

**THE REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI**

TRIBUNAL APPEAL NO. NET/12 OF 2006

1. WE CAN DO IT 1ST APPELLANT
2. LAVINGTON RESIDENTS ASSOCIATION 2ND APPELLANT

VERSUS

1. NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA).....1ST RESPONDENT
2. NOORANI MOHAMMED HUSSEIN2ND RESPONDENT

RULING ON COSTS

1. On 18th December 2006, the Appellants herein, WE CAN DO IT and LAVINGTON RESIDENTS ASSOCIATION, filed a Notice of Appeal against the Director General of NEMA and NOORANI MOHAMED HUSSEIN. The decision appealed against was NEMA's approval of the issuance of an EIA approval for the construction of flats on LR NO 3734/176 Lavington, Nairobi.
2. On 5th April 2007, leave was granted to the 2nd Appellants to withdraw. Mr Ojiambo acting for the 2nd Appellant, also informed the Tribunal that discussions between him and the counsel for the Respondents regarding costs had borne no fruit. His clients were not prepared to pay the costs of the Respondents. Mr Jimmy Rayani, Advocate for the 2nd Respondent therefore applied to the Tribunal for an order on costs and expenses in accordance with Rules 33 and 39 of the National Environment Tribunal Procedure Rules, LN No 191 of 2003. The Tribunal granted leave for submissions on the question of costs and expenses to be made orally.
3. Mr Rayani submitted that the withdrawal of the Appeal without any reasons being given was clear evidence of an abuse of process. The implications of filing an appeal are that development activity stops until the appeal is determined. Therefore where a party who has lodged an appeal chooses to withdraw it, reasons for the withdrawal must be given, otherwise one can assume that the party had acted frivolously and vexatiously in filing the appeal. He argued further that the appeal had been conducted unreasonably. Parties had attended three mentions and on each occasion the proceedings had been adjourned, largely due to failures on the part of the Appellant.
4. Mr Ng'ang'a Advocate 1st Respondent strongly associated himself with the submissions of Mr Rayani. The Respondents had made preparations for the appeal, had filed papers and had conducted the necessary research. Therefore, they deserved to be paid costs and expenses. He submitted that in determining the


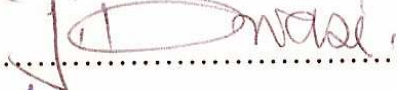



quantum of costs to be awarded the Tribunal should have regard to the Advocates Remuneration Order, in particular Schedule 5 thereof.

5. Mr Ojiambo responded that costs can only be awarded if it is demonstrated that a party acted frivolously or vexatiously in lodging an appeal: the Tribunal must find, as matter of fact, that a party had acted frivolously or vexatiously, and it was only after such a determination that the Tribunal can go into the issue of quantum. In this case such a determination had not been made. Further, Mr Ojiambo submitted, that whereas an appellant can withdraw an appeal without giving reasons, nevertheless he was prepared to give reasons, backed by documentary evidence, should such an opportunity be accorded him. On quantum he argued that there was no basis in law for relying on the Advocates Remuneration Order.
6. In response to further submissions by counsel for the Respondents that further time could not be accorded for the provision of explanations for the withdrawal, Mr Ojiambo suggested that the withdrawal of the appeal had resulted from an appreciation by his clients that the procedure that they had adopted was not the correct one.
7. The Tribunal has considered the various submissions regarding costs. The Tribunal notes that the conduct of the Appellant, Lavington Residents Association, was far from satisfactory. Having lodged the appeal, their representative, Mr Masinde, did not appear prepared to proceed with it, and caused adjournments, which, with more thought and fore planning, could have been avoided. Clearly, this conduct was aggravating to the counsel for the Respondents, who, much to their credit, always appeared on time and prepared to proceed with the matter.
8. The matter for the determination of the Tribunal is whether an award of costs is merited in the circumstances of this case. Under the Tribunal Rules costs are to be dealt with in accordance with Rule 39. Therefore the Tribunal must be satisfied, on balance, that an appeal was lodged frivolously or vexatiously or that the party withdrawing the appeal had acted wholly unreasonably in making the appeal. The Tribunal agrees with counsel for the Appellant that there must be some factual basis to support an opinion of the Tribunal that this was so.
9. Having considered the circumstances of this case, the Tribunal is not satisfied that in lodging this Appeal, the Appellant, Lavington Residents Association acted frivolously or vexatiouly or wholly unreasonably, nor is it satisfied that the conduct of Mr Masinde who first acted for the Appellant, was wholly unreasonable.
10. The Tribunal is inclined to believe that, in lodging the Appeal, the Appellant was motivated primarily by a desire to find an avenue of redress for a grievance against the approval of a development project to which, as residents, they were

opposed. It is noteworthy and commendable that as soon as the Appellants had the benefit of Mr Ojiambo's professional advice, they withdrew the Appeal.

11. The conduct of the appeal itself, while not wholly reasonable during the period that Mr Masinde represented the Appellant before the Tribunal, could be put down to the fact that Mr Masinde is not an Advocate and therefore is unfamiliar with procedures for conducting litigation. The Tribunal notes that the manner of conducting the proceedings improved markedly once Mr Ojiambo took over the matter and appeared before it.
12. For these reasons the Tribunal therefore finds unanimously that an award of costs would not be justified in the circumstances of this case, and declines the application for an award of costs.
13. The attention of parties is drawn to section 130 of the Environmental Management and Coordination Act, 1999.

DATED at Nairobi this 20th day of April, 2007

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