



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**MISC. APPL. NO. 464 OF 2006**

BETWEEN

REPUBLIC.....APPLICANT

AND

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY .....RESPONDENT

*EX-PARTE*

1. DISMAS MATE
2. MERCY KANYUA MATE

**JUDGMENT**

**Introduction**

1. The *ex-parte* applicants (“the applicants”) run a school called Highway Educational Complex which comprises a kindergarten and primary school. The school is located in a residential area where it is surrounded by bungalow, maisonettes and storey type buildings. At the time material to this suit, it had a population of about 300 pupils.
2. The respondent, the National Environment Management Authority (“NEMA”), is a statutory corporation established under **section 7** of the *Environmental Management and Co-ordination Act (Act No. 8 of 1999)* (“EMCA”). Its purpose is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

**Ex-parte Applicants’ Case**

3. The applicants state that they applied for a change of user of the plot on which the school is situated from residential to school in May 2001. No objection was raised when the proposed change of user was advertised and thereafter the City Council approved the change of user. Thereafter, the applicants began to extend and renovate the building by adding an additional floor to the two existing floors with the approval of the Nairobi City Council

4. On 15<sup>th</sup> December 2005, while the building works were proceeding, the applicants received a letter (“the Stop Order”) from the National Environment Management Authority (“NEMA”), the respondent, requiring it to carry out an Environmental Impact Assessment (“EIA”) and stop further development of the project: The letter read in part, *“You are hereby ordered to carry out and submit an Environmental Impact Assessment of the development. Please note that you should NOT carry out any further development on the aforementioned plots until the EIA report has been received by the NEMA and a decision on the same communicated to you by this Authority.”*
5. Upon receipt of the Stop Order, the applicants wrote to NEMA informing it that they had engaged an expert to carry out the EIA which was expected to be completed in January 2006.
6. On or about 2<sup>nd</sup> February 2006, NEMA officers went to the school premises and wrote in the visitors book as follows; *“To stop operations until the stop orders complied with.”*
7. The applicants thereafter forwarded the terms of reference of the EIA to NEMA for approval on 6<sup>th</sup> February 2006 but NEMA responded by suspending approval of the terms of reference on grounds that it was investigating alleged violation of the stop order. On 31<sup>st</sup> March 2006, the applicants delivered the EIA report to NEMA. The applicant alleges that to date the report has not been approved by NEMA.
8. On 4<sup>th</sup> August 2006, NEMA wrote to the applicants a letter titled, *“Closure of the Highway Education Complex School and Restoration Order for the Plots LR No. 93/860 and 93/861 on Guthera Crescent in South B/Plainview”* in which it directed the applicants as follows;
  - i. *Prepare a relocation plan and submit it to the Authority within 21 days from the date of this letter;*
  - ii. *Prepare a decommissioning plan and submit it to the Authority for approval;*
  - iii. *Submit a commitment letter to the effect you will restore the site to its origin status prior to your illegal construction;*
  - iv. *Commence restoration of the effected site as per the approved decommissioning plan. The affected building should be scaled down as per the original architectural design. The concrete rubble and any other waste/debris should be removed and dumped at the appropriate dumping site approved by the City engineer-City council of Nairobi.*
  - v. *Call inspectors from NEMA to inspect the level of compliance, which should be to the satisfaction of the Authority on such terms and conditions as may be deemed appropriate and necessary.*
9. The purport and effect of the letter dated 4<sup>th</sup> August 2006 was to direct the applicants to demolish the school premises. In the circumstances, the applicants, pursuant to leave granted on 23<sup>rd</sup> August 2006, filed the Notice of Motion dated 24<sup>th</sup> August 2006 seeking the following reliefs;
  - a. *An order of prohibition do issue prohibiting the National Environment Management Authority their servants, agents or appointees from implementing or continuing to implement and or executing or continuing to execute the order made on 4<sup>th</sup> August 2006 requiring the applicants to stop the further use of the premises being on LR No. 93/860 and 93/861.*
  - b. *An order of Certiorari do issue to being to this court and quash the order made by the National Environment Management Authority on 4<sup>th</sup> August 2006 ordering the applicants to stop further use and or construction of the facility and premises on LR No. 93/860 and 93/861.*
  - c. *An order of mandamus do issue directing the National Environment Management Authority to consider and evaluate the applicants’ Environmental Impact Assessment Report prepared by Habitat Planners in February 2006 and delivered to the respondents on 31<sup>st</sup> March 2006 and thereafter make a finding as required under the Environmental Management & Co-ordination Act, 1999.*
  - d. *An order do issue staying permanently the order by the respondent requiring the applicants to stop further use of the premises on LR No. 93/860 and 93/861 as a School and requiring the*

- applicants to stop further operation and or to relocate the school pursuant to any act of commission subsequent to the order of 4<sup>th</sup> August 2006 pending the hearing and determination of matter herein.*
- e. *Any other relief or order that this honourable court may deem fit to grant.*
  - f. *That the costs of this application be costs in the cause or be provided for.*

10. The applicants contend that the letter dated 4<sup>th</sup> February 2006 is illegal, arbitrary, null and void as they did not violate the Stop Order by continuing to carry out any construction. They further contend that they had complied with the requirements of **EMCA** in preparing an EIA Report and that therefore there was a violation of their rights to natural justice in so far as they were not heard on the EIA it submitted and before action was taken against the school by the letter of 4<sup>th</sup> August 2006.

11. In light of this provision, the applicants argue that they were never afforded the opportunity to make presentations whether oral or written to support the report, therefore the action by NEMA was arbitrary and in violation of natural justice, given the consequences of the order made on 4<sup>th</sup> August 2006.

### **Respondent's Case**

12. In response to the application, NEMA relies on the replying affidavit sworn on 14<sup>th</sup> February 2007 by Peter Odhengo, an environmental inspector. He depones that due to complaints by the residents in the area where the school is built about various environmental concerns such as overcrowding and the fact that the school is situated in one acre of land, NEMA decided to inspect the school. Upon inspection, it found that the expansion was carried out without an EIA. It therefore issued the stop order on 15<sup>th</sup> December 2005.

13. Mr Odhengo states that the applicants ignored the stop order and continued construction without waiting for the respondent's decision on the EIA. NEMA states that it declined to approve the terms of reference for the EIA report because the applicants violated the terms of the stop order and that the decision made on 4<sup>th</sup> August 2006 ordering the applicant to relocate the school, was as a result of the applicants' disregard of NEMA's authority and lawful directive which resulted in the applicant degrading the environment.

14. Annexed to the respondent's Replying affidavit is an Inspection Report relating to the school which is undated. The Inspection report reads in part as follows;

*The above inspectors from the National Environment Management Authority (NEMA) visited the school on 10<sup>th</sup> and 14<sup>th</sup> June, 2006 to verify compliance with the STOP ORDER issued to the school by NEMA in December, 2005. During the visit, it was found that:*

- i. *The construction of the additional floors were almost complete in total disregard to NEMA's previous advice as contained in the **STOP ORDER** in less than an acre space.*
- ii. *The proprietor had a meeting with two lead experts, negotiating terms and conditions for carrying out an Environmental Impact Assessment (EIA) for the extension.*
- iii. *The school is located in the middle of the residential estate in less than an acre space*
- iv. *The proprietor did not provide relevant documents from NEMA approving the extension.*

15. The respondent argues that all its actions were in accordance with the law and in exercise of its powers and that the applicants are not entitled to the orders sought.

### **Determination**

16. At the heart of this matter is the duty of the public body to comply with the rules of natural justice and it is therefore necessary to interrogate the provisions contained in **EMCA** governing EIA.

17. EIA is governed by **Part VI** of *EMCA* and the *Environmental (Impact Assessment and Audit) Regulations, 2003 (Legal Notice No. 101 of 2003)* (“*EIA Regulations*”). **Section 58** of *EMCA* requires proponents of projects specified in the **Second Schedule** to the Act to submit a project report to NEMA. The section partly reads as follows;

*58. (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.*

*(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.*

.....

19. NEMA wrote a letter dated 31<sup>st</sup> March 2006 to the applicants acknowledging receipt of copies of the EIA Report (*reference number PR/5/2/1059*) and indicating that copies of the report had been forwarded to the relevant lead agencies for comments within 21 days with effect from the date of the letter. The correspondence concluded by asking the applicant not to commence or proceed with any development of the proposed project until communication is received from NEMA on the matter. The letter further stated that the report was under review and that NEMA would communicate its assessment/findings to the applicants in due course.

20. According to the law, upon being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, NEMA was to issue an environmental impact assessment licence in accordance with **section 63** of *EMCA*. NEMA was duty-bound to respond to the applications for EIA license within three months in accordance with the law failure to which the applicants were free to proceed with the project. The relevant provisions of **section 58** of *EMCA* provide as follows:

*(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.*

*(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.*

*(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.*

21. I therefore find that failure by NEMA to communicate its findings to the applicants or within a reasonable period of the statutory period was unreasonable. It is also unreasonable that after submission of the report, the Authority has not approved or otherwise given its findings on the EIA report. The respondent gave the reason for failure to even approve the terms of reference for the EIA at paragraph 8 of the Replying affidavit as follows; “*THAT , in fact, the respondent declined to approve the terms of reference for the Environmental Impact Assessment report because of the applicants [sic] violated the terms of the stop order of 15<sup>th</sup> December, 2005...*”

22. In my view, it is unreasonable for the Authority to rely on the applicant’s alleged defiance of the Stop order to decline to approve the project absent other reasons. Once NEMA had given the applicants a go-ahead to prepare the EIA, then it was bound to approve or reject the terms of reference for the EIA and discharge its statutory obligation by considering and giving its findings

over the report to the applicants as undertaken in its acknowledgment letter of 31<sup>st</sup> March 2006.

23. The action by NEMA is also faulted on the basis of failure to give the applicants an opportunity to be heard before proceeding to issue such a drastic measure of ordering closure and decommissioning of the school. At the very least NEMA was bound to hear the applicants before proceeding to 'indefinitely' withhold approvals and licences without even giving room for correction.
24. NEMA's letter of 4<sup>th</sup> August 2006, ordering the closure and relocation of the school is no doubt a drastic measure. A reading of the said letter reveals that NEMA only had an issue with the expansion to more than one upper floor: "*Section 58 to 67, the Second Schedule of the Act and the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101, your development (expansion of the existing buildings to more than one upper floor) is identified as an activity that is out of character with the surrounding and the structures are of a scale not keeping with the surrounding, and should have therefore, undertaken an Environmental Impact Assessment before its execution, commencement or financing.*"
25. NEMA breached the rules of natural justice and acted unreasonably when it issued the order to the applicants to demolish and relocate the whole school without affording them an opportunity to be heard particularly given that three months has already elapsed since the EIA Report was delivered to NEMA. Furthermore, the action taken by NEMA was not contemplated given that the subject of the EIA was not the whole school complex but the expansion involving building of an additional floor of the existing two storey complex.

### **Conclusion and disposition**

18. It is to be recalled that this court in making its findings is not dealing with the merits or demerits of the matter. The court at this point is not concerned with whether the applicants' school ought to be preserved or demolished or whether it ought to add an additional floor or not as those are matters within the respondent's jurisdiction. The court is called upon to examine the process used to reach the decision and it has been found wanting.
19. The only option for this court is to quash the decision of NEMA contained in its letter of 4<sup>th</sup> August 2006 that was arrived at in breach of the rules of natural justice and direct it to act in accordance with the law.
20. As a result of the findings I have set out above, I make the following orders;
- a. **An order of Certiorari be and is hereby issued to bring to this court and quash the order made by the National Environment Management Authority on 4<sup>th</sup> August 2006 ordering the applicants to stop further use and or construction of the facility and premises on LR No. 93/860 and 93/861.**
  - b. **An order of mandamus be and is hereby issued directing the National Environment Management Authority to consider and evaluate the applicants' Environmental Impact Assessment Report prepared by Habitat Planners in February 2006 and delivered to the respondents on 31<sup>st</sup> March 2006 and thereafter make a finding as required under the Environmental Management & Co-ordination Act, 1999.**
  - c. **The respondent shall bear the costs of the suit.**

**DELIVERED and DATED at NAIROBI this 30<sup>th</sup> day of August 2013**

**D.S. MAJANJA**

**JUDGE**

Ms Makori instructed by K. Mogeni and Company Advocates for the *ex-parte* applicants.

Mr Kibanga instructed by Munga Kibanga & Company Advocates for NEMA.