



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ELC CIVIL SUIT NO. 964 OF 2014**

**DR. J. S MUIRU.....1<sup>ST</sup> PLAINTIFF**

**MR. GEORGE RURIA.....2<sup>ND</sup> PLAINTIFF**

**MR. JOHN KAMAU MWANGI.....3<sup>RD</sup> PLAINTIFF**

**(SUING AS CHAIRMAN, SECRETARY AND TREASURER**

**RESPECTIVELY OF TIGONI RESIDENTS ASSOCIATION)**

**VERSUS**

**TIGONI TREASURES LIMITED.....1<sup>ST</sup> DEFENDANT**

**MR. ARTHUR NAMU.....2<sup>ND</sup> DEFENDANT**

**MRS. GERTRUDE M. NAMU.....3<sup>RD</sup> DEFENDANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY.....INTENDED INTERESTED PARTY**

**RULING**

The application the subject of this ruling is dated 3<sup>rd</sup> December 2014 and is brought by the intended interested party pursuant to the provisions of section 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act, Section 13(7)(a), 19(1),(3)(f)(i) of the Environment and Land Court Act, Order 1 Rule 10(2) and 14 and Order 45 Rule 1(1) of the Civil Procedure Rules.

The brief facts leading to the application are as follows: - By an application dated 23<sup>rd</sup> July 2014, the Plaintiff sought an injunction to restrain the Defendants from constructing multi dwelling houses and/or maisonettes on land parcel no. LR 7660/72 Ithanji Road Tigoni (hereinafter referred to as the "**suit property**") pending the hearing and determination of this suit. That application was allowed by the Court in a ruling delivered on 14<sup>th</sup> November 2014.

Aggrieved by the Court's decision, the Defendants lodged a notice of appeal. On 14<sup>th</sup> January 2015, the

Court of Appeal in Civil Application No. 318 of 2014 stayed the order cancelling the EIA licence and requiring that a fresh EIA study on the proposed project be conducted involving the Plaintiff's as interested parties.

The Applicant seeks the following substantive orders in the application dated 3<sup>rd</sup> December 2014:-

1. That the National Environment Management Authority ("**NEMA**"), the Applicant herein be added as an interested party in this suit.
2. That the enforcement of the orders made by this Court and delivered on 14<sup>th</sup> November 2014 in terms of order 2 thereof be stayed pending the hearing and determination of this application.
3. That the ruling and orders made and delivered by this court on 14<sup>th</sup> November 2014 be reviewed and/or set aside.
4. That the interested party be allowed to file the necessary pleadings in response to the claims made against it.
5. That the costs of this application be provided for.

The application is supported by an affidavit sworn on 3<sup>rd</sup> December 2014, by **Njoki Mukiri**, the County Director of Environment, Kiambu County. The grounds in support of the application are that the joinder of the applicant in this suit is necessary for effectual and complete adjudication and settlement of all environmental related questions in dispute herein. The Applicant contends that the orders issued on 14<sup>th</sup> November 2014 and the judgement that may be issued in this suit will have fundamental and monumental impact on its functions under the law. It is the Applicant's averment that its input, guidance, assistance and submissions is important, fundamental and necessary in precedent setting by this Court on environmental matters.

The Applicant also avers that the ruling dated 14<sup>th</sup> November 2014 was made on account of some mistake or error on the face of the record which constitutes a ground for review. The Applicant contends that the Court was misled to believe that an EIA study report had been lodged and processed whereas there is a clear distinction between two modes of EIA stipulated under part 2 and 3 of the Environmental (Impact Assessment and Audit) Regulations, 2003. It is the Applicant's averment that subsequent to the said errors, certain inferences and deductions touching on public participation were made out of mistake/error apparent on the face of the record.

According to the Applicant, there is new and important matters or evidence relating to the EIA report and the EIA licence issued herein which was not in the custody of the Plaintiffs or Defendants herein and could therefore not be produced by the said parties at the time when the ruling and orders were made. The Applicant states that there are sufficient reasons for review of the ruling and order made on 14<sup>th</sup> November 2014 and contends that the order setting aside the EIA licence condemn and adversely impact on its statutory obligations without giving it an opportunity to be heard.

It is also the Applicant's case that the dispute herein and the ruling made on 14<sup>th</sup> November 2014 raises substantial questions of law on interpretation, implementation, consideration and approval of projects under the Environmental Management and Co-ordination Act (EMCA), the Environmental (Impact Assessment & Audit) Regulations 2003 and other relevant regulations.

Through a supplementary affidavit sworn on 29<sup>th</sup> January 2015 by Salome Machua, the Deputy Director of Compliance and Enforcement at the National Environment Management Authority(NEMA), the Applicant states that the Court of Appeal in Civil Application No. 318 of 2014(UR 240 of 2014) issued interim orders staying the order cancelling the Environmental Impact Assessment licence.

The Applicant contends that the review proceedings herein are not *sub judice* or in conflict with the

proceedings before the Court of Appeal. It is the Applicant's averment that since it is not party to the Court of Appeal proceedings, it has rightly moved this Court under the provisions of Order 45 of the Civil Procedure Rules as an aggrieved party. The Applicant further contends that no appeal has been filed to the Court of Appeal in respect to the order issued on 14<sup>th</sup> November 2014 and therefore, that the matters under review are properly within the jurisdiction of this Court.

The Plaintiffs opposed the application through a replying affidavit sworn by the 1<sup>st</sup> Plaintiff on 16<sup>th</sup> January 2015 where they contend that the application is incompetent as the Applicant seeks orders that go to the root of this suit before it has been made a party to the proceedings. The Plaintiffs aver that prayer number 3 of the application under consideration has been overtaken by events since on 14<sup>th</sup> January 2015, the Court of Appeal in Civil Application No. 318 of 2014 (UR 240 of 2014) stayed the operation of order 2 of the ruling.

According to the Plaintiffs, it would be imprudent to review the ruling of this Court when there is a pending appeal before the Court of Appeal since concurrent review and appeal proceedings may lead to contradictory judgements whose enforcement will be impossible and or may cause embarrassment to the court.

The application was canvassed by way of written submission. The Applicant in submissions dated 24<sup>th</sup> February 2015 argued that it had moved the Court for review under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules citing new and important matters or information in its custody which was not available to the Court at the time of the ruling, error apparent on the face of the record and sufficient reasons.

The Applicant submitted that it had not preferred an appeal and further, that there was no pending appeal. Counsel made reference to Order 45(2) of the Civil Procedure Rules and argued that a notice to appeal is not an appeal but an intention of appeal and reference was made to the cases of **Christopher Musyoka Musau vs. NPG Warren & others (2013) eKLR**, **Republic vs. Anti-Counterfeit Agency & 2 others ex-parte Surgippharm Limited (2014) eKLR** and **Wananchi Group (Kenya) Limited vs. Communications Commission of Kenya & another (2014) eKLR**

Counsel submitted that the remedy of review is only available to a party who is not appealing and where no appeal has been preferred and reliance was placed in the case of **Orero vs. Seko (1984) KLR 238** and **Yani Haryanto vs. E. D. & F. Man (Sugar) Ltd CA No. 122 of 1992**. The Applicant submitted that there was non compliance with Rule 82 of the Court of Appeal Rules which required an appeal to be instituted within 60 days of the date when the notice of appeal was lodged. The Applicant also relied on Rule 83 which provides that a party who fails to institute an appeal within the appointed time shall be deemed to have withdrawn his notice of appeal.

Counsel submitted that since no appeal has been preferred, the Applicant can't be joined in the appeal and therefore, that the Applicant's remedy is confined to review under Order 45 of the Civil Procedure Rules. It is the Applicant's further submission that it was not a party and did not participate in the proceedings leading to the ruling of 14<sup>th</sup> November 2014 and can therefore not be a competent appellant to an appeal of a decision whose proceedings it was not party to.

The Applicant further submitted that Order 45 of the Civil Procedure Rules is not restricted to parties in a suit and that an aggrieved party may therefore apply for review without locking out parties wishing to pursue an appeal. Counsel argued that the application is competent and that the Court has jurisdiction under section 80 of the Civil Procedure Act and Order 45 to determine the application.

While submitting that it was not asking the Court to sit on appeal in relation to its ruling, the Applicant argued that there is an error apparent on the face of the record. Counsel submitted that the parties misled the Court that there was an EIA study report and therefore, that the ruling considered and made determinations based on a mistake or error. The Applicant argued that the ruling considered and determined the legality of an alleged EIA study report by Peman Consultants Ltd that never was instead

of an EIA project report prepared by the said consultants thereby constituting an error apparent on the face of the record.

The Applicant argued that there is a distinction between an EIA project report and an EIA study report. It is the Applicant's submission that having been satisfied that the project as submitted in the EIA project report was not out of character with the environment and would not have a significant impact on the environment, there was no requirement to carry out and prepare an EIA study report under sections 58(2) of EMCA and Rule 10(3), (4) and part III of the Environmental (Impact Assessment and Audit) Regulations 2003.

Counsel argued that the provisions of part III of the Environmental (Impact Assessment and Audit) 2003 were not applicable to this case since the EIA project report had been approved and that the proponents were not therefore required to conduct an EIA study report. The Applicant submitted that the Court was misled to believe that the disputed project had proceeded for an EIA study report and the Court proceeded to set aside an EIA study report that never was for non compliance with section 58(2) of EMCA and Part 3 of the Environmental (Impact Assessment and Audit) Regulations.

The Court was referred to the case of **Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo (2001)1EA 173** for the proposition that where an error on a substantial point of law stares one in the face and could reasonably have no two opinions, a clear case of an error apparent on the face of the record would be made out. Counsel also argued that the impugned ruling granted reliefs not pleaded in the application or plaint and further, that the relief granted determined the suit with finality and reliance was placed on the case of **Nairobi City Council vs. Thabiti Enterprises Ltd (1997) eKLR**.

The Applicant also submitted that there are new and important matters or evidence relating to the EIA licence which could not be produced by the Applicant who was not party to the proceedings. It was submitted that the expertise guidance on the two modes of EIA assessment constitutes new and important matters which were not availed to Court before the ruling of 14<sup>th</sup> November 2012.

In further submission, Counsel for the Applicant stated that there is sufficient reason for review of the order made on 14<sup>th</sup> November 2014. The Applicant submitted that the ruling made without its participation has far reaching, fundamental and adverse effects on similar licences issued by it. It was further submitted that the dispute herein and the ruling delivered on 14<sup>th</sup> November 2014 raises substantial questions of law interpretation, consideration and approval of projects under EMCA and Environmental (Impact Assessment and Audit) Regulations and other relevant regulations.

Counsel submitted that the ruling in issue preemptory and substantially prejudices a pending appeal in the NEMA tribunal case no. 132 of 2014 lodged in September 2014. Lastly, it was submitted that the need for substantial justice warrants review under Order 45 Rule 1(1) of the Civil Procedure Rules, Article 159(2) (e), sections 1A(2) and 1B(1) of the Civil Procedure Rules and reference was made to the case of **Mbogoh vs. Muthoni & another(2008)1KLR (G&F)**

The Plaintiffs in submissions dated 9<sup>th</sup> March 2015 argued that it was not disputed that there was an order staying the cancellation of the EIA licence pending the hearing and determination of the appeal. Counsel submitted that a notice of appeal constitutes an appeal under rule 2 of the Court of Appeal Rules 2010 which defines an appeal to include an intended appeal. The Plaintiff relied on the case of **Equity Bank Ltd vs. West Link Mbo Ltd (2013) eKLR**

While submitting that the Defendant's intended appeal and the application for review are predicated on the same grounds, Counsel argued that both allege that the Court erred by applying the wrong provisions of EMCA and the Environmental (Impact Assessment and Audit) Regulations in its determination of the application for injunction.

Counsel relied on Order 45 Rule 2 of the Civil Procedure Rules and submitted that the application is preemptive as it seeks reliefs also sought by the Defendants in the Court of Appeal thereby making the matter subjudice. It is the Plaintiffs' submission that unless and until the Defendant intimate their

intention not to file the appeal and/or the time limit for filing an appeal expires, the Applicant has no standing to review the orders made on 14<sup>th</sup> November 2014.

In respect to the Applicant's contention that the misapplication of the law in relation to project and study reports under EMCA constitutes an error apparent on the face of the record, Counsel relied on the case of **Erick O. Odindo vs. National Bank of Kenya Ltd & 2 others (2008) eKLR** where the court cited the case of **National Bank of Kenya Ltd vs. Njau (1995-98)2EA 249** where it was held that an incorrect exposition of the law cannot be a ground for review.

The Plaintiffs in further submission argued that the Applicant had not met the threshold for the grant of a review on the basis of discovery of new and important information. It was submitted that the Applicant had been indolent in providing the information to the Court. The Plaintiffs averred that all their requests to gather information about the grant of the licence went unanswered by the Applicant. Reliance was placed on the case of **Rose Kaiza vs. Angelo Mpanju Kaiza (2009) eKLR** where the Court of Appeal cited the commentary by Mulla on the Indian Civil Procedure Code to state that where review was sought on ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open for the Court to admit evidence on the ground of sufficient cause.

According to the Plaintiffs, since the order of this Court cancelling the EIA licence has been stayed by the Court of Appeal, the rest of the ruling has no impact on the Applicant and further, that it is unclear what loss will be suffered by the Applicant should the orders remain. Counsel submitted that since equity acts in personum, the orders of this Court operate only in relation to the parties herein and have no effect on NEMAs mandate in relation to the grant or revocation of other licences under EMCA.

While submitting that there appears to be a special relationship between the Defendants and NEMA Kiambu office, the Plaintiffs argued that the Applicant is attempting to re-visit the injunction application on behalf of the Defendants in seeking to review orders that have no impact on it whatsoever. Counsel for the Plaintiffs submitted that the application is brought in flagrant disregard of due process and further, that the Applicant had approached the Court with unclean hands and was seeking to undermine the dignity and integrity of the Court. For this submission, the Plaintiffs relied on the cases of **Stephen Somek Takwenyi & another vs. David Mbuthia Githare & 2 others HCCC No. 363 of 2009** for the proposition that the Court has an inherent jurisdiction to preserve the integrity of the judicial process.

Lastly, the Plaintiffs submitted that they proceeded on the basis of the facts before them and did not mislead the Court as to the fact and law in issue and further, that the Court being the custodian of the law cannot be misled on a point of law.

The issue for determination is whether the Court should review its orders dated 14<sup>th</sup> November 2015 and if so, whether the application for review has merit.

It is common ground that the Court of Appeal in Civil Application No. 318 of 2014 (UR 240 of 2014) issued interim orders staying the order no. 2 of the ruling dated 14<sup>th</sup> November 2014 cancelling the EIA licence. The Applicant states that since it did not participate in the proceedings before this Court, it cannot seek joinder to the proceedings before the appellate court. It is also the Applicant's case that as an aggrieved party, its remedy is confined to review under Order 45 of the Civil Procedure Rules.

The Plaintiffs object to this application mainly on the ground that it would be imprudent to review the ruling when there is a pending appeal before the Court of Appeal for reasons that concurrent review and appeal proceedings may lead to contradictory judgments whose enforcement will be impossible.

The Applicant contends that since a notice of appeal is not an appeal, the right of review is therefore available to it. The case following cases

**Christopher Musyoka Musau vs. NPG Warren & others (2013) eKLR**, **Republic vs. Anti-Counterfeit Agency & 2 others ex-parte Surgippharm Limited (2014) eKLR** and **Wananchi Group (Kenya) Limited vs. Communications Commission of Kenya & another (2014) eKLR** cited by the

interested party in support of this proposition are in my opinion distinguishable since unlike in this case, the orders sought to be reviewed had not been stayed by a superior appellate court.

The Court of Appeal in the case of **Niazsons (K) Ltd vs China Road & Bridge Corporation Kenya (2001) KLR 12** held as follows.

**"The policy of the law, as I understand it, is that concurrent proceedings before two or more fora is disapproved. If any authority is necessary there is a clear enactment in Section 6 of the Civil Procedure Act."**

Similar findings have been made by the Court of Appeal in the case of **Ali Ismail Baraki & another vs. Chairman, Garissa County Service Board & 4 others, CA 236 of 2013** as follows:-

**"The principle that a court should not proceed with the trial of a matter in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties is well founded. It finds expression for instance in section 6 of the Civil Procedure Act. That principle aids in the efficient use of available judicial resources and efficient disposal of the business of the court as well as avoiding harassment of parties from multiplicity of actions. To pursue, what is substantially the same matter in different courts is in our view an abuse of the process of the court. Undoubtedly Courts have inherent powers to make orders necessary for the ends of justice and to prevent abuse of the process of the court."**

Section 6 of the Civil Procedure Act reads:-

**"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."**

The ruling sought to be reviewed was directly and substantially before the Court of Appeal in Civil Application no. 318 of 2014. The Court of Appeal went ahead to stay term 2 of the order made on 14<sup>th</sup> November 2014. It would thus be improper to review orders which have been stayed by a superior appellate court. In any event, if the Defendants succeed in their appeal, the application before this court as relates to review will have been spent. The interested party equally can apply to be enjoined as such in the pending appeal where the order they seek review of before this court is a subject of the appeal.

Since the orders sought to be reviewed have been stayed pending the outcome of the intended appeal, no prejudice will be suffered by the Applicant if the application seeking review is stayed pending the outcome of the intended appeal. This court in the face of the pending appeal in the court of appeal, which appeal is substantially and directly on the same subject matter as is sought by the Applicant in the instant application save in regard to the prayer for the joinder of the Applicant as an interested party finds it inappropriate to deal with the application in so far as it relates to review of this court's ruling of 14<sup>th</sup> November 2014 which essentially is the subject of the appeal. In the premises the court finds the Applicant's application to be joined as an interested party merited and grants the Applicant's prayer Number (1) in the Notice of Motion to be enjoined as an interested party in the suit but declines to grant any review of the orders granted by the court on 14<sup>th</sup> November 2014 for the reasons set out hereinabove.

The costs of the application shall be in the cause.

**Ruling dated, signed and delivered this.....29<sup>th</sup>...day of.....May.2015.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Kariuki for Mutiso ..... for the Plaintiff

MS Mwathane for Liko..... For the Defendant

MS Mwathane for Gitonga ..... For the interested party.