

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL APPEAL NUMBER NET/47/2009/2009

BERNARD K. NJAU.....1ST APPELLANT
KIMATHI ESTATE RESIDENTS.....2ND APPELLANT

VERSUS

DIRECTOR GENERAL NEMA.....1ST RESPONDENT
GEORGE KIARIE NG'ANG'A.....2ND RESPONDENT
JACKLINE WAMBUI NJERU.....3RD RESPONDENT
SANTA BARBRA PARK LTD.....4TH RESPONDENT

RULING ON PRELIMINARY OBJECTION

1. By a Notice of Appeal filed in this Tribunal on the 24th of November 2009, Bernard K. Njau, the first Appellant, filed this Appeal on his behalf and on behalf of all unnamed residents and members of Kimathi Estate Welfare Association against National Environmental Management Authority (NEMA) described herein as the 1st Respondent and George Kiarie Ng'ang'a, Jackline Wambui Njeru and Santa Barbra Park Ltd as the 2nd, 3rd and 4th Respondents, respectively.
2. The Appellants have brought this Appeal against the 2nd and 3rd Respondents in their capacities as officials of the 4th Respondent. The 4th Respondent is described as the developer of public land known as LR 209/7383/356 off Eldoret Road in Kimathi Estate.
3. In the summary of the Grounds of Appeal, the Appellants contend that the Environmental Impact Assessment (EIA) Licence no. 003414 for 100 apartments was irregularly obtained.

4. The Appellants further contend that the parcel of land in issue was irregularly acquired by the 2nd Respondent from the City Council as the City Council only held the parcel of land in trust for the residents of Kimathi Estate. They further stated on this particular ground that the City Council was bound by Regulations Nos. 11(2)(a)(b); (3)(a)(b); 15(1)(b) and 16(2) of the Land Planning Act Cap 303 Laws of Kenya which made it mandatory for the developers to provide land for public utilities and open spaces for use by the residents.
5. The Appellants also averred that the parcel of land in dispute was the subject of a suit in the High Court wherein orders of status quo had been issued, orders which have yet to be set aside. They further averred that despite this, the 2nd Respondent compromised, misled, misinformed or in the alternative misrepresented or concealed the truth about the above Court case so that on the 15th October 2008 the City Council approved his Building Plan No. EP554 for construction of 110 flats and annexed a copy of the said approval.
6. As against Nairobi City Council, the Appellants claimed that it ignored and/or condoned the fact that the title to the disputed public land had been excised from LR 209/7383/R (F/R NO. 302/126) which had been set aside for public purpose. In their Grounds of Appeal, the Appellants claimed that the City Council later realized that its approval had been obtained irregularly and cancelled the same. The Appellants annexed proof of this in the form of a letter of revocation.
7. The Appellants further averred that in spite of the revocation of the building plans, the 2nd and 3rd Respondents lied to, misled or concealed the truth from NEMA so that on the 20th May 2009, they were granted EIA licence no. 0003414 for the construction of 110 high rise apartments which are 4 levels above the complainants' maisonnettes/bungalows and right in the middle of the estate.
8. They therefore prayed for the cancellation and/or revocation of the EIA licence no. 003414 as the same was issued 3 months after the building plan had been cancelled by the Nairobi City Council.
9. On the 1st February 2010 the 1st Respondent filed a Notice of Appointment of Advocates through the firm of Simba & Simba Advocates and thereafter a Notice of Preliminary Objection contending that the Appeal is incompetent since the claimants have no *locus standi* and have therefore filed the Appeal in contravention of section 129 (1) of the EMCA. They also contend that the Appeal was filed out of time with 60 days having lapsed and is therefore also in contravention of the said section 129 (1) of the EMCA. Lastly, they contend

that the Appeal is otherwise an abuse of the Tribunal process and should be struck out.

10. Together with Notice of Appointment filed on the 26th March 2010, the firm of Njoroge Wachira & Company for the 2nd, 3rd and 4th Respondents filed a Preliminary Objection contending that the Appeal is incurably defective and the same does not lie against the 2nd, 3rd and 4th Respondents.
11. The 2nd, 3rd and 4th Respondents further contend that Kimathi Estate Welfare Association does not exist and that no authority is annexed to the Appeal to prove that this is a representative suit. They also raised the issue that the Directors of a Limited Liability Company cannot be personally liable unless the veil of incorporation is lifted, which is not the case in this Appeal. They further contend that there is no cause of action against the 2nd, 3rd and 4th Respondents herein. It is their contention that this Appeal does not fall within the ambit of the definition of the disputed decision under section 129. Their claim is that there exists another suit in the High Court of Kenya at Nairobi where the Appellant has sued the 2nd, 3rd and 4th Respondents. It is their contention therefore that this Appeal is a grave abuse of due process.
12. This matter came up for argument on the 10th May 2010. Advocates for the Appellants and the Respondents had the opportunity to canvass the Preliminary Objections. In his argument, Mr. Wachira for the 2nd, 3rd and 4th Respondents contended that the Appeal was defective as Kimathi Estate Welfare Association did not exist and that no document has been annexed to show that the Appellants have the authority of the said association to institute this Appeal or to act for it in any manner. Thirdly, they contended that the Directors of a Limited Company cannot be liable unless the veil of incorporation is lifted.
13. In his final submission, Mr. Wachira argued that this Appeal is not an Appeal properly filed under section 129 (1) of EMCA as the section provides that Appeals must be filed within 60 days. He asserted that this Appeal was filed more than 2 months after the issuance of the EIA licence. Mr. Wachira further argued that there was in existence another suit, ELC 495 of 2009, which was filed before this Appeal and that this Appeal is therefore an abuse of due process.
14. In his view, the Appeal was not filed in good faith and was only filed after the injunction ordered by the High Court was discharged on the 2nd December 2009. He argued that the appellant should have stuck with the said High Court case. He further asserted that the Appellants only came to the Tribunal to take

advantage of the automatic stay. He asked the Tribunal to strike out the appeal with costs.

15. Mr. Maruti who appeared for the 1st Respondent also argued his objection on two grounds namely; that the Appellants have no *locus standi* and that the Appeal was filed out of time. He further argued that even section 129(2) doesn't help the Appellants' case since while it is silent on the time for filing Appeal, it provides that Appeals be guided by such procedures as may be laid down by the Tribunal, which procedures are now set out in the National Environmental Tribunal Rules, 2003.
16. In his view, therefore, a party must read the Procedure Rules and be guided by its provisions before preferring an Appeal. He argued that the 60 day period applies under section 129(2) of the EMCA. He contended that the Appellant having not sought leave to expand time and having not brought reasons for the delay in filing the Appeal, the Appeal is incompetent and ought to be struck out.
17. In his reply, Mr. Njau for the Appellants opposed the Preliminary Objections filed by both Advocates. He conceded the 4th Respondent was wrongly enjoined in the Appeal but that the 1st, 2nd and 3rd Respondents were properly sued. On the question of the filing of the Appeal out of time, Mr. Njau contended that the Appeal was under section 129(2) of the EMCA. He argued that under rule 7 of the Tribunal Rules of Procedure Rules, this Tribunal can extend time in the interest of justice.
18. He further contended that the suit in the High Court was brought under section 3 of the EMCA and its existence does not affect the existence of the suit. Lastly, he argued that no evidence has been given to show that Kimathi Estate Welfare Association does not exist and that even if it was removed from the Appeal, the Appeal would still stand because it would still fall under the provisions of Rule 3 of the Tribunal Rules of Procedure (Legal Notice Number 191 of 2003).
19. This Tribunal has carefully considered the arguments by Advocates for the Appellants and the Respondents. This Tribunal notes that this Appeal was filed under section 129(2) of the EMCA which provides a follows:

“Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an Appeal

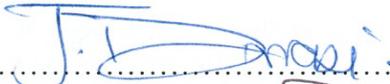
to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.”

That being the case, this Tribunal must be guided by the Tribunal Rules of Procedure in dealing with any appeal under section 129(2) of EMCA.

20. Any Appeal under section 129(2) is subject to section 126 of the EMCA which allows this Tribunal to regulate its own procedure. Under Rule 7 of the Tribunal Rules of Procedure, the Tribunal may, for good reason, extend time for filing such Appeal as it may deem just and expedient.
21. The EIA licence giving rise to this Appeal was issued on the 20th of May 2009 and the Appeal was brought on the 24th of November 2009, long after the lapse of 60 days. The Appellants in this matter have been in the Tribunal several times but have not sought leave to file this Appeal out of time as required by the NET Procedure Rules. This Appeal is therefore defective and cannot stand. This Tribunal cannot, from the documents pending before it, find basis for exercising its discretion in favour of the Appellants as contemplated by Rule 7 of the NET Procedure Rules, 2003.
22. This Appeal therefore fails. Hence the Tribunal, hereby, unanimously, strikes it out.

DATED and DELIVERED this 28th day of May 2010

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

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

Stanley Waudu..........Member

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

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