REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1535 of 2005

PETER BOGONKO…………………………... ……………………..PLAINTIFF

Versus

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY………………………………..DEFENDANT

JUDGMENT

The ex parte applicant, Peter Bogonko filed the Notice of Motion dated 28th October 2005 against the respondent, the National Environment Management Authority, hereafter referred to as NEMA, for orders of Judicial Review. He seeks the following orders:-

1. An order of certiorari to remove into this court and quash the decision of the respondent dated 6th October 2005 purporting to reject the project known as Pebo Retail Petrol Station, West Mugirango along the Kisii-Kericho high way, by the applicant.

2. An order of prohibition directed at the respondent restraining it from stopping or in any other manner whatsoever interfering with the applicant's project known as Pebo Retail Petrol Station West Mugirango along Kisii-Kericho High way.

3. Costs of and incidental to the application be provided for.

4. Such further and other relief that the court deems just to grant.

The application was expressed to have been brought under Order 53 R 3(1) (3) 4(1) CPR and S. 8 of the Law Reform Act.

The said application was premised on the following grounds:

(a) The decision of the respondent dated 6th October 2005 purporting to reject the project known as Pebo Petrol Station in West Mugirango is illegal and ultra vires the powers of the respondent under the Environmental Management and Co-ordination Act – hereinafter referred to as EMCA;

(b) The decision of the respondent thus being ultra vires the provisions of EMCA, is null and void and cannot stand;

(c) The decision of 6th October 2005 purporting to reject the project was arbitrary and oppressive;

(d) The decision of 6th October 2005 was made without giving the applicant the right to be heard and therefore violated the fundamental tenets of natural justice;

(e) The respondent being a public body and making decisions with far reaching implications to the rights and legitimate interests of the applicant is subject to the supervisory jurisdiction of the High Court.
The application is supported by the statutory statement dated 21st October 2005 and a verifying affidavit sworn by the applicant dated same day.

The respondent opposed the application and a replying affidavit was sworn by Dr. Avignon Mwinzi, the Ag Director General of the Respondent. Both parties filed skeleton arguments and lists of authorities.

The applicant was represented by Mr. Ongoya whereas the respondent was represented by Miss Munene.

The undisputed facts of this case are that the applicant intended to put up a petrol station on plot No. West/Mugirango/Siamani 5818 along the Kisii Kericho High way. It was to be known as Pebo Retail Petrol Station. He learnt in early 2005 that to put up such a project, he required the approval by National Environmental Management Authority. The said approval was to be preceded by the applicant's submission of an Environmental impact Assessment report, hereinafter referred to as (EAI) to NEMA.

The applicant duly procured the EAI report, and it was submitted to the respondent on 25th April 2005 and the applicant duly paid for it.

It is what happened after submission of the report to the respondent that the parties do not agree on.

According to the applicant, he was advised to advertise the project in the Kenya Gazette and Nation Newspaper on two different occasions which he obliged.

After submission of the report however, the respondent did not respond to the said report within 3 months as required by S. 58 (8) of Environmental Management and Co-ordination Act (EMCA). The three months having expired on 25th July 2005, the applicant decided to exercise his discretion as per provisions of Section 58 (9) of EMCA and continued with the project. But the DC Nyamira and Administration Police arrested his workers and upon enquiry at the respondent's office, the applicant was handed a letter dated 6th October 2005 indicating that the proposal for the project had been rejected.

The applicant contends that the respondent failed to conduct public hearings to assess acceptability of the proposal before the letter of 6th October 2005 was written and that the respondent cannot interfere with the applicant's statutory discretion under Section 58 (9) to proceed with the project if there is no response from the respondent and the decision of the respondent is illegal and in excess of the respondent's jurisdiction.

The applicant also contends that the respondents should give Section 58 (8) & 9 its natural and literal interpretation so that the applicant should go ahead with his project since the respondent did not object to the proposal.

On the other hand, it is the respondent's case that the applicant failed to have the EA 1 Report published in the Kenya Gazette and a newspaper with Nation wide circulation for 2 successful weeks as was required of him by Section 59 of EMCA and hence the public were not accorded sufficient time to comment on the report within 60 days. It is the respondents contention that since the notice was published on 14th June 2006, the public should have been given 60 days till 14th August 2005 to submit their comments and some more time for the respondent to consider the report and the comments.

The respondent also submitted that they received several comments from stake holders and lead agencies who opposed the project for reasons that it would interfere with water catchment areas and the EAI report had not addressed the effects of the project on the environment and their redress. Since the applicant had not given sufficient time for the advertisement, of the project, it is the respondent's submission that the public needed more time to respond to the said report and therefore the statutory period for informing the applicant cannot have expired by 25th July 2005.

It was the respondent's further submission that the respondent cannot be estopped from exercising its statutory power merely because of delay on its part. Besides they have to consider the public interest surrounding the decision and in their view, it outweighs the private interest of the applicant.

In respect of the right to a hearing, the respondents contended that once the applicant prepared the EIA report in which he made proposals and is subject to comments from the public, there was no need for another hearing.

Lastly it is the respondent's view that the applicants have wrongly moved this court for the orders of Judicial Review because under the EMCA, if any party is aggrieved by the decision of NEMA, he should appeal to the tribunal.

I have now considered the rival arguments of both parties.

Before I considering the merits, I need to consider the nature and scope of Judicial Review.

The Supreme Court Practice 1997 para 53/1/4/6 states that the remedy of Judicial Review is concerned with the 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 EVANS 1982 1 WLR 155 at page 1160,** Lord Halsham LC 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. The decision of an inferior court or public authority can be quashed where the authority or court acted without jurisdiction, exceeded jurisdiction or failed to comply with the rules of natural justice or where there is an error on the face of the record or a decision that is unreasonable."

This is in line with PLO Lumumba's view in his book "An Outline of Judicial Review in Kenya" where he states that Judicial Review is not an appeal from a decision but a review of the manner in which the decision was made.

On the other hand an order of prohibition is an order from the High Court directed at an inferior tribunal or body which forbids that body or tribunal to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceeding. See Halsburys Laws of England 4th Ed Vol 1 page 83 para 128.

Since the remedy of Judicial Review deals with the process but not the merits of the decision by the tribunal, the respondent's submission that the applicant should have complied with the provisions of the Act ie Section 129 of EMCA and appealed to the tribunal if aggrieved, is untenable. In the case of **DAVID MUGO t/a MANYATTA AUCTIONEERS V REP CA 265/1997** Chesoni, C.J, Omolo and Shah JJ in considering the existence of an alternative remedy of appeal, had this to say;

" the existence of an alternative remedy is not a bar to the granting of an order of certiorari."

It is only the High Court which has jurisdiction in Judicial Review matters and so the applicant could

not have moved the tribunal on appeal.

Was the decision of the respondent dated 6th October 2005 which is under attack, legal? The applicant had duly complied with the requirements of EMCA in preparing an EIA report. Section 58 (8) and (9) of the said Act provide that once the EIA is submitted, the Director General shall respond to the application for an EAI licence within 3 months and if the applicant does not receive any communication from the Director General within the period stipulated i.e. 3 months, then the applicant can go ahead with his project. The applicant contends that he submitted his EIA report on 25th September 2005 but no response was forthcoming and he proceeded with his project as from 13th October 2005. The respondents are of a different view. It is contended by the respondent that the applicant did not comply with Section 59 of the EMCA in that the applicant was advised to have the EIA report published for two consecutive weeks in the gazette and in a newspaper circulating in the area or proposed area of the project and a notice to that effect issued. At para 7 of his affidavit the applicant does admit that he caused the advertisement to be done only on two occasions.

The purpose of the advertisement is to ensure that members of public do see the proposed project and give their comments as to whether the project is viable or not. If they object to it, the reasons for such objection must be given. It means that members of public were denied sufficient opportunity to respond and make their comments. So, since the applicant had failed to comply with provisions of Section 59 (1) and yet they were expressly notified by the respondent, can he blame the respondents for failing to comply with Section 58 (9) or respond to the applicant's EIA report, when he himself had failed to comply with the law. Two wrongs cannot make a right and this court would not hold the respondent to have acted illegally when the applicants had done likewise.

Did the applicant need to be heard before the proposal was rejected? In my view by presenting the proposal and the comments being made by various interested persons that was sufficient hearing.

According to the respondents, the statutory period allowed for the applicants to receive the respondent's response was not supposed to have expired on 25th July 2005 but that the time for publication should have been calculated from 14th June 2005 when the advertisement appeared in the gazette and daily nation and three months would have expired on 14th September 2005.

The counsel for respondent went ahead to argue that in any case, delay in communicating its decision to the applicant cannot preclude the respondent from performing its statutory duty or that a public body cannot be estopped from performing its duty.

The applicant denies ever raising the issue of estoppel and that the respondent have no basis for raising it. Estoppel is a rule whereby a party is precluded from denying the existence of some state of fact which he has previously asserted and on which the other party has relied, to his detriment.

In this case, the applicants have relied on Section 58 (9) as giving the applicant the discretion to proceed with his project since the respondent did not respond to his EIA report and intimate whether or not the applicant could proceed. Under Section 58 (9) the applicant was entitled to proceed with the project. Even if not specifically pleaded, what the applicant is implying in essence is that the respondent is estopped from denying the existence of the provisions of Section 58 (9) of EMCA giving the applicant discretion to proceed with the project or not. But the respondent is saying that they cannot be stopped from interfering with the applicants discretion as they were merely performing their statutory duty even though the decision to do so was made out of the statutory period allowed.

In the case of **H.T.V. LTD V PRICE COMMISSION (1976) I.C.R. 170,** Lord Denning had this to say:

"it has been often said, I know that a public body which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers; and it is a misuse

of power for it to act unfairly or unjustly towards a private citizen where there is no overriding public interest to warrant it."

The issue here is whether the respondent could not stop the applicants from proceeding with the construction of the petrol station because the respondents had delayed in responding to the applicants EIA report for a period of just over a month?

The respondents relied on the case of **REP V KENYA REVENUE AUTHORITY MISC APP 946/04** where the court held that mere delay cannot prevent the respondents from enforcing duties given to them by an Act of Parliament.

In another decision of **WESTERN FISH PRODUCTS LTD. V PENWITH DISTRICT COUNCIL AND ANOTHER** (1981) 2 ALL ER 204 the court held that an estoppel could not be raised to prevent a statutory body from exercising its statutory discretion or performing its statutory duty and therefore even if the Council officers while acting in the apparent scope of their authority, had purported to determine the plaintiff's planning applications in advance, that was not binding on the council because it alone had power under the Act to determine the applications. Counsel also cited authorities like Phipson on Evidence 15th Ed and Clive Lewis on, Judicial Remedies in Public Law, 2000, all the authors agree that an act may be validly done after the expiry of a statutory time limit but it has to be done within reasonable time. Reasonable time will vary according to the circumstances of each case. In the present instance, the decision challenged was made on 6th October 2005 and yet according to the respondent, the response of the respondent should have been by 14th September 2006. A month's delay would not be unreasonable considering the fact that the public needed to put in their comments for the respondent's due consideration.

The remedy of Judicial Review being a public law remedy, the court would obviously weigh the Public interest vis a vis the rights of the applicant. The respondents have exhibited letters received from the public and some lead agencies which objected to the commencement of the project on grounds that the project would interfere with water catchment areas which is the people's source of life.

P.P. Graig in his book Administrative Law 2nd Ed quoted the case of **MARITIME ELECTRIC CO. LTD V GENERAL DAIRIES LTD QB 227** in which it was said,

"The underlying principle is that the crown cannot be estopped from exercising its powers, whether given in a statute or common law when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to the private individual…… it can however, be estopped when it is not properly exercising its powers but is misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without countervailing benefit to the public"

From the comments received from the public and other stake holders, it is indicated that the project would affect the water catchment areas. This would affect the very life of the general public and the public stood to suffer more than the applicant. In the Kenyan decision of **RODGERS MUEMA NZIOKA & OTHERS V TIOMIN k LTD CA 97/01** the court observed that under Section 58 (9) of EMCA, the applicant may start his project after 3 months if the Director General fails to reply but that needed circumspection meaning that the right to start the project was not absolute. It depends on the circumstances of each case.

Counsel for respondent relied on other cases **REP V INGAL (1876) 2 QB 1979, SECRETARY OF STATE FOR TRADE & INDUSTRY V NAMGRIDGE (1991) 3 ALL ER** where the courts have considered that public policy needs some latitude and the court found delays of 2, 3 moths in making the decision to be reasonable.

In the present case the delay in giving the decision of 6th October 2005 is only one month which in my view is reasonable in the circumstances.

What was the wider public policy behind Section 58 (9) EMCA. It was the applicants submission that it was to protect would be developers from lethargic bureaucracy so that if the officers in NEMA did not act, the applicants of the licence would exercise their discretion and proceed with their projects. Even if that were the case, I believe that section has to be read with the intention of the legislature in coming up with EMCA in mind. The preamble to the Act states that it is an Act of Parliament to provide for the establishment of an appropriate legal institutional framework for the management of the environment and for matters connected there with and incidental thereto. Its core purpose is to manage the environment. Section 3 of the Act then sets out some of the principles of the Act. Section 3 (1) states that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment, so that even as the legislature included Section 58 (9) in the Act, it cannot lose sight of its core function. What would be of priority, the protection of water catchment areas that many Kenyans depend upon for their very existence or an individuals right to put up a Petrol Station to enhance his personal life? Public policy would demand that the water catchment areas be preserved.

In any event, the court has a discretion in such matters taking into consideration of all the facts. In the case of **R V COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT KARIOBANGI HOUSING & SETTLEMENT CO-OPERATIVE SOCIETY LTD ex parte DAVID MWANGI & 13 OTHERS –** Bosire J. as he then was quoted with approval from Halbury's Laws of England 4th Ed Vol 2 page 805 para 1508 on the courts discretion in Judicial Review.

It says,

"certiorari is a discretionary remedy which the court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles."

In the instant case, the court would be reluctant to grant an order of certiorari to quash the belated decision of the respondent taking into account that the public interest involved far outweighs the applicants individual rights to putting up a petrol station to earn a living.

Can an order of prohibition issue? Even if an order of certiorari were granted, an order of prohibition to stop the respondents from interfering with the applicants' project would not be granted in light of the provisions of EMCA.

Under Section 69 (1) of the Act, NEMA in consultation with other lead agencies is charged with the duty of monitoring all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impact or operation of any projects or activity with a view to determining its immediate and long term effects on the environment.

The court cannot curb Nema's powers given by statute. The order cannot be granted.

In sum, I find that the applicant has not demonstrated that he is entitled to the orders sought and the application dated 28th October 2005 is hereby dismissed each party bearing its own costs.

Dated and delivered this 20th July 2006.

R.P.V. WENDO

JUDGE