



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 17 OF 2015 (JR)

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN THE
NATURE OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF ENVIRONMENTAL IMPACT ASSESSMENT LICENSE

AND

**IN THE MATTER OF ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, (CAP 387)
LAWS OF KENYA**

BETWEEN

GERICK KENYA LIMITEDAPPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY RESPONDENT

RULING

1. What I have before me is the ex parte Chamber Summons application brought by the applicant, Gerick Kenya Limited under order 53 rules 1 and 2 of the Civil Procedure Rules, 2010 seeking the following principal reliefs:-
 - i. **THAT this honourable court be pleased to grant leave to the applicant to apply for an order of certiorari to remove to the High Court for the purposes of being quashed, the decision of the director general of the National Environment Management Authority contained in the letter dated 13th February 2015.**
 - ii. **THAT leave be granted to the applicant to apply for an order of prohibition to prohibit the respondent from interfering with the construction of or demolishing the petrol station and/or buildings situated on land parcel No. West Mugirango/Siamani/5818.**
 - iii. **THAT this honourable court be pleased to direct that the leave if granted do operate as a stay of the proceedings until the determination of the substantive application.**

The application was supported by the statement of facts and verifying affidavit of the applicant's director, one, Erick Orina Bogonko both dated 3rd March 2015. The application came before me on 4th March 2015 when I certified the same as urgent and directed under Order 53 rule 1 (4) of the Civil Procedure Rules that the same be served upon the respondent for hearing *inter partes*. The application was served upon the respondent which responded to the same through Notice of Preliminary Objection dated 17th March 2013.

2. The applicant has sought leave to apply for orders of certiorari and prohibition against the respondent on the grounds that; on 18th August 2014, the applicant leased all that parcel of land known as **LR No. West Mugirango/Siamini/5818** (hereinafter referred to only as "**the suit property**") from one, Peter Onchoga for a term of 15 years on terms and conditions that were set out in the instrument of lease of the same date. The applicant leased the suit property for the purposes of putting up a Petrol Filling Station. Before commencing the said development on the suit property, the applicant applied to the respondent for Environmental Impact Assessment License. Towards this end, the applicant submitted to the respondent an Environmental Impact Assessment Study report pursuant to section 58 of the Environmental management and Co-ordination Act, 1999 ("EMCA"). Following the submission of the said report, the respondent issued the applicant with Environmental Impact Assessment License on 31st October 2014 on terms and conditions that were set out in the said license. Upon receipt of the said license, the applicant commenced the construction of the said Petrol Filling Station on the suit property. The project entailed the construction of four (4) underground fuel storage tanks, fuel pumps, a canopy, service bay, car wash, administration block and associated amenities.
3. After about three months of the issuance of the said license by the respondent and while the construction works were ongoing, the respondent served the applicant with Environmental Restoration Order ("the order") in relation to the project. The order was contained in the respondent's letter to the applicant dated 13th February 2015. The order required the applicant to stop the construction of the said filling station on the suit property immediately and to submit to the respondent within 7 days from the date on which it was served with the said order, a letter of commitment that it will comply with the terms thereof. The order was issued on the ground that the applicant's project was incompatible with the surrounding area which is a wet land and that the applicant had concealed the fact that an application for Environmental Impact Assessment License for a similar project on the suit property that was made earlier by the applicant had been rejected by the respondent.
4. That order was the genesis of these proceedings. The applicant has contended that the said restoration order was made against the rules of natural justice in that the applicant was not given a hearing before the issuance of the same. The applicant has also contended that the respondent had no jurisdiction to issue and/or acted in excess of its jurisdiction in issuing the said order. In its verifying affidavit, the applicant has contended that it had complied with all the conditions of the license that had been given by the respondent. The applicant has denied the respondent's allegation that it concealed certain facts in its application for Environmental Assessment License. The applicant has contended that its application for license and the Environmental Impact Assessment study report that it submitted to the respondent were considered on their own merits and were found satisfactory by the respondent. The applicant has denied that its project is incompatible with the surrounding area. The applicant has contended that the respondent has no power to cancel an environmental impact assessment license once issued. It is on account of the foregoing that the applicant has sought leave of this court to apply for an order of certiorari and to bring before this court for quashing the said Environmental Restoration order and, an order of prohibition to prohibit the respondent from stopping the applicant from continuing with the project.
5. As I have stated earlier in this ruling, the respondent raised a preliminary objection to the

application. The objection was framed as follows:-

“(1) THAT this honourable court is not the appropriate forum to hear this matter by dint of section 129 of the Environmental Management and Co-ordination Act, 1999 and section 13 of the Environment and Land Court act. The respondent pleads the issue of jurisdiction and will rely on several decided cases of superior courts.

(2) THAT the respondent was served with these proceedings within less than the statutory 7 clear days rule provided in the Civil Procedure rules and this has been of prejudice.

(3) THAT the respondent shall therefore move this court to dismiss this suit or alternatively transfer it to the right forum.”

6. The respondent's preliminary objection was argued on 13th May 2015 when Mr. Gitonga, advocate, appeared for the respondent and Mr. Bosire, advocate, appeared for the applicant. In his submission in support of the preliminary objection, Mr. Gitonga dealt with only one issue, namely, whether this court has jurisdiction to entertain the applicant's intended application for judicial review while there is an appeal process provided for under EMCA. The other objection that concerned the inadequacy of the time that was afforded to the respondent to respond to the application seems to have been abandoned by Mr. Gitonga and in my view rightly so. Mr. Gitonga submitted that the applicant was aggrieved by the decision that was made by the respondent on the Environmental Impact Assessment License that was issued by the respondent to the applicant on 31st October 2014. He submitted that the said decision required the applicant to cease the constructiona Petrol Filling Station that had been licensed by the respondent. Mr. Gitonga submitted that this decision amounted to an imposition of a condition or restriction on the license that had been issued by the respondent to the applicant. Counsel submitted that any person aggrieved by such decision has a remedy in the form of an appeal to the National Environment Tribunal pursuant to the provisions of section 129 (1) (b) of EMCA.

7. He submitted further that anaggrieved party has a right to a second appeal to this court under section 130 of EMCA in case it is not satisfied with the decision of the National Environment Tribunal (“the tribunal”). Counsel submitted that a person aggrieved by such decision has no right to access this court directly through a civil suit or judicial review. His only recourse according to counsel, is to appeal to the tribunal and if aggrieved by the decision of the tribunal to approach this court by way of a second appeal. Counsel submitted that this court has no jurisdiction to entertain the applicant's complaint herein in the first instance. In support of this submission, Mr. Gitonga cited several authorities. The first authority that he cited was the decision of Waithaka J. in **Bridge Gate Holdings Ltd –vs- National Environment Management Authority & Another, Nyeri, E&LCC No. 120 of 2014 (unreported)**. He also cited the Court of Appeal decision in **Republic –vs- National Environmental Management Authority [2011] eKLR** in support of his argument. While concluding his submission, Mr. Gitonga made remarks which I found rather inconsistent with his preliminary objection. He stated that;

“We do not deny the jurisdiction of this court. Our submission is that where there is an alternative remedy, the court can only entertain a judicial review application in exceptional circumstances.”

Mr. Gitonga urged me to strike out the applicant's application for leave or refer it to the tribunal.

8. In his submission in reply, Mr. Bosire for the applicant submitted that the respondent's preliminary objection is misconceived. He submitted that the statutory provisionsand the case

law that were cited by the respondent in support of the preliminary objection were good law prior to the promulgation of the Constitution of Kenya, 2010. Mr. Bosire submitted that this court was created to deal with all environmental and land disputes. Mr. Bosire submitted that after the creation of this court, the tribunal which is a creature of EMCA became irrelevant. Counsel submitted that it is only this court which is clothed with the jurisdiction to determine disputes over the environment and land. Counsel urged me to dismiss the preliminary objection and proceed to allow the applicant's application for leave.

9. In the case of **The MV Lillian "S" [1989] KLR 1**, Nyarangi J. A. stated as follows at page 14;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it."

10. I have considered the respondent's preliminary objection to the applicant's application herein together with the authorities cited in support thereof. I have also considered the applicant's response to the objection. In my view, the objection raises only a single issue for determination, namely, whether this court can entertain a judicial review application where there is an alternative right of appeal. In my view, this is not a jurisdictional issue. The issue concerns the choice of forum for redress. As I have stated earlier in this ruling, the respondent's advocate had conceded and rightly so at the conclusion of his submission that the respondent is not challenging the jurisdiction of this court.

11. Section 13 (1) and (2) of the Environment and Land Court Act, 2011 which deals with the jurisdiction of this court provides as follows:-

"13. (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the constitution, the court shall have power to hear and determine disputes;

(a) relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting enforceable interests in land; and

(e) any other dispute relating to environment and land

Section 13 (7) of the Act provides as follows:-

"In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just including;-

a.

b. prerogative orders

- c.
- d.
- e.
- f.
- g.
- h.
- i.

12. There is no doubt from what I have set out hereinabove that this court has jurisdiction to hear and determine the judicial review application which the applicant intends to file upon obtaining the leave sought herein. I am of the view that the respondent's objection was not well taken and the cases relied upon are of no assistance to it. The Court of Appeal case of **Republic –vs- National Environment Management Authority** (Supra) that was cited by the respondent is not an authority for the proposition that has been advanced herein by the respondent that where a statute provides an alternative remedy of appeal then the court lacks jurisdiction to entertain an application for judicial review. In fact in that case, the court agreed with the trial judge that **“the availability of an alternative remedy is not, by itself a bar to the grant of a judicial review order.”**
13. The *ratio decidendi* in that Court of Appeal case is that where parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The court stated that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of a particular case. The other case of **Bridge Gate Holdings Ltd –vs- National Environmental Management Authority & Another** (Supra) that was also relied on by the respondent is distinguishable. In that case, the plaintiff had purported to challenge the decision of the respondent herein by way of a normal civil suit which is not the case herein.
14. What is before me is a preliminary objection. In the case of **Mukisa Biscuits Co. Ltd –vs- West End Distributors Ltd [1972]** E. A 697, Sir Charles Newbold, P. stated at page 671 that; **“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”** The issue as to whether or not judicial review was the most appropriate remedy for the applicant cannot be determined in a preliminary objection. It is an issue which the court can only determine while considering the applicant's application for leave on merit.
15. I think that I have said enough to show that the respondent's preliminary objection has no merit. The applicant's advocate had urged me to allow the applicant's application for leave to apply for orders of judicial review if I disallow the respondent's preliminary objection. I am unable to accede to this request. The applicant's application has not been argued on merit and as such I cannot make a conclusive determination thereon. What the parties argued before me was a preliminary objection and my decision must be limited to the same. I would therefore dismiss the respondent's preliminary objection which I hereby do and direct the parties to take a date for the pending application for leave. The applicant shall have the cost of the preliminary objection.

Delivered, Dated and Signed at Kisii this 5th day of June 2015.

S. OKONG'O

JUDGE

In the presence of:

N/A for the applicant

Mr. Gitonga for the respondent

Millicent Court Assistant

S. OKONG'O

JUDGE



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