REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL APPEAL NO. NET/28/2008

FRANCIS MUNENE HIRAM & 93 OTHERS……APPELANTS

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA)……..1ST RESPONDENT
NKUNGWE INVESTMENTS LTD……2ND RESPONDENT
AHMED SHEIKH ABDI RAHMAN…….3RD RESPONDENT

RULING ON PRELIMINARY APPLICATIONS

1. By Notice of Appeal dated 20th August 2008 and filed in the Tribunal on 22nd August 2008, the Appellant and 93 others appealed against the decision of the National Environment Management Authority (NEMA) to issue an Environmental Impact Assessment (EIA) licence to the 2nd Respondent on the basis that NEMA did not follow the proper procedure in issuing the disputed licence by:

    (i) proceeding to issue an EIA licence to the 2nd Respondent without the District Environment Officer's approval of the proposed project;
    (ii) failing to comply with sections 68 and 69 of the Environmental Management and Co-ordination Act (EMCA) of 1999 which requires a report on public consultation duly signed and acknowledged by over 60 per cent of residents in the neighbourhood of the proposed project; and by
    (iii) failing to consult Appellants as neighbours.

2. The Appellants also faulted NEMA's approval of the proposed development of flats adjacent to their residential massionettes on grounds that the proposed flats would overshadow their residential houses and that the land on which the Respondents proposed to develop the flats, namely: L.R. No. 209/10722/89 was public land meant for public utility. On these bases, the Appellants asked the Tribunal to revoke the EIA licences issued in connection with the proposed development.

3. On 30th September 2008, the 1st Respondent, through the law firm of Anthony Gikaria & Company Advocates, filed Reply to the Appeal in which it stated, among other things, that it approved the 2nd Respondent's development by letter dated 7th April 2008 with conditions, one of which was that the 2nd Respondent complies with all relevant laws and

subsequently, on 22nd May 2008, issued it with an EIA licence with further conditions to be fulfilled in the process of project implementation. The 1st Respondent further contended that the Appellants had not demonstrated the negative environmental impacts that the 2nd Respondent's project would cause and denied that it did not address the Appellants's concerns about the proposed project. The 1st Respondent admitted the Tribunal's jurisdiction to hear and determine the appeal.

4. On 29th September 2008, the 2nd Respondent, through the law firm of L.M. Mbabu & Company Advocates, filed Reply to the Appeal in which it challenged the appeal on the basis, among others, that:

    (i) the Tribunal lacks jurisdiction to revoke an EIA licence as requested by the Appellants or to hear matters concerning EIA licences;
    (ii) the Tribunal's continued hearing of the appeal would be *ultra vires* powers conferred on it under section 129 of EMCA;
    (iii) the 2nd Respondent had instituted Miscellaneous Application No. ELC JR No. 78 of 2008 seeking, among others, orders of certiorari against the Tribunal;
    (iv) the appeal is fatally defective because: only one Appellant is disclosed but the other 93 are undisclosed and that the appeal relates only to the 2nd Respondent and yet the 3rd Respondent has been joined for reasons that are unstated and unknown;
    (v) the 2nd and 3rd Respondents own two different properties. The 2nd Respondent's property is the one currently being developed. Therefore, the Appellants should have filed two separate appeals in respect of the 2nd and 3rd Respondents' properties;
    (vi) the appeal is time-barred, having been filed on 22nd August 2008 against an EIA licence that was issued on 22nd May 2008;
    (vii) the 2nd Respondent commenced construction work immediately upon obtaining an EIA licence and has, to date, spent Kshs. 12,000,000 on the project. Therefore, a revocation of the EIA licence at the stage would cause substantial loss;
    (viii) the Appellants are guilty of laches by failing to institute an appeal immediately upon learning of the issuance of an EIA licence to the 2nd Respondent or while the 2nd Respondent was laying the foundation of the property in question; and
    (ix) the Appellants did not allege any harm to the environment caused by the development in question. Therefore, the Tribunal's refusal to revoke the EIA licence issued to the 2nd Respondent would not cause them any harm.

5. For the reasons advanced, the 2nd Respondent asked the Tribunal to dismiss the appeal with costs.

6. The 3rd Respondent has not yet replied to the appeal. Neither has there been any attendance of the Tribunal by the Appellant in person or through a representative.

7. On 7th October 2008, the 2nd Respondent, through L.M. Mbaabu & Co. Advocates filed a Preliminary Objection to the appeal, challenging the appeal on grounds that: the Tribunal lacks jurisdiction, the appeal is fatally defective in form and substance, the appeal is time-barred and that there is no harm to the environment and therefore, the Appellants lack genuine complaint. The 2nd Respondent's Preliminary Objection was heard on 15th October, 2008 and on 22nd October 2008, the Tribunal, unanimously ruled on the application, directing the Appellants to make the necessary application for enlargement of time within which to file an appeal.

8. On 28th October 2008, the Appellants, through the law firm of Kinyua Mwaniki & Wainaina Advocates filed a Notice of Motion seeking, among other orders, the Tribunal's leave to appeal out of time. The application was supported by the affidavit of Francis Munene Hiram stating, among other things, that the delay in filing an appeal was occasioned by the 1st Respondent's failure to inform the Appellants of the grant, to the 2nd and 3rd Respondents of EIA licences authorizing the development in question to proceed. Consequently, the Appellants were not aware that EIA licences had been issued and only came to know about their issuance when the 2nd Respondent deposited construction materials on Plot No. L.R. 209/10722/88.

9. Further, in the said affidavit, it was stated in support of the application that the licences granted to the 2nd and 3rd Respondents authorize the construction of a storey building within Ruby Estate in South C, which has pre-dominantly massionnettes and therefore, the development, if allowed to proceed, would be prejudicial to the Appellants. Moreover, the licences were granted without NEMA's consultation with Appellants who are likely to be directly affected by the development. On these bases, the Appellants sought enlargement of time within which to file an appeal, stating that the grant of enlargement of time would not be prejudicial to the Respondents.

10. On 8th December, 2008, the 2nd Respondent filed a Replying Affidavit stating, among other things, that:

    (i) the Appellants filed an appeal out of time before applying for enlargement of time and therefore failed to follow the proper procedure;
    (ii) Francis Munene Hiram swore an affidavit which was filed in High Court Civil Suit No. ELC 349 of 2008 stating that building materials were transported to the site for the development in question in May 2008 and therefore, the Appellants became aware of the approval of the development at the time and should have filed their appeal by August 2008;
    (iii) the Appellants were misleading the Tribunal;
    (iv) several residents of the neighbourhood in question were consulted prior to issuance of the environmental impact assessment (EIA) licences and had no objection to the development in question;
    (v) the Appellants were opposed to the development in question because they believe the plot is for public utility purposes; and that

(vi) the Appellants have not raised any environmental issue in their appeal. On these bases, the 2nd Respondent asked the Tribunal to dismiss the application for enlargement of time to file appeal.

11. The 2nd Respondent had, on 18th November 2008 and through the law firm of Mbabu & Co. Advocates filed Chamber Summons asking the Tribunal to discharge or set aside its Stop Order issued against the 2nd and 3rd Respondents on 27th August 2008 on the basis that the Respondents were incurring daily loses due to stoppage of constructions works. An affidavit filed in support of the application by John Njeru Nyaga further stated, among other things, that:

    (i) because the appeal had been filed out of time, it was defective and invalid and the Stop Order made pursuant to it ought to be set aside;
    (ii) the outcome of the Appellants' application for leave to file appeal out of time was uncertain; and that
    (iii) the 2nd Respondent was incurring losses as a result of stoppage of work.

12. On 8th December 2008, John Munene Hiram filed affidavit in reply to the 2nd Respondent's application, stating, among other things, that the 2nd Respondent's application for lifting of the Tribunal's Stop Order was filed after the Appellant filed an application for enlargement of time to file the appeal and therefore, it was filed in bad faith, the application for lifting of the Stop Order was an attempt by the 2nd Respondent to re-open a matter that the Tribunal had ruled on and that the 2nd Respondent had not come to the Tribunal with clean hands, having flouted the Tribunal's Stop Order. For the reasons advanced, the Appellants asked the Tribunal to dismiss the application.

13. The two applications were heard on 22nd December 2008. At the hearing of the applications, the Appellants were represented by Mr. Wainaina of Kinyua Mwaniki & Wainaina Advocates and the 2nd Respondent by Mr. Mbabu of L.M. Mbabu & Associates Advocates. The 1st and 3rd Respondents were not represented and did not appear. The Appellants application for enlargement of time was heard first, followed by the 2nd Respondent's application for vacation of the Tribunal's Stop Order.

APPELLANTS' APPLICATION FOR ENLARGEMENT OF TIME TO FILE APPEAL

14. On behalf of the Appellants, Mr. Wainaina sought the Tribunal's leave to file an appeal out of time and to accept the appeal already filed as having been duly filed. He stated that the challenged EIA licences were issued on 22nd May 2008 but Appellants were not aware of the issuance of the licences because the 1st Respondent did not publish any notice of their issuance, neither did it inform the Appellants that it had issued the licences to the 2nd and 3rd Respondents. Mr. Wainaina stated that in the process leading to the issuance of the licences, the Appellants who live in the same estate where the development in question is intended were not consulted. For these reasons, it was not possible for the Appellants to know of the date the licences were issued and to file an appeal within time. It was stated that the Appellants only learnt of the approval of the

development after construction materials were deposited on site and they made inquiries, upon which they were informed that EIA licences had been issued, authorizing the development to proceed. Further, Mr. Wainaina explained that the Appellants were not aware of the legal requirement that appeals to the Tribunal be filed within sixty days of the issuance of EIA licences.

15. Mr. Wainaina stated that the gist of the intended appeal is that the 2nd and 3rd Respondents intend to construct a high-rise building within Ruby Estate in South C which predominantly has massionettes and that the development is likely to change the set up of the estate and therefore, Appellants who live in the Estate should have been consulted because they are directly affected by the project. The 2nd Respondent's statement that four of the residents of the estate were consulted before the EIA licences were issued was challenged on the basis that the four individuals listed could not be representative of all the residents of the Estate, their contacts were not provided, they did not sign any document to show that they had given their views in support of the development in question and they are not known to the Appellants. In any case, Mr. Wainaina stated, a delay of one month is not inordinate. On these bases, Mr. Wainaina asked the Tribunal to allow the Appellants' application for leave to appeal out of time.

16. Mr. Mbabu for the 2nd Respondent opposed the application, stating that the Appellants had admittedly filed an appeal out of time. Mr. Mbabu also maintained that the Appellants knew of the development in question in May 2008 and ought to have filed an appeal within time. In response to Mr. Wainaina's explanation that the Appellants were not aware of the legal requirement that appeals to the Tribunal shall be filed within sixty days of the occurrence of an event, Mr. Mbabu urged the Tribunal to uphold the legal maxim that ignorance of the law is no excuse.

17. Further, Mr. Mbabu argued that the Appellants' prayer that the appeal already filed be deemed to have been duly filed is invalid, incompetent and cannot be cured by a belated application for enlargement of time. He urged the Tribunal to reject the application.

18. The Tribunal has carefully considered the Appellants' application for leave to appeal out of time in light of its ruling on Preliminary Objection issued on 22nd October 2008, reasons advanced by the Appellants for failure to appeal within time and the applicable law and regulations, namely: the Environmental Management and Co-ordination Act (EMCA) of 1999 and the National Environment Tribunal Procedure Rules (Legal Notice No. 191 of 2003).

19. The Tribunal has carefully considered the arguments presented by the Appellants' and the 2nd Respondent's Counsel. The Tribunal accepts the Appellants' explanation that delay in filing the appeal was occasioned by the 1st Respondent's failure to involve them in the process leading to the grant of EIA licences to the 2nd and 3rd Respondents or to notify them of the issuance of the licences.

20. The Tribunal has had occasion to consider the issue concerning failure to notify parties who stand to be affected by a development and are therefore interested in the outcome of

an EIA process in NET/15/2007- *James Mahinda Gatigi & 3 Others vs. NEMA & Universal Corporation Ltd. and in NET/23/2007 (Hon. Beth Mugo & 7 Others v. Director General, National Environment Management Authority (NEMA) and Silver Crest Enterprises Ltd).* As the Tribunal noted in those Appeals, Section 58(1) of EMCA requires proponents applying for an EIA licence to submit a project report to NEMA. Regulation 9 of the EIA Regulations stipulates that the project report shall be circulated for comments to relevant lead agencies, relevant district environmental committees and as necessary, relevant provincial environment committees. Upon receipt of comments from these entities, or where no comments are received by the end of a period of thirty days, NEMA shall proceed to determine a project report.

21. Section 58(2), read together with Regulation 10 of the EIA Regulations, authorize NEMA to determine applications for EIA licence on the basis of project report in one of two ways: that a project will have no significant impact on the environment or that the project report discloses sufficient mitigation measures, in which case, NEMA shall issue an EIA licence. Alternatively, NEMA could decide that a project may have significant impacts on the environment or that a project report discloses no sufficient mitigation measures in which case NEMA shall require the proponent to carry out a full EIA study. If a full EIA study is required under Section 59 of EMCA, a report of an EIA study shall be publicized in the manner set out in Section 59(1) and comments of the public sought.

22. Section 58 of EMCA, read together with Regulation 9 and 10 of the EIA Regulations do not expressly make provision for comments of members of the public to be sought by NEMA prior to NEMA making a determination on the basis of a Project Report, whether or not to issue an EIA licence. Therefore, in effect, an EIA licence may be issued without seeking the views of potentially affected members of the public and without such views being made known by NEMA.

23. In this case, the 2nd Respondent proposed to construct a storey building in a residential area predominated by massionnettes. NEMA determined the application on the basis of a Project Report as a result of which NEMA did not require the proponent to carry out an EIA study. Consequently, no publicization in terms of section 59(1) was carried out prior to the issuance of an EIA licence and as a result, the Appellants had no opportunity to make their comments on the proposed project, neither did they know of NEMA's issuance to the 2nd Respondent of an EIA licence.

24. The purpose of the EIA procedure stipulated in EMCA is to assess the potential impacts of a proposed project on the environment. As part of that assessment, the views of potentially affected members of the public is an important consideration. Section 3 of EMCA entitles every person in Kenya to a clean and healthy environment. Where, as in the present case, the proposed project potentially could jeopardize this entitlement, potentially affected members of the public have a right to be informed of the application for an EIA licence on a timely basis and to have their comments taken into account in determining the application, or, at least, to be informed of NEMA's issuance of an EIA licence to a developer. The Tribunal has ruled in, among others, NET/15/2007- *James Mahinda Gatigi & 3 Others vs. NEMA & Universal Corporation Ltd.* that a procedure

which allows a determination to be made by NEMA on an EIA application without taking into account the views of potentially affected members of the public goes against the provisions of EMCA in particular section 3(5) which enshrines the concept of public participation in the EIA and other decision making processes. In the same case, the Tribunal also ruled, as it does here, that NEMA is obliged to publicize any EIA licence application in all cases where it is minded to grant an EIA licence, on the basis of a project report alone, without the requirement of a full EIA study.

25. The Tribunal agrees with the Appellants that in the absence of a public notice and sufficient communication from NEMA, it would be very difficult to know about NEMA's consideration of proposed projects in contemplation of approval and of NEMA's issuance of EIA licences. In the present case, it would not have been possible for the Appellants to know the date of NEMA's approval of the development and its issuance of an EIA approval/licence to the 2nd and 3rd Respondents at the time of issuance to enable the Appellants to file their appeal within the stipulated sixty days. Both parties agree that the Appellants learnt of the development in question in May 2008. The Appellants' Counsel goes further to state that the matter came to the Appellants' knowledge on May 22nd 2008 and this is not challenged by the 2nd Respondent's Counsel. In any case, a delay of one month for reasons explained ought not to be considered inordinate.

26. The present appeal falls under section 129(2) for which there is no prescribed time limitation. With regard to appeals under Section 129(2), the Tribunal shall regulate its procedure as it deems fit under section 126 of EMCA. In this regard, the Tribunal Rules of Procedure, specifically Rules 4 and 7 apply. Rule 4 requires applications under section 129(2) to be filed within a period of sixty (60) days from the date of occurrence of an event. However, Rule 7 authorizes the Tribunal to extend time to appeal out of time as appears to it just and expedient.

27. On the basis of the matters aforestated, the Tribunal unanimously finds that Appellants have provided sufficient explanation for their delay in filing the appeal. Appellants are not guilty of laches. Therefore, under Rule 7 of the Tribunal Rules of Procedure, the Tribunal hereby exercises its discretion to extend time within which the appeal in question may be filed and treats the one filed as duly filed. The Respondents are at liberty to amend their Replies within a period of fourteen days from the date of this Ruling. Thereafter the matter shall proceed to a hearing on the merits.

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

2ND RESPONDENT'S APPLICATION FOR LIFTING OF STOP ORDER

29. Mr. Mbabu for the 2nd Respondent asked the Tribunal to lift its Stop Order issued against the 2nd and 3rd Respondents on 27th October 2008 on the basis that for such an order to be made, there has to be a competent appeal and that the appeal on record is not good and competent because it was filed out of time and no order for enlargement of time has been

made. Therefore, the appeal cannot support the orders and the Stop Order should be set aside as a matter of right until a competent appeal is filed.

30. Mr. Mbabu further stated that the Appellants did not file appeal within time and the 2nd Respondent commenced construction and thereby, "changed its position." Therefore, issuance of the Stop Order by the Tribunal is unjust and unfair to the 2nd Respondent. He also argued that in view of the unfairness, if the Tribunal is minded to grant the Appellants' request for enlargement of time, it should also lift the Stop Order because "one party should not enjoy everything." Mr. Mbabu stated that the Appellants should not enjoy a Stop Order and an extension of time while the 2nd Respondent suffers stoppage of work.

31. Further, Mr. Mbabu argued that the Stop Order issued by the Tribunal amounts to an injunction for which the rules require a demonstration that a party has a *prima facie* case and will suffer irreparable injury if an injunction is not granted, based on a balance of convenience. He stated that the Appellants fail on all the points because they have not adduced evidence to show that they have a serious and genuine case, have not stated the environmental harm that will result from the development in question, there is no report which shows that they stand to suffer as a result of the development, no serious complaint has been lodged by the Appellants, the Appellants have not provided names of people which should have been consulted and have not met the basic tests for such an order. On these bases, Mr. Mbabu sought the lifting of the Stop Order or the issuance by the Tribunal of such an order as will meet the ends of justice.

32. Mr. Wainaina opposed Mr. Mbabu's application on grounds that the Appellant did not seek an order of injunction from the Tribunal and none was issued, the test for grant or refusal of injunction does not apply to the Tribunal, Stop Orders for maintaining the status quo are issued under section 129(4) of EMCA upon filing an appeal, Stop Orders are mandated by law, and that the 2nd Respondent was asking the Tribunal to disregard the provisions of law. Mr. Wainaina also stated that the appeal has not been heard and finally determined. Therefore, the 2nd Respondent's prayer for lifting of the Stop Order lacks basis.

33. Further, Mr. Wainaina stated that the 2nd Respondent's application for lifting of the Stop Order is incurably defective because it fails to comply with Rule 9(1) of the Tribunal Rules of Procedure which requires that objections to appeals filed in the Tribunal shall be filed within thirty days of the filing of appeal. He also stated that the 2nd Respondent's application is a camouflage of an appeal against the Tribunal's ruling on the 2nd Respondent's Preliminary Objection issued on 22nd October 2008. On the basis of the arguments presented in support of the objection to the 2nd Respondent's application, Mr. Wainaina asked the Tribunal to dismiss the application.

34. The Tribunal has carefully considered the application in light of arguments raised and the applicable law. The Tribunal notes the provisions of section 129(4) of EMCA which states 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."

35. The Tribunal's issuance of Stop Orders is based on the above section and are intended to fulfill the legal requirement that development activities shall be stopped once an appeal is filed against them, until the appeal is determined. There is no qualification in the above provision as to the kind of appeal in which the *status quo* shall be maintained. Stop Orders apply to **any** appeal without qualification. Clearly, the provisions for maintenance of *status quo* apply to **all** appeals filed in the Tribunal. Moreover, there is no requirement that the Tribunal conducts a sieving exercise to determine, before hearing, which appeals are properly grounded and deserve Stop Orders and which ones are not.

36. Further, it is clear to the Tribunal that Stop Orders required by section 129(4) are not injunctions. Stop Orders are required by law. For these reasons, the requirements that ought to be fulfilled, including a showing of a good case with a probability of success do not apply to the issuance of Stop Orders. It would be unlawful for an administrative Tribunal to prejudge the outcome of an appeal in order to determine whether or not a particular development merits the issuance of a Stop Order. Further, under sections 126-129 of EMCA, the Tribunal may issue such orders as it deems fit, including partial or total lifting of a Stop Order, but this requires that a party provides sufficient reasons for lifting of a stop order. In the Tribunal's view, the reasons advanced by the 2nd Respondent for the lifting of the Stop Order issued on 27th October 2008 are not valid.

37. Finally, the Tribunal wishes to refer parties to its decision in NET/27/2008 (*Richard Evans & 6 Others v. National Environment Management Authority & 2 Others*) and similar decisions in which it has explained that it is in the interest of all parties that a development in question be stopped until an appeal against it is finally determined in order to save a developer and potential beneficiaries from losses that might arise in the event that an unfavourable decision is made by both the Tribunal and the High Court. The point was clearly demonstrated in NET/04/05 (*Phenom Limited v. National Environment Management Authority and Riverside Gardens Residents Association*) and High Court Civil Appeal No. 1020 of 2005 which arose out of it. In the Appeal to the Tribunal, the Tribunal ruled that the Authority's approval of the construction of seven floors was unlawful. On appeal to the High Court, the Tribunal's decision was upheld. The full import of the decisions was that the developer who had, during the Tribunal appeal, sold some of the units yet to be developed had to knock down some of the floors of the building.

38. For the reasons explained, the Tribunal, unanimously, rejects the 2nd Respondent's application. Therefore, the Stop Order issued against the 2nd Respondent on 27th October 2008 shall remain in force until the appeal is finally determined.

39. The Tribunal wishes to draw the attention of parties to section 127(2)(e) of EMCA which states that failure to comply with the Tribunal's orders is a punishable offence. Other consequences of violation of the Tribunal's orders are specified in Rule 19 of the

Tribunal Rules of Procedure (Legal Notice No. 191 of 2003). The Tribunal also draws attention of parties to section 130 of EMCA.

DATED and DELIVERED at Nairobi this 24th day of December 2008

Donald Kaniaru .....Chairman

Dwasi Jane.....Member

Stanley Waudo.....Member

Joseph Njihia.....Member

CHAIRMAN
National Environment Tribunal
P.O. Box 74772 Tel
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