

**REPUBLIC OF KENYA**

**IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI**

**TRIBUNAL APPEAL NO. NET/16/2007**

- 1. LAVINGTON RESIDENTS ASSOCIATION.....1<sup>ST</sup> APPELLANT**  
**2. NJUMBI ROAD RESIDENTS ASSOCIATION.....2<sup>ND</sup> APPELLANT**

***VERSUS***

- 1. NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY (NEMA).....1<sup>ST</sup> RESPONDENT**  
**2. DYKE HOLDINGS LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING ON COSTS**

1. On 20<sup>th</sup> March, 2007, the Appellants, Lavington Residents Association and Njumbi Road Residents Association, through Mr. Richard Kennedy Masinde, filed a Notice of Appeal dated 19<sup>th</sup> March 2007 against the 1<sup>st</sup> Respondent's approval of the 2<sup>nd</sup> Respondent's Environmental Impact Assessment Project Report and its issuance of an Environmental Impact Assessment Licence on 2<sup>nd</sup> August 2006, thereby authorizing the 2<sup>nd</sup> Respondent's development of 40 town houses on Plot No. LR. No. 3734/549 in Nairobi.
2. The 1<sup>st</sup> Respondent was represented by Ms. Anne Angwenyi and the 2<sup>nd</sup> Respondent by Mr. Mungai of Mamicha & Company Advocates which, on 11<sup>th</sup> April, 2007, filed a Memorandum of Appearance and subsequently, a Reply to Notice of Appeal dated 16<sup>th</sup> April 2007, objecting to the appeal on the basis that it had been filed out of time.
3. On 25<sup>th</sup> April 2007, Mr. Masinde filed an application seeking to withdraw the appeal under Rule 33 of the Tribunal Rules of Procedure, stating that the Appellants wished to do so because the appeal had been filed out of time and therefore had no merit. A Notice of Withdrawal of the appeal was also filed by Mr. Ojiambo Advocate who came on record for the Appellants by Notice of Appointment filed in the Tribunal on 17<sup>th</sup> May 2007.
4. At the hearing of the Appellants' application for leave to withdraw the appeal, Mr. Ojiambo for the Appellants presented his position that although the appeal had good grounds, it had not been heard on merits. He also stated that under Rules 33 and 39(2) of the Tribunal Rules of Procedure, the Tribunal does not normally make an award for costs and that it has jurisdiction to award costs against a party only if that party has acted unreasonably, vexatiously or frivolously. The Tribunal, he stated, has to make a factual finding that a party has acted frivolously, vexatiously or unreasonably in order to make

an order for costs against a party. If the Tribunal makes an order for costs in the absence of such a finding, it would be committing an error of law.

5. Mr. Mungai for the 2<sup>nd</sup> Respondent stated that he had no objection to the withdrawal of the appeal. He had not filed any submissions on costs by the time the application for withdrawal came up for hearing and left it to the Tribunal to determine whether the appeal had been filed in good faith. Ms. Angwenyi expressed the view that the Appellants withdrew the appeal in time, having realized that it had been filed out of time and that since the 1<sup>st</sup> Respondent had not instructed lawyers to handle the matter, no taxable costs would arise.
6. The Tribunal has considered matters concerning costs under Rules 39 of the Tribunal Rules of Procedure. Under the Rule, the Tribunal must make a factual finding that an appeal was lodged or has been conducted frivolously, vexatiously or unreasonably, or that the party withdrawing the appeal had acted wholly unreasonably in making the appeal. The Tribunal has considered the application for withdrawal of the appeal and notes that it was filed timeously. Both Mr. Masinde and Mr. Ojiambo for the Appellants indicated that their withdrawal was prompted by a realization that the appeal had been filed out of time and therefore had no merit. The Tribunal cannot impute bad faith on the part of the Appellants or their counsels, in the absence of supporting facts. The Tribunal has also considered that counsels for the respondents had no objection to the withdrawal of the appeal and that for the 1<sup>st</sup> Respondent, no taxable costs would arise.
7. In the circumstances, the Tribunal unanimously finds that an award of costs would not be justified and consequently, is not awarded.
8. The attention of parties is drawn to Section 130 of the Environmental Management and Co-ordination Act, 1999.

DATED at Nairobi this 20<sup>th</sup> day of June, 2007.

Donald Kaniaru..........Chairman  
Dwasi Jane..........Member  
Albert Mumma..........Member  
Stanley Waudo..........Member  
Joseph Njihia..........Member