



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC MISC.PPL NO.3 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF  
CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION  
ACT**

**AND**

**IN THE MATTER OF THE CRIMINAL PROCEEDINGS IN NDHIWA SRMCR NO.309 OF  
2015, REPUBLIC –V- SAJALENDU MAITI**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**SENIOR RESIDENT MAGISTRATE’S COURT NDHIWA .....1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ....2<sup>ND</sup> RESPONDENT**

**AND**

**SAJALENDU MAITI.....EXPARTE APPLICANT**

**JUDGMENT**

1. **Sajalendu Maiti**, the Exparte Applicant, through the notice of motion dated 10<sup>th</sup> March 2016 seeks for an order of centiorari to bring to this court and quash all the proceedings in Ndhiwa Senior Resident Magistrate Court Criminal case number **309 of 2015, Republic through National Environmental Management Authority –V- Sajalendu Maiti**. The Exparte Applicant also prays for an order of prohibition restraining the Senior Resident Magistrate’s Court Ndhiwa and National Environmental Management Authority, the 1<sup>st</sup> 2<sup>nd</sup> Respondent respectively, from proceeding with the hearing of Ndhiwa Senior Resident Magistrate’s Court Criminal case number 309 of 2015, Republic through National Environmental Management authority –V- Salajandu Maiti and costs. The notice of motion is based on the following grounds:

“ a) The 2<sup>nd</sup> Respondent’s actions of charging the Ex parte Applicant with the offences of failing to comply with a lawful order namely restoration order made on 29<sup>th</sup> April 2015 by Environmental Inspector Mr. John Maniafu is illegal and null and void ab initio, inter-alia because:-

i. That on 19<sup>th</sup> March, 2015 a group calling itself Homabay Integrity on Environment Degradation lodged a complaint with NEMA head office in Nairobi against Sukari Industries Ltd, which was received as new sewage incident of level A – major.

ii. That on 21<sup>st</sup> March, 2015 County Director of NEMA Homabay County investigated the complaint and or incident and made a report where he found out that apart from minor incident which he recommended improvement was the entire complaint was exaggerated to be classified as class A for personal and political interest. He further recommended that a comprehensive environmental audit should be carried out by NEMA to address all the issues.

iii. That before a comprehensive environmental audit had been carried out, the county director of NEMA Mr. John Maniafu under the influence of members of Homabay Integrity (same people he had accused of exaggerating the earlier complaints for personal and political reason in his report dated 21<sup>st</sup> March, 2015) issued a letter containing various orders directed to Sukari Industries Ltd inter-alia to

- Stop operating of the factory.
- Stop illegal dumping of filter mud waste (organic fertilizer) outside undesignated area within settled and unsettled areas causing injuries to members of the public.
- Restore the environmental in areas where they had ILLEGALLY DUMPED waste.
- Compensate all affected persons who were burnt and affected by the waste illegally dumped outside undesignated areas outside the factory within 14 days.

iv. That subsequent to the restoration order issued on 29<sup>th</sup> April 2015 by the County Director of NEMA Homabay, the Director General of NEMA issued another order on the 4<sup>th</sup> May, 2015 directed to the General Manager of Sukari Industries Ltd substituting the orders of 29<sup>th</sup> April, 2015, technically the orders of 4<sup>th</sup> May, 2015 superseded and or replaced the orders of 29<sup>th</sup> April, 2015 and therefore the orders of 29<sup>th</sup> April, 2015 were not in force and or existed with the effect that they could not be disobeyed and or there was no legal repercussion for non compliance as purported by NEMA in criminal case number Ndhiwa SRM CR.no.309 OF 2015.

v. That letter dated 4<sup>th</sup> May, 2015 further instructed the General Manager to show cause why legal action should not be taken for illegal dumping of waste in undesignated areas.

vi. That the Ex parte Applicant did respond to said show cause letter vide a letter dated 4<sup>th</sup> May, 2016 refuting claims of illegal dumping of waste (filter cake) in undesignated areas and offered an explanation clarifying the issue that what was being described as hazardous waste was actually a byproduct from the processing of sugar which was being supplied as organic fertilizers to farmers on their request, and it was a common practice in the sugar belt region. The further stated that in the processing of sugar there are no chemicals used and therefore the all the byproducts (waste) are organic and would not be hazardous in any way.

vii. That in Sukari’s response they did refuse to compensate the alleged victims because no liability had been proved against them and or the liability over the supplied filter cake had passed to the farm owners who had been supplied with the filter cake and or mud upon request and or the alleged victims had not proved that they had actually been burnt by the filter cake/mud.

viii. That further to the foregoing and in view of Sukari’s response NEMA sent an

environmental inspector Mr Mwangi on 30<sup>th</sup> June, 2015 who inspected the facility and investigated the issues raised and gave a report which affirmed the position taken Sukari in their response of 4<sup>th</sup> May, 2015 that there was no illegal dumping as the filter cake was being supplied on request by farmer and he made a reference to a register of the request.

ix. That subsequent to his findings the Inspector issued new orders that Sukari should apply for a composing license for filter cake site. This orders replaced the initial orders of 4<sup>th</sup> May, 2015. In the new order issued on 30<sup>th</sup> June 2015 there was no direction for restoration of the environment.

x. That vide a letter dated 21<sup>st</sup> July, 2015 NEMA requested to do an inter agency site visit on 24<sup>th</sup> July, 2015, a visit which was carried out on the set date and a meeting held thereafter between NEMA officials and Sukari Industries officials where raft of recommendations were agreed upon to be undertaken to address certain environmental concerns.

xi. That after the meeting Sukari waited for the agreed recommendation which had been reached between the parties to be officially communicated but no official communication was sent to Sukari by NEMA.

xii. That Sukari decided to write a letter to NEMA on the 10 & 11<sup>th</sup> August, 2015 giving update on the progress made in the implementation of the recommendations which had been agreed in the meeting of 24<sup>th</sup> July, 2015.

xiii. That NEMA did not respond to said letter however Sukari Industries did receive a letter from County Director of NEMA Homabay dated 6<sup>th</sup> August, 2015 requiring documents regarding the disposal of oil waste.

xiv. That Sukari Industries vide a letter dated 13<sup>th</sup> august, 2015 did respond to NEMA'S letter dated 6<sup>th</sup> august, 2015 by forwarding all the required documents requested by NEMA.

xv. That on 30<sup>th</sup> July, 2015 the County Director of NEMA Homabay County in the company of police officers from Ndhiwa police station stopped an empty tractor registration number KAU 278 G along Ndhiwa – Riat road, belonging to Sukari industries and arrested the driver & 3 other people on board on an allegation that they were transporting factory waste from the Sukari industries without a valid license. However at the time of arrest there the tractor was empty and no factory waste was being transported.

xvi. That the said employees of Sukari Industries were charged in Ndhiwa Law Court in case number Ndhiwa SRM CR.No.292 of 2015 with the offence of transporting waste without a valid waste transport license contrary to Section 87 (2) (a) of the EMCA Act.

xvii. That on 13<sup>th</sup> august, 2015 a representative of Sukari Industries Ltd was served with summons requiring Sajalendu Maiti to attend court on 16<sup>th</sup> September, 2015 to answer to criminal charges for failing to comply to lawful order issued by NEMA on 29<sup>th</sup> April, 2015.

xviii. That on the 16<sup>th</sup> September, 2015 the accused was indisposed and could not make it to court and the matter was adjourned to 11<sup>th</sup> November, 2015 and the 2<sup>nd</sup> Respondent ordered to supply the accused with all prosecution supporting documents.

xix. The Respondent also maliciously applied for summons to be issued also to all the directors of Sukari Industries Ltd over same cause of action despite them not being incharge of day to day running of the company.

xx. That to-date the 2<sup>nd</sup> Respondent in total disregard to the court order of 16<sup>th</sup> September, 2015 has never been supplied the Ex parte Applicant with the prosecution supporting documents.

xxi. That the Ex parte Applicant was able to get an alleged minutes of the meeting held 24<sup>th</sup> July, 2015 between NEMA and Sukari industries officials during the hearing of Ndiwa SRMCR NO.292 of 2015 where some of Sukari Industries had been charged by the 2<sup>nd</sup> Respondent.

xxii. That in those minutes dated 27<sup>th</sup> July, 2015 the 2<sup>nd</sup> Respondent concluded that due to public interest they needed to charge Sukari Industries Ltd with a pre-determined offences as they did to Sukari driver on 30<sup>th</sup> July, 2015 and not because they had been found committing any offence.

xxiii. Likewise the decision to charge the Ex parte hearing was because the 2<sup>nd</sup> Respondent was playing to the public gallery due to some undue influence as was captured in the County Director's Report of 21<sup>st</sup> March, 2015 despite the parties having reached some consensus that were being implemented by the Sukari Industries Ltd.

b) The criminal proceedings in Ndiwa SRMCR No.309 of 2015 have no statutory basis for being ultra vires provisions of the Environmental Management and Coordination Act because:-

i. The charges against the Ex parte applicant are not based on violation of any order or law but have been brought to further certain personal and political interest like for those who are trying to get compensation from the Sukari Industries without proving liability first.

c) The charges and criminal proceedings in Ndiwa SRMCR No.309 of 2015 is unreasonable, discriminatory and constitutes abuse of power, inter-alia, because:-

i. The 2<sup>nd</sup> Respondent is enjoined to satisfy itself that charges preferred against the Ex parte Applicant are based on violation of existing and or orders which are in force and not orders which had been substituted like in the present case.

ii. That the preferred charges and criminal proceedings are not intended to achieve ulterior motives of coercing the ex parte Applicant to compensate the alleged burn victims as listed in their stop order without proving liability and or the proceedings of this criminal proceedings to be used as a confirmation of liability to further the interest of the alleged victims in the various civil suits which have been filed against Sukari Industries Ltd but without enjoining the land owners.

iii. There has been full compliance with the agreed recommendation of 24<sup>th</sup> July, 2015 as the 2<sup>nd</sup> Respondent has issued Sukari Industries Ltd with all the necessary licenses as required by law.

d) The applicant avers that in charging the Ex-parte applicant and or the criminal, proceedings the 2<sup>nd</sup> Respondent breached the Applicant's legitimate expectation in the following ways:-

i. The Applicant expected that the 2<sup>nd</sup> Respondent would act within its powers under the Environmental Management & Coordination Act and Delegations made thereunder.

e) The decision of the 2<sup>nd</sup> Respondent to charge and prosecute the Ex parte Applicant in Ndiwa SRMCR No.309 of 2015 was made in contravention of its duties under Articles 10 and 47 of the constitution in that:

i. By dint of Article 10 of Constitution, the Respondent was enjoined to enforce the Rule of Law fairly and observe equity and non discrimination by applying the relevant legal provisions which it failed to do.

ii. Under Article 47 of the constitution the Respondent was enjoined to ensure that the contractual and commercial interests of the applicant protected by Article 40 of the Constitution would not be compromised or otherwise curtailed by discriminatory and inconsistent application of the law.

f) Cumulatively the decisions and actions of the Respondent are actuated by gross abuse of power and intentional disregard of the law that should be remedied forthwith through the grant of the relief sought by the applicant.”

2. The notice of motion is opposed by the 2<sup>nd</sup> Respondent, National Environment Management Authority, through the replying affidavit sworn by **Zephania Ouma**, the deputy director in charge of environmental compliance sworn on 1<sup>st</sup> April 2016 in which he depones as follows, among others;

a) That the 2<sup>nd</sup> Respondent is clothed by the constitution and the Law with responsibility of safeguarding the right to a clean and healthy environment for all Kenyans.

b) That the Ex parte Applicant had been served with a statutory restoration order dated 29<sup>th</sup> April 2015 before being charged in Ndiwa Criminal case number 309 of 2015.

c) That the Ex parte Applicant is yet to take a plea as he has not presented himself to the court and that the 2<sup>nd</sup> Respondent should be allowed to perform its statutory duties without fetters.

3. That earlier on the 23<sup>rd</sup> February 2016, the Ex parte Applicant had approached the court ex parte through the chamber summons of the same date and obtained leave to file and serve the notice of motion in 21 days. The court had further directed that the chamber summons be served for hearing on prayer 2 (b) of stay on 9<sup>th</sup> March 2016. That on the 9<sup>th</sup> March 2016, Mr. Olendo for the Ex parte Applicant and M/S Oluoch for Gitonga for the 2<sup>nd</sup> Respondent entered a consent that prayer 2 (b) be granted for leave to operate as stay pending the filing and determination of the notice of motion to be filed and that costs abide the outcome of the said substantive application.

4. That counsel for the Ex parte Applicant and the 2<sup>nd</sup> Respondent entered a further consent on 31<sup>st</sup> May 2016 that the notice of motion be dealt with through written submission to be filed and served in 14 days starting with the Ex parte Applicant and then the 2<sup>nd</sup> Respondent. That on 28<sup>th</sup> July 2016, the counsel for the Ex parte Applicant indicated that they were to file their written submission on that date. That a ruling date was set on that understanding but to date no counsel has filed any submissions.

5. The following are the issues for determination;

a) Whether the Ex parte Applicant has established reasonable ground for issuance of the certiorari and or prohibition orders sought.

b) Who pays the costs.

6. The court has carefully considered the grounds on the notice of motion, the statement of facts, affidavit verifying statement of facts, the supporting and replying affidavits and concluded as follows:

a) That the provisions of **Article 70 of the Constitution 2010** on enforcement of environmental rights allows any person, even without demonstrating that any person has suffered loss or injury, to move the court for redress where one alleges that a right to a clean and healthy environment recognized and protected under **Article 42 of the Constitution** “has been, is being or likely to

be denied, violated, infringed or threatened. Article 42 of the Constitution provides as follows:

- “42. *Every person has the right to a clean and healthy environment which includes the right -*
- a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and*
  - b) to have obligations relating to the environment fulfilled under Article 70.”*

That in view of the foregoing provision and noting that the 2<sup>nd</sup> Respondent is the legal body charged with the responsibility of ensuring that legal action is taken against those found fouling the environment among other duties, Homa Bay Integrity’s complaint through their letter to the 2<sup>nd</sup> Respondent dated 17<sup>th</sup> March 2015 cannot be faulted, or termed to amount to undue political influence on the 2<sup>nd</sup> Respondent.

b) That the act of the 2<sup>nd</sup> Respondent to commence investigation, issue the restoration order of 29<sup>th</sup> April 2015 and the lodging of criminal charges against the Exparte Applicant was within its mandate. That the court further find that the Exparte applicant has failed to show any failure of integrity in the process followed by 2<sup>nd</sup> Respondent, or that the action taken thereof was unreasonable, discriminatory, driven by ulterior motive or is in disregard of the law.

c) That the Exparte Applicant has failed to show that the decision to charge him was actuated by malice or that he is not likely to get a fair hearing in the criminal trial, or that it amounts to an abuse of power by the 2<sup>nd</sup> Respondent.

d) That the fact that the documents ordered to be supplied to the Exparte Applicant in the criminal case on 16<sup>th</sup> September 2015 have not been received does not on its own warrant the quashing of the criminal proceedings as appropriate orders may be obtained from the trial court to ensure compliance.

7. That in view of the foregoing the notice of motion dated 10<sup>th</sup> March 2016 by the Exparte Applicant is found to be without merit and is dismissed with costs to the 2<sup>nd</sup> Respondent. The stay orders in relation to Ndhiwa SRM criminal case No.309 of 2015, issued by consent on 9<sup>th</sup> March 2016, is hereby vacated. The Deputy Registrar to ensure a copy of this order is extracted and served on the Magistrate, in charge, Ndhiwa Law Courts for information and further necessary action.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF NOVEMBER 2016

In presence of;

Exparte Applicant                      Absent

Respondents                              Absent

Counsel                                      Mr Onyango for Orlando for Exparte Applicant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**16/11/2016**

16/11/2016

S.M. Kibunja judge

Oyugi court assistant

Parties absent

Mr Onyango for Oland for Exparte Applicant

Ourt: Ruling dated and delivered in open court in presence of Mr. Onyango for Olando for the Exparte Applicant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**16/11/2016**