



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. JUDICIAL REVIEW APPLICATION NO. 4 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) ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT, 1999; SECTIONS 2,4,6, 7(1) (b),7(2)(a)(i), (ii), (iv) and(v), 7 (2) (b), (c), (d), (e), (f), (h), (i) (iv), (k), (l), (m) AND OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015; ARTICLES 23,27(1) AND (2), 40, 47, 48, 50(1) AND 159(2)(d) OF THE CONSTITUTION OF KENYA, 2010, RULE 25 NATIONAL ENVIRONMENT TRIBUNAL (NET) PROCEDURE RULES, 2003 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 26TH APRIL,2021

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

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD INTERESTED PARTY

COUNTY GOVERNMENT OF KAJIADO.....4TH INTERESTED PARTY

RULING

By a Chambers Summons Application dated 10th May , 2021 brought pursuant to Order 53 Rule 1(1) & (2) of the Civil Procedure Rules and Sections 2, 4, 6, 7(1) (b),7 (2) (a) (i) ,(ii) & (iv) & (v), 7 (2) (b), (c), (d), (e), (f), (h), (i), (iv), (k), (l), (m) and (n) of the Fair Administrative Action Act, 2015, Section 126 (5) of the Environment Management and Co-ordination Act,1999 (EMCA) and Rule 25 of National Environment Tribunal (NET) Procedure Rules, the Applicant seeks for leave to apply for order of Certiorari and Prohibition to quash the Respondent’s decision made on 26th April, 2021. Further, it seeks to restrain the Respondent or any person claiming under or pursuant to his authority from implementing the impugned decision and that such leave does operate as stay against the said decision. The Applicant further seeks for orders that the Respondent and Interested parties be restrained from publishing claims in respect of the subject matter before this court pending hearing and determination of the substantive motion.

The Application is premised on the Supporting Affidavit, Statutory Statement, Verifying Affidavit and Supplementary Affidavit sworn by Harji Mavji Kerai, the Applicant's Director. In the said documents, he confirms that what is before court for interrogation is the Respondent decision dated 26th April, 2021 summarily dismissing NET Appeal No. 38 of 2020 without hearing and determining it on merits on alleged non-attendance of the parties including witnesses. He contends that the decision violates Rule 25 of NET Procedure Rules, 2003, Article 48, 50(1) and 159 of the Constitution, Section 126(5) of the EMCA, Section 7(2) of the Fair Administrative Action Act 2015 and ratio by the Court of Appeal in **Trust Bank Ltd v Amalo Ltd (2002) eKLR** as parties had already filed their pleadings. He insists that the 3rd Interested Party revoked its EIA License despite being requested through a letter dated 27th April, 2021 Ref: CM /LIT /1156 /3 /2019 to defer any action against its EIA License to allow prosecution of the appeal and engagement with finality. Further, the Applicant was not supplied with the Respondent's Order of 26th April, 2021 neither was it granted an opportunity to be heard. He states that the 1st and 2nd Interested Parties published articles calling for revocation of the Applicant's EIA license. He confirms that the Applicant lodged NET Appeal No. 38 of 2020 before the Respondent on 21st September, 2020 and the appeal was heard on 31st March, 2021 and scheduled for further hearing on 26th April, 2021. He states that the 3rd Interested Party confirmed that the appeal should be determined on merits as the issues raised were not trivial but apt for application of Section 132 of the EMCA. Further, this made the 3rd Interested Party to issue the Applicant with a notice to show cause instead of cancelling its EIA License. He explains that on 26th April, 2021, the Applicant's counsel Mr. Githu, informed the Respondent it lodged a Judicial Review Application before this court which impacted on the appeal. He alleges that it would not have been possible to prosecute the Appeal on 26th April, 2021 due to the fact that on 26th April, 2021 at 9.45am the 2nd Interested Party served them with two (2) fairly voluminous witness statements and experts reports in opposition to the Appeal. Further, the Applicant's Director had travelled to India on a family matter. He deposes that the Respondent disregarded and ignored the Appeal which raised prima facie case on interpretation of Section 64(1) (b) of EMCA and substantive questions of law raised by 3rd Interested Party for determination in accordance with Section 132 of EMCA. Further, that the Applicant's property is being destroyed and vandalized by among others, the 1st Interested Party, who forcibly drove domestic and wild animals to it, which matter was reported at Kimana Police Station vide OB13/22/4/21 and OB10/6/10/2020 respectively. He reiterates that the 1st Interested Party has sponsored negative media reports against the Applicant which has violated Article 40 of the Constitution including Section 26 of the Land Registration Act.

The Respondent opposed the Application through a Preliminary Objection dated 11th June, 2021 on grounds 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 1st Interested Party in opposing the application filed Grounds of Opposition dated 11th June, 2021 and a Supporting Affidavit sworn by Benson Leiyan, the 1st Interested Party's Chief Executive Officer where it contended that the Respondent's decision dated 26th April, 2021 is legal and within the ambit of the law governing conduct of matters before the Tribunal. It explains the proceedings of 26th April, 2021 and insists the Applicant was granted a chance to be heard but took it for granted. It insists the Applicant was well represented by Counsel on 26th April, 2021 and a decision to grant an adjournment is discretionary which discretion cannot be interfered with. It reiterates that the Applicant has not demonstrated any of the defined circumstances that warrant judicial review of the Respondent's decision and this exercise is merely meant to derail implementation of the Tribunal's decision of 26th April, 2021. Further, the Applicant has failed to exhaust the statutory provided appeal mechanism, hence the suit is bad in law for violating the doctrine of exhaustion of available remedies. It contends that the instant application is an attempt to bypass statutory mechanisms available for appeal, review or revision of an order of a tribunal within the court of trial and an absolute waste of the Court's time. Further, prayer No. 5 is also an attempt to infringe on the constitutional right to freedom of speech, not just for the parties in this suit, but for the world at large and it is not specific on who it should restrain. It avers that the Applicant wants a long drawn out litigious process that will in the end render any orders by this court nugatory and incapable of enforcement. Further, all allegations of harassment by the 1st Interested Party are a figment of the imagination of the Applicant. The 1st Interested Party sought for the application to be struck out or dismissed and for it to be denied leave to apply for orders of Certiorari including Prohibition in respect to the Respondent's decision dated 26th April, 2021. Further, that the Applicant should be denied orders barring or restraining the Respondent and Interested Parties from publishing articles, news or stories howsoever in respect to the merits or otherwise of claims and dispute before this court.

The Application was canvassed by way of written submissions.

Submissions

The Applicant in its submissions reiterated its claim and contended that it had established a prima facie case of the violation against which, it is exposed to real harm and prejudice and relied on the provisions of Articles 27(1) and (2), 47, 48, 50(1) and 159(2) of the Constitution; Section 7(2) of the Fair Administrative Action Act, Rule 25 of NET Procedures Rules 2003 and Section 126 (5) of the EMCA. It argued that the Respondent's orders of 26th April, 2021 which the Applicant was not supplied with was ultra vires and irregular. Further, this court must interrogate the Respondent's decision summarily dismissing the Appeal for non-attendance of parties and witnesses without hearing including determination as the Applicant's fundamental rights and freedoms were violated. Further, that the court must hold accountable quasi-judicial entities as orders the Respondent made was in excess of its jurisdiction and procedurally unfair including unjust as it exposed the Applicant's property to destruction as well as vandalism. It further submitted that this warranted the court's intervention to grant leave to challenge the said decision and issue appropriate stay orders. Further, NEMA revoked the Applicant's EIA License No. 0068059 on 27th April, 2021 while the Interested Parties risk lodging bills of costs considering the Appeal was dismissed with costs.

To buttress its averments, it relied on the following decisions: **J v Firearms Licensing Board and Another ex-parte Boniface Mwaura (2019) eKLR**, **Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti (2018) eKLR**; **Republic v National Environment Tribunal & 2 Others ex-parte Athi Water Services Board(2015) eKLR**; **Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others(2006) eKLR**, **R v Race Relations Board ex parte Setrarajan (1976)1 ALL ER.12**; **R v PPARB and Another ex parte Selex Sistemi Intergrati (2008)KLR 728**; **R v IEBC another ex-parte Coalition for Reform and Democracy & 2 others (2017) eKLR**; **President of South Africa and Others v South Africa Rugby football Union and Others (CCT16/98)2000(1) SA 1**; **Taib A. Taib v Minister for Local Governments & 3 Others (2006)eKLR** and **JR 1 of 2021 Mohammed Abey Mohamed and another v Cabinet Secretary, Interior and Citizen Services and Others**.

The Respondent in its submissions stated that the Application offends Section 130 of the EMCA, as the Applicant should have filed an appeal before the High Court challenging its decisions and not a Judicial Review Application before this court. Further, the statute provides procedures for persons aggrieved by the Respondent 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 1st Interested Party in its submission, reiterated its averments in the Replying Affidavit and Grounds of Opposition and argued that the instant Application violates the doctrine of exhaustion of available remedies of review, revision and appeal. It insisted that the Respondent could dispose of an appeal for want of prosecution and submitted that the Appeal was legally dismissed as hearing dates were issued at the end of February, 2021 after the Appeal was filed. Further, if indeed the Applicant's Director was out of the country, he would have testified virtually or other witnesses called to testify. On whether the right to freedom of expression extends to fair comments made by a party to a suit, it relied on Article 33 of the Constitution and argued that parties can issue fair comments on the Respondent's Ruling dated the 26th April, 2021 whose outcome was revocation of the Applicant's license. To support its arguments, it relied on the following decisions: **Mason Services Limited v Parklands Baptist Church Registered Trustees & Another (2018) eKLR**; **In the Matter of Mui Coal Basin Local Community (2015) eKLR**; **Union Insurance Co. of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. Nai 179 of 1998**; **United India Insurance Co. Ltd v East Africa Underwriters (Kenya) Ltd (1985) E.A 898 and Civil Appeal No.40 of 2010 Grace Wangui Ngenye vs. Chris Kirubi and Another (eKLR)**.

Analysis and Determination

Upon consideration of the Chamber Summons Application dated 10th May, 2021 together with the statutory statement as well as the respective affidavits, Grounds of Opposition and rivaling 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 26th April, 2021 and if the leave granted should operate as a stay of the impugned decision.

Both the Applicant, the Respondent and 1st Interested Party admit that there were proceedings before NET being **NET 38 OF 2020**, on 26th April, 2021. They further admit that NET dismissed the Appeal. The Applicant insists NET dismissed the Appeal without granting them a right to fair trial. Further, that NET acted ultra vires. The Interested Party insists the Applicant was granted a fair hearing. The Respondent contends that the Applicant should have filed an Appeal instead. I note the proceedings therefrom emanated from a decision by NEMA cancelling the Applicant's EIA license in respect to the suit property. The Applicant being aggrieved by this decision lodged an Appeal at NET in September, 2020 and on 26th April, 2021, it explained to NET that it had lodged JR No. 2 of 2021 before this Court touching on the dispute before NET and its witnesses were out of the country hence it sought for an adjournment, which NET declined and proceeded to dismiss the Appeal for want of prosecution. From perusal of the Order from NET which was annexed to the pleadings herein, I note the Appeal was indeed dismissed for want of prosecution and that is the basis for this Application for Judicial Review as the Applicant contends that it was not granted a right to be heard. Further, NET acted ultra vires. I must say this application for leave has been strongly opposed by the 1st Interested Party that insists the Applicant has not exhausted the available remedies to enable it seek for Judicial Review. Order 53 Rule 1 makes provisions on institution of judicial review proceedings and stipulates thus: **'(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.'**

The Court in the case of **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** described judicial review as follows: **'Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange – versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.'**

Judicial review challenges the administrative action of a person in position of authority and whether it accorded an individual seeking a remedy, a fair administrative action. In this instance, the Applicant is seeking to challenge the process the Respondent adhered to in dismissing its Appeal for want of prosecution on 26th April, 2021 after it had sought an adjournment. I note the Respondent and the 1st Interested Party have really opposed the granting of leave with the Respondent contending that members of NET cannot be sued for their actions but I note that in the current Constitutional dispensation while relying on Articles 47 and 50 of the Constitution, I find that 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 26th April, 2021 but only whether the Applicant has raised pertinent issues in the instant application. The Applicant claims it was not furnished with the decision dated the 26th

April, 2021 on time so as to Appeal which fact has not be controverted by the Respondent. In the case of **Director of Public Prosecutions & 2 Others Vs Pius Ngugi Mbugua & Another Exparte Muktar Saman Olow (2017) eKLR**, the Court observed 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. Further 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.’**

See also the case of **Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] eKLR**.

Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, it is my considered view that this court has jurisdiction to challenge a decision of NET and the procedure adhered to in making the said decision. I hence beg to disagree with the Respondent and the 1st Interested Party on this point. I opine that the Applicant is indeed entitled to leave to commence an application for Certiorari and Prohibition challenging the Respondent’s decision dated 26th April, 2021. On whether leave should operate as a stay of the Respondent’s order granted on 26th April, 2021, I will refer 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.

While, 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 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.’**

From a perusal of the Order dated 26th April, 2021 while noting that there is nothing protecting the Applicant that is the owner of the suit lands where it undertakes certain activities as the EIA license was cancelled as a result of the said decision. I opine that a right to be heard and Fair Administrative Action is a Constitutional right. It is my considered view that since the Tribunal declined to adjourn the matter and dismissed the Appeal without hearing the Applicant, there was indeed 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 decisions I have cited and order that the leave herein granted indeed operates as a stay of the decision granted on 26th April, 2021.

It is against the foregoing that I find the Chamber Summons application dated 10th May, 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