



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.....1ST INTERESTED PARTY

LONDON DISTILLERS (K) LTD.....2ND INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....4TH INTERESTED PARTY

THE HON. ATTORNEY GENERAL.....5TH INTERESTED PARTY

AND

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

RULING

1. In the Notice of Motion dated 11th October, 2019, the Ex-parte Applicant is seeking for the following orders:

a. That the Honourable Court 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 Application by the 2nd Interested Party dated 18th September, 2019 pending the hearing and determination of this Application inter-partes.

b. That the Honourable Court be and is hereby pleased to issue an order that in urging the Notice of Motion Application by the 2nd Interested Party dated 18th September, 2019, the Applicant therein had materially failed to disclose material facts: and include the representations herein particularly the letters dated 24th September, 2019 from the 2nd Interested Party and the letters dated 17th and 18th September, 2019 Mavoko Water and Sewerage Company (MAVWASCO) and the County Government of Machakos suspending and/or otherwise disconnecting the 2nd Interested Party's effluent discharge to the public sewer line.

c. That costs of this Application be in the cause.

2. The Application is premised on the grounds that on 12th 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 12th September, 2019.

3. In its Application dated 18th September, 2019 and filed on the same date, the 2nd 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 12th day of

September, 2019 pending the hearing and determination of the substantive Notice of Motion.

b. The 1st 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.

4. The Application dated 18th September, 2019 is premised on numerous grounds which are on the face of the Application and the Affidavit of the 2nd Interested Party's Environmental Advisor. According to the 2nd 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 16th August, 2016.

5. In his Affidavit, the Ex-parte Applicant's advocate deponed that the Ex-parte Applicant has since discovered new, important and compelling evidence that demonstrates that the 2nd Interested Party, via a letter dated 24th September, 2019, admitted to discharging untreated effluent into the public sewer line; that owing to the said discharge, vide letters dated 17th and 18th September, 2019, the County Government of Machakos and Mavoko Water and Sewerage Company (MAVWASCO) disconnected the 2nd Interested Party's effluent discharge to the public sewer line and that despite these material facts, the 2nd Interested Party failed to fully disclose the same to the court.

6. The Applicant's advocate deponed that the additional information which the Ex-parte Applicant has is material for the court in appreciating the provisions of Section 9(4) of the Fair Administrative Actions Act.

7. In his Replying Affidavit, the 2nd Interested Party's representative deponed that the Ex-parte Applicant is purporting to expand its territories and recalibrate its evidence by entertaining a different view of the matters in contestation by bringing before the court evidence which was not in its possession and which is irrelevant.

8. According to the 2nd Interested Party, the issue of disconnection of the 2nd Interested Party's distillery sewer line is now subject to Machakos Civil Case No. 104 of 2019 between the 2nd Interested Party and Mavoko Water and Sewerage Company, Machakos County Government and Erdemann Property Limited and also Machakos JR Application No. 48 of 2019: London Distillers (K) Limited vs. Export Processing Zones Authority.

9. The 2nd Interested Party's representative deponed that the letters being sought to be introduced are only relevant in the said two suits and that the instant Application is a tactic by the Ex-parte Applicant to delay the conclusion of the instant suit with a view of denying the 2nd Interested Party an opportunity to challenge the grant of an EIA License and construction of the Great Wall Gardens Housing Development Phase 3.

10. The Ex-parte Applicant's advocate submitted that Section 173 of the Evidence Act allows the court to receive additional documentation after a matter has been heard; that this court should consider the letters dated 27th September, 2019 and 24th September, 2019 before delivery of its Ruling and that the 2nd Interested Party was aware of the contestation between itself and Export Processing Zone.

11. The 2nd Interested Party's advocate submitted that the Ex-parte Applicant is engaged in the theater of the absurd; that the Applicant ran to this court to arrest the decision of the Tribunal and now want to arrest this court's Ruling and that this court cannot rely on the letters of 24th September, 2019 and 27th September, 2019.

12. Counsel submitted that the two letters do not address the issues before this court or the Tribunal; that the evidence they want to adduce was not available on the date the Notice of Motion dated 18th September, 2019 was filed and that the two letters have nothing to do with the Notice of Motion dated 18th September, 2019.

13. The Applicant in the current Application is seeking to arrest the Ruling in respect of the 2nd Interested Party's Application dated 18th September, 2019. According to the Applicant, while delivering its Ruling in respect of the Notice of Motion dated 18th September, 2019, this court should consider the letters dated 24th September, 2019 from the 2nd Interested Party and the letters dated 17th and 18th September, 2019 from Mavoko Water and Sewerage Company and the County Government of Machakos.

14. While arguing the Application, counsel has relied on the provisions of Section 173 of the Evidence Act. I have looked at Section 173 of the Evidence Act and have not seen its relevancy to the present Application.

15. The Application dated 18th September, 2019 is seeking for the following orders:

a. That this Honourable Court be pleased to discharge, vary and or set aside its decision/order issued on the 12th day of September, 2019 pending the hearing and determination of the substantive Notice of Motion.

b. The 1st 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.

16. The said Application was filed by the 2nd Interested Party on 18th September, 2019 under a Certificate of Urgency. The Ex-parte Applicant filed its Replying Affidavit on 24th September, 2019. The Application was argued on 24th September, 2019 whereafter the court reserved its Ruling for 18th October, 2019.

17. The Ex-parte Applicant wants this court to consider the letters dated 24th September, 2019, 27th September, 2019, 17th September, 2019 and 18th September, 2019 which were not before the court when the Application dated 18th September, 2019 was argued on 24th September, 2019.

18. It is common knowledge that parties can only rely on documents which are in their possession while arguing an Application. Furthermore, such documents should be relevant to issues at hand and be admissible. It is obvious that when the Application of 18th September, 2019 was filed and when the Ex-parte Applicant filed its Replying Affidavit on the morning of 24th September, 2019, the letters of 27th September, 2019 and 24th September, 2019 were not in existence. Consequently, it will be erroneous for this court to rely on those letters or even to allow them on record. On that ground alone, I decline the Applicant's invitation to rely on the letters dated 24th September, 2019 and 27th September, 2019 which were not in existence as at the time the pleadings closed.

19. The letter dated 17th September, 2019 was authored by the County Government of Machakos and is addressed to the 2nd Interested Party. The said letter is referenced "*Waste Water Analysis Report.*" The same is not copied to the Ex-parte Applicant at all.

20. It is not clear to this court how the Ex-parte Applicant obtained the said letters, and how the letter advances its case viz-a-viz the Notice of Motion dated 18th September, 2019. The same argument applies to the letter dated 18th September, 2019 which was authored by the Mavoko Water and Sewerage Company and addressed to the 2nd Interested Party.

21. Considering that the letters dated 17th and 18th September, 2019 were not authored or addressed to the Ex-parte Applicant, and in view of the fact that the contents of the said letters relate to other two disputes being Machakos ELC. No. 104 of 2019 and Machakos Judicial Review No. 48 of 2019, I decline to consider the contents of the said letters in my Ruling in respect to the Notice of Motion dated 18th September, 2019. Indeed, the said letters are not relevant at all to the issues raised in the Notice of Motion dated 18th September, 2019.

22. The Application dated 11th October, 2019 is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE