

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL APPEAL NO. NET/38/2009

A. ABDALLAH, CHAIRMAN, DONHOLM
PHASE 5 RESIDENTS' ASSOCIATION.....1ST APPELLANT
GEORGE MWANGI, SECRETARY, DONHOLM
PHASE 5 RESIDENTS' ASSOCIATION.....2ND APPELLANT

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA).....1ST RESPONDENT
JANE NGONYO.....2ND RESPONDENT

RULING

1. By Notice of Appeal filed in the Tribunal on 21st April 2009 and Supplementary Grounds of Appeal filed on 29th July 2009, the Appellants sought orders from the Tribunal to stop the 2nd Respondent's construction of storeyed apartments in their neighbourhood in Donholm Phase 5, cancel an EIA licence issued by NEMA to the developer and order for demolition of the 2nd Respondent's building on the basis that:
 - (i) NEMA stopped the development in 2008 until the 2nd Respondent obtained a change of user and address residents' concerns but later issued the 2nd Respondent with an EIA licence without the 2nd Respondent's consultation with residents; the 2nd Respondent was constructing a 4-storey apartment in an area that has bungalows of two bedrooms and bed-sitter;
 - (ii) the 2nd Respondent was constructing a 4-storey apartment building without parking provision and the tenants would block packing facilities for other residents;
 - (iii) the 2nd Respondent was constructing apartments for twenty four families that would need a lot of water and sewer services which would overburden the existing water and sewer services;
 - (iv) the change of user obtained relates to a different person from the 2nd Respondent;
 - (v) the conditions upon which the change of user was granted were not being complied with;
 - (vi) the 2nd Respondent's building was likely to interfere with sewage and sewer reticulation system;
 - (vii) the 2nd Respondent's building was unlikely to conform to water quality and waste management regulations;
 - (viii) the increase in population that would result from the 2nd Respondent's apartments would lead to increase of traffic pile-up and a reduction in the value of adjacent houses;
 - (ix) the height of the 2nd Respondent's building and the speed with which it was being constructed was likely to interfere with its stability;
 - (x) the building is blocking some houses from sunlight in the neighbourhood; and that

- (xi) the presence of tenants in the 2nd Respondent's apartments would cause insecurity, overcrowding and vices.
2. On 9th July, 2009, the 1st Respondent, through the firm of Ojiambo & Company Advocates, filed Reply to the appeal, in which it was stated, among other things, that:
- (i) under section 58 of the Environmental Management and Coordination Act (EMCA) of 1999 and Regulations 7, 8, 9 & 10 of the Environmental Impact Assessment and Audit Regulations of 2003, the 1st Respondent was authorized by law to issue EIA licences;
 - (ii) the 1st Respondent received from the 2nd Respondent, copies of an EIA project report on 13th August 2008, consulted with lead agencies, having sent copies of the project report to them and having received no objection to development, approved it and issued an EIA licence on specified conditions;
 - (iii) subsequently, the Appellants wrote to the 1st Respondent raising objections to the 2nd Respondent's development upon which the 1st Respondent visited the construction site and conducted investigations and stopped development until the 2nd Respondent obtained change of user;
 - (iv) subsequently the 2nd Respondent wrote to the 1st Respondent, confirming change of user;
 - (v) the project report submitted by the 2nd Respondent fully addressed the Appellants' concerns; and
 - (vi) the issues raised by the Appellants are outside of the jurisdiction of the 1st Respondent; they fall under the City Council's jurisdiction; and that
 - (vii) the Appellants have no cause of action against the 1st Respondent.
3. In response to the appeal, the 2nd Respondent swore an affidavit dated 19th May 2009 and filed in the Tribunal on the same day, stating that:
- (i) she had obtained all the necessary clearances from the City Council of Nairobi and NEMA, the 1st Respondent;
 - (ii) the Appellants initially objected to her development on the basis that she had not obtained change of user but she subsequently obtained one;
 - (iii) she had put up two public notices of the development in the newspapers but the Appellants did not respond;
 - (iv) Appellants are busybodies who have no legitimate cause to challenge her development;
 - (v) the 1st Respondent duly approved the development after receiving, from the 2nd Respondent, a project report;
 - (vi) the Appellants are to blame for failing to utilize the opportunity they had to raise their views about the project;
 - (vii) there are projects similar to the 2nd Respondent's which have or are being developed in the same neighbourhood and therefore, it appears that the Appellant's objection to the 1st Respondent's development was motivated by personal vendetta against her and her family;
 - (viii) Appellants' persistent attempt to challenge her development of the plot was a serious affront to her property rights; and that
 - (ix) She was losing vital rental income from the premises which would have been accruing to her had she completed construction.

4. For the reasons stated, the 2nd Respondent asked the Tribunal to dismiss the appeal to enable her to complete the development.
5. The appeal was heard on ten occasions between 8th June 2009 and 19th October 2009. A total of six witnesses testified. The Tribunal also visited the site of the development in question on 14th August 2009.
6. At the hearing, the Appellants were represented by Mr. Makumi of J. Makumi & Company Advocates; the 1st Respondent by Mr. Ojiambo of Ojiambo & Company Advocates and subsequently by Mr. Karanja of the same firm; and the 2nd Respondent by Mr. Avedi and Mr. Agumba, both of Abuodha & Omino Associates.
7. The Appellants called to testify, Professor Anthony Ngunge Gachanja, an EIA expert and Mr. George Mwangi, the Secretary to Donholm Phase 5 Residents Association.
8. Mr. George Mwangi testified that he is a resident of house number 253 in Donholm Phase 5 Estate but that they were not made aware of the development in question before it commenced. Their attention was drawn to the development when the 1st Respondent's officials went to the site of the development and arrested some of the workers. Residents realized that the 2nd Respondent's development was not going to be a bungalow when construction reached the 1st floor. They served the 2nd Respondent's foreman with documents indicating the kind of housing development they expected in the neighbourhood but work went on. Subsequently, they lodged a formal complaint with the 1st Respondent. However, construction work proceeded, despite a stop order that the 1st Respondent issued against it in December 2008.
9. Mr. Mwangi further stated that initially, the 1st Respondent could not issue the 2nd Respondent with an EIA licence because the 2nd Respondent had not obtained a change of user. However, by the time she obtained the change of user, construction work had reached the third floor and subsequently, the 1st Respondent issued her with an EIA licence without consulting with residents, except a Ms. Edith Nyagah who is the immediate neighbour to the 2nd Respondent's building. Thereupon, they lodged an appeal in the Tribunal, which also issued a stop order against the development but construction work proceeded regardless of the Tribunal's order.
10. Mr. Mwangi further stated that according to the Project Report presented to NEMA by the 2nd Respondent, the 2nd Respondent was to construct only three floors but on the ground, she constructed five floors with 24 units and not three floors with 16 units that were approved; Continental Developers, who were the developers of Donholm Phase 5 had limited housing developments in the area to massionnettes and bungalows but the 2nd Respondent was putting up a five-storey apartment; the building had no parking space; the class of the estate would be changed when high-rise apartments are constructed in an area with bungalows; water supply and sewer system would be overloaded; and parking would be affected. He stated that by the time the 2nd Respondent obtained change of user, residents had already lodged objections against the development with NEMA.
11. Further, Mr. Mwangi stated that NEMA approved the development and issued an EIA licence with conditions after construction work began and wondered how the 2nd Respondent could be expected to comply with the conditions which were issued after construction work had begun.
12. Mr. Mwangi stated that in the neighbourhood, there were two houses of the same nature as the 2nd Respondent's which were used for residential purposes on the upper floors and for commercial purposes on the lower floors.

13. Professor Anthony Ngure Gachanja, an EIA expert, also testified for the Appellants. He stated that he had perused the project report that was submitted to NEMA on behalf of the 2nd Respondent and found that: it states that the building would have three floors but on the ground, the 2nd Respondent constructed five floors; there was no evidence of Nairobi City Council's approval of the drawing of the building attached to the project report; it lacked architectural site layout which would show the placement of the building within the plot; details of construction materials to be used were lacking; it stated on page 48 that the 2nd Respondent would construct a septic tank but there was no site plan to show the tank; there was no indication of parking areas for residents in the architectural drawings; there was no space in the building so residents of the apartments would park on the road; the 2nd Respondent did not obtain change of user before submitting the project report to NEMA; and that the budget of 5 million for the 2nd Respondent's building indicated on the project report was too low.
14. Professor Gachanja further stated that while the developer was indicated in the report as Peter Ng'ang'a, the person who signed on behalf of the developer is Jane Ngonyo Muhia. He also faulted the process of consultation with neighbours, stating that the forms submitted did not indicate how far the people consulted were from the 2nd Respondents' building and that the 2nd Respondent failed to consult with the resident's association as is usually the case where there is such an association.
15. He further stated that there were bungalows sandwiched between the 2nd Respondent's building and the old building in the area. The bungalows would have less light and poor ventilation. The 2nd Respondent's project report also did not consider alternative site for the project.
16. In cross-examination, Professor Gachanja stated that there are three other blocks of flats in the area; he did not visit City Hall to confirm whether the 2nd Respondent's building plan was approved by the Council; and that the 2nd Respondent's project report should have contained relevant information that would enable NEMA to make a decision.
17. The 1st Respondent called only Mr. Zephania Ouma, its Principal Environment Officer and EIA reviewer to testify. Mr. Ouma stated that the 2nd Respondent's project report was submitted to NEMA on 14th August 2008 and copies were, thereafter, dispatched to relevant lead agencies, including Nairobi City Council for comment but there was no comment objecting to the development. He further stated that there was enough stakeholder consultation and that enough guidance had been given NEMA to make a decision to approve the development. NEMA issued conditional approval on 17th November 2008.
18. Mr. Ouma stated that subsequent to NEMA's approval, it received complaint from the Appellants and visited the site, upon which it was discovered that the 2nd Respondent had not complied with condition Number 2 requiring a change of user. NEMA required her to comply and she did. Therefore, there was nothing to stop NEMA from issuing her with an EIA licence, which it did on 2nd December 2008. In Mr. Ouma's view, the concept of EIA should be guiding, even before a change of user is obtained. Regarding zoning of the area, he stated that although zoning is a planning framework that should be given by Nairobi City Council, Nairobi City Council did not confirm zoning and had no objection to the development and that when NEMA officials visited the site, they found that its character has changed and that the area is a comprehensive scheme. He stated that NEMA relies on Nairobi City Council's zoning and that NEMA cannot issue zoning specifications and that it is the NCC that also issues parking specifications.

19. Mr. Ouma further stated that the developer is Jane Ngonyo, who is the person who signed submission forms to NEMA and that NEMA approved construction of sixteen units. However, he had looked at the project report submitted and noted that it indicates Peter Ng'ang'a as the proponent but this escaped his attention at the time the project report was reviewed. He stated that Mr. Ng'ang'a had signed the submission forms as Jane Ngonyo's spouse.
20. The 2nd Respondent called to testify: Mr. Donald Muigai, an EIA expert, Mr. Fredrick Nkonge Nduiga, a foreman and Jane Ngonyo, the developer.
21. Jane Ngonyo testified that she is the project proponent and that Peter Muhia Ng'ang'a is her spouse. She stated that although the property in question is registered in her name, it is family property. She intended to construct a three-floor apartment and that it is her husband who applied for and obtain NCC's approval of the building plan and hired an EIA expert to prepare a project report. She further stated that she did not know about NEMA's EIA requirements and that construction work began in March 2008 before she obtained an EIA licence from NEMA; neither had she obtained change of user. After construction work commenced, residents of the area complained and she was made to obtain change of user and NEMA approval and EIA licence. Jane Ngonyo stated that construction work was complete but she could not remember when it was completed.
22. On his part, Mr. Donald Muigai testified that he is a registered EIA expert and that he knew Jane Ngonyo as Mr. Ng'ang'a's spouse. He was consulted to prepare a project report for the 2nd Respondent and he visited the site and saw provisions for off-street parking. He also visited City Council engineers and confirmed that the area of the proposed development has a sewer line and therefore, there is no need for a septic tank.
23. Mr. Muigai further clarified that indication of Kshs. 5 million as project cost in the project report was an oversight and that once the error was brought to his attention, it was corrected. Regarding stakeholder consultation, he stated that he visited the house of the Chairman, Donholm Phase 5 Residents' Association and left a questionnaire there. He also met the Association's Secretary and gave him a questionnaire but there was no response from them. He stated that EIA guidelines require public consultation but if stakeholders fail to respond, it can be assumed that they have no objection to a development.
24. Mr. Muigai stated that the 2nd Respondent's building would not stress sewer and water systems in the area because NCC officials had not stated so in their comments on the development. Further, he stated that there are houses of a nature similar to that of the 2nd Respondent in the area in question. He confirmed that he is the one who applied for change of user on behalf of the 2nd Respondent because the 2nd Respondent was busy at the time. He confirmed that he was hired by the 2nd Respondent to prepare a project report after construction work began and that approval was for 16 units in a three-storey building. However, the 2nd Respondent put up 24 units. Mr. Muigai stated that he did not think that it was necessary for him to describe the nature of the rooms in the 2nd Respondent's apartment.
25. Regarding parking, Mr. Muigai stated that when he visited the site in question, he noted that there was provision for off-street parking.

26. Mr. Fredrick Nkonge also testified for the 2nd Respondent. He stated that his work involves supervision of construction works and that he is the one who supervised the 2nd Respondent's construction work. He stated the 2nd Respondent's construction work commenced in March 2008 and that the Appellants made inquiry about the building after it had reached the first floor, upon which he informed them that construction would go up to the fourth floor. Subsequently, the Appellants complained and NEMA officials visited the site, arrested workers and required them to obtain an EIA licence.
27. Mr. Nkonge stated that until NEMA officials visited the site and made arrests, they did not know of EIA requirements or requirement for change of user. Change of user and EIA licence were obtained. However, an appeal was filed in the Tribunal and the Tribunal issued a stop order. Nevertheless, construction work continued to completion. Nkonge stated that there is a City Council sewer line in the area and therefore, there was no need for a septic tank for the 2nd Respondent's apartments.
28. The Tribunal has carefully considered the Grounds of Appeal, the evidence tendered and submissions made by Counsel for all parties in light of the applicable laws.
29. Admittedly, the 2nd Respondent commenced construction of a five-storey building intended for use as residential apartments without first obtaining NEMA's approval and licence. The 2nd Respondent explained that she did not know of the EIA requirements. This kind of response is not valid under Kenya's laws in view of the prevailing legal position that *ignorance of the law is no excuse*. A proponent of a development of the magnitude undertaken by the 2nd Respondent is expected to conduct a feasibility study, prior to commencement of any work to familiarize herself with and meet all legal requirements. The 2nd Respondent took steps to remedy the situation by applying for and obtaining NEMA's approval and EIA licence but that was after work commenced, which means that pertinent matters concerning appropriate mitigation measures and alternative project location that ought to form part of preliminary considerations of approval of a project came to the attention of NEMA after the fact and without giving NEMA adequate chance to fully regulate the development. This is contrary to express provisions of law regarding EIA.
30. The Tribunal also notes that the 2nd Respondent took steps to apply for an EIA licence after NEMA's intervention. She did appoint an EIA expert to prepare a project report in support of her application for development approval and issuance of an EIA licence. By then, the 2nd Respondent knew or ought to have known of the legal requirements concerning EIA project reports as specified in the EMCA, sections 58-64 and in more detail in the EIA and Audit Regulations (Legal Notice no. 101 of 2003) which require, among other things, a statement of the nature of the project, the design of the project and materials to be used in construction, among other things (Regulation 7). In attempt to meet the requirements, the 2nd Respondent did state, in the Project Report prepared on her behalf by Donald Muigai Ng'iru in August 2008, on page 15 thereof, that the development would involve construction of '...a three storied flat housing.' The building was to contain sixteen units. This is what the 2nd Respondent committed herself to developing and presented to NEMA. It goes without saying that NEMA's consideration

of whether or not to allow the development was based on the 2nd Respondent's information that the building would be constructed only up to three floors ('...a three storied flat') and NEMA did issue an EIA licence on 2nd December 2008 indicating that it had approved the 2nd Respondent's request to construct a three storied building and that the 2nd Respondent would construct sixteen units thereon. In addition, the 2nd Respondent had also, by her letter, Ref. No. NEMA/PR/5/2/4343 accepted NEMA's approval conditions based on her Project Report limiting her building to three floors. However, in a clear departure from her commitment and express presentations to NEMA which formed the basis of NEMA's approval, the 2nd Respondent constructed a storied building of five floors. This means that two of the 2nd Respondent's floors of the building in question were constructed without NEMA's approval and in contravention of the law.

31. The Tribunal has also considered the Appellant's assertion that they are stakeholders but were not consulted before construction work commenced. Although witnesses for the 2nd Respondent tended to take the position that complaints were made only after construction work commenced, the Tribunal's view is that stakeholders should not be blamed for failing to raise views about the development prior to commencement when they were not at all informed of the development or consulted before actual work commenced. The Tribunal finds that the 2nd Respondent failed to properly conduct stakeholder consultation and thereby, denied the stakeholders public participation that is expressly permitted by the applicable law (EMCA of 1999) and regulations (EIA and Audit Regulations, Legal Notice No. 101 of 2003).
32. What were the stakeholders concerns and what would be an appropriate response thereto, in light of the relief sought? From the evidence tendered, it emerges that residents of Donholm Phase 5 are aggrieved by the 2nd Respondent's 4-storey apartment because the original developers of the area specified that only massionnettes and bungalows could be built there; the residents live in nearby bungalows and massionnettes that would be overshadowed by the 2nd Respondent's high-rise building thereby blocking their sunlight and air; the 2nd Respondent's high-rise building is intended to accommodate 24 families which would overload the water and sewer systems; and, the 2nd Respondent has not provided for parking inside the building and residents are concerned that it would increase traffic congestion in the area. These were the core environmental concerns raised in the Appellants' evidence. In determining these matters, the Tribunal has carefully considered the applicable laws, including EMCA, EIA and Audit Regulations, the issue of zoning and most importantly the nature of the building the 2nd Respondent indicated and reiterated to NEMA in acceptance terms in writing that she would develop as per the Project Report presented in her application for approval and issuance of EIA licence.
33. The Tribunal notes that although evidence was tendered that the original developers restricted housing developments in Donholm Phase 5 to bungalows and massionnettes, there was nothing to show that the original developer's restrictions were translated into zoning requirements by Nairobi City Council. Evidence was tendered for the 2nd Respondent that there are other buildings of a similar nature in the neighbourhood. This fact was confirmed by the Tribunal when it visited the site on 14th August during which the Tribunal also confirmed that the 2nd Respondent had constructed a building of five floors but in the Tribunal's view, the existence of other buildings of a similar nature in

the neighbourhood alone cannot legalizes the construction of a building of the nature in question.

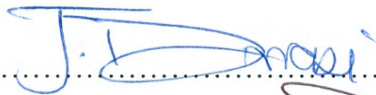
34. In determining whether the 2nd Respondent was authorized to construct a five-storied building, the Tribunal has considered not only the lack of evidence on zoning of the area in question and the nature of the buildings in the surrounding, but also the nature of the building that the 2nd Respondent presented to NEMA in her Project Report as the building she would construct in that area and for which she sought NEMA's approval. As already stated, she stated, in seeking approval of the development, that it would be a building of **three and not five** floors. Therefore, in constructing the five floors, the 2nd Respondent went beyond what she had sought approval for, without any further request to or approval from NEMA to vary the number of floors of her building. Her presentation to NEMA was totally misleading and the Tribunal is surprised that NEMA skipped this fact, if ever it inspected the building during construction. This is contrary to the spirit and letter of the law regarding EIA and more specifically, her Project Report which formed the basis of approval of her development. The mitigating measures for environmental harm likely to result from the Building, including cumulative impacts that might result from occupation of the building were only in respect of **three and not five** floors. Clearly, the 2nd Respondent exceeded the limit in terms of the number of floors that she had committed herself to develop. Regarding the number of housing units, the Tribunal finds that the 2nd Respondent flagrantly breached NEMA's licence condition to construct sixteen (16) housing units. Evidence was tendered and not controverted and in fact affirmed by the 2nd Respondent's EIA expert that the 2nd Respondent has constructed 24 units and not 16 as authorized.
35. Regarding issuance of a licence, section 58 and 59 of EMCA as well as Regulations 5, 7, 9 and 10 of the EIA regulations are clear: It is a project proponent that ought to apply for and obtain an EIA licence. The Tribunal has stated before that this condition has to be met, not just because it is a legal requirement, but also because EIA requirements are intended for environmental conservation and therefore, the issuance of an EIA licence may carry responsibilities that ought to lie on a specific and identifiable person who can be held responsible to meet environmental conservation requirements that are attendant to approval of a development. It was explained that the 2nd Respondent who is the developer as indicated on the EIA licence is a spouse to Mr. Peter Muhia Ng'ang'a who submitted EIA application documents. However, such an explanation would not exonerate a project proponent from meeting clear legal requirements regarding EIA as aforementioned.
36. For the reasons explained, the Tribunal finds that the 2nd Respondent failed to meet legal requirements regarding EIA, specifically, EIA requirements for description of the nature and design of a project in that she exceeded the number of floors that she had undertaken to develop as per her own EIA Project Report. Further, the 2nd Respondent exceeded the number of units that she was permitted to construct by constructing eight (8) more units, up from the sixteen (16) that she was authorized to develop. These blatant breaches are in addition to the 2nd Respondent's defiance of the Tribunal's Stop Order issued on 24th April 2009 in accordance with section 129(4) of EMCA, whence, as admitted, she continued building despite the order.
37. Therefore, in order to prevent environmental impunity, the Tribunal hereby, unanimously, orders the 2nd Respondent to demolish two of the five floors of her building which have been constructed

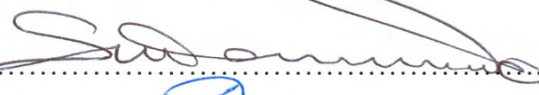
without NEMA's approval in Donholm Phase 5 Estate. NEMA is hereby directed to supervise the demolition. No occupation of the building should take place before rectification ordered herein.

- 38. In accordance with Order 39 of the Tribunal Rules of Procedure (Legal Notice No. 191 of 2003), the Tribunal hereby invites parties to make submissions on costs of the appeal on a date to be agreed by all parties.
- 39. Attention of parties is drawn to section 130 of EMCA.

DATED AND DELIVERED AT NAIROBI this 4th day of December 2009.

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

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

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

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

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