



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL MISC. APPLICATION NO. 1 OF 2019

REPUBLIC.....APPLICANT

VERSUS

1. COUNTY COMMISSIONER OF MANDERA COUNTY

2. COUNTY COMMANDER OF NATIONAL POLICE SERVICE

MANDERA COUNTY.....RESPONDENTS

EX PARTE

TAWAKAL QUARRY PRODUCERS CO-OPERATIVE SOCIETY LIMITED....EX PARTE APPLICANT

RULING

Parties

1. The ex parte applicant herein describes itself as a registered Limited Liability Co-operative Society with its principal objects being to represent, advocate and facilitate its 29 members owning, operating, working, dealing and or engaging in production, excavation and supply of construction materials particularly building blocks, concrete or sand from their licensed quarries in various areas within Mandera East Sub County in Mandera County for personal or commercial use.
2. The 1st Respondent is a state officer working under the Ministry of National Government and Coordination appointed to performs functions under Part iii of the National Government Coordination Act, whereas the 2nd Respondent is also a state officer appointed under the National Police Service At.

Reliefs Sought

3. The ex parte applicants in the instant application are seeking the following reliefs: -

- 1) THAT orders of declaration that the 1st respondent's decision, Order banning and or prohibiting extraction, excavation, works, working in or thereon and or supply construction materials particularly but not limited to building blocks, concrete or sand from or in licensed quarries within Mandera East Sub-county in the County of Mandera for personal or commercial purposes and consequent arrests, detention or the Applicant's members, their quarry works equipment, excavators and motor vehicles, seizure and destruction quarry products, charging in court and punishments for carrying on licensed quarry activities within Mandera East Sub-county in Mandera County by Respondents is unlawful, illegal, ultra vires, unreasonable, discriminative and unconstitutional.
- 2) THAT orders of certiorari to call, remove, deliver up to this Honourable court and quash the decision and or Order by the 1st Respondent banning and or prohibiting extraction, excavation, works, working in or thereon and or supply construction materials particularly but not limited to building blocks, concrete or sand from or in licensed quarries within Mandera East Sub-County in the County of Mandera for personal or commercial purposes.
- 3) THAT orders of prohibition to restrain the Respondents whether by himself and or through their agents or officers from harassing, intimidating, threatening, arresting, seizing, detaining of Applicant's members, servants, agents or any one claiming under them, Applicants members or agents quarry equipment, motor vehicles used to carry quarry products, construction materials excavated from the licensed quarries hereof and or charging in court the Applicant and its members, whether by themselves, their servants, workers and agents or anyone claiming under them for extracting, excavating, working in or thereon, carrying and or supplying construction materials particularly but not limited to building blocks, concrete or sand from or in licensed quarries within Mandera

East Sub-county in the County of Mandera for personal or commercial purposes.

4) That the costs of this application be in the cause.

4. In response to the application, the Respondents filed a Replying affidavit dated 15th July, 2019 and filed on even date. The Ex parte Applicant further filed a supplementary affidavit dated 8th August, 2019 in response to the Respondents response.

5. The applicant filed their written submissions dated 21st August, 2019 and filed on 23rd August, 2019 whereas the Respondents on the other hand placed their reliance on their filed replying affidavit.

Ex Parte Applicants case:

6. The applicants herein allege that they are licensed dealers by National Environment Management Authority (NEMA) and the County Government to own, operate work in quarries and or operating, working, dealing and or engaging in production, excavation and supply of construction materials particularly building blocks, concrete or sand from their licensed quarries in various areas within Mandera East Sub County in Mandera County for personal or commercial use.

7. They contend that they have been lawfully conducting their trade in quarry works without any intimidation or harassment, however on or about September, 2018 the 2nd Respondent began flagging off their lorries on the road carrying construction material extracted from licensed quarries, detaining and charging them for disobedience of a lawful order allegedly issued by the 1st Respondent banning quarry operations, works activities and supply of the materials therefrom within Mandera County.

8. They allege that despite several request for a copy of the said order banning their business, the same is yet to be supplied to them by the Respondents, adding that the respondent are acting in a discriminatory manner as they allow and protect high ranking officials in the county government by allowing them to operate their quarries.

9. In addition, they contend that the Respondents decisions breaches their legitimate expectation that they would act and exercise their discretion in a fair manner and in accordance with the law as the said action banning their business is prejudicial to their welfare and public interest as they exclusively rely on their quarry business to earn a living.

10. Further, they allege that the Respondents action banning their business violates their right to administrative action that is fair, reasonable, lawful, legal, justifiable based on human dignity, equality, freedom and compliant with statute and the Constitution. They allege that the said impugned action violates section 4 and 7 of the Fair Administrative Actions Act, Articles 10, Chapter 4, 6 and 13 of the Constitution, in that they were never afforded an opportunity to be heard before the said decision of banning their trade was reached and effected.

11. Furthermore, it is their position that the impugned decisions banning their quarry trade is illegal, unlawful, discriminative, biased and ultra vires as it offends the law to wit the Fair Administrative Action Act and the Constitution.

Respondent Response:

12. The Respondents vide the Replying Affidavit of one Kutswa Olaka the 1st Respondent who is the County Commissioner Mandera County opposed the instant application. He averred that on 2nd September, 2018 the Respondents flagged down the applicant's employees and servants on the road while transporting quarry materials, which he alleges was in violation of the ban on the applicant's business in the area.

13. It is the Respondents case that the order banning the applicant trade in North Eastern Region was made in good faith and for public interest following emergent violent extremism in Mandera County.

14. They averred that the ban is as a result of concerted effort and measures to curb ill motive plans by the militia group al Shabab who plan on expanding ungovernable space in Mandera County by creating a wedge between the locals and non-locals. It is their case that majority of the persons working in the quarries were non locals, who have been the target of the Al Shabab killings and that since 2014 over 57 people have been killed by the terrorist militia and majority of them being non local quarry workers.

15. It is their position that the instant ban was as a result of killing of four non local quarry workers on 3rd May, 2018, and that after every incident, they usually issue a temporary ban on quarry activities which would usually be lifted depending on the circumstances, and that once lifted the killings of non-locals resume. They allege that there have been meetings on the way forward on resumption of the quarry trade, latest being meeting on 20th June, 2019 between the Cabinet Secretary Interior and local leaders.

16. In sum, it is their position that they took the said action of banning quarry trading in order to protect the lives of quarry workers who are non-locals from attacks from the terrorist group al Shabab and that the applicants herein have misapprehended their action arguing that the instant application is misconceived, lacks merit, self-seeking, unfounded and ought to be dismissed with costs.

Ex Parte Applicants Supplementary Affidavit:

17. In response to the Respondent allegations that the ban was in view of the insecurities caused by the Al Shabab Militia group which was targeting the non-locals working in the quarry, the applicants denied the same arguing that none of its quarries has ever been attacked nor its members connived or conspired with the terrorists and neither have they refused to cooperate with the respondents to ensure safety . And that

the alleged crimes are general crimes that can happen in any part of Mandera.

18. In addition, they argued that from the Respondents signal it is apparent that the said listed attacks by terrorist happened in Hotels and lodgings, shopping centers, residential houses which are not quarry places. And that the ban presumes and curtails freedom of movement, association and employment of all Kenyans by inputting discriminative and profiling references such as locals and non-locals to justify unreasonable, unfair and unlawful limitation of the right to movement, employment or engagement in any lawful economic activity anywhere within the Republic of Kenya with enjoyment of security and protection of by the Respondent and the law.

19. Further, they allege that the Respondents ban is discriminatory as they are permitting other quarries such as Koromey quarries to operate and on the other hand purport to harass them on alleged security grounds.

Submissions:

20. Vide their written submission; the applicants addressed four issues in advancing their case. The first issue addressed by the applicants is as to whether the ban or order banning quarry business in Mandera is lawful. In this regard they submitted the Respondents impugned decision is unlawful for being in breach of Article 47(2) of the Constitution and section 4(2) and 6 of the Fair Administration Act which requires that administrative bodies decisions ought to be in a written form and reasons thereof given.

21. They allege that the decision allegedly banning their quarry business as acknowledged by the Respondents is unwritten and therefore the same amounts to a roadside declaration rendering it unlawful and in breach of the Constitution and the law. They submitted that since there is no such a written directive produced by the respondent, they instead amended their prayer for certiorari to a declaration that the purported ban is illegal, unlawful and unreasonable. In this they rely in the case of ***Republic vs Cabinet Secretary for Internal Security Ex parte Gragory Oriaro Nyauchi & 4 Others (2017) eKLR*** where the court held that decisions from administrative bodies such as the one in dispute ought to be in written form to give those affected an opportunity to seek legal advice and challenge the same where necessary.

22. The second issued addressed by the applicant is as to whether the alleged ban violated the principles of Natural Justice, Article 47(1) and (2) of the Constitution and sections 4,5 and 6 of the Fair Administrative Action Act. In this respect they submitted that neither themselves nor the members of the public of Mandera County were notified or written reasons given to them of the intention to ban quarry business in Mnadera. It is their submission that the decision banning quarry business was reached without them being heard in breach of the rules of natural justice and implored the court to find the said decision as flawed in law, illegal, unlawful and a nullity and in breach of Article 47(1) and (2) of the Constitution, sections 4,5 and 6 of the Fair Administrative Action Act.

23. In support of this ground the applicant relies in the cases of ***Republic vs Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 Others (Supra)*** and the case of ***Onyango Oloo vs Attorney General (1986-1989) EA 456***, where it was held that a decision arrived at in violations of the rules of natural justice is null and void and cannot stand.

24. The third issue addressed by the applicant is as to whether the impugned decision herein is irrational, unreasonable and took into consideration irrelevant factors. In this regard the applicants submitted that the Respondents decision banning quarry business in Mandera County is unreasonable, irrational and took into account irrelevant factors. They submitted that the reason given by the respondents that they made the decision based on insecurity reasons occasioned by violent extremism is unreasonable as there is no allegation or evidence that the applicants are members or conspirators of the said crime or contribute to the said insecurities.

25. They submitted that the said ban infringes their economic rights protected under Article 46(1)(c) as the quarry business is a business like any other, and they ought to enjoy equal protection and security from the respondent as they pursue gainful business and livelihood and have their human dignity and protection from inhuman treatment as envisaged under Articles 25, 27(1), 28 and 29 of the Constitution. And that the alleged ban limits their fundamental freedoms contrary to article 24 of the Constitution which requires legislation to that effect.

26. In addition, they submitted that the Respondents action is tantamount to banning compliance with the law on allegations that law abiders are target victims of criminals arguing that had the respondents sought their view they would have contributed their views and comments on how to deal with threats of violent extremism. They urged the court to find that the reasons proffered by the respondents are irrational, unreasonable and consider irrelevant factors. They rely in the case ***Republic vs Commission on Administrative Justice ex Parte Nyoike Isaac (2017) eKLR***.

27. The final issue addressed by the applicants is as to whether the Respondents impugned decision is discriminative and in breach of legitimate expectation. In this regard they submitted the respondent's decision herein is discriminative and contrary to Article 27(1) and (2) of the Constitution. This is in view of the fact that the alleged violent extremism is a normal crime in Mandera targeting all residents of Mandera and not limited to quarries alone as hotels and residential places are also targeted as evidenced by the signals in the Respondents replying affidavit.

28. Additionally, they submitted that the Respondents actions herein is in breach of their legitimate expectation as they expected them to act fairly and in accordance with the law to wit Article 10, 27, 47 and 50 of the Constitution and the Act in banning their business. In this they rely in the case of ***Republic vs Cabinet Secretary for Ministry of Interior & Coordination of National Government & 2 Others Ex Parte Patricia Olga Howson (2013) eKLR***.

29. In sum the applicants urged the court to find that their application is meritorious and allow the same.

ISSUE AND DETERMINATION

The nature of Judicial Review

30. Judicial review scope and purpose was enunciated by the Court of Appeal in the case of *Municipal Council Of Mombasa vs Republic & Another* [2002] eKLR 223 Civil Appeal No 185 of 2001 where it stated:

“..Judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

31. In addition, this was reiterated by the same court in *Republic vs. Kenya Revenue Authority, Ex parte Yaya Towers Limited* [2008] eKLR, where it said –

“... the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. It is important to remember in such case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or that of individual judges for that of the authority constituted by law to decide the matter in question.”

32. Therefore, based on the foregoing it is apparent that Judicial Review is the means through which the courts supervise the actions or decisions of administrative bodies or tribunals. In the case of *Civil Servants Union vs. The Minister for Civil Service* [1985] AC the Court classified judicial review under three heads: illegality, irrationality and procedural impropriety, Lord Diplock noted in this regard that: –

“Judicial review has, I think developed to a stage today when one can conveniently classify into three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality” the second, “irrationality”, and the third procedural “impropriety”. By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.... By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness”. It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third as “procedural impropriety”, rather than failure to observe rules of natural justice or failure to act with procedural fairness towards the person affected by the decision.”

33. In *Republic vs Kenya Revenue Authority, Ex parte Yaya Towers Limited* (Supra) the court stated that the grounds for review of a decision as *abuse of discretion; irrationality; excess of jurisdiction improper motives; failure to exercise discretion; abuse of the rules of natural justice; fettering discretion and error of law.*

34. Therefore upon considering the parties herein pleadings and submissions and also analyzing the facts, the following are the issues for determination: -

- a) *Whether there is breach of Article 47 of Constitution as read with Section 4 of the Fair Administrative Actions Act.*
- b) *Whether the applicants right to be heard was violated*
- c) *Whether the Respondent decision is irrational and unreasonable*
- d) *whether the exparte applicants are entitled to the prayers sought.*

a. Whether there is breach of Article 47 of Constitution as read with Section 4 of the Fair Administrative Actions Act.

35. Article 47 of the Constitution provides as follows: -

Fair administrative action

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

36. Section 4 of the Fair Administrative Actions Act provides as follows:

- 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2. Every person has the right to be given written reasons for any administrative action that is taken against him.

3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. an opportunity to be heard and to make representations in that regard;
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. a statement of reasons pursuant to section 6;
- e. notice of the right to legal representation, where applicable;
- f. notice of the right to cross-examine or where applicable; or
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

- a. attend proceedings, in person or in the company of an expert of his choice;
- b. be heard;
- c. cross-examines persons who give adverse evidence against him; and
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different

37. Section 3 of the Fair Administrative Action Act provides that.

3. (1) This Act applies to all state and non-state Application agencies, including any person

- a. exercising administrative authority;
- b. performing a judicial or quasi-judicial function under the Constitution or any written law; or
- c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

38. It is apparent from the Respondent replying affidavit that the impugned decision banning the applicant quarry business indeed exists, however the same was not availed to the applicant and this court in its written form.

39. The above Article 47(2) of the Constitution provides that If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. In this case the Respondents have confirmed the existence of the said decision and have not contested the allegation that the same was not availed to the applicants in a written form. This is therefore is a clear breach of the hereinabove provisions of the law and the Constitution

b. Whether the applicants' right to be heard was violated:

40. In addition, the exparte applicants have complained that they were never accorded any right to be heard before the ban was imposed, contrary to the provisions of the Fair Administrative Action Act and the Constitution above. In *Onyango Oloo vs. Attorney General [1986-1989] EA 456* the Court of Appeal in this regard expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the

whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at... involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

41. In this case, it is clear that the applicants herein who engage in the quarry business were not consulted by the Respondents before the decision banning their trade was reached. This in my view was breach of the rules of natural justice as provided for under Article 47 of the Constitution.

42. The Respondent on the other hand have argued that they took the decision to ban the applicants trade in order to protect the lives of quarry workers whose majority are non-locals and susceptible to terror attacks by the terrorist group al Shabab. The question therefore would be as to whether the same would qualify to limit the right to fair administrative action protected under Article 47 of the Constitution, and whether the said decision is justifiable or subject to limitation under Article 24 of the Constitution.

43. Article 24 of the Constitution provides inter alia that:

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

44. Therefore it is apparent from the above Article 24 of the Constitution that a right or fundamental freedom in the Bill of Rights including the right to fair administrative action shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including as to whether there are less restrictive means to achieve the purpose.

45. The question therefore is as to whether the Respondents action herein meets the justification envisaged under Article 24 of the Constitution. The Respondent are justifying their action based on security grounds arguing that they took the action with a view of protecting the lives of quarry workers who are susceptible to terror attacks.

46. As provided for under the above Article 24 of the Constitution, The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

47. In my opinion the respondent's action herein cannot be justified. They ought to have accorded the applicants an opportunity to be heard before the decision of banning their trade is reached. The ex parte applicants would have offered their views on how the Respondents would best protect the lives of quarry workers from the terrorists, as the said quarry workers earn a living as well as the ex parte applicants.

c. Whether the Respondent decision is irrational and unreasonable:

48. Pauline Nyamweya J in *Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR*, held in this regard as follow: -

“It is now an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This principle was settled by the decisions in *Associated Provincial Picture Houses vs Wednesbury Corporation* (1948) 1 KB 223 and *Council of Civil Service Unions vs The Minister for the Civil Service* (1985) 1 AC 374. This ground was also explained in *Pastoli vs Kabale District Local Government Council & Others*, (supra) as follows:

“...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...”

49. The ex parte applicants have urged this court to quash the respondent ban for being irrational. It is apparent from above that it is not enough that the decision is wrong or “merely” or seemingly unreasonable; it must be “so absurd that no sensible person could ever dream that it lay within the powers of the authority”.

50. Applying the above to the instant decision banning the ex parte applicants quarry trade because of insecurity, the question ought to be whether the same is so irrational and unreasonable that no one in such a position would issue such a decision. My answer to this is an emphatic no. In the circumstances of this case and the security situation in Mandera as a result of frequent terror attacks, one would not find that the decision herein meets the *Wednesbury* unreasonableness enunciated above as someone else might find the decision sound.

d. Whether the exparte applicants are entitled to the prayers sought:

51. *The Halsbury’s Laws of England*^{4th} Edn. Vol. 1(1) para 12 page 270 provides:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.

52. Furthermore, the Court added:-

“..Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.”

53. Consequently, the court power to grant orders in judicial review are discretionary in nature as they are not merit orders., it therefore means is that even where the applicant has established that their case is merited, the court has the discretion to issue or not to issue the orders sought. That discretion must however be exercised judiciously and having regard to all circumstances of the case.

54. In regard to the circumstances of this case I’m inclined to issue the sought orders for the foregoing reasons, key among them is the Respondent failure to comply with the fundamental right to fair administrative action enshrined under Article 47 of the Constitution, where they failed to accord the ex parte applicant an opportunity to be heard before the decision affecting the economic livelihood was made and neither did they provide a written decision with reasons thereof justifying their action.

Conclusion:

55. The Court thus is inclined to and do hereby allow the instant application as set out below based on the foregoing and thus makes the following orders;

a) The orders of declaration are hereby issued to the effect that the 1st respondent’s decision, Order banning and or prohibiting extraction, excavation, works, working in or thereon and or supply construction materials particularly but not limited to building blocks, concrete or sand from or in licensed quarries within Mandera East Sub-county in the County of Mandera for personal or commercial purposes and consequent arrests, detention or the Applicant’s members, their quarry works equipment, excavators and motor vehicles, seizure and destruction quarry products, charging in court and punishments for carrying on licensed quarry activities within Mandera East Sub-county in Mandera County by Respondents is unlawful, illegal, ultra vires, unreasonable, discriminative and unconstitutional.

b) The orders of certiorari are hereby issued to call, remove, deliver up to this Honourable court and quash the decision and or Order by the 1st Respondent banning and or prohibiting extraction, excavation, works, working in or thereon and or supply

construction materials particularly but not limited to building blocks, concrete or sand from or in licensed quarries within Mandera East Sub-County in the County of Mandera for personal or commercial purposes.

c) The orders of prohibition are hereby issued to prohibit and/ restrain the Respondents whether by himself and or through their agents or officers from harassing, intimidating, threatening, arresting, seizing, detaining of Applicant's members, servants, agents or any one claiming under them, Applicants members or agents quarry equipment, motor vehicles used to carry quarry products, construction materials excavated from the licensed quarries hereof and or charging in court the Applicant and its members, whether by themselves, their servants, workers and agents or anyone claiming under them for extracting, excavating, working in or thereon, carrying and or supplying construction materials particularly but not limited to building blocks, concrete or sand from or in licensed quarries within Mandera East Sub-county in the County of Mandera for personal or commercial purposes.

d) No orders as to costs.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT GARISSA THIS 12TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE