, and under

what conditions would an interested party approach the court for orders setting aside or discharge orders for leave to bring into court the decision of an inferior court or tribunal by way of judicial review?

I have already referred to the Replying Affidavit of Mr. Wainaina Kinyanjui filed on behalf of the Applicant. Mr. Aming'a learned Counsel for the Applicant relied on that Affidavit in his submission in response to Mr. Morara's arguments. He also relied upon the following authorities-

(1) Njuguna –vs- Minister for Agriculture

(2) Aga Khan Education Service Kenya –VS- Republic and Others [2004] 1 E.A. 3.

(3) The Supreme Court Practice [1997]

(4) David Mugo t/a Manyatta, Auctioneers –Vs- Republic – Civil Appeal No. (265 of 1997)

Departing from my usual custom, I will consider these authorities first. I will consider the nature of the remedy of judicial review, its application whether or not there is an alternative remedy, the consideration or principles(s) for grant of leave in judicial review proceedings, and last the grounds for setting aside such leave.

The Nature and Scope of Judicial Review

The Supreme Court Practice – 1997 paragraph 53/1-14/6.

The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. In the case of Chief Constable of North Wales Police – Vs- Evan (1982] I W.L.R. 155 Page 1160, [1982] 3 ALL ER. 142, page 143, Lord Halsham L.C. said-

"***It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."***

Thus, a decision of an inferior court or public authority may be quashed (by an order of certiorari made on application for judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the ***Wednesbury*** sense.

The Court will not however interfere on a judicial review application or act as a "***court of appeal from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision is unreasonable. The functions of the court is to see that lawful authority is not abused by unfair treatment. If the court is to attempt itself the task entrusted to that authority by the law, the court, would under the guise of preventing the abuse of power be guilty itself of usurping power"*** per Lord Brightman in **Chief Constable of North Wales Police -Vs- Evans [1982] 3 ALL ER.** 14, at page 154.

In ***David Mugo t/a Manyatta Auctioneers –Vs- Republic*** (*supra*) Chesoni, C.J. Omolo & Shah JJA considering the existence of an alternative remedy of appeal expressed themselves at page 4 as follows-

"…**.. the existence of an alternative remedy is not bar to the granting of an order of certiorari**." The correct view, in this matter, is that expressed by Lord Parker, C.J. in the English case of **Republic – Vs- CRIMINAL INJURIES COMPENSATION BOARD,** ex-Parte LAIN [1967] 2 Q.B. 804 when he said that-

"***the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time, being expended to meet the changing conditions…. We have not reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private character, has to determine matters affecting subjects provided always that it has to act judicially."***

As to when, or circumstances under which leave to bring an application for the remedy of certiorari, the Court of Appeal held in the case of **NJUGUNA –VS- MINISTER FOR AGRICULTURE** *(supra)* that –

"**the test as to whether leave should be granted to an applicant for judicial review, is whether, without examining the matter in depth, there is an arguable case that the reliefs (sought) might be granted on the hearing of the substantive application."**

In the case of **AGA KHAN EDUCATION SERVICES –VS- REPUBLIC & OTHERS** *(supra)* the Court of Appeal after stating the different position in England {where leave may be granted inter-partes} and in Kenya where leave is granted, ex-parte), proceeded to explain itself as follows:-

"***We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and in every clear cut cases, unless it be contended that judges of the superior court(High Court) grant leave as a matter of course (underling is mine). We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought more than six months prior to the applicant coming to court, and there are, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."***

With the consideration of the above captioned authorities, I have covered the nature of judicial review remedy, the principles upon which such review may be granted, that it may be resorted to notwistanding the availability of an alternative remedy by way of appeal. I now need to consider the principles upon which such leave may be set aside.

Firstly, following the practice in the United Kingdom, the appropriate procedure for challenging leave to file an application for the remedies of judicial review 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. (Halsbury's Laws of England *(4th Edition)* Vol. 1 (1) paragraph 167 at page 276.

Secondly, that at the request of the Respondent ***(Defendant***) or an interested party *(as in this case*), the court can set aside permission previously granted. However, this is a very restricted power. It was never popular with the judges, who required that there to be a very clear cut case before discharging the permission. The fact that the applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted.

What is the position in this application? The Interested Party pleads that the Applicant did not at the leave stage lay out to the court all the material necessary to enable the Court to consider before granting the leave being challenged. In the material contained in the Supporting Affidavit of Richard Michael Ashley, the Applicant had failed to disclose that there existed a right of appeal to the Environment Tribunal under the EMCA provisions. Now, so far as allegations of non-disclosure are concerned, non-disclosure relates to facts, and not the law for the courts or the judges are presumed to know the law, or if they do not know, they know how and where to find it at any one time or on any particular subject. I therefore uphold Mr. Aminga's learned counsel for the Applicants submission on this point that there was no material fact not disclosed to the court, at the application stage. The Interested Party's contention to the contrary fails.

Regarding the availability of an alternative remedy such as an appeal, whereas there are occasions when the court will require exhaustion of other remedies or procedures/such as execution procedures under Civil Procedure Act (***Cap 21, Laws of Kenya***) and the Civil Procedure Rules made thereunder, the availability of such alternative remedy is no bar to proceedings by way of judicial review. The reason for this as explained in the foregoing paragraphs of this ruling is to be found in the nature of the remedies of judicial review. They have no concern with the merits of either the applicant's or the Respondent's case. That is the jurisdiction of either the appellate mechanism under the law establishing the public body concerned or the appellate court but not the judicial review court. This court concerns itself with the review of the decision – making process, not whether NEMA had authority to issue a stop order or notice, or whether there is an appeal mechanism. An applicant's right to apply for judicial review of such public body's decision-making process is neither closed nor limited by the existence of a tribunal or an appellate mechanism. The contention that the applicant did not exhaust available alternative remedies is as irrelevant as stating that the applicant did not disclose to the court the existence of an appellate Tribunal under the EMCA.

So far as I am able to discern, the Applicant's application for leave to bring judicial review proceedings was made within the applicable provisions of the law, and the court established in accordance with those provisions and judicial precedent and the material before it, that the applicant had an arguable case. It is, and was, irrelevant for the Court to consider whether or not the Applicant would have either an easy or difficult task in establishing or prosecuting the case. That is the Applicant's task only when leave is granted, and he has filed and served the other party and has, as in this case, the Interested Party.

In the absence of any clear-cut reason, for instance, breach of some provisions of the enabling law, namely the Law Reform Act (***Cap 26, Laws of Kenya***) or the rules of procedure, namely, the provisions of Order LIII of the Civil Procedure Rules, there is no basis for setting aside or discharging the leave granted by the court on 16-08-2005, or worse, for striking out the substantive application filed by the Applicant on 6.09.2005.

Despite the fact that the Interested Party invoked correctly the Court's inherent power under Section 3A of the Civil Procedure Act, and all enabling provisions of the law pertaining to such inherent power, the cause of justice would be served eminently better by dismissing the Interested Party's Notice of Motion dated 6-12-2005 rather than either setting aside or discharging the permission granted to the Applicant, or the Applicant's substantive application as aforesaid.

For those reasons, the Interested Party's application dated 13.10.2005 and filed on the same date is therefore dismissed with costs.

Dated and delivered at Nairobi this 16th day of February, 2006.

ANYARA EMUKULE

JUDGE.