



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MACHAKOS (SITTING AT MAKUENI)

JUDICIAL REVIEW CASE NO. 75 OF 2019

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

AND

IN THE MATTER OF APPLICATION UNDER

SECTIONS 3, 126(5), 129(3)(a) &(e) OF THE ENVIRONMENT MANAGEMENT & CO-ORDINATION ACT, 1999, RULES 9(2) & (3) AND 30(a) OF THE NATIONAL ENVIRONMENT TRIBUNAL RULES, 2003, SECTIONS 2(i), 4(1), 4(3) (b) & (c), 4(4)(d), 7(1)(b), 7(2) (d) and 9(2) FAIR ADMINISTRATION ACTION ACT, No. 4 of 2015, THE LAW REFORM ACT, CAP 26; ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010; ARTICLES 42,69,70, 94 (1) & (5), 95 (3), 109 AND 159(2)(d) OF THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF THE DECISION AND/OR RULING MADE BY THE NATIONAL ENVIRONMENT TRIBUNAL APPEAL NO. NET 21 of 2019 on 6th DECEMBER 2019

BETWEEN

ERDEMANN

PROPERTY LIMITED.....EX-PARTE APPLICANT/RESPONDENT

-VERSUS-

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY 1ST INTERESTED PARTY

LONDON DISTILLERS (K) LTD.....2ND INTERESTED PARTY/APPLICANT

RULING

1. The application for determination is dated 09/01/2020 and is brought under Order 53 Rule 1(4) of the Civil Procedure Rules, Article 47, 50 and 159 (2)(d) of the Constitution, Fair Administrative Action Act No. 4 of 2015. Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. It seeks;

a. Spent

b. Spent.

c. That the instant application be heard and determined in priority to any other application or proceedings herein as it is barred by the doctrine of *res-judicata* and its extended doctrine of estoppel.

d. This honorable Court be pleased to discharge, vary and or set aside the ex parte order issued on 20th day of December 2019 *ex-debito justitiae*.

e. The entire proceedings for judicial review be struck out.

f. ERDERMANN PROPERTY LTD be barred by an order of this Court from challenging the applicability of the provisions of section 129 (4) of the Environment Management Coordination Act before this honorable Court or any other Court and the National Environment Tribunal except with the leave of this honorable Court.

2. The application is supported by the grounds on its face and the supporting affidavit of Pushpinder Singh Mann, the Interested Party's/Applicant's General Manager, sworn on the same day. The principle ground is that the entire Judicial Review (JR) proceedings, which Erdemann Property Ltd (EPL) wants to prosecute, gravitates around the application and interpretation of section 129(4) of the Environment Management Co-ordination Act (EMCA) which issue it has already canvassed multiple times in different forums and as such the entire JR proceedings are barred by the doctrine of *res judicata*, estoppel and *sub judice*.

3. Mr. Mann deposes that the instant motion of JR does not conform to the basic tenets of such a motion whose main objective is to question the irregularity or otherwise of a decision making process. He deposes that the instant motion is an appeal against the dictates of the intention of the Legislature but has been disguised as JR motion.

4. He deposes that section 129(4) of EMCA stipulates that there is an automatic stay order of any action challenged once an appeal has been filed before the National Environment Tribunal (NET).

5. He deposes that *vide* NET Appeal No. 21 of 2019, the applicant has challenged the decision of the National Environment Management Authority (NEMA) to issue an Environment Impact Assessment Licence to Erdemann Property Ltd for the construction of Greatwall Gardens Housing Phase 3 and on 04/09/2019, the Tribunal reaffirmed the stay order.

6. It's his deposition that as Erdemann Property Ltd engages the parties in endless litigation, it's still continuing with the construction of Greatwall Gardens Housing Phase 3 contrary to the provisions of section 129(4) of EMCA whose import has been affirmed severally by the High Court.

7. It's also his deposition that these proceedings are an abuse of Court process calculated to steal a match against the Interested Party/Applicant (LDK) as Erdemann Property Ltd continues with the unabated construction of the houses and selling the same off plan so as to defeat and render nugatory the hearing and determination of the substantive appeal at the Tribunal.

8. The application is opposed through the replying affidavit of Ruth Hinga, the Legal Manager of the Ex-parte Applicant/Respondent Erdemann Property Ltd, sworn on 13/01/2020. The gist of the opposition is that the Tribunal has no jurisdiction or powers to apply and essentially re-enact repealed law to issue or grant automatic *status quo* orders upon filing of an appeal before it.

9. The application was canvassed through written submissions which were subsequently highlighted and I have duly considered them.

10. The Interested Party/Applicant submits that one of the uncontested facts is that the provisions of section 129(4) of EMCA (*the section*) are in operation hence once an Appeal has been lodged before the Hon. Tribunal, there is a statutory stay of any decision/action necessitating the filing of appeal under EMCA. It submits that the amendments to the section were suspended by the Constitutional Court sitting in Nairobi and as such, the section is in full operation.

11. The Interested Party/Applicant submits that Erdemann Property Ltd has challenged the applicability of the section in four parallel proceedings and as such, it is estopped from further filing new suits on the same grounds that were heard and determined. It submits that the Tribunal found it unnecessary for an appellant to file an application for injunctive orders in light of the provisions of the section.

12. The Interested Party/Applicant submits that Erdemann Property Ltd's appeal against the decision of Statute through Machakos JR No. 41 of 2019 was heard and determined substantially on merits and the Court declined to stay the implementation of the section. It contends that the instant JR Motion is similar in nature and effect to JR 41/2019 in that the issues raised are the same, the facts are the same and the parties are also the same. It cites the case of **Pop-in Kenya Ltd & 3 Others –vs- Habib Bank AG Zurich (1990) eKLR** where the Court reiterated the principle in **Hoystead & Others –vs- Taxation Commissioners (1925) ALL ER REP 56** at p62 Letters ABC to the effect that;

“...parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new version which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted, litigation would have no end except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted.”

13. The Interested Party/Applicant submits that the current JR Motion is *sub judice* because JR 41/2019 and Machakos HC Petition No. 38 of 2019 are still pending before Court and are raising similar contestations on issues between the same parties and touching on the same subject matter.

14. Further, the Interested Party/Applicant submits that Erdemann Property Ltd has engaged in clear and uncontroverted abuse of Court process by filing multiple proceedings between the same parties on the similar question of applicability of the section, filing multiple actions before the NET, Nairobi & Machakos High Courts and also the ELC Court, using two distinct processes namely Judicial Review and Constitutional Petition to challenge a similar order, filing the current JR Motion while aware that it is *res judicata* and *sub judice*, engaging in active forum shopping for favourable orders, consistently and out rightly misrepresenting and concealing existing facts in pleadings with a

view of swaying the Courts to grant *ex parte* reliefs, filing distinct suits once dissatisfied with a decision of the Court, using sugar coated and honey glazed misrepresentations, filing multiple actions before the High Court and Environment & Land Court, seeking an order staying the statutory applicability of the section so as to sanitize the continued construction of Greatwall Housing Development.

15. The Interested Party/Applicant submits that in the application leading to issuance of *ex parte* orders in the current JR Motion, Erdemann Property Ltd calculatedly evaded to reveal the fact that it had previously litigated the issue of applicability of the section before the Hon. Tribunal and that there was a review application pending before the Tribunal. Further, it is submitted that Erdemann Property Ltd failed to disclose that the Court had withdrawn the leave given in JR 41/2019.

16. The Interested Party/Applicant London Distillers (K) Ltd submits that Judicial Review is concerned with the decision-making process and not the merits of a decision and since the current JR Motion is seeking to challenge the merits of a decision, it is not strictly a JR and should be struck out.

17. The Interested Party/Applicant submits that Erdemann Property Ltd should be barred from challenging the applicability of the section in that it has vexed London Distillers (K) Ltd, the Hon. Tribunal, NEMA and the Court by its unwarranted, repetitive and frivolous suits with the intention of forum shopping for favourable orders. It contends that Erdemann Property Ltd has legal representation of five Advocates who have a duty to the Court, society and client and should therefore be advising Erdemann Property Ltd accordingly.

18. The Ex-parte Applicant/Respondent submits that the section in question was amended vide Prevention of Torture Act, 2017 and Statute Law (Miscellaneous Amendment) Act 4 of 2018 and as such, it is not in operation contrary to the incessant assertion by London Distillers (K) Ltd. It submits that even if the amendments have been suspended, sections 19, 20 and 22 of the Interpretation and General Provisions Act proscribe a resuscitation of a repealed law upon suspension or repeal of a new law.

19. It submits that the Hon. Tribunal has dismissed substantively all the prayers sought in the interlocutory application as well as the pending appeal, and left the sole question of '*possible conflict in future on pollution issues that maybe raised by future residents*'. Erdemann Property Ltd contends that this runs afoul the Hon. Tribunal's jurisdiction vis-a vis the legal principle of justifiability and the supplementary doctrines of ripeness, avoidance and mootness.

20. It submits that before the Tribunal can issue an injunctive relief, it is enjoined by law to apply the prerequisites as set out in **Giella –vs- Cassman Brown**. It contends that despite clear absence of a *prima facie* case, the Tribunal went ahead, in error of law, to issue an injunction under a repealed law to the great prejudice of Erdemann Property Ltd.

21. The Ex-parte Applicant/Respondent denies that this is the 5th consecutive onslaught against the same decision of the Tribunal and contends that this is the very first instance that it is challenging the Tribunal's ruling of 06/12/2019. It has also denied the existence of other proceedings before the Tribunal and Court and submits that JR 41/2019 is spent by operation of law. It submits that the issues in the current JR Motion have never been determined on merit by any Court.

22. On whether the current JR Motion is *res judicata* and/or *sub judice*, the Ex-parte Applicant submits that the provisions of the Civil Procedure Act and the rules made there under do not ordinarily apply to Judicial Review proceedings. It cites **Civil Appeal No. 234 of 1995; Commissioner of Lands –vs-Hotel Kunste and Sanghani Investment Ltd –vs- Officer in Charge, Nairobi Remand & Allocation Prison (2007) 1 EA 354** where it was held that Judicial Review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply since it is governed by sections 8 & 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. It however acknowledges that the Court has inherent power to set aside JR orders but contends that such power will obviously be exercised sparingly and on very clear cut cases.

23. Relying on **Civil Appeal No. 175 of 2000; R-vs- Communications Commission of Kenya & 2 Others ex parte East Africa Televisions Network Ltd**, it submits that grant of leave is preceded by demonstration of an arguable case and as such, where there is no mistake capable of obviating the JR proceedings, the Court's inherent jurisdiction cannot be invoked to review, vacate and/or void the subsisting orders.

24. The Ex-parte Applicant/Respondent submits that *res judicata* bars a future suit only when the case is resolved based on the facts and evidence or when the final judgment concerned the actual facts giving rise to the claim. With regard to Machakos ELC Constitutional Petition No. 27 of 2019, it submits that the petition is anchored on alleged violations of its fundamental rights which are quite different from the issues in the current JR. Further, it submits that the objection on *sub judice* is misconceived as the current JR challenges the Tribunal's decision of 06/12/2019 and no proceedings are pending in any other Court against this decision.

25. On whether the filing of the current JR Motions amounts to abuse of Court process, it submits that this Court is not only a Court of law but also of Equity and justice and cannot therefore *disregard a decision that is irrational, illogical or fraught with procedural impropriety...once it has been brought to the attention of the Court...the Court should not allow itself to be made an instrument of enforcing illegalities*. It submits that the issues pending determination are weighty in as far as the Tribunal is alleged to have acted *ultra vires* its authority. Further, it contends that it is legally implausible that a repealed law can form the basis of an order to injunct.

26. It submits that the alleged multiple proceedings have been premised on different causes of action which although contiguous, cannot preclude it from lodging them especially in light of extended violations of the law.

27. On whether the Court can undertake a merit review in its JR jurisdiction, it submits that the scope of interrogating the exercise of administrative and quasi-judicial authority has since been expanded to allow interrogation into the merits of a decision and not just the procedure in arriving at the decision. It relies on the Court of Appeal decision in **R –vs- Ministry of National Heritage & Others ex parte Suchuan Investments Ltd (2016) eKLR**. It submits that this Court is empowered by law to interrogate the propriety of the Tribunal's decision as it has been invited herein.

28. It submits that contrary to London Distillers (K) Ltd.'s allegations, it actually disclosed the pending suits in paragraph 12 of the application leading to the issuance of the *ex parte* orders as well as paragraph 26 of the statutory statement.

29. It submits that the effect of the Tribunal's impugned part decision is to expose it to wanton and grave prejudice leading to losses in the multi-millions of shillings without any lawful justification. It contends that the Court was most justified in granting the reprieve that it did in exercise of its discretion. Further, Erdemann Property Ltd submits that once the Court has exercised its discretion, the same can only be vacated where it was exercised injudiciously, on wrong principles or without a reason.

30. Having looked at the application, the replying affidavit and the rival submissions, it is my considered view that the following issues arise for determination: -

a. Whether this JR case is competent.

b. Whether the *ex parte* order issued by this Court on 20th day of December 2019 should be discharged, varied and/or set aside.

31. Regarding the issue of competence, the Interested Party/Applicant London Distillers (K) Ltd contends that this case is *res judicata* in light of the proceedings in NET Appeal No. 21 of 2019, Machakos JR No. 41 of 2019 and Machakos Constitutional Petition No. 38 of 2019 (formerly Nairobi HC Petition No 437 of 2019 and currently Machakos ELC Petition No 27 of 2019).

32. I have looked at all the annexures relating to the said proceedings as well as the various interlocutory applications and made the following observations;

a. On 14/08/2019 London Distillers (K) Ltd filed NET Appeal No. 21 of 2019 to *inter alia* challenge the Environment Impact Assessment (EIA) Licence given to Erdemann Property Ltd to construct Greatwall Gardens Housing Phase 3.

b. Together with the appeal, London Distillers (K) Ltd filed an application, on the same day, for injunction to stop any further constructions pending the hearing and determination of the appeal.

c. On 26/08/2019, LDK filed another application seeking *inter alia* to stop the discharge of raw sewage into Athi River by Erdemann Property Ltd.

d. On 04/09/2019, the tribunal made an order that the filed appeal conferred an automatic stay pursuant to section 129 (4) of EMCA. Further, the order stated that the ruling on the two applications (dated 14/08/2019 & 26/08/2019) would be delivered on notice.

e. On 05/09/2019, Erdemann Property Ltd filed an application in the Tribunal seeking *inter alia*;

“3. That the Honorable Tribunal be and is hereby pleased to make an order suspending its order, decision and/or determination that section 129(4) of EMCA applies in Tribunal NET No. 21 of 2019 pending inter parties hearing and determination of the application for review herewith”

6. That the honorable Tribunal be and is hereby pleased to make an order reviewing and consequently vacating its order, decision and/or determination that section 129(4) of EMCA applies in Tribunal NET No. 21 of 2019.”

f. On 12/09/2019, the Interested Party/Applicant filed Machakos JR No. 41 of 2019 seeking *inter alia* to quash the Tribunal's decision of 04/09/2019. On the same day, it was given leave to commence JR proceedings and the leave so granted operated as stay of the order made by the Tribunal on 04/09/2019. This effectively meant that it could proceed with the construction.

g. The Interested Party/Applicant successfully applied to set aside the *ex-parte* orders issued on 12/09/2019. In his ruling dated 18/10/2019, Angote J observed that the entire application giving rise to the *ex-parte* orders, Erdemann Property Ltd had not disclosed that the Tribunal's order of 04/09/2019 was also subject to a pending application for review. It was his finding that the JR application had the effect of having parallel proceedings in that Court and the NET. Accordingly, the leave to commence JR proceedings was withdrawn.

h. Meanwhile on 06/12/2019, the Tribunal delivered its ruling with respect to the two applications and Preliminary Objections filed by Erdemann Property Ltd and two other parties who have since been expunged from the proceedings (DCI & AG). It reiterated its earlier decision to stay the construction by Erdemann Property Ltd until the appeal is heard and determined.

i. On 20/12/2019, Erdemann Property Ltd filed the current JR case seeking *inter alia* to quash the Tribunal's decision of 06/12/2019 and obtained leave *ex parte* to commence JR proceedings (from Mbogo J of Makuani ELC Court- Angote J of Machakos ELC was on leave). Again, the leave so granted operated as stay of the Tribunal order which meant that Erdemann Ltd could proceed with the construction.

j. On 13/01/2020, the current application came up for mention before Mbogo J and he directed the parties to file submissions and appear before the Machakos Court for hearing on 30/01/2020.

k. On 30/01/2020, EPL filed an application seeking the recusal of Angote. J who then directed the parties to appear before this Court on 04/02/2020.

On 04/02/2020, this Court heard submissions from the parties and issued an order staying its *ex-parte* orders of 20/12/2019.

33. This Court is now supposed to determine whether its *ex-parte* orders of 20/12/2019 should remain in force or be vacated.

34. From the pleadings filed in JR 41/2019 and the current JR motion, it is evident that both of them gravitate around the application of section 129(4) of EMCA by the Honorable Tribunal. Accordingly, it is immaterial that Erdemann Property Ltd was seeking to quash the NET decision of 04/09/2019 in JR 41/2019 while in the current JR; it is seeking to quash the NET decision of 06/12/2019.

35. This Court is alive to the evolution of section 129(4) of EMCA and the various judicial pronouncements about it but care should be taken not to delve into the merits of the issue as that is not the task at hand.

36. The current JR motion is a replica of JR 41 /2019 and we are at the same stage where Court was asked to vacate its order granting leave to commence the substantive JR motion. Apart from withdrawal of the review application dated 05/09/2019, as per Erdemann Property Ltd's submissions, the circumstances obtaining in both situations have largely remained constant and it's unfortunate that Erdemann Property Ltd seems to be taking advantage of the fact that this matter has been handled by two different Judges.

37. The decision to withdraw leave was substantially dealt with by Angote J in his ruling dated 18/10/2019 and being aggrieved by the said withdrawal, the solution was not to file another JR motion but to proceed to the Court of Appeal. In **Management Corporation Stratta Title Plan No. 301 –vs- Lee Tat Development Pte Ltd (2009) S GHC 234**, the Court of Appeal of Singapore expressed itself as follows;

“The general rule is that where a litigant seeks to re-open in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (the finality principle) outweighs the public interest in achieving justice between the parties (the justice principle) and therefore, the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppels is wrong because ‘a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake, its decision is binding unless corrected on appeal.’”

38. The orders issued by this Court on 20/12/2019 therefore amounted to an unprocedural and illegal review of the orders of 18/10/2019 because this Court was already *Functus Officio*. Erdemann Property Ltd has abused the Court process and actually exposed the Court to ridicule. As much as disclosure of the pending suits was made, the most important disclosure, in my view, was the fact that the leave granted by Angote J had been withdrawn. Had Erdemann Property Ltd disclosed this fact, this Court would certainly not have granted the *ex parte* orders on 20/12/2019. I would agree that the Ex-parte Applicant/Respondent is out to challenge the merits of a decision made by NET an issue which is not the concern of the Judicial review process. The ex-parte Applicant/Respondent ought to have confided itself to the decision making process.

39. The above being the case, this is a clear case where this court should exercise its inherent power to set aside the orders of 20th December, 2020.

40. The upshot of the foregoing is that this judicial review case is not competent and in the circumstances, the application has merit. From the foregoing the orders of 20th December, 2019 are not sustainable and the net effect is that Machakos JR No.75 of 2019 is extinguished. In the circumstances I hereby proceed to grant the following orders: -

d. The ex parte order issued on 20th day of December 2019 ex-debito justitiae is hereby discharged, varied and/or set aside.

e. The entire proceedings for judicial review are hereby struck out.

f. ERDERMANN PROPERTY LTD be and is hereby barred from challenging the applicability of the provisions of section 129 (4) of the Environment Management Coordination Act before this honorable Court or any other Court and the National Environment Tribunal except with the leave of this honorable Court.

The 2nd Interested Party shall also have costs of the application.

Signed, dated and delivered at **Makueni** this 23rd day of **April, 2020**.

MBOGO C. G.,

JUDGE.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March, 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of section 18 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MBOGO C. G.,

JUDGE.

Court Assistant- Mr. G. Kwemboi

Machakos ELC JR Case No.75 of 2019