



Erdermann Property Limited v National Environment Tribunal; London Distillers (K) Limited & another (Interested Parties); Katrina Management Consultants Limited (Exparte) (Judicial Review E016 of 2021) [2023] KEELC 734 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEELC 734 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW E016 OF 2021
A NYUKURI, J
FEBRUARY 8, 2023
IN THE MATTER OF:
AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION
IN RESPECT OF
THE DECISION AND/OR ORDERS MADE BY THE NATIONAL
ENVIRONMENT TRIBUNAL IN APPEAL NO. NET 47 OF 2020 ON 5TH
AUGUST, 2021
AND
IN THE MATTER OF
AN APPLICATION UNDER
SECTIONS 126 (5) AND 129 ENVIRONMENT MANAGEMENT
AND COORDINATION ACT, 1999;
AS READ WITH
ARTICLES 27 (1), 40, 47, 162(2)(B) & (3), 165(6) & (7) AND
169(2) OF THE CONSTITUTION OF KENYA, 2010;
SECTION 13(7)(B) ENVIRONMENT AND LAND COURT ACT
SECTIONS 3(1)(B), 7(1)(B), 7(2)(A)(I) &(II), 7(2)(D), 7(20)
(F),7(2)(I)(II), 7(2)(J), 7(2)(N) AND 9(2) OF THE FAIR
ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015
AND
SECTION 10(2) & (3), HIGH COURT (ORGANISATION &



**ADMINISTRATION) ACT AND ALL OTHER ENABLING
PROVISIONS AND PROCEDURES OF THE LAW**

BETWEEN

ERDERMANN PROPERTY LIMITED APPLICANT

AND

NATIONAL ENVIRONMENT TRIBUNAL RESPONDENT

AND

LONDON DISTILLERS (K) LIMITED INTERESTED PARTY

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED
PARTY**

AND

KATRINA MANAGEMENT CONSULTANTS LIMITED EXPARTE

RULING

Introduction

1. Before court is a notice of motion dated September 28, 2021 filed by the 1st interested party/applicant seeking orders for review, setting aside or vacation of the *ex parte* orders of the court made on September 23, 2021.
2. The application is premised on the grounds on its face as well as the supporting affidavit sworn by Ann B Amisi, advocate for the 1st interested party/applicant. The applicant's case is that when this matter came up for mention on September 23, 2021, the advocate for the *ex parte* applicant sought to withdraw the application dated August 9, 2021 with no order as to costs, which the court granted. Further, that the counsel for the *ex parte* applicant failed to disclose to the court the fact that the applicant in the instant application had filed a notice of objection to the withdrawal of the application dated August 28, 2021, which led to the *ex parte* orders in favour of the *ex parte* applicant.
3. Counsel for the applicant also averred that he was not in court on September 23, 2021 as he had logged in the court using the link for the virtual court session only to be informed later that the matter was mentioned physically in open court. She further stated that the *ex parte* orders amounted to substantive orders which were made on a mention date and that the *ex parte* orders are prejudicial to the applicant who were condemned unheard.
4. The application was opposed. Mr John Rajwayi, the planning manager at Erdemann Property Limited, the *ex parte* applicant/respondent swore a replying affidavit dated January 10, 2022 in opposition to the application. The respondent's case was that the award of costs is not a matter of course but is at the discretion of the court and that the *ex parte* applicant had a just cause in withdrawing the judicial review proceedings for the reason that leave was not granted, neither was hearing and determination ordered to take place within 7 days, contrary to order 53 rule 1(4) of the [Civil Procedure Rules](#) which rendered the application moot and overtaken by events.



5. The respondent further stated that the matter was withdrawn at a most preliminary stage after one attendance and the question of leave and stay having not been argued and there having been no substantive progress in the matter. He also averred that the court made the *ex parte* orders after having considered the justice of the matter and in exercise of its discretion.
6. He deponed further that the only prayer made by the applicant was for review, setting aside and in vacating the *ex parte* orders issued on September 23, 2021, but never sought for costs for the withdrawn judicial review application which appears to be the crux of the dispute in the instant application, and that parties are bound by their pleadings. His position was that the effect of reviewing the order would be to compel the *ex parte* applicant to pursue a legal cause that they were no longer interested in.
7. Further that the applicant was aware that the court was sitting on September 23, 2021 and that the application did not meet the threshold for grant of the orders sought. It was also his position that the power of court to review its orders is only exercised within the purview of section 80 of the [Civil Procedure Act](#) and that the applicant has not shown that the application falls within those provisions.
8. On 11th Mary 2022, parties were granted liberty to file submissions, but none were filed.

Analysis and Determination

9. Having considered the application, the affidavit in support thereto and the replying affidavit, the sole issue that arise for determination is whether the Applicant has met the threshold for review, setting aside and or vacation of the orders of this court made on September 23, 2021.
10. I have considered the record and it is important that I highlight the history of this matter. On August 9, 2021, the *ex parte* applicant filed a chamber summons dated even date having brought under a certificate of urgency seeking for leave to apply for Judicial Review orders of certiorari and prohibition in respect of the decision of the National Environment Tribunal in Net Appeal No. 47 fo 2020. That application was placed before my learned sister lady justice Ochieng, then sitting at Kajiado, on the same date, who certified the same as urgent and worthy of being heard during vacation and fixed it for interpartes hearing on August 17, 2021.
11. On August 17, 2021, the matter came up before my learned brother Justice Angote, then sitting in Machakos. On that date, both parties were represented by their respective counsel. As counsel for the 1st interested party informed court that he had filed a preliminary objection dated 13th August 2021 to the chamber summons dated August 9, 2021, the court granted the *ex parte* applicant leave to file and serve a response to the notice of preliminary objection and file a further affidavit if need be and directed that the matter be heard before Hon Ochieng J, for a ruling date, as the Judge was on transfer.
12. When this matter came up on September 23, 2021 before me, counsel for the *ex parte* applicant appeared in court in the absence of counsel for the respondents and the interested parties and informed court that the matter was coming up for directions on the hearing of the chamber summons. He also informed court that the applicant had filed a notice of withdrawal of the pleadings/chamber summons, dated August 24, 2021 and sought that the notice of withdrawal be allowed with no order as to costs.
13. The court having considered the notice of withdrawal dated August 24, 2021, granted the prayer in the notice and marked the chamber summons together with all the attendant documents as withdrawn with no order as to costs. it is that order that the applicant now seeks to have vacated and set aside.
14. The power to set aside or vacate *ex parte* orders is a discretionary power of the court which ought to be exercised judiciously where the applicant has demonstrated sufficient cause. The right to be heard



is a fundamental right jealously protected under our constitution which should be upheld at all times unless justice demands otherwise.

15. The applicant has stated and correctly so, that this matter was to be heard before my learned sister lady justice ochieng, on September 23, 2021 for fixing a ruling date. However, when this matter came up before me on September 23, 2021, counsel for the respondent who was present and who had the duty to inform the court what had transpired earlier, noting that this court did not have the advantage of typed proceedings, failed to inform court that what was coming up was not only the notice of withdrawal of their pleadings but that the respondent herein had filed a notice of objection dated August 28, 2021 objecting to the withdrawal of the pleadings with no order as to costs on grounds that the 1st interested party had filed and served both the preliminary objection and replying affidavit in response to the chamber summons seeking leave to apply for judicial review orders.
16. The applicant's counsel has explained that since the last order had directed that the matter would be heard before Hon. Justice Ochieng, he did not attend court before me on September 23, 2021. This state of affairs has not been challenged in any way by the respondent.
17. A right to be heard is a Constitutional right that cannot be taken away lightly. The applicant has shown that due to the fact that he expected the matter to be before another court, he was unable to appear in court on September 23, 2021. That explanation is excusable. Had counsel for the *ex parte* applicant brought to the court's attention the notice of objection dated August 28, 2021 filed by the respondent, this court would have taken into account the said notice in making the orders of September 23, 2021. Since the only complaint by the applicant herein is that they were represented and their counsel filed a preliminary objection and replying affidavit before the chamber summons was withdrawn, if their notice of objection date August 28, 2021 had been taken into account, then that would have been sufficient in so far as their right to be heard is concerned.
18. An order for costs is discretionary. In this case, the court's discretion was exercised without the input of the applicant although the respondent was aware that the request for not granting costs had been challenged by the applicant. The *ex parte* applicant is entitled to withdraw his case any time he deemed fit and even the applicant herein cannot stop them from withdrawing their suit since the suit belongs to them and they decide what to do and how to proceed with the suit. Therefore, it was well within their power to withdraw their pleadings.
19. On the issue of costs, it is trite law that costs follow the events, unless for good reason the court orders otherwise. While the *ex parte* applicant herein could withdraw their suit at any time, an order on whether or not they would pay or be paid costs would depend on what had transpired before the withdrawal. Where a party has incurred costs in responding to the opposite party's pleadings, unless there is sufficient cause, they ought to be paid costs, because no one should drag another person to court merely to withdraw the suit. That is what I understand as costs having to follow events.
20. In the present case, the court made the *ex parte* orders of September 23, 2021 without the presence of the applicant who had filed an objection to the withdrawal of the chamber summons with no order as to costs. Counsel for the *ex parte* applicant who bore a higher responsibility on disclosure on account of the absence of the other party, failed to disclose that his request had been objected to.
21. Having taken into account the notice of objection date August 28, 2021 and noting that indeed the applicant filed a replying affidavit and a notice of preliminary objection, both dated August 13, 2021, against the respondent's chamber summons, they were entitled to costs upon withdrawal of the chamber summons dated August 9, 2021.



22. In the premises, I set aside the orders of September 23, 2021 and order that the notice of withdrawal dated August 24, 2021 be and is hereby allowed save that the *ex parte* applicant shall bear the costs in respect to the chamber summons dated August 9, 2021 as well as costs for the instant applicant.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the Applicant

No appearance for the Respondents

Josephine – Court Assistant

