



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JUDICIAL REVIEW CASE NO. 42 OF 2019

MALKYA HEIGHTS.....APPLICANT

=VERSUS=

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY (NEMA)..... 1 ST INTERESTED PARTY

KAGOTO KAMAU.....2 ND INTERESTED PARTY

APARNA PATEL.....3 RD INTERESTED PARTY

SUZANNE MULUHUYIA..... 4 TH INTERESTED PARTY

ALVIN MUNAI..... 5 TH INTERESTED PARTY

SHARON ABDI BHARUCHA.....6 TH INTERESTED PARTY

VALERIE SIGANGA.....7 TH INTERESTED PARTY

ANNE GAKERE..... 8 TH INTERESTED PARTY

NAOMI KYALLO.....9 TH INTERESTED PARTY

EMMY MWAVUA..... 10 TH INTERESTED PARTY

JOSEPH MREMA..... 11 TH INTERESTED PARTY

S M PATEL..... 12 TH INTERESTED PARTY

C S PATEL..... 13 TH INTERESTED PARTY

SADRU MULJI..... 14 TH INTERESTED PARTY

MUTWA MWANIKI.....15 TH INTERESTED PARTY

PROF F M OKATCHA..... 16 TH INTERESTED PARTY

KATHLEEN OKATCHA.....17 TH INTERESTED PARTY

STACEY BISLEY..... 18 TH INTERESTED PARTY

KAREN JENKINS..... 19 TH INTERESTED PARTY

RULING

1. On 18/9/2019, the applicant brought an ex-parte chamber summons dated 17/9/2019 seeking leave of the court to bring judicial review proceedings to quash ex-parte orders made on 8/8/2019 by the National Environment Tribunal in **Nairobi NET Case Number 20/ 2019**. Upon considering the ex-parte application, the court rendered itself on 19/9/2019 as follows:

“ I have considered the chamber summons dated 17/9/2019. The applicant contends that the National Environment Tribunal issued a status quo order on 8/8/2019 premised on a suspended law. At this point, it is not clear if the review mechanism at NET has been exhausted. Through the review mechanism, the applicant will present to NET the court order suspending the law. The NET will have the opportunity to confirm the suspension and thereafter act appropriately. Let the applicant exhaust the internal review mechanism in tandem with the requirements of Section 9 of the Fair Administrative Action Act before initiating judicial review proceedings. I accordingly decline to grant leave at this point. The applicant will be at liberty to bring judicial review proceedings should the Tribunal disregard the alleged suspension after it is properly moved through an internal review motion. Mention on 30/1/2020.

Signed

B M Ebozo J

19/9/2019

2. Subsequently, on 30/10/2019, the applicant brought a motion seeking a review of this court's orders of 19/9/2019 in the following terms:

i. Spent.

ii. That this honorable court be pleased to review and set aside its Orders delivered on 18th September 2019 and allow the ex-parte chamber summons application dated 17th September 2019 seeking interalia for leave to be granted to the applicants to apply to the honourable court for judicial review orders and the said grant of such leave to operate as stay of the order made on 8th August 2019 in the National Environment Tribunal Appeal No 20 of 2019 and any subsequent proceedings thereof in the said appeal, pending the hearing and determination of the proceedings herein and substantive application for judicial review.

iii. That leave be and is hereby granted to the applicant as prayed for in its chamber summons dated 17th September 2019 and that such leave operates as a stay of the automatic stop orders issued by the respondent made on 8th August 2019 stopping the applicant from continuing with its development on its land Parcel LR No 1870/VI/238 situated along Lantana Road/ East Church Road/ David Osieli Road Junction, Westlands, Nairobi County, pending the hearing and determination of this application.

iv. That an early inter-partes hearing date as a matter of urgency for the substantive judicial review application as this honourable court may direct.

v. That this honourable court be pleased to grant such other directions as it may deem fit.

vi. That the costs of this application be provided for.

3. The motion dated 19/9/2019 is the subject of this ruling. It was supported by the affidavit of Taher Ezzi, a director of the applicant. He deposed that on 8/8/2019 the National Environment Tribunal, without hearing the parties inter partes, made a *status quo* order on all matters and activities subject to the appeal before it, under Section 129(4) of the Environmental Management and Co-ordination Act 1999 (the EMCA) and directed the parties to file their witness statements and lists of documents and listed the matter for hearing on 6/11/2019. He added that this court had considered the applicant's application for leave to commence judicial review proceedings and had directed the applicant to exhaust the adjudication of the legality of the impugned orders in the Tribunal. They had subsequently learnt that the sittings of the Tribunal had been halted due to budget reduction by the National Treasury. He added that he had also learnt that the Tribunal was no longer quorate. He further deposed that the applicant was incurring costs of Kshs 500,000 per day as a result of the stoppage of the development and a further sum of Kshs 54,000 per month payable to the purchasers of 5 units in the subject development. He contended that there were exceptional circumstances which, in the interest of justice, warrant the invocation of this court's jurisdiction.

4. At the hearing of the application, Mr Lusi, counsel for the applicant, submitted that at the time the applicant brought the review motion, the Tribunal was not sitting. The Tribunal had since then resumed its sittings. He argued that the applicant was however still exposed to the prejudice which necessitated the motion. He added that Section 129(4) of EMCA upon which the impugned decision was premised had been repealed and the Tribunal had therefore acted in excess of its powers.

5. I have considered the application. I have also considered the submissions' by counsel for the applicant. Similarly, I have considered the legal framework and jurisprudential principles which guide this court's exercise of review jurisdiction. The single issue falling for determination in this application is whether the applicant has demonstrated a basis upon which this court can exercise review jurisdiction.

6. The review jurisdiction of this court is exercised within the framework of Order 45(1) of the Civil Procedure Rules which provides as follows:

(1) Any person considering himself aggrieved—

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

7. The order which necessitated the initiation of the judicial review proceedings in this suit was granted by the Tribunal ex-parte at an interlocutory stage and was temporary in nature. It reads as follows:

ORDER

In Open Tribunal this 8th day of August 2019 before the Honourable Chairperson & Members of the National Environment Tribunal.

UPON hearing Mr Ayisi for Appellants ex-parte AND UPON reading the Application under certificate of urgency dated 8th August 2019:-

IT IS HEREBY ORDERED:

- 1. That orders are made in terms of Section 129(4) of the Environmental Management and Coordination pending the hearing of appeal.*
- 2. That the 1st Respondent be and is hereby ordered to ensure compliance with the provisions of Section 129(4) of the Environmental Management and Coordination Act, 1999 and enforce the same and that they are not violated.*
- 3. That the matter be heard on 5/9/2019 for directions on hearing of the Appeal.*
- 4. That the Appellant to serve the respondents with a hearing notice and all pleadings within the next 5 days from the date hereof.*

GIVEN under my hand and the seal of the National Environment Tribunal at Nairobi this 8th day of August, 2019.

ISSUED this 13th day of August 2019

Signed

DR KARIUKI MUIGUA ACTING CHAIRPERSON

THE NATIONAL ENVIRONMENT TRIBUNAL

8. The applicant's counsel conceded in his submissions before this court that the Tribunal is now sitting and is still seized of the matter. Without saying much, the applicant having conceded that the Tribunal is quorate and is sitting, it would not be proper for this court to exercise its review jurisdiction in the circumstances. The applicant can mitigate any prejudice emanating from the Tribunal's order by filing an urgent application in the Tribunal for the Tribunal's review of the impugned order. The applicant has never placed before the Tribunal the order suspending Section 129(4) of EMCA to enable the Tribunal consider it. The stay which the applicant seeks is intended to stop the Tribunal from determining the substantive dispute yet the Tribunal is the proper judicial forum mandated to deal with the substantive dispute.

9. My finding on this application is that the applicant has not satisfied the criteria for review. Consequently, the notice of motion dated 30/10/2019 is rejected.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JANUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Lusi for the Applicant

June Nafula - Court Clerk