



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. JUDICIAL REVIEW NO. 41 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT**

**AND**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**LONDON DISTILLERS (K) LTD.....2<sup>ND</sup> INTERESTED PARTY**

**DIRECTOR OF CRIMINAL**

**INVESTIGATIONS.....3<sup>RD</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC**

**PROSECUTIONS.....4<sup>TH</sup> INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> INTERESTED PARTY**

**AND**

**EX-PARTE APPLICANT:.....EDERMANN PROPERTY LIMITED**

**RULING**

1. On 12<sup>th</sup> September, 2019, the Ex-parte Applicant moved this court under a Certificate of Urgency. The Chamber Summons that this court certified as urgent and allowed is dated 12<sup>th</sup> September, 2019.
2. In its Application dated 18<sup>th</sup> September, 2019 and filed on the same date, the 2<sup>nd</sup> Interested Party has sought for the following orders:
  - a. *That this Honourable Court be pleased to discharge, vary and or set aside its decision/order issued on the 12<sup>th</sup> day of September, 2019 pending the hearing and determination of the substantive Notice of Motion.*
  - b. *The 1<sup>st</sup> Interested Party be compelled to order the immediate closure and sealing of Great Wall Garden Estate Phase 1 and 2 comprising about 2000 residential units for being constructed without a waste water treatment plant and sewer line for the purposes of disposal of its raw effluents.*
  - c. *The entire proceedings for Judicial Review be struck out.*
  - d. *Costs.*

3. The Application is premised on numerous grounds which are on the face of the Application and the Affidavit of the 2<sup>nd</sup> Interested Party's Environmental Advisor. According to the 2<sup>nd</sup> Interested Party's representative, the Ex-parte Applicant, while aware that the National Environment Tribunal (NET) is bound by the decision of the High Court, and to the effect that there is automatic stay of actions sought to be challenged before it, contemptuously proceeded with the construction of Great Wall Gardens Housing Phase 3 on L.R. No. 12581/13 after being served with the pleadings in NET Appeal No. 21 of 2019 on 16<sup>th</sup> August, 2016.
4. It is the 2<sup>nd</sup> Interested Party's case that all the parties, including the Ex- parte Applicant, substantively addressed the National Environment Tribunal (NET) on the implications of the High Court decision on the issue of *status quo* and the automatic stay upon filing of an Appeal; that the orders of the National Environment Tribunal (NET) were made in the presence of the parties and that the Chamber Summons dated 12<sup>th</sup> September, 2019 is grounded on willful misrepresentation of facts and active concealment of material facts so as to mislead the court.
5. According to the 2<sup>nd</sup> Interested Party's representative, on 14<sup>th</sup> August, 2019, the 2<sup>nd</sup> Interested Party filed an Appeal with the National Environment Tribunal (NET) against the Ex-parte Applicant and others challenging the issuance of the EIA Licence by the 1<sup>st</sup> Interested Party for the construction of Great Wall Gardens Housing Phase 3 on L.R. No. 12581/31; that on 28<sup>th</sup> August, 2019, all parties appeared before the Tribunal for hearing and that the National Environment Tribunal (NET) reminded the Ex-parte Applicant of the effect of Section 129 (4) of the Environmental Management & Co-ordination Act (EMCA) on automatic stay once an Appeal is lodged.
6. The 2<sup>nd</sup> Interested Party's representative deponed that when the 2<sup>nd</sup> Interested Party's Application dated 14<sup>th</sup> August, 2019 came up for hearing before National Environment Tribunal (NET) on 5<sup>th</sup> September, 2019, the advocates of the Ex-parte Applicant served their advocate with a Notice of Preliminary Objection together with two Notices of Motion dated 3<sup>rd</sup> September, 2019.
7. According to the 2<sup>nd</sup> Interested Party, the Tribunal directed that the Notice of Preliminary Objection filed by the Ex-parte Applicant should be heard in opposition to the 2<sup>nd</sup> Interested Party's Application; that the advocate for the Ex-parte Applicant conceded to the said direction and argued the Notice of Preliminary Objection alongside the Application dated 14<sup>th</sup> August, 2019 and that having acquiesced to the jurisdiction and mode of determination of the Notice of Preliminary Objection, the Ex-parte Applicant is barred by the doctrine of estoppel from rearguing the same grounds.
8. After hearing the Application, the 2<sup>nd</sup> Interested Party deponed that the Tribunal reserved its Ruling; that the Ex-parte Applicant filed in the Tribunal another Application on 5<sup>th</sup> September, 2019 which came up for hearing on 6<sup>th</sup> September, 2019 and that although the Application of 5<sup>th</sup> September, 2019 was slated for hearing on 23<sup>rd</sup> September, 2019, the Ex-parte Applicant filed the present Judicial Review Application on the same grounds that were before the National Environment Tribunal (NET) in the three Applications.
9. The 2<sup>nd</sup> Interested Party's representative deponed that the present Motion of Judicial Review is a restatement of the Notice of Motion Application dated 5<sup>th</sup> September, 2019 which is pending before the Tribunal; that there are two decisions of the High Court suspending the amendment of Section 129(4) of the Environmental Management and Co-ordination Act (EMCA); that there are no existing exceptional circumstances warranting the intervention of this court and that the orders of this court granted on 12<sup>th</sup> September, 2019 expressly stays further proceedings in NET No. 21 of 2019.
10. The 2<sup>nd</sup> Interested Party's representative deponed that in granting the orders of 4<sup>th</sup> September, 2019, the National Environment Tribunal (NET) reaffirmed the provisions of Section 129(4) of the Environmental Management and Co-ordination Act (EMCA) after admissions by the Ex-parte Applicant of the ongoing construction on L.R. No. 12581/13 and that in any event, the Ex-parte Applicant is not the registered proprietor of L.R. No. 12581/13.
11. The 2<sup>nd</sup> Interested Party's official finally deponed that the ex-parte orders of 12<sup>th</sup> September, 2019 were obtained on the basis of grave material non-disclosure by the Ex-parte Applicant that it had filed three (3) similar Applications before the National Environment Tribunal (NET) for variation or setting aside of the *status quo* orders; that the Ex-parte Applicant acquiesced to the jurisdiction of the Tribunal and that the current Judicial Review Application was filed by the Ex-parte Applicant to forum shop for favourable orders.
12. In response, the ex-parte Applicant's Legal Officer deponed that the scope of Judicial Review proceedings has since expanded and that in appropriate cases, the court will enter into the merits of a decision made by an inferior body.
13. The Ex-parte Applicant's Legal Officer deponed that the jurisdiction of this court was properly invoked; that the Ex-parte Applicant is the lawful proprietor of L.R. No. 12581/13 and that the crux of the current Judicial Review proceedings is the contestations on the applicability of a repealed provision of statute after the repealing provision has been suspended.
14. According to the Ex-parte Applicant, the 2<sup>nd</sup> Interested Party's Applications dated 14<sup>th</sup> and 27<sup>th</sup> August, 2019 seeking interim stop orders were scheduled for hearing; that the Ex-parte Applicant filed a Preliminary Objection against the jurisdiction to the Hon. Tribunal and that the National Environment Tribunal (NET) declined to adjourn the matter to allow for hearing and determination of the Preliminary Objection lodged by the Ex-parte Applicant herein.
15. The Ex-parte Applicant's Legal Officer deponed that it is untrue that the Ex-parte Applicant consented to the contemporaneous hearing of the Preliminary Objection and the Applications on merit; that Section 129(4) of the Environmental Management and Co-ordination Act (EMCA) is in fact suspended; that the suspension of the amended Section 129 of the Environmental Management and Co-ordination Act (EMCA) did not revive or re-enact the already repealed Section 129(4) of the Environmental Management and Co-ordination Act (EMCA) and that the Tribunal can only order *status quo* or otherwise upon hearing the parties.

16. According to the Ex-parte Applicant, the Tribunal acted contra-statute by declining to prioritize hearing of the objection; the Ex-parte Applicant filed the Application dated 5<sup>th</sup> September, 2019 seeking to review the impugned order and that the 2<sup>nd</sup> Interested Party extracted an even more irregular and unlawful order supposing that a non-existent Section 124(9), Environmental Management and Co-ordination Act (EMCA) applied and bound the parties.

17. The Ex-parte Applicant's Legal Officer finally deponed the impugned order made on 4<sup>th</sup> September, 2019 was made unlawfully and in clear violation of the law, regulations and the Respondent's own Rules.

18. When the advocates for the 2<sup>nd</sup> Interested Party and the Ex-parte Applicant appear before me, they reiterated the dispositions of their client's word for word. In the circumstances, I shall not repeat the so called "submissions" in this Ruling.

19. The current Judicial Review Application was commenced by way of a Chamber Summons dated 12<sup>th</sup> September, 2019 in which the Ex-parte Applicant prayed for the following reliefs:

*a. That this matter be certified urgent and the requirement of notice to parties be dispensed with.*

*b. That leave be and is hereby granted to the Applicant to apply to this Honourable Court for orders of certiorari to call, remove, deliver up to this Honourable Court and quash the order of the Respondent made on 4<sup>th</sup> September, 2019 and any subsequent proceedings thereof in the National Environment Tribunal Appeal No. 21 of 2019.*

*c. That leave be and is hereby granted to the Applicant to apply for orders of prohibition to restrain the Respondent or anyone claiming under its authority, from applying or in any way howsoever asserting the applicability of Section 129(4), EMCA (now repealed) to the extent that it confers an automatic status quo order, in the National Environment Tribunal Appeal No. 21 of 2019.*

*d. That the grant of such leave to operate as a stay of the order made on 4<sup>th</sup> September, 2019 in the National Environmental Tribunal Appeal No. 21 of 2019; and any subsequent proceedings thereof in the said Appeal, pending the hearing and determination of the proceedings herein and substantive Application for Judicial Review.*

*e. That this Honourable Court do grant any other or further relief that it may deem fit to grant.*

*f. That the costs of this Application be in the cause.*

20. In the Statutory Statement, the Ex-parte Applicant averred as follows:

*a. The 2<sup>nd</sup> Interested Party has filed National Environment Tribunal Appeal No. NET 21 of 2019 before the National Environment Tribunal challenging the EIA Licence issued by the 1<sup>st</sup> Interested Party dated 17<sup>th</sup> July, 2019 primarily on account of supposed non-participation in the EIA Study proceeding the grant of the License.*

*b. The Applicant herein has lodged a detailed Replying Affidavit, availing a copy of the EIA Study report evincing the 2<sup>nd</sup> Interested Party's participation; erstwhile rebutting the 2<sup>nd</sup> Interested Party's contestations. Nonetheless the matter is awaiting determination on merit therein.*

*c. Subsequent thereto the 2<sup>nd</sup> Interested Party's Applications dated 14<sup>th</sup> and 26<sup>th</sup> August, 2019 seeking interim stop orders were scheduled for hearing inter-parties on 4<sup>th</sup> September, 2019. The Application lodged a Preliminary Objection (PO) against the jurisdiction of the Hon. Tribunal dated 3<sup>rd</sup> September, 2019.*

*d. The Respondent disallowed an Application made under Rule 9, National Environment Tribunal Rules, 2003; to adjourn the said hearing to allow for a hearing and determination of Preliminary Objection lodged by the Application as well as an Application seeking to cross-examine a deponent to Affidavit sworn in support to the said two motions. The said Rule 9 provides thus;*

*Rule 9(2) and (3), Tribunal Rules mandatorily require the Tribunal to suspend and proceedings in light of a pending Preliminary Objection thus,*

*"(2) On receipt of any Preliminary Objection, the Tribunal shall suspend the proceedings on merit and shall require the Appellant to submit written observations and submissions on the objection within seven days from the date of service on him of notice of the objection (3) The Tribunal shall suspend the proceedings on merits pending its Ruling on the Objection."*

*e. The Hon. Tribunal, contrary to Section 4(1), 4 (3) and 4(4) (d) Fair Administrative Actions Act; however, directed that the duly filed Preliminary Objection be urged and heard contemporaneous to the said Applications on merit, ordered that a Ruling would be delivered on Notice. Essentially assuming and exercising discretion that the constitutive and establishing law does not confer on the Hon. Tribunal. Should the Preliminary Objections succeed, as they are bound to, they are exposed to unwarranted challenge?*

*f. But significantly the Hon. Tribunal went ahead to further draw the attention of the parties; to the applicability in the instant*

*Appeal (NET 21 of 2019), of Section 129(4), of the Environmental Management and Co-ordination Act 1999 (EMCA) which provision is in fact suspended.*

*g. The subject Section said to apply in the instant Appeal pending before the Hon. Tribunal, was suspended on 24<sup>th</sup> September, 2018 by an order of the Hon. Justice Okwary in High Court Constitutional Petition No. 251 of 2017 Okiya Omtata and Another vs. National Assembly of Kenya and Other, thus;*

*“...a conservatory order be and is hereby issued suspending all amendments purported to have been effected to Section 129(4) of the Environmental Management and Co-ordination Act 1999 (EMCA) by Statute Law (Miscellaneous Amendments) Act, 2018 (No. 4 of 2018).*

*A temporary order of prohibition be and is hereby issued prohibiting... from proceeding to give effect, in any way whatsoever, to amendments purported to have been effected to Section 129(4) of the Environmental Management and Co-ordination Act 1999 (EMCA) by Statute Law (Miscellaneous Amendments) Act, 2018 (No. 4 of 2018).”*

*h. The order made on 4<sup>th</sup> September, 2018 and served on the Applicant was therefore not only based on a non-existent provision of the law and a misapprehension of the existing law; but it is also grossly unlawful as Sections 19, 20 and 22 of the Interpretation and General Provisions Act, Cap 2 provides that where a new law that had repealed an older law has been repealed, and the new one has commenced: the suspension or repeal will not serve to revive the old law that had been repealed and replaced by the repealing law. The orders is null and void ab initio.*

*i. The impugned decision by the Hon. Tribunal has the effect of abrogating and arrogating to itself legislative power and/or authority as the Tribunal is reviving a law that has been repealed by the Constitutionally recognized legislative authority.*

*j. Indeed, the Tribunal acted contra-statute being a creature of EMCA its jurisdiction and procedure is defined under Section 125 and 126, EMCA as read with the National Environment Tribunal Rules, 2003 which the Tribunal violated, by declining to prioritize hearing the objection and/or order stay proceedings pending determination of the objection as expressly provided for under Section 126(5) EMCA as read with Rule 9 (2) and (3) of the Tribunal Rules.*

*Section 126(5), EMCA provides thus,*

*“Except as expressly provided in this Act or any regulations made thereunder, the Tribunal shall regulate its proceedings as it deems fit.”*

*k. However worse still, on the 6<sup>th</sup> of September, 2019 the 2<sup>nd</sup> Interested Party extracted an even more irregular and unlawful order supposing that a non-existent Section 124(9), EMCA applied and bound the parties, and provided thus at Order No. 2 thereof:*

*“2. That the parties are reminded of the full force and applicability of Section 124(9), of the Environmental Management and Co-ordination Act 1999 to this Appeal which reads as follows “upon any Appeal to the Tribunal under this Section, the status quo of any matter or activity which is subject of the Appeal shall be maintained until the Appeal is determined.”*

*l. The order made on 4<sup>th</sup> September, 2019 was therefore made unlawfully, in clear violation of the law, regulations and the Respondent’s own rules specifically Article 94 (5), Constitution which reserves the legislative power to Parliament. The Respondent’s revival and Application of a repealed provision is ultra vires its authority donated under Section 126 EMCA and the Rules and is for quashing.*

*Article 94(5), Constitution provides thus;*

*“No person or body other than Parliament, has power to make provision having force of law in Kenya except under authority conferred by this Constitution or by legislation.”*

21. The Ex-parte Applicant finally averred in the Statutory Statement that unless granted the orders in the Chamber Summons and leave thereof to operate as a stay, it stands to suffer irreparable loss and grave injustice as the patently unlawful order issued by the Tribunal seeks to stop it from continuing with its lawful development on its land parcel L.R. No. 12581/13 situated at Athi River.

22. More importantly, the Ex-parte Applicant averred as follows:

*“30. This application does not invite the Honourable Court to adjudicate the merit of NET No. 21 of 2019 still pending inter-partes hearing; or any other matters including the continued pollution by the 2<sup>nd</sup> Interested Party which are matters actively pending before the National Assembly and the Respondent variously: but that there patently exist exceptional circumstances which in the interest of justice warrant invocation of the court’s authority.”*

23. When the Chamber Summons was placed before the court ex-parte, the court granted to the Ex-parte Applicant leave to apply to this court orders of certiorari to quash the order of the Tribunal made on 4<sup>th</sup> September, 2019 and any subsequent proceedings therefore in NET Appeal No. 21 of 2019.

24. In addition to the above order, this court directed that the leave granted to operate as a stay of the order made on 4<sup>th</sup> September, 2019 and any subsequent proceedings thereof in the said Appeal, pending the hearing of the substantive Application for Judicial Review. It is those two orders that the 2<sup>nd</sup> Interested Party is seeking to set aside.

25. It is trite that under Order 53 Rule 1(2) of the Civil Procedure Rules, an Application for leave for an Application for an order of mandamus, prohibition or certiorari is to be made ex-parte to a Judge in Chambers, and such leave may operate as a stay of the impugned order.

26. However, the order for leave to apply for Judicial Review orders of mandamus, certiorari or prohibition may be set aside by the court. In the case of *Republic vs. National Transport Services Authority Ex-parte Extra Solutions Limited (2017) eKLR*, Aburili J. held as follows:

***“42. That this court has jurisdiction to set aside leave and/or stay granted in Judicial Review proceedings or to review its own orders in Judicial Review proceedings is not in doubt.”***

27. In the case of *Republic vs. Communications Commission of Kenya & 2 others Ex-parte East Africa Television Network Limited (2001) eKLR 82*, the Court of Appeal held as follows:

***“Leave should be granted if, on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an Application by the Respondent under inherent jurisdiction of the court, to the Judge who granted leave to set it aside.”***

28. In the case of *Kenya Bus Services Ltd & Others Vs. Attorney General & Others (2005) 1 EA 111; (2005) 1 KLR 743*, it was held:

***“It is trite law that an ex-parte order can be set aside by the Judge who gave it or by any other Judge... if an order obtained in a constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy... where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or Statutes, the inherent powers stem from the character or the nature of the court itself. It is regarded as sufficiently empowered to do justice in all situations.”***

29. The main ground that the 2<sup>nd</sup> Interested Party’s Application is premised on for the setting aside of the ex-parte orders of 12<sup>th</sup> September, 2019 is that the issues being raised by the Ex-parte Applicant are pending before the National Environment Tribunal (NET) in NET Appeal No. 21 of 2019 and that the Judicial Review Application dated 12<sup>th</sup> September, 2019 has been brought to this court with unclean hands and is grounded on willful misrepresentation of facts and active concealment of material facts which misled the court in granting the ex-parte orders.

30. The orders that the Applicant has sought to impugn were made by the Tribunal on 4<sup>th</sup> September, 2019. The said orders were made after the Tribunal heard both the Ex-parte Applicant’s advocate and the 2<sup>nd</sup> Interested Party’s advocate in respect to the Applications dated 14<sup>th</sup> August, 2019 and 26<sup>th</sup> August, 2019. The orders read as follows:

***“1. That the Ruling on the Applications will be delivered on Notice.***

***2. That the parties are reminded of the full force and applicability of Section 124(9) (sic) of the Environmental Management and Co-ordination Act to this Appeal which reads as follows “upon any Appeal to the Tribunal under this Sections the status quo of any matter or activity which is subject of the Appeal shall be maintained until the Appeal is determined.”***

31. While moving this court for ex-parte orders, the Ex-parte Applicant not only annexed the impugned orders of 4<sup>th</sup> September, 2019, but also the Application dated 14<sup>th</sup> August, 2019 filed by the 2<sup>nd</sup> Interested Party; Notice of Appeal and Grounds of Appeal filed by the 2<sup>nd</sup> Interested Party in NET Appeal No. 21 of 2019; its Notice of Preliminary Objection dated 3<sup>rd</sup> September, 2019 and the orders of 27<sup>th</sup> September, 2018 which were made by Okwany J. in Nairobi HCCC No. 251 of 2017.

32. In the Application dated 14<sup>th</sup> August, 2019, the Interested Party/Appellant sought for an order for injunction stopping the Ex-parte Applicant herein from further constructions or developments currently being undertaken on L.R. No. 12581/13 pending the hearing of the Appeal.

33. In response to the Application, the Ex-parte Applicant herein filed a Notice of Preliminary Objection in which he argued that the Appeal is time barred, amongst other prayers. Although the Ex-parte Applicant has asserted that the Preliminary Objection dated 3<sup>rd</sup> September, 2019 should have been heard first, he admitted that the same was argued alongside or in opposition to the Notice of Motion dated 14<sup>th</sup> August, 2019.

34. As I have stated above, the issues raised in the Notice of Motion dated 14<sup>th</sup> August, 2019 and the Notice of Preliminary Objection of 3<sup>rd</sup> September, 2019 are pending Ruling, which Ruling was stayed by the ex-parte orders issued by this court.

35. The 2<sup>nd</sup> Interested Party herein has referred the court to another Application dated 5<sup>th</sup> September, 2019 filed by the Ex- parte Applicant

before the National Environment Tribunal (NET). In the said Application, the Ex-parte Applicant has sought for the following orders:

**a. That the Honourable Tribunal be and is hereby pleased to issue an order arresting or otherwise suspending the delivery of its Ruling, decision and/or determination on the Notice of Motion Applications by the Appellant dated 14<sup>th</sup> and 26<sup>th</sup> August, 2019 as well as the 2<sup>nd</sup> Respondent's Preliminary Objection dated 3<sup>rd</sup> September, 2019 pending the hearing and determination of this Application for Review inter-partes.**

**b. That the Honourable Tribunal be and is hereby pleased to make an order suspending its order, decision and/or determination that 'Section 129(4), Environment Management and Coordination Act applies in Tribunal Net No. 21 of 2019' pending inter-partes hearing and determination of the Application for Review herewith.**

**c. That the Honourable Tribunal be and is hereby pleased to affix the earliest possible inter-partes hearing date for the subject Application for Review and give directions on service thereto.**

**d. That the Honourable Tribunal be and is hereby pleased to issue an order reviewing and vacating the decision to deliver its Ruling, decision and/or determination on the Notice of Motion Applications by the Appellant dated 14<sup>th</sup> and 26<sup>th</sup> August, 2019 as well as the 2<sup>nd</sup> Respondent's Preliminary Objection dated 3<sup>rd</sup> September, 2019.**

**e. That the Honourable Tribunal be and is hereby pleased to make an order reviewing and consequently vacating its order, decision and/or determination that 'Section 129 (4), Environment Management and Coordination Act applies in Tribunal NET No. 21 of 2019.'**

**f. That the Honourable Tribunal be and is hereby pleased to make an order directing that the Preliminary Objection be served and responded to within timelines affixed by the Tribunal; and the said Preliminary Objection dated 3<sup>rd</sup> September, 2019 be heard in priority to any other matter on merit.**

36. The Ex-parte Applicant has challenged the orders of 4<sup>th</sup> September, 2019 by way of an Application dated 5<sup>th</sup> September, 2019. Although the said Application was certified as urgent by the Tribunal and slated for hearing on 23<sup>rd</sup> September, 2019, the Ex-parte Applicant filed the current Judicial Review Application on 12<sup>th</sup> September, 2019 and stayed all the proceedings before the Tribunal.

37. I have gone through the entire Chamber Summons that gave rise to the ex-parte orders of 12<sup>th</sup> September, 2019 and I have not come across an averment by the Ex-parte Applicant to the effect that the order of 14<sup>th</sup> August, 2019 that he is challenging is also subject to a pending Application for Review. That in my view is not only a material non-disclosure on the part of the Ex-parte Applicant while moving this court ex-parte, but also amounts to an abuse of the court process.

38. Considering that the Ex-parte Applicant has a pending Application dated 5<sup>th</sup> September, 2019 seeking to review the orders of the Tribunal of 14<sup>th</sup> August, 2019, leave to apply for orders of certiorari to quash the same orders of 14<sup>th</sup> August, 2019 should not have been issued in the first place.

39. Furthermore, all the issues raised in the current Judicial Review Application have been raised in NET in Appeal No. 21 of 2019, including the issue of the applicability of Section 129(4) of the Environmental Management and Co-ordination Act (EMCA) and the amendments thereto. In his Application dated 5<sup>th</sup> September, 2019, and filed in the Tribunal, the Ex-parte Applicant averred as follows;

**"17. The subject Section 129(4) EMCA Act had commenced and came into operation on 21<sup>st</sup> May, 2018 by virtue of Statute Law (Miscellaneous Amendments) Act No. 4 of 2018. In accordance with Section 22, Interpretation and General Provisions Act, the repealed Section 129 EMCA ceased to have any legal effect. However, the High Court through Constitutional Petition 268 of 2018, Katiba Institute vs. Attorney General and National Environment Management Authority (NEMA) has suspended the operationalization of Section 129(4), EMCA Act: with the legal effect of interlocutorily repealing the said provision.**

**18. As such in law no Section 129(4), EMCA is available for Application and/or observance in the instant Appeal, and, it would be gravely prejudicial to the 2<sup>nd</sup> Respondent to apply the suspended provision of law.**

**19. In any event Section 129(4) EMCA Act only preserves the right of an Applicant desirous of the grant of status quo orders, to move the Honourable Tribunal as appropriate for such orders, and which the Appellant appears to have done by way of its two (2) Applications dated 14<sup>th</sup> and 26<sup>th</sup> August, 2019."**

40. In any event, the order of 14<sup>th</sup> August, 2019 which the Ex-parte Applicant is seeking to quash was interim in nature. Considering that the Appellant in the Tribunal is seeking for injunctive orders pending the hearing of the Appeal, and in view of the fact that the Tribunal heard the Ex-parte Applicant on his Preliminary Objection, the Applicant should have awaited for the Ruling of the Tribunal before moving this court, either by way of Judicial Review or Appeal.

41. In the circumstances, it is my finding that the filing of the current Judicial Review Application, and the grant of ex-parte orders, has the effect of having parallel proceedings in this court and the National Environment Tribunal (NET). The ex-parte orders of 12<sup>th</sup> September, 2019 were given by the court on the basis of non-material disclosure by the Ex- parte Applicant. The same should therefore be set aside to allow the Tribunal perform its mandate as per the law.

42. For those reasons, I allow the Notice of Motion dated 18<sup>th</sup> September, 2019 as follows;

*a. The ex-parte orders granted by this court on 12<sup>th</sup> September, 2019 be and are hereby set aside in their entirety.*

*b. The Ex-parte Applicant to pay the costs of the Application dated 12<sup>th</sup> September, 2019.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF OCTOBER, 2019.**

**O. A. ANGOTE**

**JUDGE**