



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 350 OF 2014

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010,

and

THE ENVIRONMENTAL MANAGEMENT & CO-ORDINATION ACT NO. 6 OF 1999.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KAJIADO.....1ST RESPONDENT

THE CABINET SECRETARY FOR INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....INTERESTED PARTY

EX-PARTE :

ENVIRONMENTAL & COMBUSTION CONSULTANTS LIMITED

JUDGMENT

Introduction

1. Environmental & Combustion Consultants Limited, the *ex parte* Applicant herein (hereinafter “the Applicant”), is a company specializing in the management of industrial hazardous wastes. and has been in a protracted dispute with the County Government of Kajiado, which it has sued as the 1st Respondent herein. The Applicant is aggrieved with the actions and events that happened on 21st August 2014, when it claims the 1st Respondent irregularly and unlawfully destroyed and set ablaze the Applicant’s property, developments and investments valued at KShs. 200 Million, which were located in the Applicant’s private land measuring 30 acres and known as Land Title Number KJD/KAPUTIEI-NORTH/24604, within Kajiado County.

2. The Applicant has also sued the Cabinet Secretary for Interior and Coordination of National Government and the National Police Service as the 2nd and 3rd Respondents, on account of their failure to offer the Applicant any protection to its property and to stop the 1st Respondent from its illegal actions against the Applicant, despite being aware of the Applicant's predicament. The National Environment Management Agency is joined as the 1st Interested Party herein, as the Applicant states that it complied with the requirements of the Environmental Management and Co-ordination Act (EMCA), including making an application for an Environmental Impact Assessment (EIA) License and submitting an Environmental Impact Assessment Study Report to the Interested Party, which was found to be satisfactory, and the Applicant was consequently issued with an EIA License on the 9th July 2014.

3. The Applicant accordingly filed the instant judicial review proceedings by way of a Notice of Motion application dated 18th September 2014. The Applicant is seeking the following substantive orders therein:

(a) An order of Prohibition prohibiting the Respondents from destroying, setting on fire, interfering with and/or carrying out or causing to be carried out any act detrimental and or prejudicial to the Applicant's properties, lawful investment, developments and operations within Kajiado County.

(b) An Order of Mandamus compelling the Respondents to reasonably protect and secure the Applicant's properties, lawful investment, developments and operations within Kajiado County.

4. The Application is supported by the grounds on its face; the Applicant's Statutory Statement dated 12th September 2014; and a Verifying Affidavit, Supplementary Affidavit, Further Affidavit and 2nd Further Affidavit sworn by Dr. Philip O. Mwabe, the Applicant's Managing Director, on 12th September 2014, 25th January 2016, 10th February 2017, and 7th March 2017 respectively.

5. The 1st Respondent responded to the application by filing several affidavits all sworn by Kennedy ole Kerei, the County Secretary of the County Government of Kajiado. The pleadings filed in this respect were a Replying Affidavit sworn on 2nd June 2015, a Supplementary Affidavit sworn on 19th July 2016 and a 2nd Supplementary Affidavit sworn on 3rd March 2017.

6. The 2nd and 3rd Respondents filed Grounds of Opposition dated 23rd October 2019 in opposition to the application; while the Interested Party filed a Replying Affidavit sworn on 29th August 2016 by David Ong'are, its Director in charge of Compliance and Enforcement, as its response.

7. Before examining the parties' respective cases, this Court considers it necessary to also point out that in the course of these proceedings, the Applicant brought and prosecuted contempt of Court proceedings against the Governor of the 1st Respondent, who was subsequently found to be in contempt for disobeying the stay orders granted herein in favour of the Applicant on 15th September 2014. He was consequently sentenced by this Court

8. In light of these intervening events, this Court, upon the parties' request, gave directions as to the filing of fresh written submissions on the instant application. The application was thereupon canvassed by way of the written submissions, which were relied upon by the parties for reservation of this judgment. Prof Albert Mumma & Company Advocates relied on submissions dated 7th February 2020 on behalf of the Applicant, while Lesinko Njoroge, & Gathogo Advocates filed submissions dated 3rd February 2020 in reply. Munene Wanjohi, a State Counsel at the Attorney General's chambers, filed submissions dated 23rd October 2019 for the 2nd and 3rd Respondents. The Interested Party did not file any written submissions.

The Applicant's Case

9. The Applicant in its pleadings provided a detailed background on the processes it undertook for over a period of six years prior to August 2014 to acquire land, construct facilities, and to obtain the necessary authorisations, approvals and licences to install industrial plants to handle industrial hazardous waste in Kajiado County. The Applicant also detailed the events of 21st August 2014, and stated that on the morning of that date, the Applicant through its Managing Director received a call from one Mr. Joshua Mjakusi, the County Executive Officer (Minister) for Lands & Environment in the County Government of Kajiado, summoning it for a meeting with the Governor of Kajiado County on the same day at 11 a.m. in the Governor's office.

10. That the Applicant's Managing Director and other officials proceeded to Kajiado for the meeting. That while at the said meeting, the Member of County Assembly (MCA) for Matapato Ward where the Applicant's land is located, one Hon. David Nkirrimpai, ferried youth and goons to the subject land. That these actions caused fear among the Applicants' staff members on site, whereupon the Applicant contacted the 3rd Respondent through its Officer Commanding Police Division in Kajiado, and the County Commissioner of Kajiado County, and sought their intervention through the provision of security and deterrence of the 1st Respondent from carrying out any acts which may hurt the Applicant's investment in the subject land.

11. Meanwhile, that at the meeting in Kajiado, the Members of the County Assembly who were present inquired about the value of the Applicant's investment and whether the Applicant had obtained an EIA Licence for its operations. In this respect, that a representative of the Interested Party who was invited to the meeting confirmed that they had approved the project upon confirming that the same was environmentally sound. However, that when the Applicant raised the issue of Hon. Nkirrimpai ferrying youths and goons to the premises during the meeting, the issue was played down by the members of the County Assembly.

12. The Applicant explained that while the meeting was progressing, the said youth under the charge of Hon. Nkirrimpai destroyed the perimeter wall to its premises and set the whole establishment a blaze, with Hon. Nkirrimpai alleging that the Applicant had refused to comply with the Interested Party's requirements. In addition, that despite having been notified, the police did not arrive in good time, but

only came once the premises had been set a blaze and did not apprehend any of the goons ferried by Hon. Nkirimpai.

13. The Applicant averred that upon further investigations and queries, it learnt that the destruction and setting ablaze its properties had been pre-arranged by operatives of the County Government of Kajiado, and that the police had been instructed by the County Commissioner of Kajiado County not to intervene in the irregular and unlawful burning of the Applicant's premises. Furthermore, that contrary to the 1st Respondent's allegations, the location of the its premises is in an area which is sparsely inhabited, and the Applicant has over 50 acres of land in which it operates, with no visible neighbors in the area save for an old and abandoned shooting range.

14. The events after 21st August 2014 were the subject of the Applicant's supplementary affidavits and further affidavits, whereby it alleged that the 1st Respondent thereafter unfairly and irregularly instructed its officers not to issue the Applicant with an Annual Business Permit, despite the Applicant having regularly applied for the said permit and having met all the requisite legal requirements for its issuance.

15. In addition, that on the morning of 26th January 2017, the Applicant's factory was once again invaded by hired goons who were ferried to the premises from unknown places, whereupon it sought assistance from Isinya Police Station. That the police from the said station arrived in good time and provided security to the premises, and repulsed the goons preventing their forceful entry into the premises. Further, that later that day, the 1st Respondent's Governor arrived at, and was let into the Applicant's premises, and insisted that the factory is immediately shut down, failing which the said goons would destroy the factory. That upon being shown stay orders granted by the Court, the Governor wrote down his directive on a piece of paper requiring the Applicant to shut down the factory on the ground that there were some chemical smell coming from the incinerator. A copy of the said hand written directive by the Governor was annexed by the Applicant.

16. It is the Applicant's case that the actions by the Respondents are not only malicious and in bad faith but are plainly irregular, illegal and an attack on the rule of law and the Bill of Rights as guaranteed by the Constitution. Further, that as a result, the Applicant's property has been unlawfully destroyed, the Applicant's right to property and protection to property under Article 40 of the Constitution is threatened, and the Applicant is reasonably apprehensive that the Respondents will continue with their irregular actions and completely defeat its use of the subject land and destroy its operations unless this Court intervenes.

17. The Applicant also annexed other copies of documents to support its case, including title documents to its land, its business profiles and contracts, applications for licenses, the copies of licences granted to it by the Interested Party, and of photographs showing its destroyed and burnt premises.

The 1st Respondent's Case

18. The 1st Respondent in its pleadings averred that the actions complained of are of a civil and criminal nature, and bear no relation to its public and statutory duties, and therefore do not contain a public law element over which judicial review remedies can be invoked. Furthermore, that the Applicant has not furnished any evidence that the 1st Respondent participated in the alleged destruction of its property, whose remedy lies in private law.

19. The 1st Respondent averred that the incineration plant operated by the Applicant in Kitengela town had received numerous complaints of air pollution from residents, leading to a meeting between the residents, the national government and Interested Party on 5th September 2014, which resolved that the facility should be closed. The 1st Respondent annexed a letter dated 9th September 2014 from the Ministry of Interior and Co-ordination of National Government addressed to it in this regard. Furthermore, that the license to install and operate an incinerator was irregularly obtained by the Applicant, who did not follow the law and failed to disclose to the 1st Respondent's predecessor when applying for change of user of its premises.

20. In addition, that the Applicant did not comply with the requirements of the Environmental Impact Assessment and Audit Regulations made under the Environmental Management and Co-ordination Act as regards the participation of the community in the licencing process, and commenced the construction of its incinerator before applying and obtaining an EIA licence. The 1st Respondent also claimed that there is human habitation within a range of 2 kilometers from the subject premises.

21. Specifically on the events of 21st August 2014 leading to the destruction of the Applicant's property, the 1st Respondent stated that it had no control over the said events, as the Member of the County Assembly for Matapato Ward who was involved in directing the events is not an employee or officer of the 1st Respondent. Therefore, that the 1st Respondent cannot be held accountable for the actions of destruction of the Applicant's property, which were the criminal acts of an individual, whose investigations and prosecution is the exclusive mandate of the 3rd Respondent . Furthermore, that the meeting organised by Hon Majakuzi on 21st August 2014 was aimed at addressing the grievances raised by the community , and were not aimed at facilitating the destruction as alleged.

22. Additionally, that the Applicant has not provided any evidence as regards his application for, and denial of a business permit by the 1st Respondent. That in any event, since the Applicant has not obtained development approvals from the 1st Respondent for the setting up of an incineration plant, no business permit can be given. On the events of 26th January 2017, the 1st Respondent averred that the operations of the incineration facility by the Applicant in the Stoni Athi area has faced opposition from the residents, and that the persons who participated in the events of that day were not hired goons, but affected residents of the area who had peacefully assembled to protest the fumes emitted from the incinerator. Further, that the Kajiado County Governor was called to the premises by community leaders to resolve the standoff, and his letter dated 26th January 2017 was not an order for closure of the Applicant's factory, but a request made in good faith to avert potential confrontation.

23. Lastly, the 1st Respondent contended that the Applicant has not met environmental standards in its facility as is evident from the complaints from the residents, and that matters of environment in the implementation of projects is not only a concern of the Interested Party

but also within the 1st Respondent's mandate, as stipulated in various statutes including the Physical Planning Act and Public Health Act.

The 2nd and 3rd Respondents' Case

24. The 2nd and 3rd Respondents opposed the instant application on the grounds that it is frivolous, incompetent and an abuse of the court process as it does not meet the threshold of issuing the order of mandamus sought. Further, that there is no specific legal duty that the 2nd Respondent has failed to do to warrant an order of mandamus, and that the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination. Lastly, that the judicial review deals with the processes of decision making and not the merits of the decision.

The Interested Party's Case

25. The Interested Party confirmed that it licensed the installation of the Applicant's incinerator in Kajiado County, after receiving the Applicant's Environmental Impact Assessment (EIA) Project Report, and annexed a copy of a letter dated 1st September 2013 acknowledging receipt of the said report. Further, that by a letter dated 9th June 2016, a copy of which was also annexed, it wrote to relevant lead agencies seeking their views on the project, and that no objection was received from the lead agencies within the 21 statutory days. After reviewing the EIA project report, and upon being satisfied that the project met the legal requirements for issuing an EIA licence, the Interested Party stated that it proceeded to issue the Applicant with the said licence, and annexed a copy thereof.

26. The Interested Party averred that it followed laid down rules and procedures in issuing the said licence, and after sufficient public participation, and that it is in the public interest that persons who seek to undertake development projects should not be held at ransom after acquiring the necessary approvals by the government agencies.

The Determination

27. I have considered the pleadings, submissions and arguments made by the parties, and note that the main issues arising herein relate to the culpability of the Respondents for the events that happened on the Applicant's property, and any duties arising therefrom. Three substantive issues arise for determination in this respect:

- a) Whether the acts of destruction undertaken against the Applicant's property arose from the Respondent's unlawful acts*
- b) Whether the Respondents are under a legal duty to protect and secure the Applicant's property*
- c) Whether the Applicant is entitled to the relief sought*

Whether the acts of destruction undertaken against the Applicant's property arose from the Respondent's unlawful acts

28. It is not in dispute that the Applicants' property was destroyed and set ablaze on 21st August 2014. It is also not in dispute that on 26th January 2017, the 1st Respondent's Governor did order the closure of the Respondent's business, for which he was convicted for contempt of Court by this Court for disobeying the stay orders that were in place. What is disputed is whether the said actions are attributable to the 1st Respondent, and if so, whether the 1st Respondent thereby acted unlawfully.

29. The Applicants submissions on this issue were two fold. Firstly, on the legality of its business and activities, the Applicant contended that it applied for a business permit, change of user and development permissions from the defunct Kajiado Town Council under the then Local Government Act, which Town Council received and processed the application by the ex-parte Applicant for the business permit, change of user and development permissions, and approved the developments by the Applicant to L.R KJD/Kaputieni-North/24604. Further, that the Applicant has carried out its operations for the last twenty-one years, and has always sought and obtained the requisite approvals and consents.

30. In addition, that the Applicant diligently complied with the requirements of the law and submitted its Environment Impact Assessment Report and was issued with the EIA license pursuant to section 63 of the EMCA Act by the Interested Party. According to the Applicant the EMCA Act also expressly provides on how cancellation or challenging the issuance of such licenses should be done under the Environmental (Impact Assessment and Audit) Regulations, 2003.

31. Secondly, the Applicant argued that the 1st Respondent on the 21st August, 2014 took the law unto its hands and deliberately elected to illegally and unlawfully disrupt its operations by burning its property. That this is confirmed by the fact that, the 1st Respondent through Joshua Majakusi who was the County Executive Member then in charge of Environment and Land explicitly admits that the 1st Respondent pretended to seek audience with the Managing Director of the Applicant on the very day, when the premises were set ablaze.

32. Further, that simultaneous with the meeting, the 1st Respondent contrary to Section 4 of the Fair Administrative Action Act deployed Hon. David Nkirimpai who is the Member of County Assembly for Matapato Ward with a horde of goons who went to the Applicant's property, where they deliberately set the same on fire and destroyed the property. That it cannot be a coincidence that the Applicant's property was burnt at the same time the meeting with the 1st Respondent's representatives was taking place.

33. Lastly, that the 1st Respondent's aggression towards the Applicant has been fully demonstrated by the fact that the 1st Respondent contravened court orders in a bid to shut down the Applicant's operations. That these facts and the finding of the Court on those accounts are

contained in the ruling of 9th April 2018 which is binding upon this Court as the Respondents' did not challenge the findings of the Court. The Applicant cited the case of **Muigai International (K) Limited v Nairobi City County, [2016] eKLR**, where the court prohibited the closure of a business before the person against whom a complaint is made is afforded an opportunity of being heard on the alleged nuisance and if possible an opportunity given to him to abate the same.

34. The 1st Respondent's submissions on the instant issue were that the Applicant's challenge is not within the realm of public law but in the domain of civil wrongs, which if proved, would be remediable under the law of tort and not by judicial review. Further, that judicial review is a public law remedy concerned with the decision-making process rather than the merits of the decision or the action taken, and relied on the decision in **Republic Vs Attorney General & 4 Others ex Parte Diamond Hashim Lalji And Ahmed Hasham Lalji, [2014] eKLR**.

35. In addition, that the Applicant has made groundless claims that the 1st Respondent participated in the burning of its incineration plant without any evidence, and that the 1st Respondent did not have control over the said David Ole Nkimimpai, the Member of County Assembly (MCA) for Matapatu Ward, Kajiado county, whom it is alleged ferried the goons to burn the plant. The 1st Respondent cited the decision in **Ezekiel Misango Mutisya vs National Lands Commission & 6 Others, [2014] eKLR**, for the position that where the determination of a dispute before the Court requires the Court to make a determination on disputed issues of fact, the said dispute is not suitable for judicial review.

36. The 2nd and 3rd Respondents submitted that a party seeking judicial review orders must satisfy the settled criteria for issuance of the orders, namely, illegality, impropriety of procedure and irrationality as held in **Re Bivac International SA (Bureau Veritas), (2005) 2 EA 43**). The case of **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** was also cited for this position. The 1st and 2nd Respondents also cited the cases of **Republic v Kenya Revenue Authority Ex-Parte Yaya Towers Limited [2008] e KLR, Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Metropolitan Development and Another [2014] e KLR**; for the positions that the purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected and the Court should not address the merits of the decision being challenged.

37. In light of the submissions made by the parties, it is imperative to delineate the parameters of this Court's powers in judicial review at the outset. The broad grounds for the exercise of judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

38. With the enactment of a new Constitution in 2010, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that **Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act, reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

39. Consequently, there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making. These grounds are now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence.

40. It is thus evident that this Court's jurisdiction is limited to the acts undertaken or alleged to have been undertaken by the Respondents and their propriety, and not the legality of the Applicant's operations. This is for the reason that not only is the legality of the Applicant's operation disputed, the applicable laws and procedure in this regard lie beyond the jurisdiction of this Court, and are within the jurisdiction of the Environment and Land Court. In addition, judicial review, as an administrative law remedy addresses any alleged failure to perform public obligations and functions, and does not concern itself with the operations of a private entity.

41. The question that this Court can however properly address is as regards the Respondents' actions and their legality or otherwise. The

first limb of this question is whether the actions of certain persons can be attributable to the 1st Respondent. The Applicant has alleged that the actions of certain officials of the 1st Respondent are attributable to the 1st Respondent, and in particular, the actions of one Joshua Majakusi the 1st Respondent's County Executive member in charge of environment and land, who is alleged to have been aware of the plans to destroy and burn its property; the actions of Hon. David Nkirimpai, the Member of County Assembly for Matapato Ward who is alleged to have directed the destruction and burning of its property, and the actions of the 1st Respondent's Governor, who ordered the closing down of its operations.

42. It is not in dispute that all the said persons served as officials of the 1st Respondent. Article 176 of the Constitution provides that a county government consists of a county assembly and county executive. A county assembly consists of *inter alia* members elected by voters in a ward, while a county executive consists of an elected Governor, and a deputy Governor, and members appointed by the Governor. All the officials named by the Applicant were therefore members of the county government, as they fall within these categories of membership of a county government, and any functions and actions that are demonstrated to have been undertaken in their capacity as public officials can therefore be attributed to the 1st Respondent. Put differently, the 1st Respondent will be deemed to take legal responsibility of any actions shown to have been undertaken by the said officials in their capacity as elected or appointed members of the county government.

43. The second limb of the question before the court is whether there is undisputed evidence as regards the actions undertaken by the said officials in their capacity as public officials in relation to the Applicant's property. In this regard, the 1st Respondent admitted in its pleadings that its officials led by Joshua Majakusi did hold a meeting with the Applicant's officials on 24th August 2014 on the operations at the Applicant's property. The 1st Respondent also admitted that its Governor did visit the Applicant's premises on 26th January 2017, and directed that it be shut down albeit at the instigation of the community, and the Applicant also brought evidence of a letter written by the Governor to this effect, which is not disputed. As regards the action of burning of the premises, the Applicant brought evidence of photographs of the destroyed premises. However, there was no evidence brought by the Applicant of the participation of Hon. David Nkirimpai, the Member of County Assembly for Matapato Ward in the said destruction.

44. It is thus my finding that from the foregoing exposition, there is sufficient evidence of interference with, and curtailment of the Applicant's operations by the 1st Respondent to warrant intervention by this Court. The 1st Respondent in rejoinder contended that they have powers to regulate the Applicant's operations under the Physical Planning Act and Public Health Act and in the public interest. In addition, it is evident that the 1st Respondent has disputed the lawfulness of the Applicant's operations, on account of not obtaining development approvals the setting up of an incineration plant and not meeting environmental standards. It also expressed its intention and justification not to permit the Applicant's business and operations for these reasons.

45. The 1st Respondent but did not bring any evidence of the sections of the said cited Acts or any other law that permitted it to interfere with the Applicant's operations on these grounds, nor of the processes required to be followed in this regard. It is therefore my finding that to this extent, the 1st Respondent's actions in interfering with, and continued interference with the Applicant's operations without any legal basis and without following due process is unlawful.

Whether the Respondents were under a legal duty to protect and secure the Applicant's property

46. The Applicant contended that Article 40 of the Constitution grants it the right to acquire and own property in any part of Kenya. Therefore, that the 1st Respondent cannot be permitted to contravene this right by harassing the Applicant and curtailing its peaceful and lawful operations without any legitimate and/or justifiable reason. Further, that even if the 1st Respondent has the power to regulate and license operations within its borders, it has a duty to act reasonably and rationally, and the Applicant relied on the decision to this effect in **R v. The Commissioner of Coop. Ex p. Kirinyaga Tea Growers Coop. Savings and Credit Society Ltd, [1999]1 EA 245**. The Applicant thus submitted that the actions by the 1st Respondent contravened both Articles 40 and 47 of the Constitution and ought not to be allowed to progress.

47. Specifically on the conduct of the 2nd and 3rd Respondents, the Applicant cited sections 3 and 4 of the Fair Administrative Action Act for the position that any agency whose action, omission or decision affects the legal rights or interests of any person should act in an expeditious, efficient, lawful, reasonable and procedurally fair manner. In addition, that the 2nd and 3rd Respondent on the 21st August, 2014 abused their discretion and unreasonably delayed or failed to act in discharge of the duty imposed on them by Article 243 of the constitution of Kenya as read together with sections 24 and 105 National Police Service Act, which sets out the functions and powers of the National Police Service. Further, that to date the 3rd Respondent has carried out no investigations on vandalism or even arrested any of the culprits responsible despite the ex-parte Applicants reporting the incident. Reliance was placed on the decision in **Gullid Mohamed Abadi vs O.C.P.D Isiolo Police Station & 2 Others (2006) eKLR** on the duties of the Kenya police service.

48. The Applicant further submitted that the 2nd and 3rd Respondent's failure to act to prevent the destruction of its property is clearly a breach of Applicant's rights to fair administrative action under Article 47 of the Constitution as read together with the Fair Administrative Action Act. It was also contended that the 2nd Respondent had an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant, which is evident from its letter to the Governor Kajiado County where it was allegedly unilaterally and unlawfully agreed upon to close the Applicant's operations without giving the Applicant an opportunity to be heard and make representations in that regard.

49. **The 1st Respondent on its part submitted that the** Applicant has not demonstrated that it bears any duty of providing security of its investment, and without such demonstration orders can be issued against the 1st Respondent.

50. The 2nd and 3rd Respondents similarly cited the decisions in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, **Prabhulal Gulabchand Shah vs. Attorney General & Erastus Gathoni Miano Civil Appeal No.24 of 1985**, **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** and **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194** to support their submission that the Applicant have

not demonstrated any breaches of the law or procedure which would entitle this court to intervene in this matter and grant the order sought.

51. I have considered the arguments made by the parties, and note that it is not disputed that the right to acquire and own property, and protection of the enjoyment of the property is enshrined in Article 40 of the Constitution. In addition, under Article 10 and 21(1) of the Constitution, all public officers are under a duty to respect and protect this right. Article 47 and the provisions of the Fair Administrative Action Act also impose a duty to act fairly whenever a decision maker makes decisions affecting the rights of a person or entity.

52. Specifically for the 1st Respondent, Article 174 of the Constitution provides for additional objectives and duties it is required to meet, which includes the promotion of social and economic development, and provision of accessible services. Additional duties for the 2nd and 3rd Respondents are also found in section 24 of the National Police Service Act which provides as follows:

The functions of the Kenya Police Service shall be the—

(a) provision of assistance to the public when in need;

(b) maintenance of law and order;

(c) preservation of peace;

(d) protection of life and property;

(e) investigation of crimes;

(f) collection of criminal intelligence;

(g) prevention and detection of crime;

(h) apprehension of offenders;

(i) enforcement of all laws and regulations with which it is charged; and

(j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

53. It is thus evident that the Respondents have both a constitutional and legal duty to protect the Applicant's property, unless otherwise allowed to interfere with the Applicant's enjoyment thereof by the law. The Applicant has in this regard brought evidence that its property was destroyed by unknown persons, and that its enjoyment thereof has been interfered with by the 1st Respondent. The 1st the Respondents did not bring any evidence of any law that permits them to so interfere, while the 2nd and 3rd Respondents did not provide evidence of any actions that they have undertaken to investigate the events of 21st August 2014 that resulted in the destruction of the Applicant's property.

54. However, I do note in this respect that the Applicant did concede that the 2nd and 3rd Respondents did move and act to secure and protect its property on 26th January 2017, when there was another attempt to destroy it. It is thus my finding that the Respondents have to a certain extent failed to perform their duties as regards the respect for, and the protection of the Applicant's property, and moving forward, there will be need to be observe their duties if and when the occasion arises, as it is apparent from the pleadings and evidence herein that the threat to the Applicant's enjoyment of its property still exists.

Whether the Applicant is entitled to the relief sought

55. The Applicant has sought orders of prohibition and mandamus, and relied on the principle established by courts is that an order of mandamus will issue as held by the Court of Appeal in the case of **Kenya National Examination Council vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others [1997] e KLR**. The Applicant submitted that the 3rd Respondent herein failed to act as prescribed by the law, and that had the 2nd Respondent been fair and the police acted within time when the matter was reported to them, the damage to the Applicant's property would have been avoided. Therefore, that the order of mandamus compelling the Respondents to reasonably protect and secure the Applicant's properties, lawful investment, developments and operations within Kajiado County should issue in the circumstances.

56. Furthermore, that it is clear from the affidavits filed by the 1st Respondent that it is only the stay orders issued herein by this Court which have prevented the 1st Respondent from curtailing and destroying the Applicants operations, and as such if the order of mandamus is not issued as sought, the Applicant will face a similar fate once these proceedings are concluded as the Respondents will once again destroy its premises which are currently operational.

57. The 1st Respondent on its part submitted that judicial review remedies are discretionary in nature, and that the conduct of the Applicant is a relevant factor in executing the discretion. While citing the decisions in **Patrick Kariungi vs The Commissioner of Police & Anor, [2014] eKLR** and **Republic vs Lake Victoria South Water Services Board & Another, [2013] e KLR**, for this position, the 1st Respondent contended that the Applicant has not denied that it did not obtain approval for the establishment of an incineration plant.

58. The public interest was also cited by the 1st Respondent as a relevant factor in declining the orders sought and reliance was placed on the definition of the public interest in the case of **Environmental & Combustion Consultants Ltd vs Kenya Pipeline Company Limited & 2 Others, [2016] e KLR**. It was submitted in this respect that is against the interests of the public for the Applicant to operate an incineration where hazardous material are incinerated, without compliance with the law requiring the participation of the affected residents.

59. The 2nd and 3rd Respondents on their part reiterated that the Applicant has not satisfied the threshold for the issue of the judicial review orders of prohibition and mandamus as sought.

60. The law on the grant of the orders of prohibition and mandamus was stated by the Court of Appeal in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge, (1997) e KLR** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done....”

61. This Court has already found that the 1st Respondent interference with the operation so the Applicant’s operations had no basis of law, and that they did not provide any evidence of any due process they followed in this regard to entitle them to the defenses they have raised of the Applicant’s conduct and public interest for this Court to deny the remedies sought. In addition, it is also evident from the 1st Respondent’s responses that the threat to the Applicant’s properties is still pending. The Applicant is therefore entitled to the orders sought of prohibition as against the 1st Respondent, to restrain it from any future or impending conduct as regards the Applicant’s operations without any legal basis and without following due process .

62. It is my view that the orders sought of mandamus are also merited to the extent that the 2nd and 3rd Respondents have a constitutional and legal duty to protect the Applicant’s property, the said Respondents have also not shown any actions taken as a result of the destruction of the Applicant’s property on 24th August 2014, and also in light of the future threats to the Applicant’s operations that are still existing as noted in the foregoing.

63. I accordingly find that the Applicant’s Notice of Motion dated 18th September 2014 is merited to the extent of the following orders:

I. An order of Prohibition be and is hereby granting prohibiting the 1st Respondent from unlawfully destroying, interfering with and/or carrying out or causing to be carried out any act detrimental and or prejudicial to the Applicant’s properties, developments and operations within Kajiado County, and without following the due process of the law.

II. An Order of Mandamus be and is hereby granted compelling the 2nd and 3rd Respondents to investigate and take appropriate action on the destruction of the Applicant’s properties on 21st August 2014, and upon request to do so, to reasonably protect and secure the Applicant’s properties, developments and operations within Kajiado County.

III. The Respondents shall bear the costs of the Notice of Motion dated 18th September 2014.

64. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JUNE 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will, by consent of the parties, be delivered electronically by transmission to the Applicant's and Respondents' counsels email addresses, by close of business on 8th June 2020.

P. NYAMWEYA

JUDGE