



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

REPUBLICAPPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE’S COURT NDHIWA1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ...2ND RESPONDENT

AND

SAJALENDU MAITI.....EXPARTE BETWEEN APPLICANT

RULING

1. The Exparte Applicant, **Sajalendu Maiti**, moved the court through the notice of motion, under certificate of urgency dated 16th November 2016 under **Order 45 Rule 1** of the Civil Procedure Rules, **section 3A** of the Civil Procedure Act **Chapter 21** of Laws of Kenya, seeking for the following orders;

a. That the application be certified urgent.

b. That a stay of execution of the order of the court dated the 16th November 2016 be issued pending the hearing and determination of the application.

- c. That interim order of stay in terms of the prayer above be issued ex parte.
- d. That the judgment entered herein against the Ex parte Applicant on the 16th November 2016 be reviewed and or set aside unconditionally.
- e. That upon granting the order above, leave be granted for the Ex parte Applicant to file and highlight his submission.
- f. The costs be provided for.

2. The application is based on the six grounds on its face and is supported by the two affidavits sworn by the Ex parte Applicant on the 16th November 2016 and 24th November 2016 summarized as follows:

- a. That the Ex parte Applicant failed to file his written submissions in time to be considered in the judgment due to the confusion in the registry as this matter had been running on two files, that is, ELC Misc. App. No.3 and 4 of 2016.
- b. That the submissions were eventually filed on 8th November 2016 but were not placed on the file as it was with the judge in chambers for the preparation of the judgment.
- c. That the issue on which the files was to be the lead file was sorted onto by the Deputy Registrar on the 27th July 2016 which was also the day the submissions were to be filed.
- d. That the ex parte Applicant's counsel based in Kakamega sent the submission through email to his partner in Kisumu to file in the court registry but the file was not traced.
- e. That the delay in filing the submission was not deliberate but due to confusion.
- f. That some annexures to the notice of motion dated 10th March 2016, that is the subject matter of the judgment of 16th November 2016, were inadvertently left out.
- g. That THE Ex parte Applicant's advocate discovered that the said documents had been left out after the judgment of 16th November 2016 had been delivered.
- h. That had the court considered the said documents, it could have arrived at a finding that would have been in favour of the Ex parte Applicant as the EIA licence had been issued on 30th October 2015 following the completion of the process that had been undertaken on recommendation of NEMA on 30th June 2015.

3. The provision of **Order 45 rule 1** of Civil Procedure Rules provides for review of a decree or order as follows;

“45 (I) (I) Any person considering himself aggrieved

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of a new and important matter of evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The Exparte Applicant also cited **Section 3A** of Civil Procedure Act hence invoking the court's inherent powers "..... to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the court."

4. The issues for determination are as follows:

- a. Whether the Exparte applicant has made a reasonable case for review of the judgment of 16th November 2016 in accordance with **Order 45 Rule 1** of Civil Procedure Rules.
- b. What orders to issue.
- c. Who pays the costs.

5. The notice of motion dated 16th November 2016 was placed before the Deputy Registrar on the same date and then before the court on the 17th November 2016 when directions on service were given. The court also directed the matter be mentioned on 24th November 2016 for further directions. On the 24th November 2016, the court issued interim orders in terms of prayer 2 on being satisfied that service had been effected. The court then directed that the notice of motion be heard on the 1st December 2016. On the hearing date, the court allowed the Exparte Applicant to prosecute the application in the absence of the Respondents on being satisfied that they had been served and had not filed any replying papers as required **Order 51 Rule 14** of Civil Procedure Rules.

6. The Exparte Applicant's counsel submissions are as summarized herein below;

- a. That the main basis of the application was the documents that had been omitted in the initial application that would have enabled the court to see that the notice of 29th April 2015 had been complied with and could not therefore be the basis of a criminal prosecution.
- b. That the fact that the Respondent had issued the Exparte Applicant with an E.I A. license on 30th October 2015 was on fulfilling all the orders of 29th April 2015 as confirmed by the Respondent's letter dated 11th August 2015.
- c. That the existence of two files on this matter caused confusion and hence delay in filing the written submissions.
- d. That the notice of motion dated 16th November 2016 should be granted as the decision to charge the Exparte Applicant with criminal charges was based on extraneous considerations and not non-compliance with the Respondent's orders.

7. The court has considered the grounds on the notice of motion, the supporting and further affidavits filed by the Exparte Applicant, the oral submission by counsel and come to the following findings.

- a. That the judgment dated 16th November 2016, that the Exapрте Applicant's application seeks to have reviewed, was made and delivered by this court. The application is therefore properly before the court in accordance with **Orders 45 Rule 1** of the Civil Procedure Rules, that requires such applications to be filed before the court that made the order.
- b. That the Exparte Applicant filed the application for review timeously on the same date that the judgment was delivered and therefore there was no delay.
- c. That the chamber summons for leave and stay orders dated 23rd February 2016 was filed in ELC MISC. APPL. No.3 of 2016 while the notice of motion dated 10th March 2016 for the substantive judicial review orders was filed in ELC MISC. Appl. No.4 of 2016. That the court noted the confusion caused by the two files running simultaneously on the 31st May 2016 and directed the

parties to appear before the Deputy Registrar. The record shows that on 21st July 2016 directions were issued by the Deputy Registrar in the presence of counsel that the substantive application do continue under ELC Misc. App No. 3 of 2016. The record for the ELC. Misc. App No.4 of 2016 was filed inside ELC Misc. App. No.3 of 2016.

d. That the finding in (c) above shows that the Exparte Applicant's counsel and the Registry may have had some problems tracing the file to place the written submissions. The submissions, though filed on 8th November 2016, were not placed in the file until after the judgment was delivered.

e. That the court has also confirmed the documents annexed to the further affidavit sworn by the Exparte Applicant on 24th November 2016 had not been annexed to the substantive application and therefore were not considered when the court prepared and rendered its judgment dated 16th November 2016. The court also accepts the Exparte Applicant's explanation that the counsel had only come to discover the omission to annex the documents after the judgment had been delivered. That the court takes the fact of the discovery of the missing documents to amount to a sufficient reason for the court to review its judgment of 16th November 2016 so as to get the opportunity to evaluate the contents of the documents that have now been availed and their impact to the judgment tendered. This will also enable the court to give due consideration to the filed written submissions.

8. The court has looked afresh at the documents availed through the further affidavit, the written submissions and the evidence tendered earlier and concluded as follows:

a. That the three page letter dated 29th April 2015 by Mr. John Maniafu of the Respondent, addressed the General Manager, Sukari Industries Limited, required specified improvement measures to be undertaken to mitigate the environmental concerns observed during the inspection failure to which prosecution would be commenced.

b. That inspection report dated 30th June 2015 contains the details of the inspector's observations and directions on the required improvements, which are to;

1. Install oil trap at the fuel pump station.

2. Apply for a composing license for filter cake site (yard),”

The Exparte Applicant's case is that those were the only two outstanding issues noted out of the works earlier ordered in the notice dated 29th April 2015. The Respondents have not defended the application and the court takes it that they have not disputed that position. The court has not been addressed on the issue of compensation required to be paid to the unnamed individuals who had allegedly suffered injuries. That is an issue that the affected individuals may pursue in civil claims notwithstanding the decision herein.

c. The Exparte Applicant has also availed a copy of Environmental Impact Assessment license No.NEMA/EIA/PSL/2469 issued on 30th October 2015 to Sukari Industries Limited for the establishment of a dumping site for filter mud and boiler ash distribution to farmers. The position of the Exparte Applicant is that the issuance of the E.IA license was an indication that they had complied with the respondent's improvement order of 29th April 2015 and therefore there was no reasonable basis of preferring criminal charge against him.

d. The copy of the charge sheet dated 13th August 2016 annexed to the notice of motion dated 10th March 2016 is for an offence of failing to comply with lawful order contrary to **Section 137 (b)** of Environmental Management and **Cordination Act No.8 of 1999**. The particulars are that on the 29th April 2015 at Ndhiwa in Homabay County being the general manager of Sukari Industries limited did fail to comply with a lawful order namely restoration order made by Environmental Inspector John Muniaful thus contravening the said Act.

e. That even though inspection report dated 30th June 2015 is not signed by the said **John Muniafu** it contains signatures of **M. Wahome (0049) and Wachira Bore (NEMA 23)** who the court takes to be officers from the respondent where the said John Muniafu also works. That the said report requires only installation of oil trap at the fuel pump station and application for a composing license for filter cake site. That as the report is dated about two months after the notice of 29th April 2015, it is only reasonable to conclude that it represents the only remaining works that the Respondents desired of Sukari Industries Limited to carry out so as to be compliant with the requirements of the environmental law.

f. That in view of the foregoing and in the absence of fresh investigations having been conducted and notices issued, the contention by the Exparte Applicant that the prosecution commenced through the charge sheet dated 13th August 2015 was discriminatory and based on political and public pressure considerations appear reasonable. The court therefore finds that the Exparte Applicant has established a case for review of the judgment dated 16th November 2016.

9. That for reasons set out above, the court's judgment dated 16th November 2016 is hereby reviewed in accordance with **Order 80** of Civil Procedure Rules and the following orders issued;

a. That an order of certiorari be and is hereby issued calling into this court and quashing all the proceedings in Ndhiwa S.R.M. Criminal case Number **309 of 2015 Republic through NEMA –V- Sajalendu Maiti**.

b. That each party bears their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER 2016

In presence of

Exparte Applicant ABSENT

Respondents ABSENT

Counsel ABSENT

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

20/12/2016

20/12/2016

S.M. Kibunja Judge

Oyugis court assistant

Parties absent

Counsel absent

Court: Ruling dated and delivered in open court in absence of all parties and their counsel.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

20/12/2016

Court: The Deputy Registrar to communicate the delivery of the ruling.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

20/12/2016