REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL APPEAL NO. NET/18/2007

TONY MZEE & OTHERS……APPELLANTS

VERSUS

DIRECTOR GENERAL, NEMA……..1ST RESPONDENT
SHAMCO INVESTMENT LTD……2ND RESPONDENT
PHARMA CONSULTANTS…….3RD RESPODNENT

RULING

1. The Notice of Appeal herein was filed on 20th April 2007. The Appeal arises out of the development of 8 maisonettes on L.R. No 3734/937 along Jacaranda Avenue, Nairobi, of which the 2nd Respondent is the registered owner. The appeal is brought by 24 owners/occupiers of properties along Jacaranda Avenue, neighbouring the property on which the development is taking place. The appeal is brought against the Director General of the National Environment Management Authority (NEMA), the owner of the property on which the development is taking place, the 2nd Respondent herein and the main contractors of the development, the 3rd Respondent herein.

2. The events leading to the appeal are that on 29th March 2007, NEMA served on the developer a "cessation order" on the basis that "ground inspection established that you never obtained an environmental impact assessment licence from this Authority as required." Subsequently, on 10th April 2007, NEMA wrote revoking the cessation order stating that it (NEMA) had established that an EIA licence No. 0000454 had been issued to the developer on 16th March 2007. The Appellants contend that the development of the 8 units and associated works are unlawful and/or illegal and, having stopped the works, NEMA erred in revoking the order of stoppage.

3. The 2nd Respondent filed a Reply on 10th May 2007 and amended it on 18th May 2007.The 1st Respondent filed a Reply on 4th June 2007 and the 3rd Respondent filed a Reply on 14th May 2007. The Respondents raised preliminary objections to the Appeal, and the Tribunal disposed of these objections by a Ruling dated 4th September 2007. The matter therefore proceeded to a hearing on the merits, and was heard on diverse dates between 18th August to 26th November 2007. The Appellants called two witnesses, while the Respondents together called seven witnesses. Members of the Tribunal visited the site on 4th October 2007.

4. Mr Chacha Odera Advocate of the firm of Oraro & Company Advocates represented the Appellants. Mr Khamalla and Miss Mkaruri Advocate both from

the firm of Simba & Simba Advocates represented the 1st Respondent, Mr Kamau Karori Advocate from the firm of Iseme, Kamau & Maema Advocates represented the 2nd Respondent and Mr Liko Advocate from the firm of Sichangi & Co Advocates represented the 3rd Respondent.

5. From the evidence adduced the sequence of events forming the background to this appeal can be recounted briefly as follows:

    a. On 18th October 2005, the Director of City Planning approved Plan Reg No DX 638 for the proposed domestic building proposing the erection of 8 maisonettes on L.R. No 3734/937;
    b. On 16th November 2005, an EIA project Report in respect of the development of 8 maisonettes was submitted to NEMA in support of an application for an EIA licence;
    c. On 18th January 2006, NEMA issued a letter of approval of the development, subject to several mandatory conditions, among them condition number 5, which stipulated that "the development should adhere to the 0.05 ha minimum for one dwelling unit specification, 0.35 maximum permitted ground coverage and 0.75 permitted plot development ratio specifications for residential development in Zone 5 of the City of Nairobi;
    d. On 17th March 2006, (and *not* 16th March 2006 as stated in NEMA's letter of 10th April 2007) an EIA licence was issued, subject to a different set of conditions, the main one being that the Environmental Management Plan should be adhered to;
    e. On 29th March 2007, NEMA issued a "cessation order" citing its belief that the 2nd Respondent had not obtained an EIA licence for the development; and
    f. On 10th April 2007, NEMA revoked the cessation order citing the fact that it had established that an EIA licence had indeed been issued.

6. The evidence adduced by the witnesses of the 2nd Respondent showed that, because the proposed development was for 8 units in Zone 5 within which the recommended specification per single dwelling is 0.05 ha, the City Council had required the developer, as a condition granting approval, to construct a sewer line as the method of waste water disposal, instead of resort to septic tanks, which is the standard method of waste water disposal in the area neighbouring this development. Given the City Council's planning guidelines, without a sewer line, approval could only be granted for the construction of 4 to 5 units on this 0.2835 ha plot. Approval for the construction of a sewer line was granted on 25th August 2005 and this was followed, on 18th October 2005, with an approval for the construction of the 8 maisonettes.

7. The construction of the sewer line commenced sometime in early March 2007. By then the construction of the 8 maisonettes was nearing completion. According to the plans submitted to the Tribunal, the sewer line is to run along Jacaranda

Avenue, take a turn at the junction of Jacaranda Avenue and Ramisi Road and then run along Ramisi Road to join the trunk sewer running along James Gichuru Road. Because the gradient from the premises on which the maisonettes are being constructed to Jacaranda Avenue is uphill, the sewage is to be pumped, using an electric powered pump, up to the first manhole, just outside the plot on Jacaranda Avenue, from where it will flow by gravity to the trunk sewer on James Gichuru Road.

8. Before the construction of the sewer line could be completed it was halted by NEMA's cessation order dated 29th March 2007, to which reference has been made. Following the revocation of the cessation order by NEMA on 10th April 2007, the Appellants lodged this Appeal on 20th April 2007, and a Stop Order was issued by the Tribunal in accordance with section 129(4) of EMCA which provides that "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." The effect of these events is that the construction of the sewer line was halted midstream and remains uncompleted to date.

9. Mr George Oraro, the Appellants' second witness, recounted the events leading to the lodging of the appeal. He said that his residence lies at the corner of Jacaranda Avenue and Ramisi Road. He and other residents noticed that excavation with a view to laying a sewer line had commenced along Jacaranda Avenue, sometime in March of 2007. There was a great deal of soil piled up along the roadside and pipes and other materials were lying on the roadside.

10. One evening, on returning home, he found that both sides of the entrance to his residence had been excavated. The excavation damaged the part of his driveway that is outside of his gate as well as the water pipe leading to his compound. A flurry of activity followed. In an effort to find out whether the development had been authorized, Mr Oraro and other members of the local residents association, wrote to, and made inquiries of, the relevant authorities, including NEMA and the City Council, as well as to the developer, and eventually were able to obtain the information about the development. It was as a result of their intervention that NEMA's letter of cessation of 29th March 2007 was written. When NEMA revoked that cessation order the residents appealed to the Tribunal.

11. From the evidence it is clear that the residents were seriously inconvenienced by the nuisance caused by the excavations for the construction of the sewer line: the roads were partially blocked, dust was being generated, and, at least with respect to Mr Oraro's residence, water supply was interfered with. It was this nuisance that galvanized them into action. Indeed, until the excavation for the sewer line commenced, although they had been aware of the fact that the 8 maisonettes in question were being constructed, they made no attempts to stop the construction, despite what might have seemed to be a non-compliance with the planning guidelines for Zone 5, and their disquiet at the changing character of the

neighbourhood. The residents were particularly aggravated by the lack of information and consultation with them before the excavation commenced.

12. When eventually they lodged the appeal, it was underpinned by the legal argument that the EIA approval and licence that had been granted was for the construction of the maisonettes, not of the sewer line. Under the provisions of both EMCA and the Water Act, 2002, the construction of a sewer line required an EIA licence and according to Mr Chacha Odera, Advocate, a *separate* EIA licence. Accordingly, this development was being carried out unlawfully as no EIA licence for it had been obtained. It, therefore, should be stopped until an application for an EIA licence is made, an EIA study carried out and the appropriate EIA licence issued.

13. A complementary argument advanced by the Appellants was that, in any case, the EIA licence in question did not authorize the construction of 8 maisonettes as it was made subject to a mandatory condition which stipulated that "the development should adhere to the 0.05 ha minimum for one dwelling unit specification, 0.35 maximum permitted ground coverage and 0.75 permitted plot development ratio specifications for residential development in Zone 5 of the City of Nairobi. Given that this plot is only 0.2835 ha in size, in effect, the EIA licence which the developer obtained authorizes the construction of only 4 to 5 maisonnetes. Therefore, this development which is of 8 maisonettes, is unlawful for this reason also.

14. The Respondents sought to counter these legal arguments variously. They submitted that the Appellants lacked *locus* under section 129 of EMCA to bring the appeal, as they were not persons aggrieved in terms of section 129(1); that the appeal was out of time, since it was attempting to challenge the EIA licence, which had been issued more than a year before the appeal was lodged; that the letter of 10th April 2007 revoking the cessation order was not a decision within the meaning of section 129 of EMCA and therefore could not form the basis of an appeal; that the responsibility to carry out the EIA study for the sewer line fell on the City Council of Nairobi (not a party in the appeal) which had required that a sewer line be constructed as a condition to granting planning permission for the maisonettes; and that, in any case, the construction of the maisonettes was all but complete and the Tribunal should not issue a stop order if the effect of such an order would lead to greater prejudice to the environment and the wider public.

15. The Tribunal has considered all of these submissions and the authorities adduced in support of each of them. The Tribunal is not persuaded by the submissions urged in support of three of them.

16. In previous appeals the Tribunal has ruled that section 129(2) of EMCA grants *locus* to a wider scope of potential appellants than does section 129(1), including appellants of the category of the Appellants herein.

17. As regards the argument that the responsibility to carry out an EIA study for the sewer line fell on the City Council, the Tribunal is of the respectful view that the elaborate submissions that were made on this point are founded on a misreading of the provisions of section 58(1) of EMCA. It is true that section 58(1) requires any person who "causes" another to carry out an undertaking to apply for an EIA licence. But the obligation to apply for an EIA licence applies both to the person carrying out the undertaking as well as to the person causing the other to carry out the undertaking. The fact that the obligation applies to the person causing the other to carry out the undertaking does not exempt the person actually carrying out the undertaking from the obligation. Accordingly, the 2nd Respondent, as the person developing the sewer works was obligated to apply for an EIA licence. For good measure, section 58(1) includes within its provisions the person *financing* the works, which, by its own admission, the 2nd Respondent knew, undertook to do and is doing.

18. While on this point the Tribunal wishes to comment on a matter that caused it considerable concern. At page 17 (para 3.3.4) of the Environmental Impact Assessment Project Report submitted as part of the 2nd Respondent's Reply, it is stated that "*there is the Nairobi City Council (NCC) sewer main running along Jacaranda Avenue*." In evidence Mr Keneth Onacha, the EIA Expert from Environment, Health and Safety Resource Centre Ltd, the firm which was commissioned to prepare an EIA Project Report, maintained that this was a true statement, in the face of overwhelming evidence to the contrary. He sought to argue that since approval had been granted by the City Council to construct the sewer line, therefore it was true to state in the EIA Project Report, that the sewer line was there which, in fact, is a false statement.

19. The Tribunal draws the attention of parties and their witnesses to the provisions of Rule 39 of the National Environment Tribunal Procedure Rules LN No 191 of 2003 which state that the Tribunal may make an order awarding costs and expenses "against a party if it is of the opinion that the conduct of that party in making, pursuing or resisting the appeal was wholly unreasonable." The Tribunal finds that, in maintaining throughout the appeal process that there is a sewer main running along Jacaranda Avenue, the 2nd Respondent's conduct was wholly unreasonable. The Tribunal is minded to award costs and expenses against the 2nd Respondent and, in line with rule 39(2) of the Tribunal's Procedure Rules, invites the 2nd Respondent, on date to be determined, to make representations against the making of an order on costs against it.

20. The Tribunal has considered the submission that NEMA's letter dated 10th April 2007 revoking the cessation order, is not a decision capable of being appealed against within the meaning of the work decision in section 129(2) of EMCA. The 2nd Respondent, who made this submission relied on the definition of the term "decision" as elucidated in the case of *R* v *Minister for Transport & Communications ex parte Waa Ship Garbage Collectors & 15 others* KLR (E & L) 1, 563. That authority makes a distinction between decisions made in execise

of judicial and quasi-judicial powers and "purely administrative or executive decisions." Judicial or quasi-judicial decisions are decisions made in situations where the decision making body is ascertaining facts or law and has to consider proposals, objections and evidence while purely administrative decisions will depend on the facts and circumstances of each case.

21. There is much in this definition of "decision" that resonates with the kinds of decisions made by NEMA: some, like decisions made following a public hearing on an EIA Study report, would clearly be categorized as quasi-judicial, while others like the routine day to day directions of the Director General to his officers, might, legitimately, be considered purely administrative. The question is: where in this continuum does the letter of 10th April 2007 fall?

22. That letter stated as follows: "*Our letter Ref. No NEMA/5/11/Vol. I dated 29th March 2007 on the above subject refers. The letter is hereby revoked. Since communication to you on the above matter, the Authority has established that indeed you have undertaken an Environmental Impact Assessment (EIA) Project report which was submitted to the National Environmental Management Authority (NEMA) on 16th November 2005. The Report was reviewed and an EIA licence No 000454 was issued to yourselves on 16th March 2006.*"

23. The Appellants argue that this revocation letter represents a decision by NEMA that an EIA licence was issued, whereas no EIA licence for the sewer line was applied for or issued. The 2nd Respondent argues that this letter is merely a communication from NEMA that an EIA licence had been issued and it represents no decision upon which an appeal can be based. The Tribunal is inclined to the view that it does contain a decision upon which an appeal can be based, since the letter of 29th March 2007 to which it refers had required the addressee to "conduct an EIA Study Report for the *sewerage connection* and the eight maisonettes..." By revoking this letter NEMA lifted its earlier requirement that the developer carry an EIA Study for *the sewerage connection.*

24. In light of this finding, the challenge that the Appeal was filed out of time cannot be sustained. The trigger for the filing of the Appeal was a decision of the Authority communicated by letter dated 10th April 2007, not the EIA licence issued on 17th March 2006.

25. The Tribunal has considered the effect of maintaining the stop order against the construction of the sewer line pending the submission of an EIA Project Report for the sewer line and has come to the conclusion that this would, on balance, cause greater prejudice to the environment, and to the wider public, than if the stop order was lifted in order to allow the construction of the sewer line to be completed.

26. From the evidence adduced by Mr Joseph Waweru Macharia, the 3rd Respondent's civil engineer in charge of installing the sewer line, the excavation

works for the sewer line were substantially complete. At the time when NEMA's cessation order was served, only a few more days were required to finalize the works. Further, the maisonettes to be served by the sewer line have substantially been built. The lack of access to sewerage facilities is the principal reason for the limitations imposed on the density of housing development in this zone. Therefore, with the installation of this sewer line, there is no environmental reason against this development since the Tribunal accepts that a well functioning sewerage facility would adequately meet the requirements for the disposal of waste water arising from the 8 maisonettes on land the size of this plot.

27. Were an EIA Project Report to be submitted, it would consider the environmental impacts of installing a sewer line as well as the environmental impacts arising during the construction phase of the project. The key long term issue would include whether the sewerage system would operate sustainably.

28. Mr. Gurdial Singh Ghataure, and Mr Ravinder Singh Mathari, witnesses summonsed by the 2nd Respondent testified that they were responsible for designing the sewerage system and for the electrical works respectively. The design was based on an electricity operated pumping system to overcome the gradient. The sewage sludge would be stored temporarily in two conservancy tanks and then periodically (once a week) pumped to the first manhole from where it would flow by gravity to the trunk sewer line. There would be two pumps, so that in case one failed the other would serve until the first one had been repaired. In order to cater for the risk of a power failure they would install a stand-by generator. Mr Ghataure testified that he had installed similar systems in Kisii and in Kampala and they operated satisfactorily.

29. With regard to the environmental impacts during the construction phase of the project, the inconvenience to the neighbours clearly would be a key concern. However, this kind of inconvenience, aggravating as it is, is transient in nature, and in this case, will end within a few days, given that the construction was to be completed in another few days. It must also be weighed against the inconvenience that would arise from keeping the site in its present state for another several months while the EIA Project report was prepared and considered, with the road partially blocked, and the pipes lying alongside the road.

30. Further, the sewer line is a 9 inch pipe and its design allows for use by other residents whose property adjoin the street along which it passes, which is an environmental good to the wider public. It was said in evidence that after a period of one year the sewer line, if constructed and operating to the satisfaction of the sewerage services provider, Nairobi Water and Sewerage Company Ltd, will be adopted by it, and thereafter, any resident whose property adjoins the sewer line may connect to it. Apparently, the pipe has the capacity to serve a population of 8,000 people. Further, the adoption process provides an additional environmental safeguard against poor design and operation, since the sewerage services provider

carries out a technical inspection of the works during construction and prior to adoption to ensure that they have been built to specification.

31. Taking all these factors into account the Tribunal finds that these proceedings of the appeal have elicited the information that would have been provided through an EIA Project report on the sewer line, and that the information is sufficient to enable the Tribunal exercise the powers conferred on it by section 129(3)(b) of EMCA which empowers the Tribunal to exercise any of the powers which could have been exercised by the Authority, to issue to the 2nd Respondent an EIA licence for the sewer line which it is constructing along Jacaranda Avenue, Nairobi.

32. Accordingly, the Tribunal unanimously lifts the Stop Order dated 20th April 2007, permits the construction of the sewer line to continue to completion and hereby issues the required EIA licence for the sewer line to the 2nd Respondent.

33. The EIA licence for the sewer line is issued subject to the following conditions:

    a. That the 2nd Respondent shall pay the requisite EIA licence fees for the sewer line to NEMA of an amount to be determined in accordance with the applicable regulations.
    b. That the 2nd Respondent shall repair the damaged water pipes and any other damaged items and property belonging to the neighbouring properties.

34. Nairobi Water and Sewerage Company Ltd shall provide a certificate to NEMA that the technical design, installation and operation of the sewer works is of acceptable standards, once it satisfies itself that this is so.

35. The attention of parties is drawn to section 130 of EMCA.

DATED at Nairobi this 18th day of December, 2007.

Donald Kaniaru.....Chairman

Dwasi Jane.....Member

Albert Mumma.....Member

Stanley Waudo.....Member

Joseph Njihia.....Member