IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MUSINGA & KANTAI, JJ.A.)

CIVIL APPLICATION NO. 105 OF 2020

BETWEEN

ERDERMANN PROPERTIES LIMITED.....APPLICANT

AND

NATIONAL ENVIRONMENT TRIBUNAL .....RESPONDENT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

LONDON DISTILLERS (K) LIMITED..... 2ND INTERESTED PARTY

(Being an appeal from the Ruling of the Environment and Land Court at Makueni (Mbogo, J.) delivered 23rd April, 2020

in E.L.C. No. 75 of 2019)

RULING OF THE COURT

In a ruling before the **National Environmental Tribunal in Tribunal Appeal No. NET 21 of 2019** the tribunal made several findings – it struck out some parties from the appeal finding them to be not necessary to the appeal; it struck out prayers relating to licences issued for development of previous premises; and a preliminary objection taken against a decision for change of user of premises was allowed. The main issue here relates to the grant of a prayer (v) fashioned by the tribunal as follows:

> ***"The prayer no. 2 in the appellants application dated 14th August 2019 for stay of any construction in respect of phase 3 of the project be and is hereby allowed to preserve the status quo of the matter pending the hearing and determination of the appeal. This is in line with the intention of section 129(4) of EMCA which seeks to preserve the status quo of a matter or activity once an appeal is filed so as to safeguard, in the interim, the interest of any innocent purchaser of the said Phase 3 development."***

A little background will help in unravelling what the main issue between the parties is about.

The applicant, Erdermann Properties Limited, is a real estate developer in Kenya and had developed various projects including Great Wall Gardens Housing Development Phase 1 and 2. It was in the process of developing Great Wall Gardens Housing Development Phase 3 on L.R. No. 12581/13 in Athi River when the 2nd Interested Party, London Distillers (K) Limited, took an objection challenging the decision of the 1st Interested Party (National Environment Management Authority) for issuance of change of user of the parcels of land comprising Great Wall Gardens Housing Development Phases 1, 2 and 3 on parcels of land L.R. No. 27317/2, 12581/14 and 12581/13 from industrial development to residential.

As we have seen the tribunal, in the ruling delivered on 6th December, 2019, amongst other things stayed construction of the said Phase 3 of the applicant's project, pending hearing and determination of the appeal before the tribunal.

The applicant was unhappy with that decision. It filed various suits one of which was **Machakos Environment and Land Court Judicial Review Case No. 75 of 2019.** Leave was granted to commence judicial review proceedings to apply for orders of prohibition and that leave

was to operate as a stay of the decision of the tribunal made on 6th December, 2019. These orders were made on 20th December, 2019. The substantive motion was filed and was heard by Mbogo, J. who in a ruling made on 23rd April, 2020 made various findings. At paragraphs 36, 37 and 38 of the ruling:

> ***"36. The current JR motion is a replica of JR 41/2019 and we are at the same stage where Court was asked to vacate its order granting leave to commence the substantive JR motion. Apart from withdrawal of the review application dated 05/09/2019, as per Erdemann Property Ltd's submissions, the circumstances obtaining in both situations have largely remained constant and its unfortunate that Erdemann Property Ltd seems to be taking advantage of the fact that this matter has been handled by two different Judges.***
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> ***37. The decision to withdraw leave was substantially dealt with by Angote J in his ruling dated 18/10/2019 and being aggrieved by the said withdrawal, the solution was not to file another JR motion but to proceed to the Court of Appeal. In Management Corporation Stratta Title Plan No. 301 –vs- Lee Tat Development Pte Ltd (2009) S GHC 234, the Court of Appeal of Singapore expressed itself as follows;***
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> ***"The general rule is that where a litigant seeks to re-open in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (the finding principle) outweighs the public interest in achieving justice between the parties (the justice principle) and therefore, the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppels is wrong because 'a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake, its decision is binding unless corrected on appeal.***
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> ***38. The orders issued by this Court on 20/12/2019 therefore amounted to an uprocedural and illegal review of the orders of 18/10/2019 because this Court was already Functus Officio. Erdemann Property Ltd has abused the Court process and actually exposed the Court to ridicule. As much as disclosure of the pending suits was made, the most important disclosure, in my view, was the fact that the leave granted by Angote J had been withdrawn. Had Erdemann Property Ltd disclosed this fact, this Court would certainly not have granted ex parte orders on 20/12/2019. I would agree that the Ex-parte Applicant/Respondent is out to challenge the merits of a decision made by NET an issue which is not the concern of the Judicial review process. The ex-parte Applicant/Respondent ought to have confided itself to the decision making process"***

In the end the Judge considered the circumstances of the case and exercised his inherent power and set aside the orders he had issued on 20th December, 2020 after finding that the judicial review case was incompetent; the order of 20th December, 2020 grating leave to commence judicial review proceedings was set aside, the proceedings thereat were struck out and the applicant was:

> ***"…. barred from challenging the applicability of the provisions of Section 129(4) of the Environment Management Coordination Act before the honorable Court or any other Court and the National Environment Tribunal except with the leave of this honorable Court."***

These orders did not go well with the applicant which filed a Notice of Appeal against the whole of that decision.

We are now asked in the Motion said to be brought under **Sections 3(1),(2) & (3), 3A & 3B Appellate Jurisdiction Act; Rules 5(2) (b), 29, 31, 41, 42 & 47 Court of Appeal Rules, 2010**; **Articles 40, 47, 48 and 50(2)** of the **Constitution of Kenya** and all other enabling provisions of law to order an expedited hearing of the application and the intended appeal; to issue an injunction or stay of execution of the whole of the said ruling of the Environment and Land Court; to order an injunction to restrain operationalization of the decision of the tribunal made on 6th December, 2019, and related prayers. Amongst the many grounds in support of the motion, and in a supporting affidavit of Mrs. Ruth Hinga, the applicant's Legal Manager, the history of the dispute as we have set out is given. It is said that the tribunal gave a decision in excess of its jurisdiction; that the Phase 3 project is valued in excess of Ksh.3,000,000,000; that the applicant is exposed to irreparable harm that would render the appeal nugatory; that the interested party (London Distillers (K) Limited) would suffer no prejudice if stay is ordered; amongst other things.

In an application for stay of execution pending an appeal such as this one an applicant must, firstly, show that the appeal, or intended appeal, as the case may be, is arguable which is to say that the same is not frivolous. Such applicant must, in addition, show that the appeal, absent stay, would, if successful be rendered nugatory.

Section 129 of the **Environmental Management and Coordination Act Cap 387 Laws of Kenya** is to the following effect:

> ***"(1) Any person who is aggrieved by—***
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> ***(a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or regulations made thereunder,***
>
> ***(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder***
>
> ***(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;***
>
> ***(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;***

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he 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.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just

(4) 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. (Emphasis added)

We have perused the draft Memorandum of Appeal and have duly considered the many grounds intended to be taken on appeal.

The provision of the Environmental Management and Coordination Act clearly grants the tribunal power to grant an order of status quo pending an appeal before it. There was an appeal before that tribunal and we know not why the applicant has not prosecuted it but chose, instead, to file various suits in Nairobi, Machakos and Makueni praying for various reliefs.

Mbogo, J, examined all the material before him and found that the applicant had abused the process of the court by not only forum shopping, but also withholding material information while seeking orders from him.

Upon our own consideration while not delving deeply into the issues which would belong to the bench that will deal with the intended appeal we are not satisfied that there is an arguable appeal in this matter. Being of that thinking, we need not go into a consideration of whether the intended appeal would be rendered nugatory.

The motion fails and is dismissed with costs to the respondent and the interested parties.

Considering the facts of the case and the allegation that the project being undertaken by the applicant involves a huge financial investment let the intended appeal be filed and be heard on the basis of priority.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR