REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. JUDICIAL REVIEW APPLICATION NO. 2 OF 2021

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI AND PROHIBITION; AND SUCH LEAVE TO OPERATE AS STAY

AND

AN APPLICATION UNDER SECTIONS 129(3) (a) AND (e), 126(5) AND 129 (4) OF THE ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT, 1999; SECTIONS 2(i), 7(1) (b),7(a) (i) & (ii), 7 (2) (b), (c), (d), (k), (I), (m), and (n) AND 9(2) FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015; ARTICLES 47 OF THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW

AND

IN THE MATTER OF: THE DECISION AND/OR ORDERS MADE BY THE NATIONAL ENVIRONMENT TRIBUNAL IN APPEAL NO. NET 38 OF 2020 ON 23RD MARCH, 2013

BETWEEN

KILIAVO FRESH LIMITED.....APPLICANT

VERSUS

THE NATIONAL ENVIRONMENTAL TRIBUNAL.....RESPONDENT

AND

BIG LIFE FOUNDATION.....1ST INTERESTED PARTY

THE CONSERVATION ALLIANCE OF KENYA.....2ND INTERESTED PARTY

RULING

By a Chamber Summons Application dated 1st April, 2021 brought pursuant to Order 53 Rule 1(1) & (2) of the Civil Procedure Rules and Section 2(1),7(1) (b),7(2) (a), (i) and (ii) of Fair Administrative Action Act, 2015, the Applicant seeks leave to apply for orders of Certiorari and Prohibition to quash and stay the Respondent's decision made on 23rd March, 2021; restrain implementation of the said decision and for expeditious determination of the substantive motion. The Applicant further seeks orders to restrain any person claiming under the Respondent or pursuant to its authority from mapping or generating a report on Kimana-Wildlife Corridor or giving effect to the impugned decision dated the 23rd March, 2021 and leave granted to operate as a stay of the Respondent's decision.

The Application is premised on the Supporting Affidavit, Statutory Statement, Verifying Affidavit and Supplementary Affidavit sworn by Harji Mavji Kerai, the Applicant's Director, as well as the annexures thereon. In the said affidavit including statements, the deponent confirms that the Applicant is the registered proprietor of LR Nos. Loitoktok /Kimana-Tikondo /4209, 4210 and 4211 respectively, hereinafter referred as the 'suit lands'. He alleges that the Respondent's decision dated 23rd March, 2021 in NET Appeal No.38 of 2020 is ultra vires and contravenes Sections 65, 66, 67, 68 and 69 of the Wildlife Conservation and Management Act, 2013; Articles 10, 185 (2),186 (1) ,187 (2) and Section 10 Part 2 of the Fourth Schedule of the Constitution; Sections 55, 56 and 57 of the Physical Planning and Land Use Act, 2019; Section 129 of the Environmental Management and Coordination Act (EMCA) and the Kajiado County Land Sub-Division Guidelines, 2018. Further, the said decisions designated and delineated private property as a possible wildlife conservation

easement by directing the National Environment Management Authority (NEMA) and Kenya Wildlife Services (KWS) to map out the Kimana-Wildlife Corridor yet land planning and zoning is a function of the County Government. He explains that the Applicant undertakes an intergrade mixed-use farm comprising of conservation agriculture, livestock production, wildlife rangers base and necessary farm infrastructure upon obtaining all the statutory approvals including an EIA License No.0068059 from NEMA. He insists that the Applicant has invested on the suit lands through fencing, growing organic fruits and vegetables for sale within Kenya and worldwide, employed over 300 locals, commissioned boreholes as well as renovated Oldoinyo Primary School. He contends that the Respondent's orders prohibiting any activities on the suit lands exposes the Applicant to unmitigated waste, vandalism and irreparable loss of its agribusiness of organic fruits and vegetables. He claims that the Respondent violated Section 130 of the EMCA by issuing orders that were different and distinct from the cause pursued. Further, the Respondent never supplied the Applicant with its decision.

The Respondent opposed the Application by filing a Preliminary Objection dated 11th June, 2021 where it contended that the Application contravenes Section 130 and 133 of the EMCA which grants immunity to the Respondent from being sued. Further, the Applicant ought to have filed an appeal before the High Court and not a Judicial Review Application.

The Interested Parties opposed the application and filed Grounds of Opposition dated 23rd April, 2021 and Replying Affidavit sworn by Steve Okobo Itela. In the said pleadings they insist the decision of the Tribunal dated 23rd March, 2021 is legal and well within the ambit of the matters before the Tribunal specifically Section 129 (3) of the EMCA. Further, identification of a wildlife corridor means identifying through scientific means the route through which wildlife migrate and does not constitute zoning. They claim the order dated 23rd March, 2021 by the Respondent was directed to KWS to confirm if suit lands were within geographical location of a wildlife corridor. Further, that the citizens of Kenya have a right to a clean and healthy environment as provided by Article 42 of the Constitution and state organs are mandated to protect against harmful activities to the environment as envisaged under Article 69 of the Constitution. They contend that the license issued to the Applicant on 6th August, 2020 being EIA LICENCE NUMBER 0068069 was clear in its conditions for the Applicant to obtain approval from KWS which letter has not been obtained as alleged. Further, that the suit lands had already been identified as falling within a government gazette land use management plan being the Kenya Vision 2030 Flagship project '***Securing Wildlife Migratory Routes and Corridors'***. They explain that the vandalism and damage referenced by the Applicant is caused by wildlife that continue to break down the Applicant's fence and proceedings at the National Environmental Tribunal (NET) were commenced by the Applicant. Further, granting orders to water, tend and transplant seedlings will effectively render the proceedings at the NET nugatory as the Applicant will need to harvest its crop. They reaffirm that existence of other farms that are proximate to the suit lands is irrelevant and communal interest must always be upheld. They reiterate that the Applicant's application should be struck out or dismissed. Further, it should be denied leave to apply for orders of CERTIORARI including PROHIBITION and the Court should decline to stay the proceedings at NET being Appeal No. 38 of 2020.

The application was canvassed by way of written submissions which were highlighted on 16th June, 2021.

SUBMISSIONS

The Applicant in its submissions contended that it had established a prima facie as the violation against it exposed it to real harm and prejudice. It insisted that the decision made on 23rd March, 2021 was ultra vires and amounts to unjust administrative action as it was not within the power conferred to the Respondent. Further, that it was contrary to Article 40 of the Constitution as well as Sections 67, 68 and 69 of the Wildlife Management and Conservation Act. It submitted that the Power to issue a wildlife easement order was restricted to the Environment and Land Court and was not a shared jurisdiction. It further submitted that the Applicant was not involved in the delineation of the Wildlife corridor and was hence likely to suffer if the said decision was not quashed. It was the Applicant's submissions that section 130 of the EMCA did not oust the jurisdiction of this court to interrogate if power was exercised properly. On the Respondent's Preliminary Objection, it insisted Tribunal can be sued and sought for the said Objection to be dismissed. To buttress its averments, it relied on various decisions including: **Republic v National Environment Tribunal & 2 Others ex-parte Athi Water Services Board (2015) eKLR; Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125 and Taib Ali Taib Vs Minister for Local Government (2006) eKLR.**

The Respondent in its submissions contended that the Application offends Section 130 of the EMCA. Further, that the Applicant should have filed an appeal before the High Court challenging its decisions and not a Judicial Review Application before this court. It further submitted that statute provides procedures for persons aggrieved by the Respondent's orders. To support these arguments, it relied on the following decisions: **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another (2015) eKLR, Speaker of National Assembly v Karume (1992) eKLR, and Republic v Public Procurement Administrative Review Board & 3 Others Ex-parte Saracen Media Limited (2018) eKLR.**

The Interested Parties in their submissions insist the Applicant has a right to judicial review but it has to be in conformity set out in the case of **Mason Services Limited v Parklands Baptist Church Registered Trustees & Another (2018) eKLR** and **in the Matter of Mui Coal Basin Local Community (2015) eKLR.** They submitted that the Applicant has not exhausted the remedies available under section 130 of the EMCA and that orders under Judicial Review is not available where the said order is contested. They challenged contestation of the Respondent's Order issued on 23rd March, 2021 and relied on the case of **Firearms Licensing Board & Anor Ex parte Boniface Mwaura (2019) eKLR** to support this argument. They further submitted that the Applicant has demonstrated it was within time to file an appeal or review and relied on the case of **Taib Ali Taib Vs Minister for Local Government (2006) eKLR;** Further, at the time of filing this instant application, the matter had already been concluded by the Tribunal and there should be consideration of public interest as a key determinant for stay. To support this argument, they relied on the case of **R V Capital Markets Authority Ex parte Joseph Mumo & Another**.

In rejoinder, the Applicant insists section 130 of the EMCA does not ouster or block a party to move by way of Judicial Review. Further, Applicant is yet to receive Order of NET dated 23rd March, 2021 despite severally seeking for the same. The Applicant reiterates that it has not exhausted the remedy for Appeal as they do not have the decision so as to draw the grounds of Appeal. To buttress its averments, it relied on the case of **Garissa HC Petition No. 1 of 2021 Mohamed A Mohamed V Cabinet Secretary for Interior & Others.**

Analysis and Determination

Upon consideration of the Chamber Summons Application dated 1st April, 2021 together with the statement of facts as well as the respective affidavits, Grounds of Opposition and rivalling submissions, the only issue for determination is whether the Applicant is entitled to leave to institute judicial review proceedings of Certiorari and Prohibition against the decision by the Respondent dated 23rd March, 2021 and if the leave granted should operate as a stay of the impugned decision.

It is not in dispute that the Respondent made a decision dated 23rd March, 2021 in respect to the suit lands which belong to the Applicant relating to the mapping or generating a report on Kimana-Wildlife Corridor. The Applicant contends that it is aggrieved with the decision as it will interfere with the economic activities on the suit lands. Further, that it has not been served with a copy of the said decision to enable it Appeal. The Applicant lodged an Appeal at NET which was determined. The Respondent and the Interested Parties opposed the instant application contending that it offends the provisions of section 130 of the EMCA. Further, that the Applicant has not exhausted the available remedies to enable it seek for Judicial Review. The Interested Parties further insist that since the fulcrum of the dispute revolves arounds public interest, no stay should be provided. I will proceed to make reference to Order 53 Rule 1 which governs institution of judicial review proceedings and states that:' ***(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.'***

Judicial review is not concerned about the merits of the decisions but the process, which was adhered to. It challenges the administrative action of a person in position of authority. I note the Applicant is merely seeking to challenge the process adhered to by the Respondent in making the impugned decision dated the 23rd March, 2021 which affects the suit lands and the economic activities thereon. The Applicant insists it was not involved in the delineation of the wildlife corridor which affects its lands. Further, it has not been served with the said decision. I note the Respondent and the Interested Parties have really opposed the granting of leave, but in the current Constitutional dispensation while laying emphasis on Articles 47 and 50 of the Constitution, a right to be heard and a right to fair administrative action are rights which have to be respected.

At this juncture, as a Court I will not analyze the merits or demerits of the impugned decision dated the 23rd March, 2021 but only whether the Applicant has raised pertinent issues in the instant application to warrant orders of judicial review.

In the Supreme Court case of **Judges and Magistrates Vetting Board v Centre for Human Rights and Democracy [2014] eKLR** it was held that: '**When Courts conduct judicial review, they are in essence ensuring that the decisions made by the relevant bodies are lawful. Consequently, should they find that the decision made is unlawful, Courts can set aside that decision. Judicial review, therefore, can be said to safeguard the rule of law, and individual rights; and ensures that decision makers are not above the law, but have taken responsibility for making lawful decisions, in the knowledge that they are reviewable."**

Further in the case of **Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR** where the Court held that: '**It is also noted that the necessity for leave before commencement of legal proceedings is a requirement in various areas of legal practice. For instance, there is need for leave before one can appeal certain decisions under the Civil Procedure Rules, 2010. The need for leave by itself cannot therefore be said to be unconstitutional. Fortunately, the Petitioner need not seek leave to commence judicial review proceedings under the FAA Act. 92. The courts have over the years established that for a party to prove violation of rights under the provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement, and the injury suffered. 93. The requirement to discharge the burden of proof has been stated in many decisions including Britestone Pte Ltd v Smith & Associates Far East Ltd [2007] SGCA 47 where it was held that: "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him." 94. The Petitioner pointed out the constitutional provisions allegedly violated by the impugned provisions without tendering evidence of how the requirement for leave before the commencement of judicial review proceedings violates those provisions. He did not state how the necessity for leave negatively affects the right to access justice under Article 48. His claim that the need for leave before applying for judicial review orders contravenes Article 159(3)(c) & (d) which requires justice to be done without delay and undue regard to technicalities does not accord with the decisions of the superior courts of this country to the effect that procedural rules are necessary for the delivery of justice. I therefore find no merit in this petition and I dismiss it. 95. This petition, however, has demonstrated the need to formally do away with sections 8 and 9 of the LR Act and Order 53 CPR. In my view, sections 8 and 9 of the LR Act and Order 53 of the CPR no longer serve any purpose as the FAA Act has aligned judicial review of administrative action with the Constitution. 96. What is now required is for the Chief Justice to make rules under Section 10(2) of the FAA Act and the Cabinet Secretary for the time being responsible for the administration of justice, in consultation with the Commission on Administrative Justice, to make regulations under Section 13(1) of the Act. The National Assembly may also need to formally repeal sections 8 and 9 of the LR Act so that the FAA Act becomes the only law upon which applications for orders of judicial review are anchored. 97. Nevertheless, as I have already stated, sections 8 and 9 of the LR Act and Order 53 of the CPR have been rendered otiose and their continued retention in our statute books will only serve to promote the wrong notion that Kenya has a two-tracked system for seeking judicial review against administrative action.'**

While in the case of **Director of Public Prosecutions & 2 Others Vs Pius Ngugi Mbugua & Another Exparte Muktar Saman Olow (2017) eKLR,** it was held that a fundamental principle in judicial review cases is that the concern of courts has nothing to do with the merits of the decision but the process in arriving at that decision.

Based on the facts as presented while associating myself with the cited decisions and quoted legal provisions, I opine that the Applicant is indeed entitled to leave to commence an application for Certiorari and Prohibition challenging the Respondent's decision dated 23rd March,

2021. On whether leave should operate as a stay of the Respondent's order granted on 23rd March, 2021, I wish to make reference to the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** where the Court of Appeal while defining a prima facie case stated that it is a case in which on the materials presented to the court or tribunal, it will conclude there is an apparent infringement of the Applicant's rights.

Further in the case of **Taib A. Taib V Minister For Local Government & 3 Others [2006] eKLR**, the Court while dealing with an issue of stay in a judicial review proceedings observed that:' **The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act……As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined.'**

I note the Applicant herein is the owner of the suit lands wherein it undertakes an intergrade mixed-use farm comprising of conservation agriculture, livestock production, and has made a wildlife rangers base. Further, the Respondent and Interested Parties have not disputed that the Applicant undertakes the aforementioned activities on the suit lands and if obtained it all the statutory approvals including an EIA License No.0068059 from NEMA to undertake the said activities on the suit lands. The Respondent does not deny that it did not engage the Applicant in arriving at the decision dated 23rd March, 2021 and failed to furnish the Applicant with the said decision to enable it Appeal. To my mind, I am of the view that there is an apparent infringement of the Applicant's rights which requires the Court's interrogation before making a determination on the same. In the circumstances, I will associate myself with the decision I have cited above and order that the leave granted herein indeed operates as a stay of the decision granted on 23rd March, 2021.

It is against the foregoing that I find the Chamber Summons application dated 1st April, 2021 merited and will allow it. I grant the Applicant leave of 21 days to file and serve the substantive motion on Judicial Review orders of Certiorari and Prohibition.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE