REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 474 of 2012

MOSES NGATIA & 8 OTHERS.....APPELLANTS

VERSUS

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

KIRTESH SHAH.....2ND RESPONDENT

(From the decision and orders of the National Environmental Tribunal in NET APPEAL NO. 70 of 2011)

J U D G M E N T

This appeal arises from the Ruling of the National Environmental Tribunal, "**NET**" dated 9th August, 2012.

The nine Appellants, as the record confirms, had on 7th February, 2011, filed a complaint and objection with the National Environment Management Authority NEMA, against a Project Proposal and an Environmental Impact Assessment/Audit EIA) Report, dated 30th November, 2010. The Report had been reviewed by NEMA which had then ordered for a full audit and other relevant investigation to be undertaken under the relevant law. Since the 2nd Respondent who was the proponent of the project herein, had commenced construction related to the project on the land, L. R. No. Kajiado/Kitengela/20344, the Appellant herein had demanded that the project be stopped forthwith pending the completion of a full assessment and audit as well as the fulfillment by the proponent, of other pre-requirements including the obtainance of a proper licence. The Appellants had also demanded that the proponent and certain NEMA officials, who were believed to have broken some provisions of the NEMA Act, should be investigated and be prosecuted. And finally, the Appellants had further sought that they be enjoined in the matter and be constantly consulted and involved in any further assessments and audits of the project.

The record further shows that the NEMA acknowledged the Appellants' complaints and promised to

investigate them, vis avis, the project and stake-holders project-level reports and views. The NEMA also promised to investigate a complaint that the original project report was based on false and fraudulent information from the proponent and the experts who had written the original project-level reports.

By the letter of the NEMA Director General dated 22nd February, 2011, NEMA later informed the Appellants that it had reviewed the Environmental Impact Assessment Project Report of the Project and carried fresh investigation as sought by the Appellants, and that the Authority had, notwithstanding the complaints and objections from the Appellants, decided to approve the proposed project at the report level. That the project involved the development of six (6) go-downs intended to house grain grinding factory (Posho mill) for the manufacture and processing of animal feeds. The NEMA also stated that the approval of a licence, however, would be subjected to several conditions intended to create and maintain environmentally suitable conditions as provided under the relevant law. That in taking this course, the NEMA had taken into account information gathered at site during two visits by its officers at different times, had taken up consultation with the neighbours surrounding the site and had done thorough evaluation of the submitted Environmental Impact Assessment Report drawn after investigations were made concerning the Objections and complaints by the Appellants.

The result of the above course of action taken by the NEMA, was that the Appellants, filed an appeal to the National Environmental Tribunal (NET), being Appeal No. NET/70/2011. In it they became the Appellants, while the NEMA and one Kirtesh Shah became the 1st and 2nd Respondent. The addendum of the Notice of Appeal to the Tribunal raised Ten grounds of appeal. The said grounds of appeal can be grouped into four main grounds which can be summarized as follows:-

1)That the NEMA approved the 2nd Respondent's Project and issued the relevant licence in error since its investigations and consultations were limited, inadequate and were based on false or fraudulent information and expert findings.

2)That NEMA's approval of the project was based on misapprehension of the true nature of the proposed project and the Tribunal's order to correct the conditions of issuing the project licence was improper and contrary to the principles which would facilitate appropriate and sustainable development and sound environmental management.

3)That the NEMA erred in law and fact in not visiting Karen and investigating the former site of the project to establish the true reasons of its relocation to Kiserian and erred in law in placing the burden of evidence thereof on the Appellants/Objectors.

4)That the NEMA erred in law and fact in permitting an industrial factory to be situated in a residential cum agricultural area contrary to the evidence before it.

Both parties were given full opportunity to file necessary documents to support or oppose the appeal before the national Environmental Tribunal. They were later allowed to agitate their cases each through their advocates who called and guided production of evidence as allowed by the law. They each finally gave their legal submissions summarizing all the evidence on the record.

By a ruling dated 9th August, 2012 the National Environmental Tribunal gave its findings of the appeal. It found that the Appellants appeal, had to fail. The Tribunal then proceeded to direct the National Environment Management Authority (NEMA), to issue the 2nd Respondent, Kirtesh Shah, a corrected letter of Development approval removing the unnecessary ambiguity concerning the nature of the project, especially the conflict between approval conditions 1.1 and 1.2. The Tribunal also directed the NEMA to issue an Environmental Impact Assessment (EIA) Licence for the development of the project without further delay. That is what aggrieved the Appellants herein who were also Appellants before the Tribunal, to file this further appeal to this court.

The Appellants filed a memorandum of Appeal containing 17 grounds of appeal which shall shortly be considered in their entirely. They then sought that this court sets aside the orders of the National Environmental Tribunal stated above, cancel the Environmental Impact Assessment licence for

development issued by NEMA and approved by NET in favour of the 2nd Respondent. The Appellants further sought that a demolition order be issued against the 2nd Respondent's factory development project on L.R. No. Kajiado/Kitengela/20344, and finally also sought the grant of costs of this appeal and before the Tribunal in Appeal NET /70/2011, to the Appellants.

Both sides filed written submissions besides the similar submissions before the lower Tribunal. I have carefully perused the submissions. I have also studied all the NEMA and the NET records of this matter.

The grounds of appeal listed in this appeal are as follows that: -

1. The honourable tribunal erred in law and fact in finding that 1st Respondent consulted the Appellants and the potentially affected persons prior to approval of the suit project contrary to evidence on record.

2. The tribunal erred in law and fact in holding that 1st Respondent in approving the project at the project report level or at all as a posho mill (grain grinding factory), had appreciated the true nature of the proposed project.

3. The tribunal erred in law and fact in finding that condition 1.1 and 1.2 of the 1st Respondent's approval letter of 22nd February, 2011 reference to the approval for "grain grinding factory" was an error that was not influenced by lack of appreciation of the nature of the proposed development.

4. The tribunal erred in law and fact in ordering the 1st Respondent, NEMA , to

a) issue the 2nd Respondent with a corrected Letter of Development Approval removing the unnecessary ambiguity concerning the nature of the project, especially the conflict between approval condition 1.1 and 1.2.

b)issue an EIA licence for the development without further delay.

5. The tribunal erred in law and fact in finding that the 1st Respondent took cognizance of the Appellants interest and claims or threat to the environment, as contained in their letter of 7th February, 2011 and served on the same day contrary to the evidence on record.

6. The tribunal erred in law and fact in finding that the Appellant's allegations of fraud, misrepresentation and falsehoods on the part of the 2nd Respondent lacks basis.

7. The tribunal erred in law and fact in finding that the Appellants should have produced evidence to show a complaint made against the 2nd Respondent's operation of an animal feeds processing factory in Karen.

8. The tribunal erred in law and fact by finding that the Appellants ought to have produced documentary evidence in respect of threats to health or ailments suffered due to the operation of the Karen Animal Feeds Factory before being closed.

9. The tribunal erred in law and fact in failing to visit the Karen area where the proposed factory had been previously located as per the evidence and pleadings.

10. The tribunal misdirected itself in law and fact in finding that the Appellants ought to have produced documents showing zoning of the area in question and in so finding, failed to take all the evidence into consideration with regard to zoning

11. The tribunal misdirected itself and erred in law and fact in finding that there was no evidence to show restrictions that would exclude the proposed development, in light of the change of user

approval granted to the 2nd Respondent.

12. The tribunal misdirected itself and erred in law and fact in permitting an industrial factory to be situated in a residential/agricultural area contrary to evidence before it.

13. The tribunal erred in law by failing to call for all or further evidence it may have deemed necessary before reaching its findings.

14. The tribunal misdirected itself in law by setting evidentiary burden and standards way above the statutory levels under EMCA without notice to the parties.

15. The tribunal misdirected itself in law by conducting itself as a court of law rather than as a tribunal resulting in wrong, unjust and prejudicial findings.

16. The tribunal misdirected itself in law in conducting the proceedings as a trial and in failing to inquire into the issues raised in the appeal by actively and on its own motion calling for documents, evidence and clarifications during the course of the proceedings.

This court will now consider each of the grounds of appeal cited above either singly or jointly with others in order to resolve them as it will deem fit, proper and just.

The Appellants first ground is that they, as neighbours at the site of the project proposal, were not, or were not sufficiently consulted so that they could express their opinion, file partial or full objection to the project which was likely to bring or cause negative environmental and/or health hazards. The Appellant called several witness before the NET to support this argument. The purpose of calling the several witnesses was to tender adequate evidence to convince and persuade the NET to set aside NEMA's approval of the development in question, to subject the Respondent's project to a full Environmental Impact Assessment (EIA) study and audit, to stop the Respondent from proceeding with the work on the project pending a full EIA study, and to order for the 2nd Respondent's criminal prosecution for an alleged fraudulent making of false statements in his original Project Report.

In responding to this issue of lack of consultation, the Tribunal noted that in the past occasions, it had ruled that a proponent of a project ought to consult with potentially affected persons. The Tribunal however, found that in this case the NEMA had consulted about the project with such potentially affected persons, including some of the Appellants who were available, before it approved it. These included the 3rd Appellant who also alerted the other Appellants and through their joint advocate M/s Muchiri Gachara & Company, wrote a serious objection to NEMA.

The record shows that on receiving the Appellant's complaint and objections, NEMA directly or through its agents, stopped the construction of the project and ordered its relevant officers to investigate. It was only after site investigation had been completed and an environmental impact assessment report made that NEMA, approved the project after being satisfied of its suitability subject to certain conditions which it attached to the approval.

Furthermore, this court observes that the National Environment Tribunal, also took into account the evidence of one Josephine Nashipae who testified before it that the Kitengela/Oloosirkon Land Owner's Association had written a letter to NEMA, dated 14th February, 2011 indicating that members of the association who were the land owners surrounding the project site, had been consulted over the project and had confirmed their support for it. The letter is on page 70 of the appeal record. The Tribunal noted that the Appellants did not challenge the existence and the contents of the letter before the Tribunal. Noting finally that most of the Appellants lived in Nairobi, away from the project and, notwithstanding the fact that they may be owning some land plots there, the Tribunal came to the conclusion that adequate consultation in accordance with the relevant law and practice, had been made.

Having carefully considered the above evidence which was produced before the Tribunal; having also

noted that the Tribunal was in the best position to judge the demeanour of the witnesses before it, for the purpose of assessing the credibility of their evidence: and having noted that the Tribunal reached no illogical or unreasonable conclusion; and finally, this court having been convinced that the conclusions reached by the Tribunal on this issue of consultation was indeed reasonable, logical, and in accordance with the relevant statutory requirements, the court finds no valid grounds for interfering with the Tribunal's decision. NEMA in this court's finding, timely responded to the complaints and objections raised by the Appellants through their advocates by stopping the project until full investigations were made. NEMA, thereafter approved the proposed project upon the favourable evidence gathered during the resultant investigation. It gave the approval, not just to appear as not standing in the path of development but also because it was satisfied through the environmental impact assessment and audit, that the project, was environmentally viable and suitable for development. In the above circumstances, this court finds no merit on the first ground of appeal.

The second ground of appeal is whether or not NEMA had properly appreciated the true nature of the proposed project which was an animal feed manufacturing factory and not a posho mill or a grain-grinding factory. The Appellant's case was that NEMA approved the project because it believed it to be a posho mill or a grain-grinding factory.

I have properly perused the records, including the proponents' original application for approval. It clearly shows that the licence the 2nd Respondent sought was for six go-downs to house a factory for animal feeds manufacturing and processing. I note further that the introduction heading to the 2nd Respondent's Project Report is **"animal feeds manufacturing and processing factory."** I further observe that in the Reference part of its approval letter dated 22nd February, 2011, it reads: -

"ENVIRONMENTAL IMPACT ASSESSMENT (EIA) FOR THE PROPOSED DEVELOPMENT OF SIX (6 No.) GODOWNS AND OFFICES FOR THE OPERATION OF ANIMAL FEEDS PROCESSING FACTORY ONPLOT NO. KAJIADO/KITENGELA/20344 ....."

It seems clear to this court, therefore, that NEMA sufficiently understood and appreciated that it was dealing with a licence for animal feeds manufacture and storage and not grain grinding factory (posho mill). There is also the impression that animal feeds manufacture has the grinding of grains and other plant stuff, as part of the process. Be that what it may, this ground in my view, has no merit and fails.

However, in its letter of approval dated 22nd February, 2011, NEMA clearly in error on the face of the records before it, presented a purported 2nd project referred to as: - **"Grains Grinding Factory (Posho Mill)....."** which the 2nd Respondent had nowhere sought in his earlier application. The National Environmental Tribunal considered the inclusion of the words **"Grain Grinding Factory (Posho Mill)"** as an error. This court, in the circumstances of the case, accords the error to be a mere inadvertent inclusion and a simple error on the face of the records. The court finds that the same did not in any way mislead NEMA or affect it in its process of approving the correct project licence for the manufacture of animal feeds. The court hereby approves the Tribunals directive to NEMA to correct the possible confusion, if any, created in the minds of the Appellants, by amending the wording of the letter unless grains grinding forms part of the animal's feeds manufacture. In this court's view NEMA should comply by removing any reference to the "**grains grinding factory (posho mill)"** from the letter unless grains grinding forms part of the animal's feeds manufacture. This takes care of grounds three and four of the grounds of appeal.

Ground (5) raises the issue as to whether or not the National Environmental Tribunal in reality took into account the Appellant's interest, or whether it indeed considered the demands of or threats towards environment when writing its letter to the NEMA dated 22nd February, 2011. The Appellants evidence before the NET was that the project would generate dust which would pollute the air, pollute the nearby river, negatively affect wildlife in the area, create foul smell and, attract rodents and snakes. However, NEMA had approved the project after receiving the EIA report after the prompted investigations arising from the Appellants Advocate's complaint letter aforementioned. The Reports had recommended approval of the project subject to terms which took care to satisfy the concerns raised by the Appellants.

These included mechanisms that would prevent and/or reduce the alleged unfavourable environmental effects and threats. It included an environmental management and monitoring plan on page 16 to 31 of the EIA Report. It further included a requirement of periodic environmental audit. All these measures unfortunately, had not come to the attention and information of the Appellants who admitted the fact before the Tribunal.

This court has no doubt, therefore that the Tribunal considered these comprehensive management and control measures and came to the conclusion that NEMA was entitled to its decision to approve the project in these circumstances. This court, in equal measure and upon the same material and evidence, comes to a similar finding. It therefore finds no merit in this ground of appeal.

Under ground six of appeal, the Appellants complained that the Project Level Report which NEMA originally received from the 2nd Respondent seeking approval to start the project, was based on falsehoods fraud and misrepresentation, for which reason the Appellants demanded that the 2nd Respondent deserved to be criminally prosecuted. What the appellants had regarded as false and fraudulent as far as this court understands, were two facts –

(a) That the 2nd Respondent had shown in the project level report that there was a glass manufacturing factory in the vicinity of the project site which factory did not exist according to the Appellants.

(b) That the 2nd Respondent had annexed photographs of the project site which did not show existence of residential houses around it while there were such houses in the area.

The Tribunal had however established and indeed accepted the position that there was a glass factory within 2-3 kilometers of the project site but found that the presence of the glass factory was totally irrelevant to the suit project. Secondly, the Tribunal also accepted the explanation which had been offered by the 2nd Respondent that photographs which had been taken of the project site had not included the residential house around it. What is of importance, however, is the Tribunal's conclusions that there were no falsehoods or misrepresentations in the project level reports which were capable of misleading or wrongly influencing NEMA to make a wrong decision concerning its original approval of the project. This court has considered this ground of appeal. It finds the alleged two facts to be of little consequence in the NEMA's process of approval of the project. The presence of a glass factory within 2-3 kilometers was confirmed. How it influenced the approval process by NEMA and later, the Tribunal, was not demonstrated by the appellants. This ground of appeal therefore also fails.

The seventh ground of Appeal is that the NET erred in law and fact in finding that it was the Appellants who should have given evidence showing that the 2nd Respondent's former animal feeds factory at Karen, was shut down due to its disastrous environmental and health consequences which included negative health impacts, rodent infestation and environmental pollution. I have perused the Tribunal's record. I find that the Appellants who alleged these consequences did not produce any kind of evidence in support of their allegations about the 2nd Respondents Karen animal feeds factory. Even Mr. Mugo who was one of the appellants and who strongly alleged that he developed poor health because of the negative impacts from the said former factory, did not produce any document such as a medical report, to prove any ailment or treatment thereof. The result was that the NET had no evidence upon which to base the conclusion which the Appellants sought. This court cannot possibly come to any different conclusion where there is no such evidence and dismisses this ground of appeal.

The eighth ground of appeal is that the Tribunal erred in law and fact by finding that the appellants ought to have themselves produced evidence in respect of threats to ill health or ailments suffered due to the operation of the Karen animal feeds factory before it was closed. It is however trite law that the party that claims the existence of certain facts has the burden to adduce evidence to the proof thereof, at least on the balance of probabilities or any lesser standard as envisaged by the Appellants. They clearly adduced no such evidence. The Tribunal in this court's view, acted properly. This ground also fails accordingly.

The ninth ground of appeal is that the Tribunal erred in law and fact in failing to visit the Karen area where the proposed animal feeds factory had been previously situated, to assess the existence of the negative environmental impacts alleged by the Appellants. In this court's view this ground is closely connected with grounds 8 and 7 above. The Appellants who were properly represented by a qualified Legal Counsel should have encouraged Appellants to produce documentary or oral evidence to support their allegation. The Counsel did not even request the Tribunal to visit Karen. And even if such request could have been made, both NEMA and NET would demand the assistance of experts and experts reports of which none were availed by the Appellants. In the absence of any creditable evidence to persuade the NEMA and NET to decide to set up an independent investigation concerning the Karen factory, this court makes a finding that both institutions acted properly and according to law. This ground must therefore fail.

The tenth ground of appeal is that the Tribunal erred in law and fact in finding that the Appellants ought to have produced documents showing zoning of the project site and that it failed to record evidence in relation to zoning. There is evidence on the record, however, that the 2nd Respondent did not deny the fact that his project development is situated in an agricultural area. Because of that, the 2nd Respondent had sought and obtained from Olkejuado County Council, a change of user of the site land to commercial or industrial use. Having noted the above fact the Tribunal accepted the same but went further to observe that even then, the Appellants did not produce evidence of any prior existing limitation by any other authority prohibiting a commercial or industrial project from being situated in an agricultural area. The tribunal also noted that the site area had not been specifically zoned for agricultural and residential purposes only.

This court has considered the matter. It totally accepts the two above conclusions reached by the Tribunal on the facts already examined above. NEMA clearly approved the project with full knowledge that it was situated in an agricultural and residential area, but on terms that would clearly control and/or remove any probable negative environmental and health impacts. That meant that the project situation did not in the circumstances of this case, impact negatively. That also was the reason why the project approval, especially after the environment impact assessment was done, was pegged to specific conditions to be always observed by the 2nd Respondent. The immediate above findings apply similarly and equally to ground (11) and (12) of the appeal.

Grounds thirteen blames the Tribunal for not, on its own motion, calling for general evidence to assist it to arrive at its findings. The Appellants also thought that the Tribunal should on its own, have visited Karen to collect relevant evidence to decide the Appellant's allegation. As stated earlier however, the appellants should have tendered prima facie evidence upon which the Tribunal and NEMA could have logically been obliged to investigate the matter, inclusive of visiting the area, to conclusively decide the issue. The Tribunal saw no such prima facie evidence, upon which on a motion of its own, it could visit Karen and investigate within the powers given to it under the relevant law.

This court finds that the Tribunal acted reasonably in the above circumstances. Put differently, the NEMA and the Tribunal, notwithstanding its wide powers under the Act, can only act reasonably and within logic upon prima facie evidence and not upon mere or sheer allegations. Short of the above, the institutions would find themselves chasing after every sheer allegations made to them. On that basis, this ground of appeal fails.

Grounds 15 and 16 also deal with the standard of proof which the NET should adopt for cases brought before it as a Tribunal. The Appellants argued that it should be below the standard of proof used in civil cases in regular courts of law. This court understands that argument to mean that the standard of proof should be below the balance of probabilities.

This court has considered this argument. Apart from the fact that the evidence before the tribunal, in whatever manner, adduced or collected, must be such that it is in the least adequate to persuade the Tribunal to come to a reasonable and/or just finding, no specific standard of proof is specified under the relevant law. Furthermore the Tribunal's conduct is really not fettered or restricted. Section 26(2) of the Environmental and Co-ordination management Act, Rules (1999) states: -

"Subject to this rule, the Tribunal shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings and shall so far as appears to be appropriate, seek to avoid legal technicality and formality in its proceedings."

Clearly therefore, the parties were at liberty to adduce any relevant evidence written or oral in any reasonable manner. Fortunately the Appellants were being led by qualified advocates who were free to introduce such evidence as in their view, would be necessary to persuade the Tribunal, inclusive of making requests to visit relevant places such as Karen. They were at liberty even to request the Tribunal to order for an environmental impact assessment of previous Karen site of the industry to make it part of evidence before the ruling could be made. Appellants however did nothing of the kind, only to later blame the Tribunal. In the view of this court the Tribunal was not necessarily obliged to take any steps that were not imperative to assisting it to arrive at its findings of the case before it.

The comprehensive result of this appeal, therefore, is that it has no merit and is hereby dismissed, with costs to the Respondents. Orders accordingly.

Dated and delivered at Nairobi this 21st day of March 2013.

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JUDGE