REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 192 OF 2018

(CONSOLIDATED WITH PETITION NO. 11 OF 2018)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE WATTER RESOURCESAUTHORITY (WRA).....RESPONDENT

AND

GEMS MANAGEMENT LIMITED & OTHERS.....INTERESTED PARTIES

RULING

1. The ex parte applicant herein, **Superior Homes (Kenya) PLC**, vide these proceedings seeks, substantially, the following orders:

> **1. An order of certiorari to remove to the High Court and quash the decisions and findings of the Respondent as contained in its letter dated 16th April, 2018 as well as its enforcement orders issued on 31st May, 2018 in respect of Houses Nos. TB 023A, FB 025A, FB 026A, B 027A, FB 028A, FB 029A and FB 030A situate on LR No. 27409 IR No. 103926/1 known as "Green Park Estate."**
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> **2. An order of prohibition do issue to prohibit the Respondent from enforcing its orders issued on 31st May, 2018 in respect of Houses Nos. TB 023A, FB 025A, FB 026A, B 027A, FB 028A, FB 029A and FB 030A situate on LR No. 27409 IR No. 103926/1 known as "Green Park Estate."**

2. The said application was based on the grounds that the decision to issue the said enforcement orders is unreasonable, illogical, illegal, untenable and contravenes the ex parte applicant's legitimate expectation and is motivated by ulterior purposes other than those recognised in law. It was contended that even before the construction of the subject houses had commenced the ex parte applicant applied for and obtained an Environmental Impact Assessment Licence from NEMA. The Applicant's case was that the grounds upon which the said decision was made was illogical in the circumstances of this case.

3. Upon considering the application the Court granted leave to the applicant to commence judicial review proceedings and stayed further proceedings consequent upon the said impugned decision. When the matter came for directions on 3rd July, 2018, Learned Counsel for the ex parte applicant, **Mr Nyachoti**, informed the Court that subsequent to the leave being granted, the applicant filed a constitutional petition No. 11 of 2018 against the Respondent herein. Accordingly, directions were sought from the Court on the manner of proceeding in both matters since the parties were unable to agree on the same.

4. It is this state of affairs that necessitated this ruling.

5. In the said petition the petitioner, which is the applicant herein, reiterates that the decision to issue the said enforcement orders is unreasonable, illogical, illegal, untenable and contravenes the petitioner's as well as the interested parties' rights to ownership of property as enshrined in Article 40 of the Constitution. The rest of the grounds were also substantially similar to the grounds upon which the judicial review application was based.

6. The petitioner therefore sought a raft of declarations directed at the lawfulness of the Respondent's decision. Apart from those declaratory orders, there was a prayer for injunction restraining the enforcement of the said decision, special damages and general damages.

7. The question that calls for determination is whether these two sets of proceedings may be consolidated.

8. As regards the rationale for consolidation, the High Court of South Africa (Orange Free State Provincial Division) in **Application No.: 3260/2001** between **The Maize Board vs. F.H. Badenhorst & 18 Others** held that:

> **"In an application [for consolidation], the Court has a discretion whether or not to grant the application. In *New Zealand Insurance Co Ltd v Stone & Others 1963 (3) SA 63 (C)*, Corbett, AJ stated the following at 69AC:**
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> **"In such an application for consolidation the Court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the Court to refuse a consolidation of actions, even though the balance of convenience would favour it. The authorities also appear to establish that the onus is upon the party applying to Court for a consolidation to satisfy the Court upon these points."**
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> **The purpose of joinder…is to ensure that issues which are essentially the same are heard and determined in one trial so as to avoid a multiplicity of actions with the concomitant disadvantages and prejudice. The paramount test in regard to consolidation of actions is convenience. Convenience would usually dictate that a multiplicity of actions and the costs incidental thereto should be avoided."**

9. In **Hilton Walter Nabongo Osinya & Another vs. Savings & Loan (K) Limited & Another Nairobi HCCC No. 274 of 1998 Ringera, J** (as he then was) held that:

> **"The whole point of consolidating suits is to enable common questions of law and facts to be tried together in the same forum with a view to saving judicial time and avoiding the possibility of conflicting decisions on the same issues by different courts. A consolidated trial of two actions results in one common decree and there is no question of abandoning any of the suits."**

10. Therefore consolidation of suits is a case management tool and as held by **Kuloba, J** in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63:**

> **"This means that whatever is done…it must as far as is practicable, be to ensure that the parties fight it out on level ground on equal footing, attempt to minimise and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases…"**

11. This was the position adopted by the Court of Appeal in **David Ojwang Okebe & 11 Others vs. South Nyanza Sugar Company Limited & 2 others [2009] eKLR**, where it was stated that:

> **"The main object of consolidation is to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Thus, where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or series of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so. Such was the case in the matter before us."**

12. I therefore agree with the holding in **Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 others [2014] eKLR**, where the Supreme Court stated:

> **"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties."**

13. Therefore being a case management tool, the Court has the power in undertaking case management to consolidate suits before it and this power is exercisable either on own motion or on an application of the parties. As appreciated by the Court of Appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010:**

> **"…this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."**

14. It was alluded by the counsel for the parties that the judicial review application discloses grounds which are peculiar to that mode of proceeding and which may not be appropriate in a petition. This position seems to echo the jurisprudence existing prior to the enactment of the Constitution of Kenya, 2010. For example in **Republic vs. The Commissioner of Police Ex Parte Nicholas Gituku Karia Nairobi HCMA No. 534 of 2003 (HCK) [2004] 2 KLR 506, Nyamu, Ibrahim, JJ & Makhandia, AJ** on 5th November, 2004 held that:

> **"It is improper to combine both judicial review applications with constitutional application, as both are special jurisdiction with a set of special rules. And secondly the Constitution is the supreme law and all other laws must conform to it and its interpretation, methods of amendment or repeal is different from that of the ordinary Acts of Parliament."**

15. That above position however gave way with the advent of the Constitution of Kenya, 2010. That the said position is nolonger appropriate for the purposes of the development of the law was even appreciated by **Lord Denning** in **O'Reilly vs. Mackman [1982] 3 WLR 604, 623** where he expressed himself as follows:

> **"Just as the pick and shovel is nolonger suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 300 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 300 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty."**

16. In our case, it is my considered view that this machinery was achieved by the promulgation of the current Constitution under which Article 23(3) of the provides:

> **In any proceedings brought under Article 22, a court may grant appropriate relief, including—**
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> **i. a declaration of rights;**
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> **ii. an injunction;**
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> **iii. a conservatory order;**
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> **iv. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
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> **v. an order for compensation; and**
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> ***vi. an order of judicial review.***

17. The current Constitution provides in Article 47 as follows:

> **1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
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> **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.**

18. It is therefore clear that the right to fair administrative action, which is the backbone of judicial review has been elevated to a constitutional right capable of being litigated upon as a ground for a petition seeking redress for violation of the Bill of Rights. Therefore as was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)** judicial review has been said to stem from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. In my view it is nolonger possible to create clear distinction between the grounds upon which judicial review remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted. Whereas the remedies in judicial review are limited and restricted, the grounds cut across both.

19. It is therefore my view and I so hold that where the application for judicial review may well be disposed of in a petition, in order achieve the objective of timely disposal of cases, and where appropriate the petition and the judicial review ought to be consolidated and merged together.

20. I have considered this judicial review application and Petition No. 11 of 2018 and I do not see any hindrance to both causes being heard together.

21. In the premises I direct that:

> **1. This Judicial Review Application is hereby consolidated with Petition No. 11 of 2018 and henceforth proceedings will be undertaken in the Petition.**
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> **2. The Petitioner shall be Superior Homes (Kenya) PLC.**
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> **3. The Respondent shall be Water Resources Authority (WRA).**
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> **3. The interested parties in the petition shall remain as the interested parties.**

4. The orders of stay issued in the Judicial Review application shall be deemed as conservatory orders for the purposes of the consolidated cause pending the hearing and determination of the same or until further orders of this Court.

22. It is so ordered.

Dated at Machakos this 6th day of July, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyachoti for the Applicant/Petitioner

Mr Chenge for the Respondent and holding brief for Mr Khaseke for the Interested Parties

CA Geoffrey