



**Coldstone Investment Limited v Director General National
Environment Management Authority & another (Tribunal Appeal
15 of 2023) [2023] KENET 1256 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KENET 1256 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 15 OF 2023**

**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**

NOVEMBER 10, 2023

BETWEEN

COLDSTONE INVESTMENT LIMITED APPELLANT

AND

**DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT**

KHALEEJ TOWERS LIMITED 2ND RESPONDENT

RULING

1. Before the Honorable Tribunal is the 2nd Respondent's Application dated 29th September 2023 principally seeking that the Honorable Tribunal be pleased to discharge, vary or set aside the orders of interim injunction issued on 22nd September 2023. The Application is supported by the affidavit of Omar Hassan Hussein sworn on 27th September 2023.
2. The Application did not go unopposed and in that regard the Appellant filed the Replying Affidavit Sworn by Daniel Wahienya on 5th October 2023.
3. Having considered the 2nd Respondent's Application and the supporting affidavit thereto and the Appellant's Replying Affidavit, the Tribunal has isolated the following as the sole issue arising for determination-

Whether the Tribunal should discharge, vary or set aside its orders of interim injunction issued on 22nd September 2023

4. Whereas the [National Environment Tribunal Procedure Rules](#) does not expressly provide for the power of the Tribunal to discharge its injunctive orders, the Tribunal notes that the jurisdiction of the courts



to set aside an order of injunction is to be found under Order 40 Rule 7 [Civil Procedure Rules](#). As such, in determining the application the Tribunal will among other things be guided by the said provision which provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order”

5. The use of the word ‘may’ in the above provision shows that the act of discharging an injunction is an exercise of discretion which like all other discretionary powers must be exercised judiciously. The High Court in the case of [St Patricks Hill School Ltd v Bank of Africa Kenya Ltd](#) [2018] eKLR, held as follows:

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”

6. In the case of [Edward Karanja Ragui v Barclays Bank of Kenya Ltd](#) [2002] eKLR, the Court was confronted with an application for discharge of interlocutory injunction. The Court held that it is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged.
7. From the above authorities, the Tribunal finds that an interlocutory injunction may be set aside if the end of justice so demand or if it’s proved that the same was obtained by means of misrepresentation or concealment of material facts. The 2nd Respondent has not alleged that the interim injunction orders were obtained through misrepresentation or concealment of material facts. As such, the Tribunal will only consider whether it is in interest of justice to discharge its orders.
8. Vide the orders on 22nd September 2023, the Tribunal ordered the 2nd Respondent to comply with the conditions contained in the 1st Respondent’s letter dated 6th March 2023 and that there be a temporary injunction within the 14 days stopping any further construction on the suit property. The 1st Respondent was ordered to inspect/supervise compliance with the orders and file a status report within 14 days.
9. The 1st Respondent did not file the status report within the stipulated time, and as such, the orders were extended. In Support of its Application, the 2nd Respondent argues the order directing it to stop construction has caused great hardship, inconvenience and financial loss. However, the Appellant states that the 2nd Respondent is still continuing with construction in disobedience of the orders they are seeking to discharge. The Appellant has provided electronic evidence to demonstrate this. On the other hand, we have also seen a report by the 1st Respondent indicating dated the 5th October, 2023 indicating that construction had been stopped as at the date of the report and that there is evidence of adequate safety nets and scaffolding. What the report by the 1st Respondent doesn’t state unequivocally is whether there is compliance with each of the 4 items listed as conditions set out in the improvement order, conditions of which were to be observed by the 2nd Respondent.
10. The orders of 22nd September 2023 were issued with a view of protecting the Appellant’s right to clean and healthy environment pursuant to the mandate placed on the Tribunal by Article 70(2) of the [Constitution](#) as read with Section 129(3) of [EMCA](#). The 1st Respondent’s report has not convinced the Tribunal that the conditions contained in the letter dated 6th March 2023 have been complied. There



is also the material presented by the Appellant indicating that construction is still ongoing regardless of the orders of this Tribunal, this cannot be ignored or wished away.

11. Accordingly, we find no merit in the 2nd Respondent's Application dated 29th September 2023 and the same is hereby dismissed with no orders as to costs.

12. The Tribunal makes the following final orders-

- a. The Appellant and 2nd Respondent are hereby directed to engage in negotiations facilitated by the 1st Respondent to resolve the subject issues within 14 days and thereafter the 1st Respondent to provide the Tribunal with a report as to the outcome of the negotiations;
- b. Within the same period the 1st Respondent to simultaneously re-inspect the site and file a fresh report covering the following areas-
 - (i) adherence to the EIA license conditions during all the phases of the project
 - (ii) effective control of the dust and falling debris
 - (iii) development of public complaints resolution mechanisms to resolve issues arising during construction
 - (iv) whether health and safety issues within the construction site are adequately addressed. For the avoidance of doubt, the fresh report be lodged by way of an affidavit by a technical officer of the 1st Respondent;
- c. The matter will be mentioned on the 24th November, 2023 to confirm settlement and/or further directions as the contempt application and the main appeal.
- d. Leave to Appeal granted to the 2nd Respondent/Applicant.

DATED AND DELIVERED AT NAIROBI, THIS 10TH DAY OF NOVEMBER 2023

EMMANUEL MUMIA - CHAIRMAN

WINNIE TSUMA - VICE-CHAIR

KARIUKI MUIGUA - MEMBER

DUNCAN KURIA - MEMBER

RONALD ALLAMANO - MEMBER

