REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 8 OF 2021

(FORMERLY HIGH COURT PETITION NO. E496 OF 2021)

COMMUNIST PARTY OF KENYA.....PETITIONER

VERSUS

NAIROBI METROPOLITAN SERVICES.....1ST RESPONDENT

DIRECTOR GENERAL OF

NAIROBI METROPOLITAN SERVICES.....2ND RESPONDENT

COUNTY ASSEMBLY OF NAIROBI.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

NATIONAL ENVIRONMENTMANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

NAIROBI CITY COUNTY.....2ND INTERESTED PARTY

RULING NO. 2

Introduction

1. In its Ruling dated **7th December 2021**, this Court, after due analysis of the applicable principles for the grant of conservatory orders to the facts of the instant case; restrained the 1st and 2nd Respondents from carrying out any renovations, cutting down of tress and any works on **Uhuru Park** (hereinafter the "**Park"**) pending the hearing and determination of Petition.

2. Immediately thereafter, by a motion dated **8th December 2021,** the 2nd Respondent moved this Court for the following prayers: -

i. Spent…

ii. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to temporarily set aside the proceedings of the 6th day of December, 2021 and the subsequent ruling and/or orders delivered and issued thereof on the 7th day of

December, 2021.

iii. THAT pending the hearing and determination of the Application, this Honourable Court be pleased to make an order that the Petitioner duly serves the 2nd Respondent forthwith with the pleadings in this matter and to continue to so do during the pendency of this matter and thereafter grant leave to the 2nd Respondent to file its response to the Applicant and the Petition.

iv. THAT pending the hearing and determination of the Petition, this Honourable Court be pleased to temporarily set aside the proceedings of the 6th day of December, 2021 and the subsequent ruling delivered by on the 7th day of December, 2021.

v. THAT pending the hearing and determination of the Petition, this Honourable Court be pleased to make an order that the Petitioner duly serves the 2nd Respondent forthwith with the pleadings in this matter and to continue to so do during the pendency of this matter and thereafter grant leave to the 2nd Respondent to file its response to the Applicant and the Petition.

vi. THAT costs of this Application be borne by the Petitioner.

3. The Application is supported by the grounds on the face thereof and further by the Affidavit of **Lieutenant General Mohammed Badi** on behalf of the 2nd Respondent herein.

4. Pursuant to the directions issued on **10th December 2021**, it was directed that the said Application be served upon all parties for hearing on 1**6th December 2021.**

5. The 1st, 3rd, 4th Respondents and equally the 2nd Interested party supported the Application. The Application was however opposed by the Petitioner while the 1st Interested party held no position leaving it for the Court's determination. The Application was heard by way of oral submissions from the parties.

The 2nd Respondent's /Applicant's case

6. During the hearing of the Application **Learned Counsel Mr. Okatch** submitted on behalf of the 2nd Respondent. He relied on the affidavit sworn by **Lieutenant General Mohammed Badi** on **10th December 2021.** It was his case that he was never served with any pleadings and to date he has equally not been served.

7. He averred that he learnt of the matter through the press on Tuesday 7th December 2021 after the delivery of the ruling and he immediately instructed his Advocates **Messrs Okatch & Partners** to verify the accuracy of the same.

8. Conversely, it was stated that the Advocates were able to verify and indeed confirmed the existence of the said orders.

9. The Applicant complained that the said orders were issued without giving him an opportunity to be heard. It was further averred that the Court record for **29th November 2021** had directed the Petitioner to effect service of its pleadings upon all the parties on **6th December 2021** where further directions would be issued.

10. The Applicant further complained that the Court was misled to believe that service had been effected and the matter was wrongly converted for hearing on **6th December 2021** when indeed it was actually scheduled for mention for further directions.

11. It was contented that the Court was left with a one-sided highly sensationalised version and unsupported allegations when it proceeded to render its ruling.

12. Additionally, it was contended that the orders were issued on the aspect that there was no public participation and no Environmental Impact Assessment licence yet there was extensive public participation which had been undertaken from 2018 and further an Environmental Impact Assessment (EIA) report was in existence.

13. According to the Applicant, if the proceedings and ruling are not set aside, it will have far-reaching consequences on the impugned project and it will cause great public injustice and extend the unfair manner that the orders of the **7th day of December, 2021** were granted.

14. The Applicant further made reference to the ***Court of Appeal Case of Civil Appeal Number E291 OF 2021 Independent Electoral and Boundaries Commission v David Ndii & Others*** the gist of which was that where service had not been properly effected a right to a fair trial and natural justice was contravened.

15. Counsel for the Applicant concluded his oral submissions by requesting the Court to allow the Application and set aside and/or vary its orders issued on **7th December 2021** saying no prejudice would be occasioned to the Petitioner.

1st and 4th Respondents' submissions

16. The 1st and 4th Respondents in support of the Application referred to the affidavit sworn on **7th December 2021** by **Maureen Njeri** the Director Environment, Water and Sanitation of the 1st Respondent.

17. It was stated in the Replying Affidavit that while they acknowledged being served with the Application on **2nd December 2021** for attendance on **6th December 2021**, they were surprised when the Court proceeded to hear the Application on **6th December 2021 and** rendered a ruling on **7th December 2021** without granting them an opportunity to be heard.

18. In respect to the Environmental Impact Assessment (EIA), the 1st and 4th Respondents further stated that public participation was an ongoing process and as such there was extensive public participation which had been conducted in respect to the rehabilitation of the Park and an EIA report had been submitted to the 1st interested party and the same was awaiting issuance of an EIA license.

19. During the oral submissions of the Application, **Learned Counsel Mr. Motari** while requesting the Court to set aside its earlier orders, emphasized on the fact that they were condemned unheard contrary to ***Articles 47 and 50 of the Constitution*** and he further submitted that the issue of the EIA was not an issue for consideration by the Court and that should the Court have given them an opportunity to be heard, it could have arrived at a different outcome.

The 3rd Respondent's and 2nd Interested party's submissions

20. The 3rd Respondent and the 2nd Interested party did not file any response to the Application but their Counsels separately made oral submissions supporting the Application. It was their submission that the orders were equally issued *exparte* without granting their clients an opportunity to be heard and thus being contrary to the rules of natural justice. They also opined that the orders were prejudicial to their clients and hence there was greater need to have them set aside.

1st Interested party's submissions

21. **Learned Counsel Ms. Sakami holding brief for Mr. Maina Advocate** for the 1st Interested party did not support nor oppose the Application. However she acknowledged that the 1st Respondent had submitted an EIA report after the commencement of this case and the same was pending for consideration.

The Petitioner's submissions

22. The Application was strongly opposed by the Petitioner. **Learned Counsel Mr. Wachira** submitted that all the Respondents were served with the Application in accordance with the Court order issued on **29th November 2021** and he had filed an affidavit of service confirming such service. Counsel submitted that in confirmation of service, the 1st, 2nd and 4th Respondents filed a memorandum of appearance and even appeared during the delivery of the ruling on **7th December 2021.** It was his further submission that pursuant to ***Article 156 of the Constitution,*** the Attorney General was permitted to represent such parties which was also the case herein.

23. It was further submitted that, the matters that were being raised by the 2nd Respondent in respect to issues of public participation and the EIA were issues that ought to be raised in response to the main Petition and not to have been brought by an application seeking for variation and setting aside of the conservatory orders. Counsel also submitted that **paragraph 17 of the Affidavit sworn by Maureen Njeri** had equally confirmed that no EIA licence had been obtained prior to the commencement of the project.

24. The Petitioner concluded his submission by urging the Court to dismiss the Application with costs.

Analysis and determination

25. The Court has carefully considered the Application as well as the parties' affidavits and oral submissions for and against the Application. In my humble view, the main issue for determination is whether this Court should proceed to set aside the proceedings of **6th December 2021** and its subsequent ruling and/or conservatory orders issued on **7th December 2021.**

26. On issuance of conservatory orders, ***Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (The Mutunga Rules)*** provides as follows: -

Rule 23;

"Conservatory or interim orders

(1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an Application for conservatory or interim orders.

(2) Service of the Application in sub rule (1) may be dispensed with, with leave of the Court.

(3) The orders issued in sub-rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court."

27. On setting aside of conservatory orders, ***Rule 25 of Mutunga rules*** provides as follows: -

"Setting aside, varying or discharge an order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on Application by a party dissatisfied with the order."

28. It is thus evident that the ***Mutunga Rules*** do not specifically provide for the form in which a conservatory order may be set aside or reviewed. However, the Civil Procedure Rules still remain the parent rules for reference, and where there is a lacuna in a procedure under the ***Mutunga Rules***, the ***Civil Procedure Rules*** apply.

29. The jurisdiction of the Court to review its own orders is provided for in ***Section 80 of the Civil Procedure Act and Order 45 Rule of the Civil Procedure Rules 2010***

Section 80 stipulates: -

"Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

30. ***Order 45 Rule 1 of the Civil Procedure Rules*** is couched in similar terms and goes on to provide the procedure and the conditions that an Applicant must satisfy as follows: -

"45(1) 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 new and important matter or 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."

31. In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of ***new and important matter or evidence.*** It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is ***some mistake or error apparent on the face of the record, or for any other sufficient reason***. The error must be evident on the face of the record and should not require much labour in explanation. An Application for review must also be made ***without unreasonable delay.***

32. In the instant case, the Conservatory Order was issued on **7th December, 2021** and the Application was filed on **10th December 2021**. The Application was therefore filed timeously.

33. In the case of ***Benjoh Amalgamated Ltd vs Kenya Commercial Bank Ltd [2014] eKLR*** it was held that review orders are intended to correct mistakes and human error and should be issued in exceptional circumstances.

34. What constitutes an error on the face of the record is well settled. The error must be evident on the face of the record and should not require an elaborate argument to be established. This was the holding of the Court of Appeal in the case of ***National Bank of Kenya Limited v Ndungu Njau [1997] eKLR***, *w*hich stated: -

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review"

35. The 2nd Respondent has premised the Application that the proceedings of **6th December 2021** and subsequent ruling delivered on **7th December 2021** was issued on the mistaken belief that the 2nd Respondent was served. According to the Applicant, the Petitioner had misled the Court that there had been proper service which was not the correct position.

36. The Applicant and those supporting the Application complained that the impugned order was made without the parties being heard first and further that the same proceeded when the matter was scheduled for mention and or directions and not the hearing of the Application.

37. Where a party comes to Court and disputes service, the Court is faced with two options:

i) To consider and examine whether the affidavit of service that was filed demonstrated proper service, or;

ii) To allow the party disputing service upon moving the Court appropriately to cross examine the process server on the veracity and contents of the affidavit of service on record.

38. In the instant case, the 2nd Respondent disputed service but did not make an request for cross examination of the process server. Hence therefore the Court is obligated to scrutinize whether the affidavit of service that was placed on record prior to the proceedings of 6th and 7th December 2021 demonstrated proper service.

39. I have perused the affidavit of service that was filed on **2nd December 2021** and wish to highlight the following aspects which I will flag out for the purposes of this ruling; that paragraph 2 of the affidavit of service sworn by one **Boniface Kilonzo** a process server on **2nd December 2021** deposed as follows: -

Paragraph 2.

"That on 2nd December 2021 at 8.00am, I received in duplicate copies of the mention notice dated 1st December 2021 and Notice of Motion Application under certificate of urgency dated 22nd November 2021 from M/S Wandeto Wachira Advocates with

instructions to serve the same upon the Respondents therein".

Paragraph 4.

"That on the same day at 9.30am, I proceeded to the Offices of the 2nd Respondent located at Kenyatta International Conference Centre, where I met a secretary to whom I introduced myself to and explained the purpose of my visit. The said secretary accepted my service and stamped and signed on my return copy".

Paragraph 8.

"That I hereby return to this Honourable Court a copy of the mention notice dated 1st December 2021 and notice of motion Application under certificate of urgency having been duly served upon all the parties."

40. The 1st Respondent's replying affidavit at paragraph 4 also deposed as follows: -

"That the Petitioner filed an Application dated 22nd November 2021 and on 29th November 2021, the Court directed the Petitioner to serve the Application and the petition on the respondents for directions on 6th December 2021 which Application was served on 2nd December 2021…."

41. A keen perusal of the said affidavits clearly confirms that there was service on all the Respondents including the 1st interested party who attended the Court proceedings of **6th December 2021.**

42. I am also guided by ***Order 5, rule 9 of the Civil Procedure rules, Mode of service on the Government***

(3) All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite.

(4) In this rule, "document" includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications.

43. In view of the foregoing, 1 therefore find that service was properly effected and all the Respondents including the 2nd Respondent were served. The 2nd Respondent cannot choose at this stage to argue that he was never personally served.

44. On the other aspect of whether or not the Respondents were not granted a fair hearing prior to the issuance of the orders of **7th December 2021**, the record shows that when the matter came up *ex-parte* on **29th November 2021**, the Court directed that all parties be served first. Later when the matter came up on **6th December 2021**, the Court directed the learned Counsels present for the Petitioner and the Interested party to specifically address the Court on the issue of the conservatory orders which they did. The fact that the Respondents opted not to attend does not give them the right to complain at this stage. The complaint is therefore without any basis, and is not merited.

45. A right to a fair hearing and due process of the law is enshrined in our Constitution under ***Article 50***. It is not lost to this Court that there are exceptions to the general rule that a party should not be condemned unheard. I am guided by the decision in the case of ***Thomas Edison Ltd. vs. Bathok 1912 15 C.L.R. 679*** wherein it was held thus:-

"There is a primary precept governing administration of justice that no man is to be condemned unheard and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence, but instances occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or if irremediable by one party, interim orders may issue to give room to the court to determine the dispute on the merits."

46. A party who after being served and duly notified of the proceedings cannot plead of his violation of the right to a fair hearing to the same proceedings on his own failure to attend the said proceedings. A right to a fair hearing applies to all the parties and it is equally the duty of each and every party to attend court proceedings when duly notified.

47. The Court also respectfully disagrees with the submissions of the 2nd Respondent and those is support of the Application that it could not have considered to hear an application for conservatory orders on **6th December 2021**. As per the Court directions that were issued on **29th November 2021**, the Court had declined to grant the said orders *exparte* but ordered that the application be served for directions and further orders on **6th December 2021** when the Court would consider the same. Hence therefore on **6th December 2021**, nothing stopped the Court from considering the said application since in a Constitutional Petition as was the case herein, an application for conservatory orders can be considered at any stage of the proceedings so long as it is before the final determination and disposal of the main Petition.

48. This Court is not persuaded that the applicants' supporting affidavit and the 1st respondent's relying affidavit together with the submissions of the 3rd respondent and the 2nd interested party which were in support of the Application have brought out any ***new and important matter or evidence.***

49. Furthermore, the conservatory orders issued were issued based on facts placed before the Court which facts have not been proven to be false as the applicant and the 1st respondent depose clearly that ***the Environmental Impact Assessment license has not been issued to date.***

50. All said and done, I observe that the order the applicants seeks to have reviewed, is a conservatory order issued on the **7th December 2021.** I do note that Conservatory orders are in my view not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person. (See the case of ***Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR***).

51. Accordingly, it is clear that conservatory orders are issued not to aid a party but to preserve the status quo that is being challenged by the petition. Without delving into the merits of this petition, I do note that the basis of the instant petition is *interalia;* alleged lack of public participation in decision making, compliance to ***section 125(2) of the Public Finance Management Act***, compliance with ***Regulation 17 of the Environmental Management and Coordination (Impact Assessment and Audit) Regulations, 2003*** among other provisions.

52. It is my humble view that it is not in the best interest of administration of justice to allow the Application dated **8th December 2021** for setting aside the conservatory orders as that would have the effect of rendering the petitioner herein mere pious sojourners or explorers in their pursuit of compliance with constitutional values and in effect render the Petition an academic exercise and nugatory.

53. A perusal of the orders issued on **7th December 2021**, shows that this Court was satisfied there was a prima facie case warranting the specific conservatory orders that were issued. I reiterate that it would, in the circumstances of this case, be improper for this court to purport to overturn the said orders at this stage.

54. Given the circumstances of this case, I am not satisfied that the applicant has met the threshold for setting aside the conservatory orders issued on **7th December 2021** and the proceedings for **6th December 2021.**

55. Consequently, I find the Application dated **8th December 2021** not merited, the same is dismissed with no orders as to costs.

56. For the avoidance of doubt, the orders issued on **7th December 2021** remain in force. The said orders had already fast tracked the hearing of the main Petition and all parties are reminded to comply.

57. Orders accordingly.

DATED, SIGNED AND DELIVERED BY ELECTRONIC MAIL AT NAIROBI THIS 30TH DAY OF DECEMBER 2021.

E. K. WABWOTO

JUDGE