



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. JUDICIAL REVIEW CASE NO. 41 OF 2019

REPUBLIC.....APPLICANT

VERSUS

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

LONDON DISTILLERS (K) LTD.....2ND INTERESTED PARTY/APPLICANT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH INTERESTED PARTY

THE HON. ATTORNEY GENERAL.....5TH INTERESTED PARTY

AND

ERDERMANN PROPERTY LTD.....EX-PARTE APPLICANT/RESPONDENT

RULING

1. In the Application dated 1st November, 2019, the 3rd Interested Party/Applicant has sought for the following orders:

a. The Notice of Motion Application dated 23rd September, 2019 by the Ex-parte Applicant and the entire proceedings for Judicial Review be struck out.

b. Costs of this Application and the entire proceedings herein be paid to the Applicant/2nd Interested Party in any event.

2. The Application is supported by the Affidavit of the 3rd Interested Party's Administration Manager who has deponed that pursuant to the Orders made by this Court on 12th September, 2019, leave was granted to the Ex-parte Applicant to institute Judicial Review proceedings so as to seek a raft of prerogative Orders and that the grant of leave operated as a stay of the proceedings and any Orders hitherto made in Nairobi Net No. 21 of 2019.

3. It was deponed that by Application dated 18th September, 2019, the 2nd Interested Party moved the Court to set aside the aforesaid Orders made on 12th September, 2019; that the Ex-parte Applicant then filed the substantive Judicial Review Application by way of Notice of Motion dated 23rd September, 2019 seeking several prerogative Orders pursuant to the grant of leave thereof and served the same upon the Applicant herein and that on 18th October, 2019 this court delivered a Ruling allowing the 2nd Interested Party's Application dated 18th September, 2019 and set aside the interlocutory Orders issued on 12th September, 2019, *inter alia* granting leave to institute Judicial Review proceedings and grant of leave to operate as stay of any Orders or proceedings in Nairobi Net No. 21 of 2019.

4. It is the Interested Party's case that given the decision of this Honourable Court on 18th October, 2019, there is no Judicial Review

Application capable of being urged as its substratum has been lost as a consequence of the leave preceding the filing of the substantive Notice of Motion being rendered and declared as null and void.

5. According to the 2nd Interested Party/Applicant, the subsisting substantive Notice of Motion for Judicial Review has been rendered null and void as it is not based on any foundation at all and that unless struck out, the existence of the Notice of Motion Application dated 23rd September, 2019 for Judicial Review whose existence is now contrary to the law, shall be used as a reference point against the 2nd Interested Party/Applicant so as to derail the proceedings pending before the National Environment Tribunal being NET No. 21 of 2019 thereby necessitating a formal Order to be issued.

6. The Application was opposed by the Ex-parte Applicant/Respondent who filed Grounds of Opposition. The Ex-parte Applicant/Respondent averred that the Application is ill-conceived and without any legal or factual premise for disregarding Section 9(i)(b) of the Law Reform Act as read with Order 53, Rule 1 of the Civil Procedure Rules, 2010 which requires that leave shall be granted before any Application for an order of mandamus, prohibition or certiorari can be filed.

7. According to the Ex-parte Applicant, after the Ruling that was delivered by the court on 18th October, 2019 setting aside in their entirety Orders made on 12th September, 2019, including the Order granting leave to the Ex-parte Applicant to commence Judicial Review proceedings, there is no Application for prerogative writs that is pending.

8. The Ex-parte Applicant averred that the court was lawfully rendered *functus officio* upon the Order vacating leave to pursue Judicial Review Orders and that the Application is entirely frivolous, devoid of any iota of legal merit, a brazen abuse of legal and court process; and an attempt to unduly vex the Respondent into incurring unjustified legal costs.

9. It was averred by the Ex-parte Applicant that the Application as couched is a most unfortunate scheme by the 2nd Interested Party to seek futile and stale orders as there are no judicial proceedings pending before this court, the proceedings having been extinguished by the withdrawal of leave and that the Application has been made in bad faith, is unfounded in law and/or fact, unmerited and is otherwise an abuse of Court process and is for dismissal with costs.

10. The Ex-parte Applicant averred that despite being seemingly filed on 6th November, 2019 and fixed for hearing on 19th November, 2019 at 9am or soon thereafter, the Application was only served on 18th October, 2019 at 5:03pm and that the Application was lodged to lend credence to a Preliminary Objection lodged in High Court (Machakos) Pet. No. 38 of 2019 (*formerly HCC NBO Petition 437 of 2019*).

11. In his submissions, the 2nd Interested Party's advocate submitted that given the decision of this court on 18th November, 2019, there is no Judicial Review Application capable of being heard and determined in particular, the substantive Notice of Motion Application filed by the Ex-parte Applicant and dated 23rd September, 2019 seeking the prerogative Orders and that the substratum of the said Application has been lost as a consequence of the leave preceding the filing of the said Application being set aside, rendered and declared null and void.

12. The 2nd Interested Party's advocate submitted that the Court found that indeed the Ex-parte Applicant was guilty of non-disclosure of material facts at the time of obtaining ex-parte Orders, and consequently set aside the ex-parte Orders; that the court further found that the grant of the said Orders would have had the effect of parallel proceedings before it and the Respondent and that the Notice of Motion as filed was brought before this Court with unclean hands.

13. Counsel submitted that while the court exercised its inherent powers in setting aside the ex-parte Orders, it did not pronounce itself on the substantive Notice of Motion Application that had earlier been filed by the Ex-parte Applicant and that the continued existence of the Notice of Motion will amount to a continued abuse of the Court process.

14. Counsel submitted that where the Court finds that its process is being abused, it has the inherent power to terminate the proceedings without going to the merits of the case. Counsel relied on the cases of **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** and **Republic vs. Business Premises Rent Tribunal Interested Party John Mwangi Muturi & 3 Others [2016]**, in which the court held as follows:

“In the premises, I set aside the orders granted herein on 18th December 2015 and strike out the application dated 17th December 2015. Without leave these proceedings are still-born. It follows that these proceedings are rendered incompetent and are struck out with half the costs to the 1st and 2nd Interested Parties.”

15. Counsel also relied on the case of **Republic vs. National Environment Tribunal & 2 others Ex-parte West Kenya Sugar Co. Ltd [2016] eKLR**, in which the court set aside ex-parte Orders granting leave to file Judicial Review proceedings and held that where ex-parte orders granting leave to file Judicial Review proceedings have been vacated, the substantive Application lacks foundation and it follows that the same should be struck out.

16. On the issue of whether the Applicant/2nd Interested Party is entitled to costs, it was submitted that the general rule as to costs is provided for in Section 27 of the Civil Procedure Act which provides as follows:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

17. It was submitted by the 2nd Interested Party’s advocate that the Ex- parte Applicant dragged the 2nd Interested Party to these proceedings and should therefore bear the costs of the same; that the 2nd Interested Party successfully challenged the grant of ex-parte Orders when the Court vacated the same on 18th October, 2019 and that this Court should strike out the Notice of Motion dated 23rd September, 2019 and with costs to the 2nd Interested Party.

18. The Ex-parte Applicant’s advocate submitted that this court, sitting as a Judicial Review Court in entertaining the Application by the 2nd Interested Party must as a question of preliminary, be persuaded that it has jurisdiction to consider and grant the prayers sought notwithstanding its Ruling of 18th October, 2019 which rendered the Honourable Court *functus officio* and that the doctrine of *functus officio* is one of the expressions in law on the principle of finality. Counsel relied on the Supreme Court decision in ***Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR*** where the Supreme Court cited with approval an excerpt from an Article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 which reads:-

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

19. Counsel also relied on the case of ***Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*** where it was held that Judicial Review jurisdiction is a special jurisdiction which is neither civil nor criminal; that the Civil Procedure Act does not apply since it is governed by Sections 8 and 9 of the Law Reform Act being the substantive law (*which now as of necessity includes Article 47 of the Constitution, the Fair Administrative Actions Act, 2015*); and, *Order 53 of the Civil Procedure Rules being the procedural law*) and that the Court cannot be invited to engage in review of its decision to either now ‘strike-out’ a Motion for which leave was withdrawn or reconsider a question of costs.

20. It was submitted that Order 53 of the Civil Procedure Rules, 2010 and Section 8(5) of the Law Reform Act expressly oust the Court’s jurisdiction on matters review. Counsel relied on the Court of Appeal decision in ***Biren Amritlal Shah & Another vs. Republic & 3 Others [2013] eKLR*** where the court found *inter alia*, that Judicial Review proceedings are not amenable for review but can only be challenged on appeal.

21. It was submitted that pursuant to Section 9(i) (b) of the Law Reform Act, as read with Order 53, Rule 1 of the Civil Procedure Rules, 2010, once leave is withdrawn as this court did on 18th October, 2019, there is absolutely nothing left for consideration; that the effect of the Judicial Review court withdrawing leave is to legally terminate and deny any possibility and/or plausibility of the proceedings going a step further and that the Orders sought cannot obtain as there are no proceedings for which this court can assume jurisdiction and consider whether or not to strike out “*the Notice of Motion Application dated 23rd September, 2019.*”

22. It was submitted that the English decision in ***M V Home Office (House of Lords) 1 A.C. [1994] 377*** addressed the effect of withdrawal of leave in Judicial Review proceedings and the consequent proceedings, where it was held as follows:

“But, if the Judge has refused leave to move for Judicial Review he is functus officio and has no jurisdiction to grant any form of interim relief.”

23. Counsel also relied on the decision of ***Republic vs. Chairman Kanduyi Land Disputes Tribunal ex-parte Absolom Kisutia Masibo & Another [2013] eKLR*** where the court held that once leave has been vacated, the Court becomes *functus officio* and the proceedings stand extinguished by operation of law and that any subsequent action is a nullity in law.

24. While relying on the case of ***Commissioner of Lands vs. Hotel Kunste Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*** it was submitted that in as far as the instant invitation for exercise of discretion under Section 27 of the Civil Procedure Act, the provisions of the Civil Procedure Act as well as the Rules made thereunder do not ordinarily apply to Judicial Review proceedings since the Civil Procedure Act is expressed to be “*An Act of Parliament to make provision for procedure in civil courts*”.

25. It was submitted that the court having dismissed the instant Judicial Review proceedings, it became *functus officio* and cannot assume jurisdiction on any antecedent matter.

26. The Ex-parte Applicant instituted these proceedings on 12th September, 2019 vide Chamber Summons filed under a Certificate of Urgency seeking leave to commence Judicial Review proceedings against the Stop Order issued by the Respondent on 4th September, 2019, stopping the construction of the proposed residential apartments known as Great Wall Gardens Housing Development Phase 3 on Plot L.R. No. 12581/13.

27. The Ex-parte Applicant also sought for leave so granted to act as stay of the proceedings in NET No. 21 of 2019 ***London Distillers (K) Limited vs. National Environment Management Authority (NEMA) & 5 Others*** and the Order dated 4th September, 2019 pending the hearing and determination of these proceedings. The Ex-parte Applicant obtained Orders ex-parte on 12th September, 2019 which stopped the

proceedings before the Respondent and the Respondent's Stop Order of 4th September, 2019.

28. After the court granted the said ex-parte orders, the 2nd Interested Party filed a Notice of Motion Application under a Certificate of Urgency dated 18th September, 2019 seeking to set aside the orders made by this court on 12th September, 2019, on the ground that the Orders were obtained on the basis of material non-disclosure and misrepresentations by the Ex-parte Applicant.

29. Pursuant to the leave granted on 12th September, 2019, and before the court delivered its Ruling on the 2nd Interested Party's Application dated 18th September, 2019, the Ex-parte Applicant filed the substantive Notice of Motion Application for Judicial Review Orders dated 23rd September, 2019, seeking to quash the Orders of the Respondent herein and further an Order restraining the Respondent or any other party from asserting the applicability of Section 129(4) of the Environment Management and Coordination Act No. 8 of 1999.

30. Upon hearing the parties on the 2nd Respondent's Application dated 18th September, 2019, this Court delivered its Ruling on 18th October, 2019. The Court allowed the 2nd Interested Party's Application and consequently set aside and vacated the *ex-parte* Orders made by this Court on 12th September 2019, which *inter alia* granted the Ex-parte Applicant leave to institute Judicial Review proceedings. As stated above, by the time the court delivered its Ruling, the Ex-parte Applicant had already filed the substantive Motion which the 2nd Interested Party wants to be struck out with costs. Order 53 Rule 1 of the Civil Procedure Rules provides as follows:

"No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule."

31. Indeed, as correctly submitted by both parties, given the decision of this court on 18th October, 2019 withdrawing the leave that it had granted to the Ex-parte Applicant to commence Judicial Review proceedings, there is no Judicial Review Application capable of being heard and determined, and in particular, the substantive Notice of Motion Application filed by the Ex-parte Applicant and dated 23rd September, 2019 seeking for prerogative Orders. The substratum of the said Application was lost as a consequence of the leave preceding the filing of the said Application being set aside.

32. However, as already stated in the preceding paragraphs, the Ex-parte Applicant cannot be faulted for filing the Notice of Motion dated 23rd September, 2019. Indeed, as at the time the said Application was filed, the leave granted to the Ex-parte Applicant by the court was still subsisting. Furthermore, the Applicant was under an obligation in law, having being granted leave, to file the said Application within 21 days from the date that it was granted leave by the court.

33. Consequently, the Notice of Motion dated 23rd September, 2019 became a nullity from the date the court pronounced its Ruling on 18th October, 2019 and set aside the leave that it had granted to the Ex-parte Applicant. That being the case, the said Notice of Motion is not capable of being prosecuted, having become a nullity by operation of the law. The only question that I should determine is whether this court became *functus officio* upon delivering the Ruling of 18th October, 2019 or whether the court can proceed to strike out the Application.

34. Although the Notice of Motion dated 23rd September, 2019 became a nullity by operation of law after the delivery of the Ruling by this court on 18th October, 2019, the court record indicate that this matter is still alive. Indeed, even where a pleading is null and void on the face of the record, the court ought to state so to enable the proceedings to be formerly terminated, and for the court register to indicate as much. In the case of *Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169*, Lord Denning, delivering the opinion of the Privy Council at page 1172 (1) stated as follows:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

35. Although the Notice of Motion dated 23rd November, 2019 is a nullity in law, it is convenient for this court to state so. This court cannot be said to be *functus officio* in making such a declaration considering that it never dealt with the legality of the said Notice of Motion while delivering its Ruling of 18th October, 2019.

36. The next issue I will deal with is whether the 2nd Interested Party is entitled to costs in respect of the Notice of Motion dated 23rd November, 2009. Considering that the said Notice of Motion became a nullity upon the pronouncement of the Ruling of 18th October, 2019, and in view of the fact that no arguments were made in respect to the Application, the 2nd Interested Party, or any other party is not entitled to costs for the Application.

37. Indeed, as correctly submitted by the 2nd Interested Party's advocate, costs follow the event. The events in respect of the impugned Notice of Motion are that the same became void by operation of the law. When the Notice of Motion was filed, the same was valid. Indeed, it would have been different had the Application been filed without the leave of the court at all, or outside the requisite period of 21 days. However, that is not what happened in this case.

38. That being the case, the only costs that the 2nd Interested Party was entitled to was in respect to the Chamber Summons that sought leave to commence the current Notice of Motion, in which the Ruling was rendered in its favour. Indeed, this court awarded the 2nd Interested Party the costs for the Application it filed seeking to set aside the leave that was granted by the court to the Applicant *ex-parte*.

39. In fact, the 2nd Interested Party did not file any response to the Notice of Motion dated 23rd September, 2019 because none could have been filed anyway. In the circumstances, and despite filing the current Application, the 2nd Interested Party cannot be granted costs in respect to the Notice of Motion dated 23rd September, 2019 which is being struck out for convenience and for the record to reflect as such.

40. For those reasons, the Notice of Motion dated 23rd September, 2019 is struck out with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF MARCH, 2021.

O.A. ANGOTE

JUDGE