



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

JUDICIAL REVIEW NO. 8 OF 2020

IN THE MATTER OF:

MARA NGECHÉ SAFARI CAMP LIMITED FOR LEAVE TO

APPLY FOR JUDICIAL REVIEW ORDERS

OF CERTIORARI AND PROHIBITION

IN THE MATTER OF:

ARTICLES 165(6) & (7) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF:

SECTION 8 AND 9 OF THE LAW

REFORM ACT (CAP 26) THE LAWS OF KENYA

IN THE MATTER OF:

SECTION 7 OF THE FAIR AND ADMINISTRATIVE ACT 2015

IN THE MATTER OF:

OCCUPATIONAL AND SAFETY ACT 2007 AND ENVIRONMENTAL MANAGEMENT AND

COORDINATION ACT, CAP 387 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....RESPONDENT

AND

MARA NGENCHE SAFARI CAMP LIMITED.....EX PARTE APPLICANT

JUDGEMENT

1. Before this court for determination is the Ex parte Applicant's Notice of Motion application dated 6th October, 2020 and filed in court on 12th October, 2020. The Ex parte Applicant seeks judicial review orders as follows:-

(a) That an order of certiorari does issue to quash the decisions, directives and/or orders of 17th September, 2020 by Respondent to close and/or shut down the operations of the Mara Ngenche Safari Camp situated in the Maasai Mara Game

Reserve.

(b) That an order of prohibition does issue directed at the Respondent, its officers and any other authority acting on their instructions to close or otherwise shutdown the Ex parte Applicant camp or interfering with the normal operations of the Mara Ngeche Safari Camp situated in the Maasai Mara Game Reserve.

(c) That the court be at liberty to make such further and other orders that it deems fit to meet the end of justice.

(d) That the costs of this application be provided for.

2. The application is based on the grounds on its face, the statutory statement dated 21st September, 2020 and the verifying affidavit of Minazali Rajabali Hessien Manji, the Director of the Ex parte Applicant, sworn at Nairobi on 20th September, 2020. It is deposed therein that the Exparte Applicant is a duly licensed hospitality and tourism service provider and operates a camp that has been in operation for the last ten (10) years, and is audited by the Respondent and all other governing bodies on yearly basis, that at the time of the establishment, the camp had existed prior and as such the procedure to be followed was to submit a Self-Environmented Audit Report with the Respondent which was duly done, that the Applicant in 2008 sought approval to set up a semi-permanent eco-tented camp from the County Council of Narok and the latter sought approval for the setting up of the same from the Ministry of Local Government as has been the procedure, that the Ministry of Local Government thereafter sought for the Respondent's approval towards the intended development of the Applicant's camp before the approval could be granted, that the Applicant submitted an Environmented Assessment Audit to the Respondent and sought all the necessary approvals for the establishment of the camp and approvals for obtaining the lease from the County Council of Narok, that in fact the Respondent vide a letter dated 15th May, 2009 addressed to the Applicant's Managing Director indicated that it had received comments on the Applicant's initiated Environment Audit Report and that the same was found to be satisfactory and further advised to prepare the annual Self-Environmented Audit, that the Applicant duly complied and presented its Environmented impact Assessment to the Respondent who approved it and the same was forwarded to the Ministry of Local Government for processing and approval and that the same was confirmed by the County Council of Narok vide their letter dated 28th May, 2009 to the Ministry of Local Government, that pursuant to the Applicant's compliance with the Respondent's regulations, the Commissioner of Lands received communication from the Ministry of Local Government to issue the Applicant with a lease to operate the said camp in Mara Game Reserve, that on 17th September, 2020 the Respondent moved to the Applicant's camp and without due process whatsoever dramatically announced through the media that they were proceeding to shut down the camp; these pronouncements have been aired continuously on various Television channels and on online platforms; which continues to injure the reputation and status of the Applicant's camp, that the Respondent's action is an afterthought after the Applicant filed ELC JR 7 of 2020; **Republic -Vs-Narok County Government and 2 others** wherein orders were granted maintaining status quo (that the Narok County Government and Ministry of Tourism and Wildlife were directed not to interfere with the Applicant's camp), that no notice for closure has been served upon the Applicant or any documents to that effect and/or any accompanying documents in accordance with the Environment Management and Coordination Act, Cap 387 and that the action, decision and/or orders by the Respondent and its officers is unlawful, irrational, unreasonable and procedurally unfair and an abuse of power clearly motivated by malice and/or bad faith to close the Applicant's operations and/or remove the Applicant camp without due process or notice whatsoever which action and decision continues to occasion irreparable and substantial loss to the Applicant.

3. Opposing the application, the Respondent filed on 22nd March, 2021 what it termed as "Respondent's reply" dated 22nd March, 2021. The Respondent averred that:-

(a) That the acting Director Compliance and Enforcement in the employment of the National Environment Management Authority and the Respondent in this suit is familiar with the facts of this case.

(b) That the National Environment Management Authority (NEMA) is the principal instrument of Government established under section 7 of the Environmental Management and Coordination Act (EMCA) to exercise general supervision and coordination over all matters relating to the environment.

(c) That the Respondent received the Interested Party's Environmental Audit on 8th May, 2009 and assigned it the reference No. NEMA/EA/5/2/7713.

(d) That the report was reviewed on 13th May, 2009 and an issue letter released to the client on 14th May, 2009.

(e) That the issue raised was adequately addressed and a compliance letter to the improvement order signed on 15th May, 2009.

(f) That the report indicated that the camp was located in the Low Use Zone that is set aside for tourism facilities and not on the Mara River Ecological zone which is reserved to protect the zone's sensitive areas including the wildebeest crossing points.

(g) That subsequent Environmental Audits were conducted on 11th December, 2012, 28th February, 2014 and 13th November, 2015 all of which determined that the facility was in compliance with environmental standards.

(h) That on 17th November, 2017 after an Environmental Audit was conducted, some issues were raised which included, management of waste water and application of effluent discharge license as well as compliance to requirements of Occupational Safety and Health Act 2007.

(i) That on 21st March, 2019 the Environmental Audit Report raised additional issues such as management of various waste

streams, emission measurement reports for the generator and requested the Interested Party to attach a valid effluent discharge license.

(j) That the Interested party's allegation that it has never had issues since commencement of its operations is therefore false as the evidence on record proves otherwise.

(k) That the Respondent at all material times during the operation of the Interested party's facility conducted itself in accordance with the provisions of the Environment Management and Coordination Act 2015.

(l) That wildebeest attempting to cross the Mara River into the Low Use zone that ideally hosts tourist facilities is an emerging issue that requires specialized studies to ascertain the likely causes of such a change especially one that has not been observed for years and to inform appropriate actions/interventions that will avert any further incidences of that nature.

(m) That upon the change in course of the wildebeests, an incident that attracted a lot of media attention, the Respondent conducted a site visit on 17th September, 2020 which site visit confirmed the presence of additional tents that had not been disclosed by the Interested Party.

(n) That there was a failure to disclose factual information on the actual number and location of the tents in the camp, subsequently the decision to suspend the operations of the camp until specialized studies are carried out was valid and should be upheld by the court.

4. The response from the Respondent prompted the Ex parte Applicant's further affidavit sworn by Minazali Rajabali Hessien Manji on 12th May, 2021.

5. The affiant has deposed *inter alia* that he has been informed by his Advocate which information he verily believes to be true that the said response is fatally defective and ought to be struck out for contravening the law on affidavits as a response to the application of this nature, that he is informed by his Advocate which information he verily believes to be true that the said response by the Respondent ought to be struck out as it has been filed without leave of the court as when the matter came up on 10th March, 2020 the Respondent had not filed any response even after several adjournments at their instance since September, 2020 when the matter was filed; pleadings were closed and the court directed that the matter to proceed for hearing by way of written submissions, that notwithstanding his averments in paragraphs 3 and 4, and if the court so admits the said response his response to the Respondents averments are that the Ex parte Applicant's camp is located in the low use zone that is set aside for tourism facilities and is NOT located on Mara River Ecological Zone reserved for wildebeests crossing, that the improvement notice of 2017 and 2019 which was duly complied with was not given as the reason for the administrative decision to close the Ex parte Applicant's camp and the same is merely an afterthought; that the Respondent did not conduct itself in accordance with the provisions of the Environment and Coordination Act, 2015 for the reasons:-

(i) That the Respondent did not issue the Ex parte Applicant with a written Notice pertaining to any closure of the camp as stipulated in the Act.

(ii) That the Respondent did not issue the ex parte Applicant with any written reason as to the administrative action for the closure of the camp.

(iii) That the Respondent did not take into account the Ex parte Applicant's Environmental audit assessment which was conducted in accordance with the environmental regulations, guidelines and procedures issued under this Act.

(iv) That the Respondent did not take into account that it had been satisfied and issued approvals to the Ex parte Applicant's Audit assessment and issued licences for compliance.

(v) That the Respondent's officials did not carry out a lawful inspection as stipulated by the Act and no such report from the purported inspection has been filed with this honourable court.

(vi) That the Respondent flaunted the Act when its officials visited the premises under the guise of an inspection and ordered the closure of the camp for no apparent reason.

(vii) That the Respondent did not give the Ex parte Applicant an opportunity to be heard before the arbitrary administrative action of closing the camp was issued.

(viii) The Respondent did not take into account the legitimate expectation of the Ex parte Applicant when it unfairly and without due process directed that the Ex parte Applicant's camp be closed.

(ix) That the Respondent acted with malice and contrary to the Act when it issued a press conference closing the camp without any due process in full contravention of the law.

(x) That the Respondent contravened the law by issuing a directive which was marred with ulterior motives calculated to prejudice and frustrate the rights of the Ex parte Applicant who had obtained stay orders in JR No. 7 of 020:Mara Ngeche Sarari Camp -Vs- Narok County Government and Anor.

6. He further deposed that the wildebeest attempting to cross the Mara River into the low zone is a matter that affects all establishments in the

Mara Game Reserve and thus singling out the Ex parte Applicant for closure while the Respondent carries out specialized studies is totally unfair and unreasonable, that the Ex parte Applicant has always disclosed the number of structures at the camp as provided for in the Environmental Assessment Audits conducted annually, that the alleged site visit on 17th September, 2020 was provoked by social media allegations of wildebeests crossing incident as well as the sentiments issued by the Minister of Tourism on twitter and therefore the issue of the number of tents was purely an afterthought by the Respondents to arbitrarily close the camp without due process and that on 18th September, 2020, the Ex parte Applicant wrote to the Respondent requesting for an opportunity to be heard and to present all the documents requested for; the said letter was never responded to and neither did the Respondent issue any official communication to the Ex parte Applicant regarding the matter, that instead the Respondent continued to indicate that it had ordered closure of the Ex parte Applicant's camp on various media platforms for flouting its regulations.

7. On the 31st May, 2021, the Respondent filed what it termed as "Respondent's replying affidavit". The Affidavit was sworn on 26th May, 2021 by Zephania Ouma, its acting Director compliance and Enforcement whereupon the deponent reiterated the averments in the Respondent's reply.

8. The application was canvassed by way of written submissions.

9. The Ex parte Applicant filed its submissions on the 24th May, 2021, the same being dated on even date. It identified the following issues for determination: -

(i) Whether the Respondent acted with procedural fairness in making the order to close the Ex parte Applicant's camp.

(ii) Whether the Respondent's action of ordering the closure of the Ex parte Applicant's camp was made within the legal parameters of the law.

(iii) Whether the Respondent's order of closing the Ex parte Applicant's camp was made rationally and reasonably.

(iv) Whether the Respondent's response dated 22nd March, 2021 contravenes the law on affidavit evidence and is fatally defective and ought to be struck out.

(v) Whether the Respondent should bear the costs.

10. On whether the Respondent acted with procedural fairness in making the order to close the Ex parte Applicant's camp, the counsel for the Ex parte cited Article 47 of the Constitution and Sections 4 and 5 of the Fair Administrative Action Act which clearly provides for an administrative action that is fair and just the value of which is that any individual affected by any administrative decision should have the opportunity to present their case fully and fairly; and have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory institutional and social context of the decision. The counsel relied on the case of the **National Land Commission & 2 Others Ex parte Archdiocese of Nairobi Kenya Registered Trustees (St Joseph Mukasa Catholic Church Kahawa West) (2018)eKLR** where Odunga J had this to say:-

"what the Constitution requires in my view is the notification of the intention to take an action against a person likely to be adversely affected thereby and the reasons for the intended action. The said reasons, it is my view must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under Article 47 of the Constitution entail an opportunity to the applicant to be heard on the circumstances alleged to constitute satisfactory reasons for the taking of the adverse action."

11. The counsel went on to submit that the Respondent breached the Ex parte's Constitutional right under Articles 47 and 50 with regard to fair administrative action and the right to fair hearing before issuing the closure orders through various media platforms. The counsel termed the Respondent's decision as one that breached the rules of natural justice and acted in contravention of section 4 of the Fair Administrative Act.

12. It was also the counsel's submissions that it is now settled law that a decision given without the principles of natural justice is void. The counsel further cited the case of the **National Land Commission (Supra)** where Odunga, J stated: -

"In my finding, a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be air not oily should the case that the Respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the authority concerned ought to approach the issue with an unbiased disposition. In other words, the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold."

13. Arising from the above, the counsel submitted that the Respondent was obliged to give the Ex parte Applicant a hearing before it made its decision which decision, undoubtedly, affected the interests of the Ex parte Applicant by depriving it of its rights to the enjoyment of a property to which it is legally licensed to operate by the County Government of Narok.

14. On the issue of whether the Respondent's actions of ordering the closure of the Ex parte Applicant's was made within the legal parameters of the law, the counsel submitted that the Respondent's actions and directive to hastily and without cause to close the Ex parte Applicant's camp was tainted with illegalities as the said NEMA officials who visited the Ex parte Applicant's premises did not have legal

mandate and authority to investigate and make orders for closure of the camp.

15. It was further submitted that it is not known under which law or authority the Respondent's investigating officers together with the Chairman of the Respondent relied on in ambushing the Ex parte Applicant's premises without a warrant and shortly thereafter ordering for its closure due to made up reasons and without affording the Ex parte Applicant an opportunity to be heard.

16. On the concerns raised by the Respondent, counsel pointed out that the Chairman does not have powers under any statute to perform the functions that he performed nor has he been given any powers to issue directives as done in the present case.

17. The counsel was of the view that acting out of the legal parameters of the law amount to gross abuse and misuse of power.

18. On whether the Respondent's order of closing the Ex parte Applicant's camp was made rationally and reasonably, the Ex parte Applicant contend that the Respondent's in making the orders for closure of the camp acted unreasonably and irrationally and such actions exceeded its jurisdiction and was detrimental in nature to all bodies that are governed by the Respondent's authority with regard to compliance with Environmental Laws and Regulations.

19. On whether the Respondent's Reply contravenes the law on Affidavits and is fatally defective and inadmissible, the counsel cited order 51 Rule 14 of the Civil Procedure Rules which stipulates that any Respondent who wishes to oppose any application may file a notice of preliminary objection, replying affidavit and a statement of grounds of opposition.

20. The counsel pointed out that from the Respondent's Reply at paragraph 1 and 2, Zephaniah Ouma purports to make oath and swear the affidavit in question and that what comes to mind is that the Respondent sought to file a replying affidavit. The counsel added that the said statement as filed contravenes section 4 and 5 of Oaths and Statutory Declarations Act, Cap 15 as it is not properly commissioned as prescribed by law.

21. On whether the Respondent should bear the costs, the counsel submitted that Section 7 of the Civil Procedure Act has stipulated that costs of any action, cause or other matter or issue shall follow the event and that the principle has been settled in several cases.

22. The counsel concluded by urging the court to grant the orders sought in the application.

23. On the other hand, the Respondent identified four (4) issues for determination. The four issues are:-

(i) Whether the Respondent's order of closure of the camp are within the legal parameters of the law, procedurally fair, reasonable and rational;

(ii) Whether the Ex parte Applicant exhausted their right to Appeal to the National Environment Tribunal;

(iii) Whether the Respondent's response dated 22nd, March, 2021 contravenes the law on affidavits;

(iv) Whether the Respondents should bear the costs.

24. With regard to the first issue, the Respondent's counsel submissions were that the Respondent ordered the closure of the Ex parte Applicant's camp based on its mandate to assess the operations of the latter to ensure that they are in compliance with the Environmental Management Objectives as provided under Section 9 (2) (1) of the Environment Management and Coordination Act (EMCA).

25. The counsel further relied on Section 69 (1) of the same Act and Regulations 40 (1) of the Environment (Impact Assessment and Audit) Regulations, 2003 which mandate the Respondent in consultation with relevant lead agencies to monitor all environmental phenomena with a view to making assessment of any possible changes in the environment as well as monitoring the operations of any industry, project or activity with a view of determining its immediate and long term effects on the environment.

26. The counsel further relied on sections 50 as read with section 51 of the EMCA and submitted that the Respondents order to close the Applicant's camp was within the parameters of the law, was procedurally fair and was reasonable and rational as it was done to allow the specialized study on the change of route by the wildebeests in order to inform appropriate actions or interventions that will arrest any future incidences of the same nature.

27. On whether the Ex parte Applicant exhausted their right to appeal to the National Environmental Tribunal (NET), the counsel cited Section 129 (1) (b) and (e) of EMCA which provides that:-

(i) Any person who is aggrieved by:-

(b) the imposition of any condition, limitation or restriction on his license under this Act or regulation made thereunder:.....

(e) the imposition against him of an environmental restriction order or environmental improvement order by the Authority under this Act or regulations made thereunder,

.....may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

28. The counsel further cited Section 9 (2) of the Fair Administrative Act, No. 4 of 2016 which outlines that the Ex parte Applicant aggrieved by the Actions of the Respondent had the option of an appeal to the NET before instituting this suit.

29. The counsel further relied on the case of **Speaker of the National Assembly –Vs_ James Njenga Karume (1992)eKLR** where the Court of Appeal stated thus:-

“in our view, there is considerable merit in the submissions that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

30. The counsel also relied on the case of **Republic -Vs- Principal Magistrate Lamu Magistrate Court & Anor Ex parte Kenya Forest Service (2016)eKLR**.

31. Arising from the above the counsel submitted that the Ex parte Applicant had an alternative that it could have exhausted prior to the institution of Judicial Review proceedings before coming to this court and that the alternative remedies are provided for in the statute thus it should only be in exceptional circumstances that an order of Judicial Review should be granted.

32. On whether the Respondents response dated 22nd March, 2021 contravenes the law on affidavits, the Respondent admitted that an error was made and pointed out that the oversight was hastily amended by filing of the Respondent’s amended replying affidavit sworn by Zephania Ouma on 26th May, 2021. It was the counsel’s submissions that the amendment of the affidavit was carried despite the court’s opinion to accept the misdescribed affidavit under Order 19 Rule 7 which provides that: -

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

33. The Respondent contends that the error in the Respondent’s initial reply did not go to the substance of the case and was rectified in good faith.

34. Regarding the issue of whether the Respondent should bear the costs, the counsel was of the view that having satisfactorily canvassed the Ex parte Applicant’s issues, it would be deemed fair and just that each party bears its costs.

35. Having read the application, the reply and the rival submissions, I do note that the issues for determination as framed by the parties herein are more or less similar and therefore I will address them jointly. I however, propose to first deal with the issue of whether the Respondent’s response dated 22nd March, 2021 contravenes the law on affidavits. It is common ground that the said response dated 22nd March, 2021 does not comply with Sections 4 and 5 of the Oaths and Statutory Declarations Act, Cap 15. However, the error has been cured though the Respondent’s amended replying affidavit dated 26th May, 2021.

36. It is common ground that during the site visit on 17th September, 2020 the Respondent ordered that the Ex parte Applicant’s camp be closed. It is also common ground that the inspection was led by the chairman of the Respondent who appears to have made the decision to close the camp. It is doubtful if the Chairman has the power to make such orders as made on the material day.

37. Whereas the Respondent has statutory mandates to carry out inspection such as the one that was carried in the camp of the Ex parte Applicant, no notice of the intended site visit was ever communicated to the Ex parte Applicant. The thread that comes out from this incident is that the Ex parte Applicant was not given the chance to be heard before the closure announcement was made.

38. There is nothing to show that the Respondent performed any of the functions listed under Section 129 (1) of EMCA so as to warrant an appeal by the Ex parte Applicant to the National Environment Tribunal. As it were, the actions taken by the Respondent on the 17th September, 2020 were not only procedurally unfair but were also unreasonable and irrational and contravened the Constitutional and Fair Administrative Action Act.

39. I am alive to the fact that judicial review is concerned with the decision making process and not with the merit of the case and bearing this in mind, it is apparent the decision making of the Respondent leading to the closure of the Ex parte Applicant’s camp on 17th September, 2020 is wanting. In the circumstances, therefore, I am satisfied that the application by the Ex parte Applicant has merits and I hereby proceed to issue the following orders: -

(i) That an order of certiorari do issue to quash the decisions, directives and/or orders of 17thSeptember, 2020 by the Respondent to close and/or shut down the operations of the Mara Ngeche Safari Camp situated in the Maasai Mara Game Reserve.

(ii) That an order of prohibition do issue directed at the Respondent is officers and nay other authority acting on tier instructions to close or otherwise shut down the Ex parte Applicant camp or interfering with the normal operations of the Mara Ngeche Safari Camp situated in the Maasai Mara Game Reserve.

(iii) That the court be at liberty to make such further and other orders that it deems fit to meet the end of justice

(iv) That the costs of this application be provided for.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 15TH DAY OF DECEMBER, 2021.

MBOGO C.G

JUDGE

15th December, 2021

In the presence of: -

CA: T.Chuma