



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. 401 OF 2017

REPUBLIC APPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

COMPLY INDUSTRIES LIMITED..... EX PARTE APPLICANT

CONSOLIDATED WITH

ELCC NO. 402 OF 2017

REPUBLIC.....APPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

TIMSALES LIMITED.....EX PARTE APPLICANT

JUDGMENT

1. Proceedings in this consolidated cause commenced on 31st October 2011 when Comply Industries Limited (hereinafter “Comply”) filed an application seeking leave to apply for a judicial review order of certiorari in respect of a decision of the respondent, National Environment Management Authority (hereinafter “NEMA”). The application was filed in the High Court as **HC Judicial Review Application No. 121 of 2011**. The matter was later transferred to this court and became ELCC No. 401 of 2017. Leave having been granted, Comply filed Notice of Motion dated 10th November 2011 seeking the following orders:

1. That an order of certiorari to bring to the High Court and to quash the respondents order contained in its letter dated 17th October, 2011.
2. That cost (sic) be awarded to the Applicant.

2. A few days earlier on 24th October 2011, Timsales Limited (hereinafter “Timsales”) filed an application seeking leave to apply for a judicial review order of certiorari in respect of a decision of NEMA. Its application was also filed in the High Court and was serialized as **HC Judicial Review Application No. 118 of 2011**. The matter was later also transferred to this court thus becoming ELCC No. 402 of 2017. Having obtained leave, Timsales filed Notice of Motion dated 27th October 2011 seeking the following orders:

1. That an order of certiorari to bring to the High Court and to quash the respondents order contained in its letter dated 17th October, 2011.
2. That (sic) be awarded to the applicant.

3. Both matters were consolidated pursuant to an order of this court made on 12th November 2019.

4. Comply’s application is grounded on statement of facts dated 31st October 2011, a supporting affidavit and verifying affidavit, both sworn

by Nilesh Mahendra Mehta, its General Manager. He deposed that as at the date of his affidavit, Comply was engaged in the manufacture of wood products such as plywood and block boards for local and export markets and was employing over 2,000 workers in the factory. That it was processing about 150 tons of finished wood products per day while sources its raw materials from commercial forest plantations of the Kenya Forest Service. That after harvesting each plantation Comply would replant the harvested area and tend the tree seedlings until they mature. He added that on 21st October 2011 NEMA served Comply with a notice to stop harvesting of logs on grounds that it had not complied with the **Environmental Management and Co-ordination Act, 1999 (EMCA)**. He annexed a copy of the notice which was dated 17th October 2011. I note that the notice was also addressed to Timsales, a company which the deponent stated is sister to Comply. He further stated that the Kenya Forest Service had allocated Comply plantation forests to harvest and Comply paid as per invoices. According to him, the stop order in the notice would cause Comply irreparably suffering of loss of revenue to the tune of over KShs 8 million daily since the forest service serves as the source of its raw materials and its 2,000 employees would be rendered jobless. That Comply was not heard prior to issuance of the notice. He added that Comply had been using the forest resources in a responsible and sustainable manner.

5. Timsales' application is grounded on statement of facts dated 24th October 2011, a supporting affidavit and verifying affidavit, both sworn by Sarbjit Singh Rai, its Managing Director. His affidavits are generally along the lines of those of Comply save for stating that Timsales employed over 3,000 workers and that it stood to lose revenue of over KShs 5 million daily.

6. NEMA reacted to the applications through a replying affidavit sworn by Edward Juma Masakha, its then Provincial Director of Environment in charge of Rift Valley Province. He deposed that his duties include monitoring compliance with environmental standards established under **EMCA**, monitoring activities of other sector-specific environmental resources and conducting environmental audits. The affidavit is full of legal arguments as opposed to facts, contrary to **Order 19 Rule 3** of the **Civil Procedure Rules**. Suffice it to state that the deponent confirmed that NEMA issued the notice complained of and added that it did so pursuant to its mandate under **EMCA**.

7. The applications were canvassed through written submissions, which both sides duly filed and exchanged.

8. It is argued on behalf of Comply and Timsales that NEMA failed to give them a hearing before issuing the notice thereby condemning them unheard and breaching the principles of natural justice. It is further argued that they are entitled to move the court even if alternative remedy is available. The cases of **COTU vs. Benjamin K. Nzioka and Others Civil Application No. Nai. 249 of 1993**, **Nyongesa & 4 others v Egerton University College [1990] eKLR** and **Kadamas & Another vs Municipality of Kisumu [1985] eKLR** among others, are cited in support of those submissions. Unfortunately, no copies of the said decisions were availed.

9. For NEMA it is argued that its impugned notice was a restoration order issued pursuant to **Section 108** of **EMCA** and if aggrieved, Comply and Timsales ought to have appealed against it to the National Environment Tribunal (NET) in terms of **Section 129 (1)** of **EMCA**. That although the existence of an alternative remedy is not a bar to commencement of judicial review proceedings, it is for Comply and Timsales to demonstrate exceptional circumstances that would remove the matter from the appeal process set out under **EMCA**. It is argued that Comply and Timsales have failed to do so. To bolster those submissions, the case of **Republic v National Environmental Management Authority [2011] eKLR** is cited. In response to Comply and Timsales' arguments that they had obtained authorizations from the Kenya Forest Service, NEMA referred to **Section 58 (1), (2) and (3)** of **EMCA** and **Section 75 (1), (2) and (3)** of the **Forest Conservation and Management Act, 2016** and argued that no licence or permit granted by the Kenya Forest Service exempts any person from complying with the provisions of **EMCA**. Consequently, Comply and Timsales were required to submit an Environmental Impact Assessment Report and obtain an Environmental Impact Assessment Licence from NEMA before the timber harvesting. In regard to Comply and Timsales' arguments that the notice breached the principles of natural justice, NEMA argued that Comply and Timsales started the timber harvesting without obtaining an Environmental Impact Assessment Licence and therefore the notice was proper. In conclusion, NEMA argued that granting the orders would result in curbing its statutory powers. Relying on **Sam Odera & 3 others v National Environmental Management Authority & another [2006] eKLR**, it urged the court to apply the precautionary principle and dismiss the applications with costs.

10. I have considered the applications, the affidavits and the submissions. The issues that arise for determination are whether the impugned notice breached the principles of natural justice; secondly, whether Comply and Timsales had a suitable alternative remedy thus disentitling them from moving the court; and finally, whether the relief sought is available.

11. The scope of the jurisdiction of a judicial review court was reiterated by the Court of Appeal in **Municipal Council of Mombasa v Republic & another [2002] eKLR** as follows:

... judicial review is concerned with the decision -making process, not with the merits of the decision itself. ... 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.

12. Further, in the Ugandan case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the court stated:

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...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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...Procedural Impropriety is when there is a 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.

13. Did the impugned notice breach the principles of natural justice? Were Comply and Timsales entitled to a hearing before the notice was issued? I am not persuaded that they were entitled to such a hearing or that the notice breached the principles of natural justice. NEMA is a body corporate established under EMCA with the objective of exercising general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of the Government of Kenya in implementation of all policies relating to the environment. Comply and Timsales readily admit that they were in the process of harvesting forests or felling trees in forests when NEMA issued the notice. They were therefore required to submit an Environmental Impact Assessment Report to NEMA and obtain from it an Environmental Impact Assessment Licence before commencing or proceeding with the timber harvesting in view of Section 58 (1), (2) and (3) of EMCA which provides:

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

14. Comply and Timsales' undertaking of forest or timber harvesting was a "project" in view of Section 2 of EMCA which defines "project" to include any project, programme or policy that leads to projects which may have an impact on the environment and further in view of Paragraph 2 (5) of the Second Schedule of EMCA which mandatorily requires submission of an Environmental Impact Assessment Study Report in respect of forestry related activities, including timber harvesting in plantation forests. The impugned notice merely required Comply and Timsales to perform their statutory obligations and even correctly reminded them that it is an offence under Section 138 of EMCA to fail to submit an Environmental Impact Assessment Report. Thus, the first issue for determination is answered in the negative: the impugned notice did not breach principles of natural justice. NEMA was under no obligation to give Comply and Timsales a hearing prior to issuance of the notice.

15. Did Comply and Timsales have a suitable alternative remedy thus disentitling them from moving the court? I am persuaded that they had. The Court of Appeal stated in Republic v National Environmental Management Authority (supra) as follows:

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...

16. Comply and Timsales' complaint is that the notice was issued without their being given an opportunity to explain themselves. They maintain that implementation of the notice would have serious consequences on their business and further that they had been using the forest resources in a responsible and sustainable manner.

17. The impugned notice was essentially an environmental restoration order issued pursuant to Section 108 of EMCA. Needless to state, Comply and Timsales were aggrieved by the notice, as is apparent from their action of commencing these proceedings. Pursuant to Section 129 (1) (e) of EMCA, a person who is aggrieved by an environmental restoration order has a right of appeal NET. Upon considering an appeal, NET has jurisdiction under Section 129 (3) of EMCA to;

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

(d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

(e) if satisfied upon application by any party, review any orders made under paragraph (a).

18. Further, under **Section 130** of **EMCA**, a person aggrieved by a decision or order of NET can appeal to this court. The statutory appeal procedure under **EMCA** has adequate remedies including setting aside of an environmental restoration order, which is essentially what Comply and Timsales seek to achieve through an order of certiorari. No exceptional circumstances have been demonstrated that warranted judicial review proceedings in the circumstances. Thus, the availability of a suitable alternative remedy disentitles Comply and Timsales from moving the court an order of certiorari.

19. In view of the foregoing discourse, I am not persuaded that Comply and Timsales are entitled to the relief sought. Notice of Motion dated 10th November 2011 and Notice of Motion dated 27th October 2011 are both dismissed with costs to the respondent (NEMA).

Dated, signed and delivered at Nakuru this 29th day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Mutai holding brief for Mr Koome for the ex parte applicants

No appearance for the respondents

Court Assistants: B. Jelimo & J. Lotkomoi