



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MAKUENI**

**JUDICIAL REVIEW NO.3 OF 2020**

**IN THE MATTER OF: AN APPLICATION BY JANE WANDERA FOR LEAVE TO APPLY**

**FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**IN THE MATTER OF: ARTICLE 47 & 50 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE MAKUENI COUNTY FINANCE ACT, 2019, MAKUENI COUNTY**

**SAND CONSERVATION AND UTILISATION ACT, 2015**

**IN THE MATTER OF: ISSUANCE OF DEMAND NOTICE FOR CLOSURE OF PREMISES**

**BETWEEN**

**JANE WANDERA.....APPLICANT**

**AND**

**MAKUENI COUNTY SAND CONSERVATION AND UTILISATION AUTHORITY.....RESPONDENT**

**J U D G E M E N T**

1. By her notice of motion application dated 27<sup>th</sup> April, 2020 and filed in court on 29<sup>th</sup> April, 2020, Jane Wandera, the Ex-parte Applicant herein, prays for orders: -

**2) THAT an ORDER OF CERTIORARI to remove into the High Court and quash the Respondent's Demand Notice dated 17<sup>th</sup> March, 2020 for closure of operations on the Applicant's parcel of land known as UNS. RESIDENTIAL PLOT "C" WITHIN SULTAN HAMUD.**

**3) THAT an ORDER OF PROHIBITION directed at the Respondents, their agents, employees or anyone acting on their instructions from closure of operations on the Applicant's parcel of land known as UNS. RESIDENTIAL PLOT "C" WITHIN SULTAN HAMUD.**

**4) THAT an ORDER OF MANDAMUS compelling the Respondent to issue a license to the Applicant for purposes of running a Commercial Yard for Building Materials on land parcel UNS. RESIDENTIAL PLOT "C" WITHIN SULTAN HAMUD.**

**5) THAT the costs of this Application be provided for.**

2. The Notice of Motion application is predicated on the grounds on its face and is accompanied by the Applicant's verifying affidavit sworn at Sultan Hamud on the 27<sup>th</sup> April, 2020 and a statutory statement dated 23<sup>rd</sup> March, 2020 filed in court together with the chamber summons application dated 23<sup>rd</sup> March, 2020 for leave (to the Ex-parte Applicant) to apply for prerogative orders of certiorari, prohibition and mandamus.

3. The application is opposed by the Respondent vide the replying affidavit of Halinishi Yusuf, it's Managing Director, sworn at Makueni on the 04<sup>th</sup> May, 2020 and filed in court on 05<sup>th</sup> May, 2020.

4. In rejoinder to the Respondents, the Ex-parte Applicant filed her further affidavit on 11<sup>th</sup> September, 2020 the same having been sworn at Machakos on 10<sup>th</sup> September, 2020.

5. The application was canvassed by way of written submissions.

6. The Ex-parte Applicant has deposed in paragraphs 2, 3, 4, 5, 6, 7 and 8 of her verifying affidavit that she is the registered and lawful owner of all that parcel of land known as UNS. RESIDENTIAL PLOT "C" WITHIN SULTAN HAMUD as shown by the annexed Letter of Allotment and Registry Map Sheet marked "JW-1", that she utilizes her parcel of land for various commercial ventures including the sale of construction materials including ballast, boulders, sand and building stones as shown by the photos annexed thereto and marked "JW-2", that Under Section 21 of the Makueni County Sand Conservation and Utilisation Act, 2015 Act, any person intending to *inter alia*, distribute sand for commercial purpose ought to apply for A License from the Sand Conservation and Utilization Authority, that further, the Second Schedule Part 9 of the Makueni County Finance Act, 2019 provides for the license fees to be paid by a Commercial Building Materials Yard. In particular, Sultan Hamud being a Zone A area, an Applicant ought to pay Kshs.15,000/= per year, that she severally tried to apply to the Sand Conservation and utilization Authority and the Respondents officers at Sultan Hamud for a license to operate her business to no avail, that the Respondents officers have always insisted on charging the Applicant for a license of which she doesn't operate, that they claim that her business is purely a sand yard, which is not the case, that the Respondent has issued a demand notice dated 17<sup>th</sup> March, 2020 seeking the closure of all operations on her parcel of land claiming that she has not paid for the requisite licenses.

7. Halinishi Yusuf has deposed in paragraphs 3, 4, 5, 6, 9, 11 and 12 of his replying affidavit that the contents of paragraphs 3 of the Applicant's Verifying Affidavit are denied and in response he wishes to state that the Applicant utilizes the parcel in question majorly as a sand yard, that the presence of other items in the parcel require the Applicant to acquire all relevant licenses and not one license in place of all other requisite licenses, that in response to the contents of paragraphs 5 of the Applicant's Verifying Affidavit, he wishes to state that the Applicant is misleading the court in purporting that the Makueni County Finance Act, 2019 allows her to pay Kshs.15,000/= as license fees for a Commercial Building Material Yard. The provision in question, Second Schedule, part 9 of the Makueni County Finance Act provides for license fees for various Commercial Building Materials including ballast, bricks, sand and timber. Each of these items has specific license fees that all merchants dealing in them are aware of including the Applicant herein, that the said Kshs.15,000/= license fees is in relation to Commercial Building Material/Ballast yard and not all commercial building materials, that in response to paragraph 6 of the Applicant's verifying affidavit, he wishes to state that the Applicant has not applied for any license from the Makueni County Sand Conservation and Utilization Authority, that the licence to operate a ballast yard is not issued by the Sand Authority but a different entity altogether and that only sand related licenses can be applied to and issued by the Sand Authority, that the Applicant operates several yards in one parcel of land including a sand yard, a ballast yard, a brick yard and a timber yard which must be licensed separately by law but she has refused to pay and has continued to operate illegally despite several reminders for payment, that the Applicant has not shown and or demonstrated violation of his constitutional rights and freedoms if any and is on a fishing expedition to justify the claim, that from the petition, there is nothing to suggest that the Petitioner's constitutional rights were violated or that the Respondents breached the constitution in any manner by issuing the Demand Notice pursuant to the Makueni County Sand Conservation and Utilization Act 2015, that based on the above salient issues, the court ought to vacate the ex parte orders and strike out the application for want of merit.

8. And in her further affidavit, the Ex-parte Applicant has deposed in paragraphs 4, 6 and 7 that it is clear from the notice that it was not issued to the owner of the land but to JOHN WANDERA, it is clear that the Respondent did not ascertain the ownership of the premises before issuing the impugned notice. The notice was arbitrarily issued, that she is advised by her Advocates on record that there was no legal basis for the closure of the premises without following the set out procedure, the Respondent did not in fact issue a single demand note, that she is advised by her Advocates on record that what is before the court is a judicial review application and not a Constitutional Petition as wrongly set out by the Respondents at paragraphs 9, 10 and 11 of the Replying Affidavit.

9. By the time of writing this judgement, it is only the Counsel for the Ex-parte Applicant who had filed their submissions.

10. In his submissions, the Counsel for the Ex-parte Applicant submitted that the notice of closure dated 17<sup>th</sup> March, 2020 issued by the Respondent was directed to the Ex-parte Applicant's husband and not to her.

11. The Counsel went on to submit that one of the grounds for impugning a decision is the commission of procedural improprieties as was held in **Pastoli vs. Kabale District Local Government Council and Others [2008]** cited in **Edward N. Omotii vs. County Government of Machakos & 2 others [2019] eKLR** as follows: -

*"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."*

12. Arising from the above, the Counsel submitted that the Ex-parte Applicant was never given reasons for the rejection of her application for a license as is required under **section 22 of the Makueni County Sand Conservation and Utilization Act, 2015**.

13. **Article 47(1) & (2) of the Constitution** states;

*"that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."*

14. **Fair Administrative Actions Act 2015** is a statute that was enacted "to give effect to Article 47 of the Constitution, and for connected purposes."

The act defines "**administrative action**" to include;

i. The powers, functions and duties exercised by authorities or quasi-judicial Tribunals; or

ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relate.

15. Arising from the above, I have no doubt that the Respondent herein is liable to be subjected to judicial review reliefs.

16. In the case of **Ransa Company Ltd vs. Manoa Francesca & 2 others [2015] eKLR**, the Court of Appeal expressed itself thus: -

*“As we all appreciate, a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.”*

17. Needless to say, judicial review involves assessment of the manner in which a decision is made so as to ensure that public powers are exercised in accordance with the basic principles of legality, fairness and rationality.

18. From the facts adduced by the Ex-parte Applicant herein, I am of the considered view that the Respondent ought to have given the Applicant the chance to be heard before the issue of the closure notice dated 17<sup>th</sup> March, 2020. The decision of the Respondent to issue the closure notice (without affording the Ex-parte Applicant the chance to be heard) is irrational and runs foul the rules of fairness. The Respondent had a duty to give the Applicant satisfactory reasons on why the license for her business could not be granted.

19. The upshot of the foregoing is the application has merits and I hereby proceed to grant payers 2, 3, 4 and 5 of the notice of motion application dated 27<sup>th</sup> April, 2020.

Signed, dated and delivered at Makueni via email this **26<sup>th</sup>** day of **November, 2020**.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi