

THE REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. NET/14/2006 OF 2006

1. WE CARE ABOUT NAIROBI DO IT..... 1ST APPELLANT

2. LAVINGTON RESIDENTS ASSOCIATION..... 2ND APPELLANT

VERSUS

1. DIRECTOR GENERAL/ NEMA..... 1ST RESPONDENT

2. ABDUL SHAKUR KASMANI..... 2ND RESPONDENT

RULING

1. By Notice of Appeal dated 13 November 2006 and filed jointly by the Appellants (We Care About Nairobi DO IT, 1st Appellant and Lavington Residents Association, 2nd Appellant) through Kennedy Maside, against the Respondents (Director General/NEMA, 1st Respondent, and Abdul Shakur Kasmani, 2nd Respondent) challenging NEMA's issuance of an EIA licence no. 0000509 dated 29 May 2006, and summarised the grounds of appeal as: no change of user, neighbours objected to project, no public participation, no advertisement as per Section 58 of EMCA and misleading information by NEMA denying issuance of licence while had actually done.
2. The Appellants sought to have the developer stopped from further construction or selling or occupation of the seven town houses under development on Plot LR. No. 3734/274 on O'Washika Road, Lavington, and Nairobi till this matter was determined.
3. The 1st Respondent, through Mereka & Company Advocates filed its reply on 23rd January 2007 contesting the grounds of appeal and fully justifying its action to issue licence and was of the view that the appeal was "merely academic and only amounted to an abuse of the process of the Tribunal. " Further they filed, on 4th May 2007, a notice to raise preliminary objection on points of law; that the Appellants had no locus standi in the subject matter and hence had no right of audience before the Tribunal, and if found to have locus, the appeal was not properly before the Tribunal, having been filed out of time, contrary to Rule 4(2) of the Tribunal Rules of Procedure.

4. By notice of appointment filed on 8 March 2007, J.H. Ojiambo, Advocate, notified that he was on record to represent the 1st and 2nd Appellants. On 28th March 2007, the Advocate filed a Notice of Withdrawal to represent the 1st Appellant.
5. No notice of representation of the 1st Appellant was thereafter formally filed.
6. The matter came up for mention and to determine the way forward on 6th June 2007. Given the withdrawal of Counsel for the 1st Appellant, and the absence of Counsel Ojiambo to inform the Tribunal, Mr. Maside who filed the appeal in the first instance stated that the 2nd Respondent wished to withdraw the appeal and the 1st Appellant had no objection to the withdrawal. This was in view of the decisions of the Tribunal on withdrawal in earlier rulings (nos. 11, 12 and 13 in April 2007). Mr. Masinde, whose representation in the Tribunal was unclear, sought permission, which the Tribunal granted, to clarify representation and to file an application to withdraw the appeal within days.
7. In the meantime, the 2nd Respondent who had not figured or filed any appearance was in the Tribunal. He said he had not been served with any documents and needed time to review the matter. No explanation was given by the Appellants for this situation. The Tribunal provided him with a file, and set an agreed time (18 June 2007) for the next mention and review of the application of withdrawal. Mr. Masinde was requested to be present and to inform Ojiambo to be present as well. The issue of costs would be argued then.
8. The 2nd Respondent by notice of appointment on 8th June 2007, entered an appearance through Mogusu Miencha & Company Advocates, and filed a Notice of Preliminary Objection, that the Appellants failed to comply with Rule 7 of Tribunal Rules of Procedure, lacked locus standi, and if they had locus, the appeal was filed out of time contrary to Rule 4(2). In other words the two Respondents were dancing to the same tune.
9. Before the mention and hearing on 18 June 2007, the 1st Respondent filed written submissions stating that, in principle, they were not opposed to the intended withdrawal but the actions of the Appellants were such that the Tribunal should find that an order for costs in favour of the 1st Respondent was due and assess them accordingly.
10. By the time the matter came up in the Tribunal the situation was as follows:-
 - The Appellants, expressly or impliedly, wished to withdraw the appeal, and the Respondents were not opposed to this.
 - The said withdrawal was brought up before the preliminary objections were argued, and once withdrawal was allowed, as it was, only the issue of possible costs remained to be settled.

- Accordingly, there was no longer a point in ruling on the preliminary points. Nor was there a need to substantively deal with the merits of the appeal.
- Kennedy Masinde was not present and did not appear and there was no explanation then or thereafter, till the matter closed on 18th June, 2007. Surprisingly, on 20th July, 2007, he filed Notice to Withdraw the Appeal. On the other hand, Counsel Ojiambo was present on 18th June 2007 and argued against the Tribunal awarding costs.
- Advocate Miencha was present representing the 2nd Respondent as was Advocate Mutua Molo, instructed by Mereka & Co. Advocates, for the 1st Respondent and these Counsel were ready to proceed with the matter on the issue of costs.

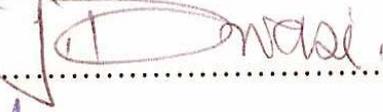
Neither Appellant wished to carry on, in view of the odds against them, following Tribunal Rulings on NET cases nos. 11, 12 and 13. And Counsel Ojiambo argued that no costs should be found against the Appellants since no factual determination could be made since the appeal had not been substantively considered and determined.

11. The Respondents' Counsel argued that the appeal should not, in any case, have been filed since it did not fall within the provisions of the Environmental Management and Coordinating Act (EMCA) and of the Tribunal's Rules of Procedure. The Tribunal should, therefore, contrary to Ojiambo's arguments, award costs to them.
12. Those that file appeals should diligently observe EMCA and the Rules of Procedure and the Tribunal shall not, of course, condone their non-observance. This matter never reached a substantive stage, and the 2nd Respondent did not have an opportunity to file a substantive reply having appeared by chance at the time the withdrawal of the appeal featured, but the 1st Respondent did. No witnesses were called either. Regrettably, the 2nd Respondent was not served with the appeal papers, and understandably was upset and considered it harassment that yet another case on the same matter was simultaneously filed, through Kennedy Masinde, in the Chief Magistrate's Court, Nairobi.
13. The only material difference between this matter and the cases (11, 12 and 13) was that in the present matter the 1st Appellant failed, without explanation, to appear as previously agreed with their officer in the Tribunal. The Counsel for the two Respondents, however, did and urged the Tribunal to award costs.

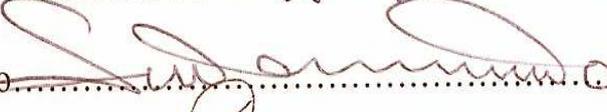
14. The Tribunal, conscious of its Rule 39 of the Rules of Procedure, has considered the claim of costs, and has unanimously come to the conclusion that it awards no costs on the Appellants on bringing the appeal before it because the Tribunal does not think that they filed the appeal vexatiously. It appears that the Appellants did not appreciate time limitation but once they did, they applied to withdraw the appeal. However, the 1st Appellant is ordered to pay cost of the attendance of the Counsel for NEMA and for the 2nd Respondent for one morning of 18 June 2007, the date of their attendance before the Tribunal in the absence of the 1st Appellant's representative, Mr. Kennedy Masinde. The cost is assessed at KShs. 5000 per respondent party; a total of KShs. 10,000.
15. The Tribunal draws the attention of the parties to Section 130 of EMCA.

DONE at NAIROBI this 30th day of July 2007.

Donald Kaniaru..........Chairman

Dwasi Jane..........Member

Albert Mumma..........Member

Stanley Waudo..........Member

Joseph Njihia..........Member