



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

PETITION NO. 2 OF 2020

TAWAQAL QUARRY PRODUCERS

CO-OPERATIVE SOCIETY LIMITED.....PETITIONER

VERSUS

TAHLIL CONSTRUCTION AND GENERAL

TRADING COMPANY LTD.....1ST RESPONDENT

ABDIHAMID MAALIM ALI.....2ND RESPONDENT

JAMAA HUSSEIN MAALIM.....3RD RESPONDENT

SAEED SHEIKH IBRAHIM.....4TH RESPONDENT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF MANDERA.....2ND INTERESTED PARTY

RULING

Introduction

1. The application before the Court is a Notice of Motion dated 23rd June 2020 brought by the Applicant seeking the following orders:-

(a) That this application be certified as urgent and be allocated on a priority basis.

(b) That the Honourable Court do review and lift paragraph 4 and 5 of its order dated 18th June 2020 issued pursuant to Notice of Motion and petition by the petitioner dated 11th May 2020.

2. The application is premised on grounds set out on the face thereof as follows:-

(a) That the respondents have complied with the various regulatory and licensing requirements as a necessary precondition to the Quarrying business.

(b) That the respondents have procured all the necessary approvals and licences for the quarrying business from the relevant licensing and regulatory authorities.

(c) That the Petition and Notice of Motion application dated 11th May 2020 is rendered substantially devoid of any cause of action.

(d) That the respondents have invested substantially in the quarrying business and have facilitated compliance with the vigorous

licensing and regulatory requirements and therefore any further impeachment to the resumption of the business is punitive and a serious infringement of their economic and social rights as enshrined in Article 43 (1) (a-f) under the Bill of Rights and also a breach of natural justice.

(e) That for an undertaking of this nature, the approvals of the 1st and 2nd interested parties are the ultimate pre-condition that one needs to fulfil.

(f) That unless a review of the said order is allowed, the respondents will not be able to enjoy the fruits of their rigorous investment, which they had undertaken at a considerable expense.

(g) That the license granted by one regulatory authority (County Government of Mandera) will expire on the 31st December 2020, yet the hearing and determination of the matter is likely to go beyond that date, rendering the expensive licensing exercise futile.

3. Statement of the Facts

(i) On 8th June 2020, this Honourable Court issued an order by consent of the parties for the status quo to be maintained pending the interparties hearing of the application dated 11th May 2020.

(ii) The Notice of Motion application dated 23rd June 2020 is brought under *Order 45 Rule 1 of the Civil Procedure Rules* and all enabling provisions of the law.

(iii) The applicant through the supporting affidavit of the 2nd respondent contend that they had undertaken extensive public participation with members of the Fikow Community as required by the 1st interested party and were subsequently issued with the necessary licenses. He further contends that they invested Ksh. 7,620,000/= in the quarrying project and had a recurrent expenditure of Ksh. 728,000/=.

(iv) In response to the applicant's averments, the respondents questioned the purported attempts by the applicant to attain compliance as contemptuous. The respondents also challenged the manner in which the new licenses have been issued as unprocedural, unlawful and obtained through corrupt means. It claimed that the 1st interested party, NEMA abused their power in issuing the same.

(v) It raised the issue that their petition sought an order of certiorari to quash the decision or orders granted to the respondents without compliance with the Environment Management and Co-ordination Act, the County Government Act or the Constitution, thus its cause of action still stands.

(vi) The applicant alluded to the existence of another matter in Mandera that was commenced against the respondent orchestrated by the petitioner herein.

(vii) The submissions by the applicant are that they complied with public participation and did the necessary consultations, and also undertook the Environmental Impact Assessment Report and acquired the requisite licence from NEMA and Mandera County Government licenses.

(viii) The applicant submitted that the order of certiorari by the petitioner were anticipatory and irregular. It was also submitted that the allegations by the petitioner as regards the manner in which the licences were obtained ought to be dispensed with in a Judicial Review forum and reaffirmed its claim that the suit herein was devoid of a cause of action and impotent, thus should be dismissed.

(ix) The submissions by the respondent/petitioner are that the applicant has not met the threshold for setting aside a consent order, relying on the case of **Brooke Bond Liebig Ltd Vs Mallya (1975) A 266 as cited in Erick Gakuya Mwathaita Vs Maganjo Joshua Kago (2017) and CIC General Insurance Co. Ltd Vs Phyllis Mbula (2019) e K.L.R.** that a consent order can only be discharged on proof of fraud or collusion or proof of an agreement contrary to public policy.

(x) The petitioner claimed that there was no new EIA report that addressed the concerns raised by the 2nd interested party, it challenged the approvalsthat that they were not procedurally and lawfully obtained and submitted that the Court should not review based on the illegality and that the applicant failed to meet the grounds of review. It relied on the case of **Kamau Mucuha Vs Ripples Ltd (1993) e K.L.R.** That the actions of the respondents were subjudice and in contempt of the Court.

Issues For Determination

4. The following are the probable issues this Court is called upon to determine in this application: -

(i) Whether the application for review is merited?

(ii) Whether the circumstances for an application for injunction/status quo still subsists?

(iii) Who will pay costs?

Legal Analysis

5. **Section 80 CPA as read with Order 45 Rule 1 (b) CPR** are the legal provisions for an order of review. **Order 45 Rule 1** provides as follows:-

“Any person considering himself aggrieved –

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desire to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay”.

6. The subject of this application is an order entered by consent of the parties on 8th June 2020 which reads as follows:-

1. That Notice of Motion dated 11th May 2020 is taken out from today’s cause list and rescheduled to 6th July 2020 for hearing.

2. That the 1st, 2nd, 3rd and 4th respondents are granted leave to file and serve a replying affidavit within 14 days from today.

3. That the applicant/petitioner is also granted corresponding leave to file and serve a supplementary affidavit within 14 days from the date of service by the respondents.

4. That status quo to be maintained until the hearing and determination of the said application.

5. The status is that there shall be no quarrying activities taking place until the hearing and determination of the said application”.

7. The applicant now seeks a review of paragraphs 4 and 5 of the aforesaid consent order. The grounds for setting aside review and/or variation of a consent order was set out in the case of **Flora Wasike Vs Destimo Wamboka (1982 – 88) 1 K.A.R 626** where it was held as follows:-

“It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out”.

8. Again in the case of **Hiram Vs Kassam (1952) 19 E.A.E.A. 131**, the Court pronounced itself as follows:-

“Prima facie, an order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court, or if consent was given without sufficient material facts, or in general for a reason which would enable the Court to set aside an agreement”.

9. The applicants are not challenging the consent order recorded in the presence of their counsel on grounds of fraud or collusion or by an agreement contrary to the policy of the Court or any other sufficient grounds which would enable this Court to set aside an agreement. The applicants have stated that they have complied with statutory obligations by obtaining licenses from NEMA and the County Government of Mandera. Those are the very reasons under which this Petition and the Notice of Motion dated 11th May 2020 was brought and which are yet to be heard and determined. Those cannot be grounds for review as the same are subject of the substantive petition and the Notice of Motion aforementioned which are still pending. The petitioner at paragraph 13 of the Petition herein had challenged the quarrying activities by the respondents stating that the same are regulated and subject to the provisions of Part VI of the Environment Management and Co-ordination Act and the County Government Act hence must be licensed by the 1st and 2nd interested parties. The same averments are contained in prayer 2 of the Notice of Motion dated 11th May 2020. The new evidence which the applicant contends are licenses issued by the 1st and 2nd interested parties and public participation at Fikow Area cannot be new evidence in my view as the interlocutory application dated 11th May 2020 and the petition herein have not been heard. Those are substantive issues that cannot be determined in an application for Judicial Review when the substantive motion and the Petition is yet to be heard and determined.

Conclusion

10. For the foregoing reasons, I find the application dated 23rd June 2020 lacking merit and the same is hereby dismissed with costs to the petitioner. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Garissa this 26th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence:

1. Litoro for Petitioner

2. Kirika for Respondent

3. Ngala for 1st Interested Party

4. Fardowsa- Court Assistant