



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

JUDICIAL REVIEW MISC. APPLICATION NO.2 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF

CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT

AND

IN THE MATTER OF THE DECISION OF THE RESPONDENT CONTAINED IN THE

LETTER DATED 29TH JANUARY, 2016

BETWEEN

REPUBLICAPPLICANT

VERSUS

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

AND

WEST KENYA SUGAR CO. LTD.....EXPARTE APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....1ST INTERESTED PARTY

SHABAN WANDERA.....2ND INTERESTED PARTY

RULING

1. The 2nd Interested party, **Shaban Wandera**, filed the notice of motion under certificate of urgency dated 19th February 2016 seeking for leave to be enjoined in the proceedings as an Interested Party, setting aside or suspending order 2 of the orders of 12th February 2016, and costs. The application is

based on the eight grounds on the face of the notice of motion and supported by the affidavit of **Shaban Wandera**, sworn on 19th February 2016.

2. The application is opposed by the Exparte Applicant, **West Kenya Sugar Company Limited**, through the grounds of opposition dated 29th February 2016 and filed through their advocates.

3. The notice of motion was placed before the court exparte on the 22nd February 2016 when it was satisfied urgent in terms of prayer 1, and directions on service given. The interpartes hearing date of 29th February 2016 was set. On the 29th February 2016, Mr Madowo, Olendo and Mr Mutai for the then intended Interested Party, the Exparte Applicant and Respondent respectively addressed the court. The court granted prayer 2 of the application enjoining the Interested Party in the proceedings. The court also gave further directions and adjourned the hearing to 16th March 2016. That on that date, Mr Olendo and Mr Madowo for the Exparte Applicant and Interested Party respectively addressed the court on whether or not to allow the Exparte Applicant's counsel's application to have their preliminary objection dated and filed the same day, the 16th March 2016, be heard first. M/S Langat for the Respondent indicated that the application coming up for hearing did not involve her clients. The court directed that the application dated 19th February 2016, and the Preliminary objection under notice dated 16th March 2016, be heard together and are subject matter of this ruling.

4. The notice of preliminary objection dated 16th March 2016 by the Exparte Applicant raises three grounds which can be summarized into two as follows:

a) That prayer 2 (on enjoining the Interested Party in these proceedings) having been allowed, then the entire application has been spent as prayer 3 and 4 were meant to be for the period between the hearing and determination of this suit.

b) That the application lacks merit and is otherwise an abuse of the process of the court.

5. Mr Madowo and Mr Olendo for the Interested Party and Exparte Applicant respectively, made their verbal submissions on the 16th March 2016 and are as summarized hereinbelow:

a) **Interested Party Counsel's Submissions:**

The learned counsel submitted that while he had no quarrel with the leave granted to file the substantive application on 10th February 2016, the order that the leave so granted to operate as stay of the letter dated 29th January 2016 was erroneous. That the letter of 29th January 2016 was not an administrative decision amenable to judicial review but an administrative communication pursuant to **Section 129(1) of EMCA**. The learned counsel referred to the decision of **Republic -V- National Environment Tribunal Exparte National Housing Corporation [2012] eKLR, Busia H.C MISC. App. No.84 of 2015, Republic -V- National Envelopment Tribunal & 2 Others Exparte Applicant Busia Sugar Industry and African Polysack limited**, where the court held that letter similar to the one in this case was merely informative and not amenable to judicial review. The learned counsel submitted that the Tribunal Appeal case number **Net/169/2016** was still pending and gave a copy of a mention notice dated 14th March 2016 and 1st respondent's grounds of preliminary objection dated 23rd February 2016 as proof. The counsel submitted that where alternative reliefs are available, then the parties should pursue them instead of initiating constitutional petitions. The counsel referred to this court's decision in **Gabriel Olong Oriwo & Another -V- Augustino Omwanda & Another [2015] eKLR**. He further submitted that the Exparte Applicant should pursue the appeal number **169 of 2016** instead of filing this application as it was subjudice. Finally, the leaned counsel submitted that the preliminary objection should be disregarded as the court had given directions on the 29th February 2016 on how the application was to be heard. He submitted that the prayers in their application are not spent and their application should be allowed with costs and be awarded punitive damages.

b) **The Exparte Applicant counsel's Submissions:**

That prayers 3 and 4 of the application dated 19th February 2016 were to be useful if given in the

interim, but as prayer 2 has been granted, then they would serve no purpose even if granted at this stage. That this court has power to supervise the subordinate court's and Tribunals and therefore their application is not subjudice. The learned counsel submitted that the letter of 29th January 2016, subject matter of these proceedings, was issued in excess of the Tribunal's powers as it was similar to a works stop order and the leave granted to the Exparte Applicant should not be denied through the current application.

That the stay orders of 10th February 2016 cannot be stayed as sought by the Interested Party and asked that the application be dismissed with costs and the Preliminary objection upheld with costs.

6. The issues for determination in respect of prayer 3 and 4 of the application dated 19th February 2016 and the notice of Preliminary objection dated 16th March 2016 are as follows:

- a) Whether the letter by the National Environment Tribunal dated 29th January 2016 contains an administrative decision or a communication of statutory edict.
- b) Whether the letter of 29th January 2016 is amenable to judicial review.
- c) Whether the prayers in the application are all spent and if so whether the preliminary objection should be upheld.
- d) Who pays the costs.

7. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by the 2nd Interested Party, the grounds on the notice of preliminary objection, the rival submissions by both counsel and come to the following determinations;

a) That the Exparte Applicant approached the court through the chamber summons under certificate of urgency dated 10th February 2016, brought under **Order 53 Rule 1(2) of the Civil Procedure Rules**, seeking for leave to apply for an order of certiorari to call into this court and quash the letter dated 29th January 2016 and that the leave so granted do operate as stay. That the court granted the leave and directed that the substantive application be filed within 21 days. That the court also granted the prayer that the leave do operate as stay. That the court was entitled to make the orders it did on 10th February 2016 on the basis of the facts availed and was within its powers under **Order 53 of Civil Procedure Rules**.

b) That the 2nd interested party then filed the notice of motion dated 19th February 2016, through which he has been enjoined as a party in these proceedings. That the prayers remaining determination are prayers 3, 4 and 6 and it is upon them that the Exparte Applicant has raised a preliminary objection on the basis that they are already spent, have been overtaken by events and are an abuse of the process of the court. The said prayers are as reproduced hereinbelow;

" 3. That pending interpartes hearing of this application, the orders of the court dated 12th February 2016 be set aside, varied and discharged all together.

4. That in the alternative, this Honorable court suspends the contents of order number 2 in the court order dated 12th February 2016 and orders that the status quo prior to the issuance of such orders be maintained pending the hearing and determination of this application.

6. That the Respondents bear the costs of this application."

That the court agrees with the submissions of the Exparte Applicants counsel's in support of their preliminary objection that prayers 3 and 4 are phrased in a way that they would get spent upon the **"hearing and determination of this application."** The two prayers are not phrased in a way that would have allowed them outlive this application. The 2nd Interested Party should have probably phrased them to be dependent upon the hearing and determination of the substantive application for certiorari

orders. To that effect therefore, the court upholds the Exparte Applicant's preliminary objection that prayers 3 ad 4 will remain spent upon this ruling being delivered. The same fate will befall prayer 6 as the court will pronounce itself on the issue of costs in this ruling.

c) That though prayers 1, 3, 4 and 6 will be spent upon this ruling being delivered, the leave granted to enjoin the Interested Party in terms of prayer 2 will not be affected by this ruling and the party will have the right, like any other party herein, to continue participating in these proceedings, including the substantive application as an interested party.

d) That notwithstanding the findings in (b) and (c) above, this court cannot place down its pen of justice without addressing itself on the fate of the exparte Orders issued on 10th February 2016 which prompted the 2nd Interested Party to file the notice of motion dated 19th February 2016. The Exparte orders were premised on what the Exparte Applicant called an administrative order contained in the letter dated 29th January 2016 by National Environment Tribunal in excess of its powers. The counsel for the 2nd Interested Party differed contending that the letter was only a communication based on a statutory provision of **Section 129 (4) of EMCA**. The provision states as follows:

129 (4)." 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".

The letter of 29th January 2016 at paragraph 2 stated as follows:

" TAKE FURTHER NOTICE that Section 129 (4) of EMCA states that " Upon any appeal to the Tribunal under this Section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined".

The letter continued at Paragraph 3 as follows;

"The purpose of this letter therefore, is to direct that all activities relating to the appeal in question MUST be stopped until this appeal is heard and determined by the Tribunal".

The contents of paragraph 3 of the said letter is merely a restatement of the contents of **Section 129(4) of EMCA** and not an administrative order independent of the statutory provision.

e) That the superior court have dealt with with similar questions in other cases and come to the position that the National Environment Tribunal letters communicating of the position of **Section 129 (4) of EMCA**, once an appeal has been filed, is not an administrative decision and hence not amenable to judicial review. In the Busia H.C. MISC. Application No.84 of 2015, **Republic -V- National Environment Tribunal & 2 others Exparte Busia Sugar Ltd & Another**, the court held as follows;

" ...That the letter was an administrative communication on behalf of the Tribunal in terms of Section 129(4) of the EMCA

which as a matter of course demands stoppage of activities relating to the subject matter of the appeal filed. The letter is therefore not amenable to judicial review."

In another case dealing with a similar issue in **Republic -V- National Environment Tribunal Ex parte National Housing Corporation** [2012} eKLR, the court held as follows:

" The letter in my view was purely, informative. It was telling the Applicant that an appeal had been filed and as per Section 129(4) EM & CA, the status quo prevailing at the time the appeal was filed was to be maintained. It would not have served any purpose if the Respondent was to hear the appeal as the construction continued. If indeed the 2nd interested Party had raised environmental matters in its appeal, then the construction had to stop so

that for the environmental degradation could be averted."

f) That in view of the finding in (d) and (e) that the letter dated 29th January 2016 was not amenable to judicial review, it follows that the ex parte orders of 10th February 2016 granting the Ex parte Applicant leave to file the substantive application for judicial review orders of certiorari and stay of the letter dated 29th January 2016 cannot be allowed to remain in force. It was granted in error following the misrepresentation and or non disclosure by the Ex parte Applicant. This court dealt with similar matter in the **Busia HC Misc. App.No.84 of 2015 Republic -V- National Environment Tribunal & 2 Others Ex parte Busia Sugar Limited & Another** where it came to a similar finding and vacated the ex parte orders. As in that case the court on its own motion vacates the ex parte orders of the 10th February 2016. This will allow the parties to pursue their interests through the Tribunal appeal that is pending.

g) That following the order in (f) above the substantive application dated 10th March 2016, and filed pursuant to the orders of 10th February 2016 which have been vacated, has no foundation to stand on. It stands struck out for avoidance of doubts.

h) That due to the nature of these proceedings and the fact that the 2nd Interested Party is the one who moved the court to be enjoined, the court will deviate from the usual practice where costs follow the events. Each party will bear their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF MAY 2016

In presence of;

Ex parte Applicant Absent

Respondent Absent

1st Interested Party absent

2nd Interested Party absent

Counsel Mr Olando for Ex parte Applicant

Mr Madowo for 2nd Interested Party

M/s Onsongo for Nyauma for the A/G

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016

18/5/2016

S.M. KIBUNJA j

Oyugi court Assistant

Mr Olendo for Exparte Applicant

Mr Madowa for the 2nd interested party

M/S Onsongo for Nyauma for the A/G

Court: The ruling delivered in open court in presence of Mr Olendo for Exarte Applicant, Mr Madowo for 2nd interested party and M/s Onsongo for Nyauma for the A/G.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016