



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JR. APPLICATION NO. 92 OF 2016

SANLAM KENYA PLC.....1ST APPLICANT

(Formerly known as PAN AFRICA LIFE

ASSURANCE COMPANY LIMITED)

SEYANI BROTHERS & COMPANY LTD.....2ND APPLICANT

VERSUS

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

CHIEF MAGISTRATE, KIBERA LAW COURTS...2ND RESPONDENT

THE REGISTERED TRUSTEES OF

THE SISTERS OF MERCY (KENYA).....INTERESTED PARTY

JUDGMENT

1. This judicial review application was triggered by two decisions made by the National Environment Management Authority (**the 1st respondent**). The first decision was the issuance of an Improvement Notice (Order) dated 8/4/2016 requiring M/s Pan Africa Life Assurance Company Limited (now known as **SANLAM KENYA PLC**) requiring it to stop all construction works on Land Reference Number 1870/V/72 (**the suit property**) situated along Waiyaki Way, Westlands, Nairobi. The Notice was based on the grounds that: (i) the project proponent was undertaking construction works outside the hours specified in the EIA Licence; and (ii) the construction equipment was producing excessive noise. The second decision was the initiation of criminal proceedings against one Joseph Njonge on a charge of breaching conditions of a licence contrary to Section 45(2) (d) of the Environmental Impact Assessment and Audit Regulations 2003 as read with Section 144 of the Environmental Management and Co-ordination Act, No 5 of 2015 as amended. The criminal charge was preferred against the said Joseph Njonge on 19/4/2016. Aggrieved by the two decisions, Pan Africa Life Assurance Company Limited (**1st applicant**) together with its project contractor, Seyani Brothers & Company Limited (**2nd applicant**) sought and obtained leave to bring a substantive motion to quash the two decisions and terminate the criminal proceedings. On 9/5/2016, this court (Okongo J) granted leave and stayed the Improvement Notice (Order)

2. Pursuant to the leave granted on 9th May 2016, the exparte applicants brought a substantive Notice of Motion dated 18th May 2016 seeking the following orders:

a) **CERTIORARI to remove into the court for purposes of quashing the Improvement Notice (Order) dated 8th April 2016 issued by the NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA), the 1st respondent by which it stopped all construction works on ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 1870/V/72 being works undertaken by SEYANI BROTHERS & COMPANY LIMITED on behalf and for benefit of PANAFRICA LIFE ASSURANCE COMPANY LTD, the 1st respondent.**

b) **CERTIORARI to remove into the court for purposes of quashing the decision by National Environment Management Authority (NEMA) to institute and undertake criminal proceedings against SEYANI BROTHERS & COMPANY LIMITED, THE 2nd Applicant and its officer Joseph Njoroje at the Chief Magistrate Court, Kibera Law Courts in Criminal Case No. 1831 of 2016 (R-vs-Joseph Njoroje) for a charge disclosed as “Breaching conditions of a License contrary**

to Sections 45(2) (d) of the Environment Impact Assessment and Audit Regulation, 200 as read with Section 144 of the Environmental Management and Co-ordination Act, Number 5 of 2015 Amended “as contained in the cash bail receipt number 1131649 dated 8th April 2016 and issued at 2317 hours.

c) PROHIBITION directed at the NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) the 1st Respondent restraining it from interfering or stopping the applicants from carrying out construction works on ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 2870/V/72 in terms of the Improvement Notice(Order) dated 8th April 2016 and or issuing such other Improvement Notice (Order) that would unfairly and illegally interfere with the lawful user by way of construction works on ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER 2870/V/72.

The Applicants' Case

3. The applicants' case is that they were issued with NEMA EIA Licence Number NEMA/EIA/PSL/378 as varied by a Certificate of Variation Number NEMA/EIA/VC/134 to carry out development of an office block on LR No 1970/V/72 along Waiyaki Way, Nairobi. While undertaking construction works on 8th April 2016, officers from NEMA raided the construction site and served the contractors with an Improvement Notice (Order) which required the contractor to, among other things, stop all construction works on the site immediately.

4. The applicants contend that despite issuing a commitment letter to the effect that they would adhere to the conditions set out in the Improvement Notice (Order), NEMA maliciously refused to lift the enforcement order and proceeded to prefer criminal proceedings against the contractor and his staff. The applicants contend that the actions of NEMA are illegal, unfair and contrary to the provisions of the Fair Administrative Action Act. The applicants further contend that the contractor was not afforded a warning or an opportunity to show cause before the drastic decision to suspend the EIA Licence and charge the contractor's site manager was taken. They aver that the actions of the 1st respondent were not only *ultra vires* but also against the rules of natural justice. Consequently, they sought leave and subsequently brought a substantive motion to quash both the Improvement Notice and the prosecution.

The 1st Respondent's Case

5. Professor Geoffrey Wahungu, the Chief Executive Officer of the 1st respondent swore a replying affidavit on 28th June 2016 stating that the EIA Licence issued to the applicants was subject to general, construction, operational and other conditions and that the licence was subject to monitoring for compliance throughout the project cycle. He averred that the 1st interested party brought to his attention gross violations of the EIA Licence. Professor Wahungu averred that on 8th April 2006, its officers inspected the suit property at around 22.00 hours and found the contractor on site progressing with works in violation of Condition 2.12 of the EIA Licence issued to the applicants. He averred that the 1st respondent's decision to issue an Improvement Notice (Order) to stop the construction and prefer charges against the project site manager was proper and lawful as provided by the Environment Management & Coordination Act (EMCA) and the Environmental (Impact Assessment and Audit) Regulations 2003. The 1st respondent also contended that the present application is incompetent for want of jurisdiction.

The Interested Party's Case

6. Through grounds of opposition dated 23rd June 2016, the interested party contended that the applicants had not exhausted the right of appeal to the National Environment Tribunal (NET) as envisaged under **Section 129 of Environmental Management & Coordination Act (EMCA)** as well as **Section 9(2) of the Fair Administrative Action Act**. The interested party also averred that some of the grounds upon which the application was premised were not supported by the averments of facts in the verifying affidavits. The interested party urged that the court should act with restraint in dealing with administrative decisions taken by the 1st respondent in lawful exercise of its statutory power.

7. Sister Anne Itotia swore a replying affidavit on 23rd June 2016 on behalf of the interested party. She stated that the interested party was legitimately aggrieved by the development that despite several meetings with the applicants aimed at amicably resolving the gross abrogation of their right to a healthy environment, trespass and encroachment into their property, the applicants had persisted in violating their rights. She stated that the interested party had persistently worked in breach of the authorized hours and that the interested party's plea was for the applicants to comply with the conditions in the EIA Licence and cease trespassing or encroaching on their property.

8. The motion was canvassed through written submissions. Mr Steve Luseno, counsel for the applicant, in submissions dated 28th April 2017, relied on Article 47 of the Constitution and the case of **Paris Wambugu Nyaga v. Kenyatta University (2014) eKLR**. He argued that there was procedural impropriety on the part of the 1st respondent in the manner it issued and executed the Improvement Notice (Order) and arrest. Counsel submitted that there was no evidence that the Improvement Notice (order) was issued with the approval of the 1st respondents' Director General in consultation with the lead agency as required under Regulation 25 of the Noise Regulations and EMCA. Further, he submitted that the 1st respondent could not issue an Improvement Notice and charge the proponent simultaneously as provided under Regulation 25(2) of the Noise Regulations and Section 117(3)(g) of EMCA. Counsel also argued that the 1st respondent did not have an arrest warrant as required by Section 117(3)(h) of EMCA and reliance was placed on the case of **R v National Environment Management Authority & Another ex parte Philip Kisia & Another NRB JR No. 251 of 2011**.

9. The applicants submitted that despite complying with the Improvement Notice by attending the 1st respondent's office, issuing a commitment letter and apologizing to the interested party, the 1st respondent declined to lift the improvement notice and proceeded to pursue criminal proceedings against their site manager. The court was referred to the case of **R v Attorney General & Another v Ex parte Waswa & 2 Others (2005)1KLR 280** for the submission that there is a presumption that administrative powers conferred by an Act of Parliament will be exercised fairly. It was the applicant's submission that non-compliance with the conditions of an EIA licence is not automatically actionable as EMCA enjoins the 1st respondent to afford an opportunity to the proponents to remedy the breach. Counsel argued that the decision to arrest the applicants' site manager and institute criminal proceedings after issuance of an Improvement Notice (Order) was unfair.

10. Reference was made to **Section 4(3)(b)** of the Fair Administrative Action Act and the cases of **Msagha v Chief Justice & 7 Others, NRB HCMCA No. 1062 of 2004** and **Ernst & Young LLP v Capital Markets Authority & Another (2017) eKLR** for the submission that principles of natural justice must be upheld in the exercise of administrative powers. Counsel argued that the improvement notice was not served on the 1st applicant who was the project proponent and therefore, that the 1st applicant was not afforded an opportunity to make representations before the notice was issued. It was also submitted that the 2nd applicant's staff on site was not afforded an opportunity to explain why they were undertaking construction beyond the prescribed working hours. The applicants submitted that the contractor was constrained to work beyond the limits because it was undertaking construction of a tall column running between the ground floor and the 4th floor whose structural integrity would have been affected had it been abandoned midstream. The applicants submitted that denying them an opportunity to justify their actions rendered the 1st defendant's actions illegal and void *ab initio*. Reference was made to the case of **Onyango Oloo v Attorney General (1986-1989) EA 456** as cited in **R v Kenya School of Law & 2 Others Ex Parte Juliet Wanjiru Njoroge & 5 Others (2015) eKLR**.

11. According to the applicants, the 1st respondent's decision was taken with ulterior motive calculated to prejudice their rights. They contended that throughout the project, there were many unresolved disputes between the applicants and the interested party. The applicants relied on **Section 7(2)(e)** of the Fair Administrative Action Act and the case of **Kuria & 3 Others v Attorney General (2002) 2KLR69** and **Francis Matheka & 10 Others v. Director of Public Prosecutions & Another (2015) eKLR** for the submission that the court has power to prohibit continuation of criminal proceedings instituted for extraneous purposes.

12. Mr Chiuri, counsel for the interested party, filed written submissions dated 25th July 2017. He argued that the applicants had not exhausted the right of appeal to the National Environment Tribunal (NET) as stipulated under **Section 129(1)(E)** of EMCA and **Section 9(2)** of the Fair Administrative Action Act. He relied on the case of **R v National Environment Management Authority(2011) eKLR** where the court stated that where an alternative procedure is provided, judicial review is only available in exceptional circumstances. Counsel for the interested party submitted that the application before the court was premature because alternative remedies had not been exhausted.

13. The interested party conceded that judicial review proceedings were proper if restricted to the criminal proceedings. It was also submitted that the allegations in grounds (d) and (k) were mere allegations not substantiated in the verifying affidavits. Lastly, the court was urged to act with restraint when dealing with the administrative actions of the 1st respondent in lawful exercise of its statutory powers.

Issues and Determination

14. The court has considered the substantive motion, the statutory statement and the verifying affidavits. The court has also considered the parties' rival submissions, relevant legal framework and applicable jurisprudence. Five key issues fall for determination in this motion. The first issue is whether the present judicial review proceedings were initiated prematurely and in violation of the provisions of Section 129 of EMCA and Section 9 of the Fair Administrative Action Act. The second issue is whether the 1st respondent violated the applicants' right to be heard prior to the issuance of the Improvement Notice (Order). The third issue is whether the criminal proceedings initiated against the 2nd applicant's site manager, Joseph Njonge, were actuated by ulterior motives. The fourth issue is whether the applicants are entitled to the orders sought in the motion. The last issue is whether any of the parties should be condemned to bear costs of these proceedings. I will deal with the five issues in the order in which they are itemized.

15. The first issue is whether the present judicial review proceedings were initiated prematurely and in violation of the provisions of Section 129 of EMCA and Section 9 of the Fair Administrative Action Act. Section 125 of EMCA established the National Environment Tribunal (NET). The jurisdictional mandate of NET is spelt out in Section 129(1) and (2) of the Act which provides as follows:

(1) Any person who is aggrieved by-

a) the grant of licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

b) the imposition of any condition, limitation or restriction on the persons licensed under this Act or its regulations;

c) the revocation, suspension or variation of the person's licence under this Act or its regulations;

d) the imposition against the person of an environmental restoration order or environmental improvement order by the authority under this Act or its regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

16. It suffices to observe that, the issuance of an Improvement Notice a decision appealable to the National Environment Tribunal (NET) within the framework of Section 129 (1) of EMCA.

17. Secondly, it is to be noted that Section 9 (2) of the Fair Administrative Action Act bars this court against exercising judicial review jurisdiction unless available statutory appeal and review mechanisms have been exhausted. It provides thus:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

18. Reference to the 'High Court' in Section 9(2) of the Act is to be construed to conform with the constitutional architecture of the Judiciary in so far as it relates to the constitutional jurisdiction of the three superior courts of equal status. Secondly, it is to be noted that the Fair Administrative Action Act has fundamentally changed the character, scope and procedure of judicial review proceedings in Kenya. First, judicial review remedy is available only after available review and appeal mechanisms have been exhausted. Second, the courts do not have undefined discretion to *suo motto* grant exemption from the requirement to exhaust review and appeal mechanisms; the applicant must move the court and satisfy the **interest of justice** criteria set out in Section 9(4) of the Act before exemption is granted.

19. The present motion seeks a review of the Improvement Notice (Order) suspending further construction. The redress avenue provided in the law is an appeal to the National Environment Tribunal within the framework of Section 129(1) of EMCA. The applicants opted to ignore that appeal mechanism and instead came to this court. They did so without seeking exemption under Section 9 (4) of the Fair Administrative Action Act. In my view, in so far as the judicial review motion seeks to quash the Improvement Notice (Order) dated 8/4/2016, it is untenable because the applicants have not complied with the mandatory provisions of Section 9 (2) and (4) of the Fair Administrative Action Act.

20. There is sound rationale behind the requirement for exhaustion of appeal and review mechanisms. Firstly, there is need to ensure orderly functioning of agencies engaged in administrative and *quasi judicial* processes. Secondly, there is need to avoid turning judicial review proceedings into mechanisms for unnecessarily disrupting administrative and *quasi judicial* processes. Where the court is appropriately moved and the interest of justice criteria is satisfied, the court may properly grant an exemption under Section 9(4) of the Act. No exemption was sought in the present proceedings.

21. My finding on the first issue therefore is that, the present judicial review proceedings were initiated prematurely and in violation of the provisions of Section 129 of EMCA and Section 9(2) and (4) of the Fair Administrative Action Act in so far as they relate to the quashing of the Improvement Notice (Order) issued by the 1st respondent.

22. The second issue is whether the 1st respondent violated the applicants' right to be heard. The applicants contended that the Improvement Notice (Order) was not served upon the 1st applicant who is the project proponent under the EIA Licence. They argued that the 1st applicant was not afforded an opportunity to make representations before the Improvement Notice (Order) was issued.

23. I have carefully examined the material notice. It was issued pursuant to an inspection conducted on 8/4/2016 at 10.00 p.m. During the inspection, the 1st respondent found construction works in progress outside the working hours stipulated in the EIA Licence. Secondly, the construction equipment was emitting excessive noise. Consequently, the 1st respondent directed immediate stoppage of the works. Secondly, the 1st respondent required the 1st applicant to go to its offices on 16th Floor of Nyayo House at 1400 hours on 11/4/2016, accompanied with their legal advisor.

24. Condition No 2.12 of the EIA Licence provided as follows:

The proponent shall ensure that construction activities are undertaken during the day (and not at night) between 8.00hrs and 17.00hours, and that transportation of construction material to site are undertaken during week days (and not weekends) off peak hours

25. The applicants conceded that construction was ongoing at 10.00 pm. They justified the violation of the terms of the EIA Licence on the ground that they were erecting columns and that they were constrained to execute the works beyond the stipulated working hours to avoid compromising the structural integrity of the columns. They have not explained why they did not obtain prior authorization to execute the works outside the stipulated hours. In my view, in the absence of prior request and grant of prior authorization, the 1st respondent properly stopped further violation of the EIA Licence the terms of the EIA Licence. The action taken by the 1st respondent was neither arbitrary nor irrational. It was the duty of the applicants to obtain prior authorization. The contention that the applicants were denied a hearing prior to the stoppage is tantamount to contending that the 1st respondent should have stood by and watched as the violation continued. The court's finding on this issue is that there was no violation of the right to a hearing prior to the issuance of the Improvement Notice (Order) because the Notice was issued to arrest further violation of the terms of the EIA Licence

26. The third issue is whether the prosecution of Joseph Njonge, the 2nd respondent's site manager, was actuated by malice. The applicants have contended that the criminal proceedings against Joseph Njonge is vendetta against the 1st and 2nd applicants by the interested party, Registered Trustees Congregation of Sisters of Mercy - Kenya Province, who were owners of a neighbouring property.

27. Article 157(6) of the Constitution vests state prosecutorial powers in the Director of Public Prosecution (**the DPP**) and these powers are exercised by the DPP either in person or by subordinate officers acting in accordance with his instructions. Section 6 of the Office of the Director of Public Prosecutions Act enjoins the DPP not to be under the direction or control of any person or authority when exercising state prosecutorial powers.

28. Although the applicants contend that the prosecution of Mr Joseph Njonge was actuated by malice, no evidence has been tendered to support that allegation. Secondly, Mr Joseph Njonge is not a party to the present application. Similarly, the DPP who is the state prosecutor is not a respondent in the application. The court therefore finds no merit in the allegation that the prosecution of Joseph Njonge is actuated by malice.

29. The totality of the court's findings on the above three issues is that there is no merit in the applicants' plea for orders of certiorari and prohibition itemized in the Notice of Motion dated 18/5/2016. The application is accordingly dismissed for lack of merit.

30. Because the present litigation was triggered by an environmental governance instrument issued by the 1st respondent, and the resultant litigation bears public interest elements, I direct that each party bears own costs.

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JUNE 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Mwangi holding brief for Mr Luseno for the Applicant

Ms Sekami for the 1st Respondent

Mr. Musundi holding brief for Mr Chiuri for the Interested Party

Ms Halima Abdi - Court Clerk