

**REPUBLIC OF KENYA**  
**IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI**  
**TRIBUNAL APPEAL NO. NET/48/DEC/2009**

STRATHMORE EDUCATION TRUST  
REGISTERED TRUSTEES.....1<sup>ST</sup> APPELLANT  
STRATHMORE UNIVERSITY.....2<sup>ND</sup> APPELLANT

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT  
MANAGEMENT AUTHORITY (NEMA).....1<sup>ST</sup> RESPONDENT  
IDM HOMES COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT

**RULING**

1. By Notice of Appeal filed in the Tribunal on 4<sup>th</sup> December 2009, the Appellants challenge NEMA's issuance of an environmental impact assessment (EIA) licence to the 2<sup>nd</sup> Respondent on 10<sup>th</sup> June 2009 on the grounds, among others, that:
  - (i) the 2<sup>nd</sup> Respondent obtained an EIA licence from NEMA to construct residential houses on land, L.R number 209/6705/2, off Mbagathi Road in Nairobi;
  - (ii) the 2<sup>nd</sup> Respondent did not apply to NEMA for an EIA licence to rehabilitate water pipes or to construct or extend a sewer line;
  - (iii) regardless of the absence of necessary licences, the 2<sup>nd</sup> Respondent obtained a licence from Nairobi City Council to enable it to illegally enter upon the 1<sup>st</sup> Appellant's land, L.R. No. 209/11613, to excavate trenches thereon and construct an underground sewer line;
  - (iv) the sewer line, if constructed, would cross the 1<sup>st</sup> Appellant's said property;
  - (v) the 2<sup>nd</sup> Respondent did not obtain the 1<sup>st</sup> Appellant's permission to enter land, L.R. No. 209/11613;
  - (vi) the 2<sup>nd</sup> Respondent did not obtain wayleave to construct a sewer line and to rehabilitate water pipes on land, L.R. No. 209/11613;
  - (vii) the 2<sup>nd</sup> Respondent did not obtain permits as required by the Water Act to rehabilitate water pipes on the said land; and that

- (viii) by failing to follow the applicable laws in obtaining EIA licence and required permits, the 2<sup>nd</sup> Respondent deprived the Appellants of their right to a public hearing as provided by both the Water Act and the Environmental Management and Co-ordination Act (EMCA), No. 8 of 1999).
2. For the reasons stated, the Appellants asked the Tribunal to: issue an order stopping the construction of a sewer line on the 1<sup>st</sup> Appellant's land parcel L.R. No. 209/11613 and direct the 2<sup>nd</sup> Respondent to restore the environment, cancel the EIA licence issued by NEMA to the 2<sup>nd</sup> Respondent and direct the 2<sup>nd</sup> Respondent to comply with all environmental laws.
  3. On 17<sup>th</sup> February 2010, the 1<sup>st</sup> Respondent filed Reply to the appeal, stating, among other things, that:
    - (i) it granted the 2<sup>nd</sup> Respondent an EIA licence to construct "Domestic Building" on land, L.R. 209/6705/2 of Mbagathi Road in Nairobi;
    - (ii) at no time has the 2<sup>nd</sup> Respondent applied to NEMA for an EIA licence for sewage disposal works on plot, L.R. No. 209/6705/2 and no EIA licence has been given for such works as required by the second Schedule to EMCA;
    - (iii) at all material times, the 2<sup>nd</sup> Respondent indicated to NEMA that its sewerage system and solid waste disposal system were within its plot number L.R. 209/6705/2 off Mbagathi Road; and that
    - (iv) the 1<sup>st</sup> Respondent, NEMA, is a stranger to allegations of trespass by the 2<sup>nd</sup> Respondent on the 1<sup>st</sup> Appellant's plot number L.R. No. 209/11613 and to the 2<sup>nd</sup> Respondent's non-compliance with provisions of the Water Act, 2002.
  4. The 2<sup>nd</sup> Respondent did not file reply to the appeal. Instead, it did, through the law firm of Ahmednasir, Abdikadir & Company Advocates, file a Memorandum of Appearance and a Notice of Preliminary Objection to the appeal on 11<sup>th</sup> March 2010.
  5. In its Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent stated that:
    - (i) the Tribunal lacks jurisdiction to entertain the appeal because the matter has been heard and determined by the High Court;
    - (ii) the matter presented in the appeal is *res judicata* because it has been directly and substantially raised before the High Court which heard and finally determined it;
    - (iii) the appeal is contrary to section 130 of EMCA; and that

- (iv) the Appellant's filing of an appeal in the Tribunal amounts to abuse of court process because they did so only after failing to obtain an injunction from the High Court and are only "forum-shopping and riding horses and donkeys through court system process."
6. The 2<sup>nd</sup> Respondent's Preliminary Objection was heard on 29<sup>th</sup> March 2010 and on 24<sup>th</sup> June 2010, the Tribunal issued a ruling, dismissing the Objection.
  7. Subsequently, the Tribunal and Counsel for all parties visited the site in question on 6<sup>th</sup> September 2010. During the site visit, the Tribunal noted that the sewer line whose construction formed the basis of the Appellants' claim was being constructed by the 2<sup>nd</sup> Respondent along a stream in a marshy area within the Appellants' land to serve residential houses that are being constructed by the 2<sup>nd</sup> Respondent on a plot on the upper side of the Appellant's land.
  8. After the site visit, the appeal was set down for hearing on 1<sup>st</sup> October 2010. However, Counsel for all parties agreed to present the merits of their positions by way of written submissions. Counsel for the Appellant and the 2<sup>nd</sup> Respondent filed written submissions on 11<sup>th</sup> October 2010 and 18<sup>th</sup> October 2010, respectively. Counsel for the 1<sup>st</sup> Respondent did not file written submissions. Written submissions were orally presented on 18<sup>th</sup> October 2010 by Mr. Kibet, Counsel for the Appellants and both Mr. Biriq and Mr. Sagana, Counsel for the 2<sup>nd</sup> Respondent. Acknowledging that the 1<sup>st</sup> Respondent had not filed written submissions, Mr. Omari briefly presented the 1<sup>st</sup> Respondent's position on the appeal.
  9. Counsel for the Appellants stated that the 2<sup>nd</sup> Respondent was constructing a sewer line right inside a wetland and a riparian reserve in breach of the Appellants' right as a riparian owner of land, L.R. No. /209/11613. He cited the case of *Nairobi Golf Hotel v. Pelican Engineering*, KLR(E&L)1 which defines a riparian owner as a person who owns land on a bank of a river, or along a river or bordering a river or contiguous to a river.
  10. He stated that during the Tribunal's visit to the site in question, it was noted that part of the wall of the sewer line that was constructed by the 2<sup>nd</sup> Respondent on a wetland inside the Appellant's land had collapsed, indicating that if allowed to operate, the sewer line would pose serious environmental degradation and harm human populations using water down the stream. Counsel stated that because the Appellant was constructing a sewer line along a stream in a marshy area and "right inside water" it could not be said that the sewer line would not pollute the environment when in operation. He stated that section 42(1) of the Environmental Management and Co-ordination Act (EMCA of 1999) prohibits activities of the kind undertaken by the Appellant in a wet land.
  11. Further, Counsel for the Appellants stated that section 58 of EMCA requires a licence for construction of a sewer line and that Rule 12 of the Second Schedule to EMCA lists

sewerage disposal works among activities requiring a specific Environmental Impact Assessment (EIA) licence, which the 2<sup>nd</sup> Respondent never obtained. He stated that among the 2<sup>nd</sup> Respondent's bundle of documents was an EIA licence dated 10<sup>th</sup> June 2009, indicating that the licensed activity was development of a domestic building and not construction of a sewer line. However, the 2<sup>nd</sup> Respondent now purports that the EIA licence gives it the right to undertake sewerage works, but it does not.

12. Further, Counsel for the Appellants stated that even if the EIA licence obtained by the 2<sup>nd</sup> Respondent authorized it to construct a sewer line, the 2<sup>nd</sup> Respondent had failed to construct the sewer line in question in accordance with the law because they had not obtained a licence to undertake "instream activities" within a wetland as required by section 25(d) of the Water Act which requires a permit for any activity to be carried out in or in relation to a water resource. He further stated that the 2<sup>nd</sup> Respondent had also failed to comply with the provisions of Rule 16(1) and the Fifth Schedule, Part A(K) of the Water Resources Management Rules of 2007 which require one to obtain authority from the Water Resources Management Authority to undertake any in-stream works.
13. Further, he stated, the 2<sup>nd</sup> Respondent also failed to obtain wayleave to construct the sewer line in question as required by the Wayleaves Act. He stated that the fact that a river passes through the Appellants' land does not authorize the 2<sup>nd</sup> Respondent to construct a sewer line along the river without first obtaining wayleave. He also stated that even if Nairobi City Council issued a letter of approval of the 2<sup>nd</sup> Respondent's construction of a sewer line, that did not override provisions of EMCA, the Water Act and the Wayleaves Act. In any case, he stated, Nairobi City Council's letter to the 2<sup>nd</sup> Respondent dated 9<sup>th</sup> July 2008 which approved the development directed the 2<sup>nd</sup> Respondent to obtain wayleave.
14. For the reasons stated, Counsel for the Appellants asked the Tribunal to set aside or quash the EIA licence issued to the 2<sup>nd</sup> Respondent on 10<sup>th</sup> June 2009 and issue a permanent order to stop the 2<sup>nd</sup> Respondent from constructing the sewerage line in question and a restoration order directing it to restore the environment affected by its sewerage works.
15. On his part, Mr. Biriq, Counsel for the 2<sup>nd</sup> Respondent stated that the appeal lacked merit because it did not raise any environmental issue that could not be mitigated by measures proposed in the 2<sup>nd</sup> Respondent's EIA Report. He stated that an alternative route had been suggested by the Appellants but the suggestion was not based on any environmental consideration.
16. Mr. Biriq also stated that NEMA was right in issuing the 2<sup>nd</sup> Respondent with an EIA licence on the basis of environmental issues considered in accordance with the law. He further stated that grounds of the Appellants' appeal in the Tribunal had all been considered and determined by the High Court in ELC 266 of 2009. Therefore, he stated, the Appellants' claim in the Tribunal was statute-barred.

17. Mr. Biriq stated that he agreed with Counsel for the Appellants that a separate EIA was necessary for sewerage works, but stated that such a licence is necessary if sewer construction is the only activity one is undertaking. He also stated that the Second Schedule to EMCA and section 58 of the Act requiring EIA licence for sewerage works apply only when one is not connecting to an existing sewer system. He also stated that sewerage construction comes as a package in a project. Therefore, one does not need a separate EIA for it.
18. Mr. Biriq acknowledged that during site visit, it was noted that trenches that had been excavated for the sewer line had collapsed, but contended that the activity was carried out almost a year ago during heavy rains, which would definitely cause the trenches to collapse. He stated that the riparian reserve along the river running through the Appellants' land is a public utility.
19. Mr. Biriq stated that there was no alternative route for the sewer line in question because the area has steep slopes. He stated that sewage can only flow on natural drainage, which can only be guaranteed along the river passing through the Appellants' land. He stated that in Nairobi, all sewer systems run along rivers. Moreover, he stated, the 2<sup>nd</sup> Respondent is undertaking its development in a densely populated area where everyone is happy with the project except the Appellants. He referred the Tribunal to a copy of questionnaires administered on residents of the area to show that all of the people interviewed, including leaders of a nearby church were supportive of the project.
20. He further stated that water-proof and corrosion-resistant pipes would be used to construct the sewer line in question as part of mitigation measures. He stated that the Appellants failed to show that the environment of the area would be impacted by construction of the sewer line in ways that cannot be mitigated. He relied on the case of *Peter K. Waweru v. The Republic, Nairobi Miscellaneous Civil Application No. 118 of 2004* to state that the Tribunal should not stand in the way of development and urged the Tribunal to consider sustainable development which, he stated, is supported by Article 67 of the new Constitution. He also referred to the case of *Jamii Bora Charitable Trust & Another v Director General, National Environment Management authority & another* (NET/02/03/2005) to state that in that case, the Tribunal did not stop the development because there were rivers and wildlife in the area.
21. For the reasons stated, Mr. Biriq asked the Tribunal to dismiss the appeal.
22. In his submissions, Mr. Omari, Counsel for the 1<sup>st</sup> Respondent relied on the 1<sup>st</sup> Respondent's Reply to the appeal and its list of documents submitted to the Tribunal. He stated that the Appellants sought a number of reliefs but only their request to the Tribunal to quash the EIA licence issued to the 2<sup>nd</sup> Respondent affected the 1<sup>st</sup> Respondent.
23. Mr. Omari further stated that the EIA licence dated 10<sup>th</sup> June 2009 was issued to the 2<sup>nd</sup> Respondent with a number of conditions, including condition number 5 which required

the 2<sup>nd</sup> Respondent to submit proposed design drawings for water and sewage reticulation to Nairobi Water and Sewerage Company for evaluation and approval. Mr. Omari also stated that the EIA Project report submitted by the 2<sup>nd</sup> Respondent addressed the issue of sewage disposal at page 18 and that the 1<sup>st</sup> Respondent thought the issue was adequately tackled.

24. Mr. Omari stated that under section 9 of EMCA, NEMA supervises development projects to ensure that the environment is not degraded. On that basis, NEMA wrote to the 2<sup>nd</sup> Respondent on 11<sup>th</sup> December 2009 when it came to its notice that the 2<sup>nd</sup> Respondent had not indicated in its EIA Project Report that construction of a sewer line was one of its proposed activities. He stated that the 2<sup>nd</sup> Respondent should have applied either for an environmental easement under sections 112 - 116 of EMCA or for a sewerage wayleave. He finally stated that he felt that the 2<sup>nd</sup> Respondent should have applied for a sewerage disposal licence.
25. In reply to submissions made by Counsel for both 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Mr. Kibet, Counsel for the Appellants stated that the position taken by Mr. Omari, Counsel for the 1<sup>st</sup> Respondent was that the 2<sup>nd</sup> Respondent had not complied with EIA licence conditions but its Counsel was shy to state that the licence issued should be quashed. He further stated that the 2<sup>nd</sup> Respondent's contention that the matter before the Tribunal had been dealt with by the High Court was *res judicata* because the Tribunal had already dealt with that issue in its ruling on the Preliminary Objection. Further, he stated that even if a sewer line had to be constructed along a river, one constructing such a line had to comply with the law.
26. In light of the applicable law, the Tribunal has carefully considered submissions made by Counsel for all parties, the written submissions including authorities cited and observations made during its site visit.
27. It is the Tribunal's considered view that matters concerning whether or not it has jurisdiction to entertain the appeal herein, whether the appeal was filed in time and issues of *res judicata* were addressed in details in its ruling on the 2<sup>nd</sup> Respondent's Preliminary Objection issued on 24<sup>th</sup> June 2010 and cannot be re-considered at this stage. Counsel for the 2<sup>nd</sup> Respondent is precluded from raising those issues again, at this stage.
28. The Tribunal notes that the matter at issue is the construction of a sewer line along a river that runs across a marshy section of the 2<sup>nd</sup> Appellant's land. While the Appellants maintain that the 2<sup>nd</sup> Respondent neither consulted them nor obtained wayleave, a permit from the Water Resources Management Authority and a separate EIA for it, the 2<sup>nd</sup> Respondent maintains that sewer lines are constructed along rivers, there is no alternative route for their proposed sewer line, the sewer line is part of construction of residential houses and does not require a separate EIA and that construction of the line would not affect the surrounding environment. To the contrary, the Tribunal finds that section 58 of EMCA which requires project proponents to obtain EIA licenses and the Second

Schedule to EMCA which lists waste disposal, including sewage disposal works among projects requiring EIA (item 12) leave no doubt that the 2<sup>nd</sup> Respondent was legally-bound to apply for and obtain a separate EIA licence for its construction of a sewer line.

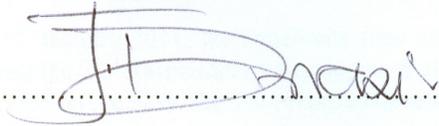
29. Although an application for an EIA licence could be obtained for both construction of residential houses and sewer line, such an application should be based on an EIA project report or EIA study report that also details a proposed construction of a sewer line, includes design drawing and other components and seeks approval of both construction of houses and sewer line. A perusal of the 2<sup>nd</sup> Respondent's Project Report submitted to the Tribunal shows that sewerage system and solid waste disposal system is considered as a sub-topic but only briefly, without detail, without necessary plans and drawings and with indication that an application for its approval was made to Nairobi City Council (page 18 of the report) and Not to NEMA, as required by EMCA (section 58 and Second Schedule). A perusal of the EIA licence number 0003609 issued to the 2<sup>nd</sup> Respondent on 10<sup>th</sup> June 2009 leaves no doubt that NEMA only licensed the 2<sup>nd</sup> Respondent's construction of domestic building and that the objective of the project for which the licence was sought was "development of maisonette Type B." Mr. Omari, NEMA's Counsel confirmed that the 2<sup>nd</sup> Respondent had not indicated in its EIA Project Report that construction of a sewer line was one of its proposed activities and also expressed his view that the 2<sup>nd</sup> Respondent should have applied for an environmental easement under EMCA.
30. The Tribunal also finds that the 2<sup>nd</sup> Respondent failed to obtain wayleave as required by the Wayleaves Act, Chapter 292, sections 3- 6. Even if the 2<sup>nd</sup> Appellant's land was the only route for the 2<sup>nd</sup> Respondent's proposed sewer line, the 2<sup>nd</sup> Respondent would still be bound by law to obtain wayleave. In the process, the Appellants' would be given a chance to raise their views or, at least, be consulted. Sustainable development claimed by Mr. Biriq, Counsel for the 2<sup>nd</sup> Respondent, cannot be supported by a developer's unilateral and deliberate encroachment on another person's land without any prior notification of the land owner, just because a river happens to pass on his land.
31. Also, the 2<sup>nd</sup> Respondent failed to comply with EIA licence condition number 5 which required it to submit proposed design drawings for water and sewage reticulation to Nairobi Water and Sewerage Company for evaluation and approval. The 2<sup>nd</sup> Respondent did not show that the required drawings were submitted to the Council for approval. Neither was any Council approval of such drawings provided.
32. Further, the Tribunal finds that the 2<sup>nd</sup> Respondent's activities are in breach of section 25(d) of the Water Act which requires a permit for any activity to be carried out in or in relation to a water resource. To the extent that the 2<sup>nd</sup> Respondent seeks to construct a sewer line along and into a river, its activities are "in-stream" for which a permit is required.

33. For the reasons explained, the Tribunal, hereby, unanimously, directs the 2<sup>nd</sup> Respondent to stop its construction of a sewer line on the Appellants' land unless and until it secures agreement with the Appellants.

34. Further, the Tribunal directs the 2<sup>nd</sup> Respondent to comply with the provisions of law in obtaining necessary permits and EIA licence for construction of a sewer line for its housing project.

DATED and DELIVERED at Nairobi this 29th day of November 2010.

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

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

Tom Ojienda..........Member

Evans Gaturu..........Member

**CHAIRMAN**  
**National Environment Tribunal**  
**P.O. Box 74772 Tel \_\_\_\_\_**  
**NAIROBI**