REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 26 OF 2011

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA SECTIONS 8 AND 9

AND

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

AND

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL ENVIRONMENTAL TRIBUNAL.....RESPONDENT

DAVID N NDETEI.....INTERESTED PARTY

EX PARTE ORBIT CHEMICALS INDUSTRIES LIMITED

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 14th March 2011 filed on 15th March, 2011, the *ex parte* applicant herein, **Orbit Chemicals Industries Limited**, seeks the following orders:

1. **Prohibition Prohibiting The National Environmental Tribunal from hearing the Tribunal Appeal No. 56 of 2010 for want of Jurisdiction.**
2. **Certiorari quashing the decision of the majority of the Respondent's membership dated 17th December 2010 that purports to arrogate the respondent jurisdiction, parallel to the High Court's.**
3. **The costs of this application and the entire cause be provided for.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed on 10th February, 2011 and a verifying affidavit sworn the same day by **Walter Mochoge**, the applicant's Administration Manager.

3. According to the deponent, **Professor David M. Ndetei** (hereinafter referred to as the interested party) sued the applicant in HCCC No. 1400 of 1994 seeking an injunction to restrain the applicant from causing nuisance onto his property being L.R No. 1504/13, a permanent injunction directing the applicant to re-direct all storm water that originates from its premises away from the plaintiff's and emptying untreated septic tanks, damages for nuisance, damages for negligence, special damages as particularized, exemplary damages, costs and interest. The said matter, according to the deponent is on going, currently pending before His Lordship **Mr Justice Anyara Emukule** sitting in Nakuru and was last taken out of the hearing list of the High Court of 25th October 2010 and is coming up for hearing on 18th May 2011. However, while the suit was still subsisting before the High Court, **Professor David Ndetei** apparently referred the matter to the **National Environmental Management Authority** (NEMA) seeking to close down the ex parte applicant for allegedly contravening environmental laws. It is deposed that NEMA dismissed the interested party's application, following which he filed an appeal to the National Environmental Tribunal in Tribunal Appeal No. 56 of 2010. The deponent, instructed the ex parte applicant's advocates to raise a Preliminary objection which he is informed they did, on 25th November 2010, challenging the jurisdiction of the tribunal to hear the appeal when the orders sought were substantially similar to those sought in the pending HCCC No. 1400 of 1994. The said objection was, however dismissed by a majority and the tribunal is determined to hear the appeal.
4. It is however the ex parte applicant's position that the Tribunal lacks jurisdiction to hear the appeal when the orders sought are substantially similar to those sought in the case before the High Court.

INTERESTED PARTY'S CASE

5. In opposition to the application, the interested party filed a replying affidavit sworn by himself on 21st February 2013 in which he deposed that on the advice of his legal counsel the application is devoid of merit and an abuse of court process because the grounds relied on by the applicant are substantively false. It is deposed that whereas the averment of paragraph 3 and 4 of the affidavit are substantially correct in that there is a pending High court matter and also another at National Environmental Tribunal hereinafter referred to as (NEMA), the prayers and grounds in support of his claim in the High Court matter are substantially different from those sought from the Respondent vide Tribunal Appeal No. 56 of 2010. To him, the prayers in the Amended Plaint are meant to examine the legality or otherwise of the consequences of the Ex-parte Applicants actions on his property and remedy for the same while the Appeal to the Respondent is to examine circumstances under which the Ex-parte Applicant acquired the National Environmental Management Authority (NEMA) license to operate in that particular area in the manner that it does and quash the license if found irregular or direct the Ex-parte applicant on usage vis-à-vis the damage it has caused to himself. In his view, his claim in the High Court matter is negligence in the constructions and operation of the Ex-parte Applicant's factory and the claim at NEMA is challenging NEMA's decision to allow the Ex parte Applicant to continue operating its factory despite its lack of proper waste management structures, which act is still continuous. It is his view that as is evident in the Notice of Appeal referred to by the applicant, he is challenging NEMA for failure to allow him to participate in the preparation of an environmental audit report of the Applicant's factory and NEMA's failure or refusal to furnish him with a copy of the audit report. To him the claims and remedies presented in the High Court Civil Suit No. 1400 of 1994 as amended in 2001 are not the same as those presented in the appeal at NEMA as the substance of the claims are different hence the ex parte Applicant is deliberately misleading the court and has also failed to disclose that as at today the factory still continues to emit effluent on to environment, hence there being a continuous emission degradation of the environment by the acts of the Applicant, there is need to challenge the continued licensing of the factory in question through NEMA, which is the body mandated by law to govern such.
6. On the issue of jurisdiction, the interested party contends that the NEMA tribunal is mandated by S. 127(1) (9) of ***Environmental Management and Co-ordination Act***, 1999 (EMCA) to deal with the subject of the appeal thereof and the High court has jurisdiction to issue the orders sought before it hence there is no issue of parallel decisions being met by different courts. He contends that the ex parte Applicant mislead this court to obtain the stay herein and he urges the court to

discharge the same and allow the proceedings at NEMA to proceed for final determination of the appeal before it as this matter is not *sub judice* as both matters touch substantially different facts and though related they give rise to different issues, are founded on different pleadings and call for entirely different orders in law.

7. Based on advice from his advocates the interested party believes that the process of judicial review is a preserve of undue or would be undue decisions of administrative bodies but not a process to prevent prospective hardships in litigation which is what the ex-parte applicant is trying to do and which is an abuse of this courts process hence be dismissed with costs.

APPLICANT'S SUBMISSIONS

8. On behalf of the *ex parte* applicant it was submitted, while reiterating the contents of the supporting affidavit that the reliefs the appellant seeks in the High Court are substantially similar to the orders sought in the Tribunal. According to the ex parte applicant the National Environment Tribunal (the Respondent) is a subordinate court within the meaning of section 2 of Cap 21 as read with Article 169(1)(d) of the Constitution since the Respondent is established under section 125 of EMCA and is thus a subordinate court within the meaning of Article 169(1)(d) of the Constitution. The ex parte applicant's contention that the Respondent lacks the jurisdiction to hear and determine the appeal before it in light of the pendency of the High Court suit based on the same subject matter between the same parties is based on section 6 of the ***Civil Procedure Act*** which bars courts from trying such suits. It is submitted that the appellant's contention which was upheld by a majority of the Respondent that NEMA was not a party to the High Court matter failed to appreciate the fact that the orders which were being sought were executable against the ex parte applicant and not NEMA with the result that it would have similar consequences as that of the High Court if it also favours the appellant.
9. It is submitted that the appellant should have stayed or withdrawn the High Court matter before filing the Appeal in the Tribunal since the Respondent has jurisdiction to determine this suit under EMCA rather than choosing to file the appeal to be heard and determined concurrently with the High Court case. Citing **Mohamed Basshekh vs. Sheikh Ali Mohamed Mwinzagu [2004] eKLR** and **Estate of Mohamed Ishaq and 2 Others vs. Passaglia Gusseppe and 2 Others [2008] eKLR**, it is submitted that there is a possibility of a conflict arising should the High Court arrive at a different decision from the Respondent as the two suits relate to the same parties and substantially the same subject matter and moreso in light of he fact that under section 130 of the EMCA, appeals from the Tribunal lie to the High Court. The court is therefore urged to quash the respondent's ruling of 17th December 2010 arrogating it jurisdiction and stay the entire appeal until the High Court case is determined as contemplated in section 6 since there appears to be an abuse of the legal process. Relying on **Republic vs. Olenguruone Land Dispute Tribunal & Another ex parte Ann Cherotich [2010] eKLR**, it is submitted that in the event that the Court adopts the applicant's submissions on section 6, the result would be that the Respondent lacks jurisdiction.

INTERESTED PARTIES' SUBMISSIONS

10. On behalf of the Interested Party, it is submitted, while reiterating the contents of their replying affidavit and on the authority of **Republic vs. Judicial Service Commission exp Pareno Misc. Civ. Application No. 1025 of 2003** and **Republic vs. Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology exp Cecilia Mwathi & Another Misc. Application No. 30 of 2007** that despite the applicant praying for an order of prohibition and certiorari has not pleaded any ground whatsoever in express pleading and that there is no fact that warrants the court's attention for an audience for a judicial review remedy. According to the interested party, except that the interested party/plaintiff amended his plaint, it is inaccurate for the applicant to allege that the prayers before the High Court are the same as those before the respondent in the appeal.
11. According to the interested party since the issue of jurisdiction is grounded on sub judice, the proper procvedure is to raise a preliminary objection failure of which the matter should be appealed and not challenged by way of judicial review.

12. It is submitted that in light of the provisions of section 64, 125 and 129 of EMCA, the ex parte applicant's allegation that the Tribunal lacks jurisdiction is legally unfounded adn baseless.
13. Relying on **Bulhan & Another vs. Eastern and Southern Trade Development Bank Civil Suit No. 555 of 2001 [2004] 1 KLR 147**, it is submitted that "matter in issue" under section 6 of the Civil Procedure Act does not mean any matter in issue in a suit but has reference to the entire subject in controversy hence it is not sufficient that one or some issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa. It is reiterated that the applicant having been dissatisfied with the decision made on a preliminary objection could only appeal pursuant to section 13091) of EMCA.
14. According to the interested party this application was an afterthought intended to disrupt the ongoing judicial process and ought to be dismissed with costs.

DETERMINATION

15. Having considered the foregoing this is the view I form of the matter.
16. That the respondent is a subordinate court can nolonger be in doubt. Article 169(1) of the Constitution defines a subordinate court as meaning inter alia any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2). The Respondent is a Tribunal established by EMCA which is an Act of Parliament. It follows that section 6 of the Civil Procedure Act, which embodies a doctrine not created by the ***Civil Procedure Act*** but only gives recognition to the doctrine of *sub judice*. The rationale for this principle was set out in the case of **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993,** in which it was held:

"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

17. Section 6 of the Civil Procedure Act provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

18. It is therefore clear that section 6 of the Civil Procedure Act expressly bars a Court from proceeding with a matter which is caught up by the said section and in my view the Court has no discretion in the matter once it finds that section the conditions under section 6 have been satisfied.
19. In the present case it is clear that the applicant does not allege that the Respondent has no jurisdiction to deal with the issues before it. Rather it is the contention of the applicant that the Respondent is barred from proceeding with those issues. That is the jurisdictional issue which forms the subject of this application.
20. In my view in determining whether or not *sub judice* applies the purpose of the said doctrine is crucial. As stated above the purpose of the doctrine is not to forever bar the impugned proceedings from being undertaken but to put a brake as it were thereon until earlier proceedings are determined. It is not therefore the semantics involved or the names of the parties involved that is crucial but the effect of proceeding with the two causes hence the use of the phrases ***"directly and substantially in issue"*** and ***"between the same parties, or between parties under whom they or any of them claim, litigating under the same title".*** What the Court ought to ask itself is whether by entertaining the subsequent suit it would amount to a duplication or multiplication of suits thus

clogging the wheels of justice. It is now recognised in out jurisdiction that one of the objectives of the overriding objectives in sections 1A and 1B of the ***Civil Procedure Act*** as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing. In order to achieve the said aims the Court must ensure that the cases are allotted their appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

21. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court held:

"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."

22. In **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. In **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, Nyamu, J** (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the "3I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, it was held that:

"Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed 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. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of *Donoghue vs. Stephenson* in the last century."

23. From the definition of procedural impropriety it is my view and I so hold that the failure by a Tribunal to adhere to and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision amounts to procedural impropriety and justifies the court in granting judicial review remedies. Since the doctrine of *sub judice* is a procedural rule laid down in a statute which ought to guide a Tribunal in determining an issue before it the failure to give effect to it where applicable justifies the grant of judicial review remedies.

24. In the instant case it is admitted that at least one of the prayers sought in both the High Court suit

and the Appeal is the same i.e. the prayer for damages. Therefore with respect to the said prayer the possibility of the two forums arriving at conflicting decisions cannot be rules out. That is a scenario that ought to be avoided at all costs. Apart from that I have looked at the prayers being sought in the appeal and it is my considered view that if properly advised the said prayers could have formed the subject of the High Court case since the High Court has jurisdiction to grant the same. Piecemeal litigation or litigation by instalments ought not to be encouraged.

ORDER

25. According while I am not satisfied that the decision of the Respondent ought to be quashed taking into account the fact that not all the prayers sought before the Respondent are capable of being granted in the High Court case, I hereby grant an order of prohibition prohibiting the Respondent from hearing the Tribunal Appeal No. 56 of 2010 pending the hearing and determination of the said HCCC No. 1400 of 1994. The applicant shall have the costs of this application.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties