



Republic v Director General, National Environmental Management Authority & 3 others; Maasai Mara Lemek Landowners Conservancy Limited & another (Exparte Applicants) (Environment and Land Judicial Review Case E002 of 2024) [2024] KEELC 5096 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5096 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2024**

**CG MBOGO, J
JULY 4, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**DIRECTOR GENERAL, NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY 1ST RESPONDENT**

**CABINET SECRETARY MINISTRY OF ENVIRONMENT, CLIMATE CHANGE
& FORESTRY 2ND RESPONDENT**

EXECUTIVE OFFICE OF THE PRESIDENT 3RD RESPONDENT

LESOKWAN CAMP LIMITED 4TH RESPONDENT

AND

**MAASAI MARA LEMEK LANDOWNERS CONSERVANCY
LIMITED EXPARTE APPLICANT**

OLD BOMA LIMITED EXPARTE APPLICANT

RULING

1. Before this court for determination is the Notice of Motion Application dated 7th June, 2024 filed by the 4th respondent, and it is expressed to be brought under Section 19 (2) of the Environment & Land Court Act, Section 1A (1), (2), (3), 1B,3A & 63 (e) of the Civil Procedure Act, and Order 50 Rule 15 of the Civil Procedure Rules seeking the following orders: -

1. Spent.

2. Spent.



3. The ex-parte orders made on 5th June, 2024 in these proceedings be set aside in toto
 4. Order number “d” of the ex-parte orders herein made on 5th June, 2024, to the “leave granted do operate as stay of the decision of the 1st respondent dated 14th May, 2024 issued to the 4th respondent pending the hearing and determination of the judicial review proceedings herein”, be vacated and set aside in toto, as this ELC court set aside a similar order on 28th May, 2024 in Narok ELC Case No. E010 of 2023 (Maasai Mara Lemek Landowners Conservancy Limited & Old Boma Limited versus Losokwan Camp Limited) over the same subject matter hence these proceedings are barred under Section 6 of the [Civil Procedure Act](#).
 5. The ex-parte applicants do pay the 4th respondent the cost of this application and of the entire proceedings.
2. The application is premised on the grounds on its face, and further as contained in the affidavit of the 4th respondent. The application was supported by the affidavit of Gichohi Mwaniki, the director of the 4th respondent which was sworn on even date. The 4th respondent deposed that these proceedings were lodged in gross abuse of the court process, since the court is divested of jurisdiction under the provisions of Section 6 of the [Civil Procedure Act](#), owing to a similar case that is pending in Narok ELC Case No. E010 of 2024.
 3. The 4th respondent deposed that the judicial review proceedings are incompetent and premature as the ex-parte applicants have not exhausted the dispute resolution mechanisms under the provisions of Section 32 (a) (i) and 125 of the Environmental Management and Coordination Act (EMCA), in deference to the doctrine of exhaustion. He deposed that they stand aggrieved by the order of leave to operate as stay issued on 5th June, 2024 for being oppressive and unjust to the 4th respondent.
 4. He deposed that they have not trespassed or entered into any identifiable or unidentified plots, and that the ex-parte applicants deliberately misled this court into believing that the 4th respondent is erecting a new camp on the ground when it is not. He deposed that the 4th respondent has been on the ground operating the same camp since the year 2012, and it was only re firming what the recent heavy rains had damaged and securing the existing camp on the more solid ground. He went on to depose that the 4th respondent sought the necessary approvals from NEMA to establish the camp which was issued on 14th May, 2024.
 5. The 4th respondent deposed that the orders were issued in error, and they ought to be set aside. He deposed that the ex-parte applicants failed to disclose that it has in the past unsuccessfully attempted to coerce the 4th respondent into joining the conservancy without success, hence the suit is borne out of malice. He deposed that there is no prejudice that the ex-parte applicants stand to suffer if the orders sought herein are not granted. He further deposed that the harm visited on the 4th respondent is irreparable, and there is need for this court’s urgent intervention.
 6. The 4th respondent deposed that the ex-parte applicants were obligated to demonstrate exceptional circumstances with credible cogent evidence to support such an order, and even given an undertaking as to damages. He deposed that it was never issued with a notice of intention to sue, and this court set aside similar orders on 28th May, 2024 in ELC Case No. E010 of 2024 hence these proceedings are barred under Section 6 of the [Civil Procedure Act](#). He deposed that to entertain these proceedings in parallel to the subsisting case in ELC E010 of 2024 would be embarrassing to the judicial process, and would breach the overruling objective delineated in the provisions of Section 1B of the [Civil Procedure Act](#).



7. Jeremiah Mutisya, the director of the 2nd ex-parte applicant filed his replying affidavit sworn on 20th June, 2024 in response thereto. The 2nd ex-parte applicant deposed that there were sufficient grounds set out in the application that justified stay of the decision subject matter of the judicial review application, and that this court will only set aside its orders where misrepresentation or concealment of material facts were used to obtain the orders. He deposed that the 4th respondent has failed to demonstrate that the ex-parte applicants engaged in any misrepresentation or concealment of material facts in the application that led to the issuance of the orders.
8. He deposed that this application is an attempt by the 4th respondent to misuse this court's processes so as to benefit from their own fraudulent misrepresentation, and to pervert due process. He went on to depose that the decision of 14th May, 2024 is the subject of this judicial review application owing to the failure of the 4th respondent to disclose material facts. Further, he deposed that the effect of the grant of the orders sought by the 4th respondent in the instant application would be to reinstate the 1st respondent's authorization or license dated 14th May, 2024, and lead to the continued construction of the tourist camp on parcel number Cis-Mara/Lemek/6541 without an Environmental Impact Assessment study, and without an Environmental Impact Assessment License and in contravention of the 3rd and 1st respondents' clear directives.
9. The 2nd ex-parte applicant deposed that these proceedings do not offend the provisions of Section 6 of the Civil Procedure Act as the subject matter and issues in ELC No. E010 of 2024 are seeking orders of injunction stopping the defendant from erecting a camp in a wildlife corridor, whereas the instant case is seeking to quash the decision of the 1st respondent dated 14th May, 2024, and to enforce the decision of the 3rd respondent dated 24th July, 2023. He also deposed that the judicial review proceedings concern itself with the decisions of the 1st and 3rd respondents, and Sections 32 (a)(i) and 125 of the Environmental Management Coordination Act do not oust the judicial review jurisdiction of this court. He deposed that Section 13 (5) of the Environment and Land Court Act grants this court jurisdiction to hear and determine judicial review applications which is also based on allegation of violation of the Constitution under Articles 42, 69 and 70 of the Constitution, and breach of the right to public participation as set out in Article 10 of the Constitution.
10. The 4th respondent filed its supplementary affidavit sworn on 27th June, 2024. While reiterating the averments contained in the supporting affidavit, the 4th respondent deposed that this court cannot in law be a first port of call to challenge the 1st respondent's decision. The 4th respondent maintained that the instant proceedings is sub judice of the existing similar case in ELC Case No. E010 of 2024.
11. The application was canvassed by way of written submissions. The 4th respondent filed its written submissions dated 27th June, 2024 where it raised four issues for determination as provided below: -
 - a. Whether the leave granted to the ex-parte applicants on 5th June, 2024 should be set aside and vacated.
 - b. Whether these proceedings are barred under Section 6 of the Civil Procedure Act by dint of the previous suit filed by the ex-parte applicants, in Narok ELC Case No. E010 of 2024 (Maasai Mara Lemek Landowners Conservancy Limited & Old Boma Limited versus Losokwan Camp Limited) over the same subject matter.
 - c. Whether the orders issued by the ELC Court on 5th June, 2024 herein granting leave to the ex-parte applicants to seek judicial review orders of certiorari and prohibition ought to be vacated on the basis that this honourable court constitutes forums non conveniens.



- d. Whether the order for leave in these judicial review proceedings was obtained through material non-disclosure of relevant material facts by the ex-parte applicants.
12. On the first issue, the 4th respondent submitted that Order 51 Rule 15 of the Civil Procedure Rules accords this court the jurisdiction to set aside ex parte orders. It relied on the cases of Kenya Bus Services Limited & Others versus Attorney General & Others [2005] 1 EA 111; [2005] 1 KLR 743, R versus Communications Commission of Kenya & 2 Others ex parte East Africa Televisions Network Limited, Civil Appeal no. 175 of 2000 [2001] KLR 82; [2001] 1 EA 199, Njuguna versus Minister for Agriculture Civil Appeal No. 144 of 2000 [2000] 1 EA 184 and Chairman Co-operative Tribunal & 8 Others Ex Parte Management Committee Konza Ranching & Farming Cooperative Society Limited [2014] eKLR.
 13. On the second issue, the 4th respondent submitted that Section 6 of the *Civil Procedure Act* expressly bars these proceedings as the impugned ex-parte orders was secured by the ex-parte applicants by material non-disclosure of material facts of the proceedings in ELC Case No. E010 of 2024. Further, it was submitted that it would be extremely exceptional, and out of the ordinary were the concurrent proceedings to be entertained. To buttress on this submission, the 4th respondent relied on the case of Legal Advice Center aka Kituo Cha Sheria versus Communication Authority of Kenya [2015] eKLR. The 4th respondent submitted that the general order of prohibition sought by the ex-parte applicant can only be lodged before the 1st respondent's tribunal as it was held in the cases of Thika Min Hydro Co. Limited versus Josphat Karu Ndwiga [2013] eKLR, and Karuri & Others versus Dawa Pharmaceuticals Company Limited & Others [2007] 1 EA 235.
 14. On the third issue, the 4th respondent submitted that there was material non-disclosure of the pendency of the suit in ELC Case No. E010 of 2024, and these proceedings ought to be struck out, and dismissed as constituting an abuse of the court process and it is a practice that cannot be condoned. The 4th respondent relied on the case of Hussein Ali & 4 Others versus Commissioner of Lands, Lands Registrar & 7 Others [2013] eKLR. He further submitted that the ex-parte applicants secured the orders on deliberate misrepresentation and ought to be set aside since the 4th respondent stands to suffer loss. Reliance was placed in the cases of Gurbachan Singh Kalsi versus Yowani Ekori Civil Appeal No. 62 of 1958, and Apondi versus Canuald Metal Packaging [2005] 1 EA 12.
 15. The 4th respondent further submitted that the ex-parte applicants have not exhausted the appeal process under Section 129 (1) and (2) of the Environmental Management & Coordination Act, and neither have they written to the National Environmental and Management Authority pursuant to Section 110 of the Act. He submitted that the doctrine of exhaustion mandates the ex parte applicants to exhaust the dispute resolution mechanisms provided under the EMCA before resorting to this court. The 4th respondent relied on the cases of Speaker of National Assembly versus Karume [1992] KLR, Geoffrey Muthinja & Another versus Samule Muguna Henry & 1756 Others [2015] eKLR and William Odhiambo Ramogi & 3 Others versus Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR.
 16. In conclusion, the 4th respondent submitted that there is no prejudice or injustice that the ex-parte applicants stand to suffer if the orders are granted to vacate the orders of 5th June, 2024.
 17. The ex-parte applicants filed their written submissions dated 2nd July, 2024 and submitted that this court became functus officio after hearing and determining the application for grant of leave to file judicial review proceedings. That upon pronouncing itself as per Order 53 Rules 1 and 2 of the Civil Procedure Rules, this court ceases to have jurisdiction to hear and determine them again. Further, it



was submitted that if the 4th respondent does not agree with the court on the issues of leave to file judicial review proceedings, it may only appeal against the order to the Court of Appeal.

18. They further submitted that the issue of whether leave to file judicial review should operate as a stay of the subject matter decision or not is res judicata, the issues having been heard, considered and determined on merit by the same court. It was also submitted that judicial review proceedings do not offend Section 6 of the *Civil Procedure Act* as it only requires the court to stay proceedings where the matter in the present case are also directly and substantially in issue in a previously instituted suit between the same parties. They submitted that Section 6 does not provide a basis for the grant of the orders sought in the instant application.
19. The ex-parte applicants further submitted that the 4th respondent is barred by the doctrine of estoppel from contending that parties are barred by the decision of the 1st respondent or must resolve such disputes through the bodies established by Sections 32, 125 and 129 of the EMCA before resorting to other dispute resolution avenues. Further, they submitted that the 4th respondent elected not to appeal against the 1st respondent's stop order through the avenues provided in the EMCA and instead chose to rely on misrepresentation and concealment of material facts.
20. They submitted that Section 13 (5) of the ELC Act grants this court jurisdiction to hear and determine judicial review applications for prerogative orders which include writ of certiorari and prohibition. It was also submitted that Section 3 (3) of the EMCA grants any person, who claims that their right to a clean and healthy environment has been violated, to apply to this court for redress. In support of this submission, the ex-parte applicants relied on the cases of Abidha *Nicholus versus the Attorney General & 7 Others, Supreme Court Petition No. E007 of 2023*, Kenya Revenue Authority & 2 Others versus Daraza Investments Limited [2018] eKLR, Ken Kisinga versus Daniel Kiplagat Kirui & 5 Others [2015] eKLR, Raphael Nzomo & Another versus National Environmental Management Authority & Others, Nairobi ELC Petition No. E004 of 2013, and West Kenya Sugar Company Limited versus Busia Sugar Industries Limited & 2 Others [2017] eKLR.
21. The ex-parte applicants further submitted that unlike the remedies and processes availed in the EMCA, judicial review is not an appeal from a decision but a review of the manner in which the decision was made. Reliance was placed in the cases of Commissioner of Lands versus Kunste Hotel Limited [1997] eKLR, and Republic versus Kenya National Examination Council Ex-parte Gathenji & Others Civil Appeal No. 266 of 1997.
22. The ex-parte applicants submitted a court will only set aside its own orders where there was non-disclosure of material facts, where there was irregularity in obtaining the order and in case of change in circumstances of the case or new developments. Further, it was submitted that to grant the orders sought by the 4th respondent would amount to this court's approval and/ or countenance of the clear fraudulent activities.
23. I have considered the application, replies thereof and the written submissions as well as the authorities cited by the ex-parte applicants and the 4th respondent. In my view the issue for determination is whether this court ought to set aside its orders issued on 5th June, 2024.
24. The instant application was triggered by the orders of this court issued on 5th June, 2024, and more particularly prayer "d" which granted as follows: -

“That leave granted herein do operate as a stay of the decision of the 1st respondent dated 14th May, 2024 issued to the 4th respondent pending the hearing and determination of the judicial review proceedings herein.”



25. The 4th respondent argued that there was material non-disclosure of the fact that Section 6 of the *Civil Procedure Act* bars these proceedings owing to proceedings in Narok ELC Case No. E010 of 2024 lodged by the same parties seeking similar reliefs. The 4th respondent argued that the doctrine of res sub judice applies to the instant case whose effect is orchestrated to delay the cause of justice. Further, it was argued that the ex-parte applicants have not exhausted the dispute resolution processes provided under the Environmental Management and Coordination Act before resorting to this court.
26. The ex-parte applicants on the hand contended that the 4th respondent failed to demonstrate that they engaged in any misrepresentation of material facts and that Section 6 of the *Civil Procedure Act* does not apply in these proceedings. According to them, the judicial review proceedings in this case concerns decision making process as regards the letter dated 14th May, 2024.
27. Order 51 Rule 15 of the Civil Procedure Rules provides for setting aside of ex parte orders. In the case of *Zebedee Mmata Injera versus Benson Anubi Luhong; Joanne C.K. Luhongo (Interested Party) [2021] eKLR*, it was held as follows;
- “... while Order 51 Rule 15 of the civil procedure rules gives the court power to set aside any order made ex parte, the court’s discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. That the court’s discretion to set aside an ex parte ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court’s favor or discretion to adduce sufficient and plausible reasons that are demonstratable, and persuasive to the court...”
28. Also, the Court of Appeal in *Aga Khan Education Service Kenya versus Republic through Ali Seif, Benson Nairagu, Joseph Ngethe Gitau and the Attorney General Civil Appeal No.257 of 2003* held as follows: -
- “So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature ex parte orders are provisional and can be set aside by the judge who has granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or another, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the superior court.”
29. From the foregoing, it is clear that this court has power to review its decision in respect of prerogative orders, in the appropriate circumstances.
30. The principles upon which such orders may be set aside or reviewed were set out in the case of *Republic versus Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR* where it was held thus:
- “I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting aside such stay orders would only be merited if: -a) There is non-disclosure of material facts b) concealment of material documents c) misrepresentation”
31. It is not in dispute that as at the time of filing the judicial review proceedings, there was ELCL Case No. E010 of 2024 filed by the ex-parte applicants vide a plaint dated 21st May, 2024. In the plaint, the



ex-parte applicants sought injunctive orders against the 4th respondent as well as eviction orders. The 4th respondent raised a preliminary objection challenging the suit for want of jurisdiction, the same was upheld vide the ruling delivered on 24th June, 2024. This court struck out the suit on account of jurisdiction. I do agree with the 4th respondent that the ex-parte applicants did not disclose to this court the existence of ELCL Case no. E010 of 2024 at the time of filing the instant proceedings and this could have exposed this court to embarrassment resulting from any conflicting orders.

32. Be that as it may, and since the suit has since been struck out, and what remains is the judicial review proceedings. I do understand that judicial review proceedings are concerned with the decision-making process, and having analysed the contentions by both parties, each party seems to be blaming the other for non-disclosure or concealment of material facts. In these proceedings, the ex-parte applicants is challenging the decision by NEMA Nairobi office dated 14th May, 2024 which they argue was a scheme by the 4th respondent to go round the clear directives and decision of the 1st respondent dated 17th November, 2023. The ex-parte applicants also seem to have taken the position that it is the 4th respondent to appeal to NEMA since the decision made on 17th November, 2023 was issued against it. I would not at this stage wish to deliberate further as it is the subject of these proceedings. Bearing in mind that in exercising discretion, this court has to do so with utmost care, I find no plausible or compelling reasons to set aside the said orders.
33. Having said the above, I find no merit in the notice of motion dated 7th June, 2024, the same is hereby dismissed. Costs in the cause. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 4TH DAY OF JULY, 2024.

HON. MBOGO C.G.

JUDGE

04/07/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

