REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 251 OF 2011

REPUBLIC .....APPLICANT

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY .....1ST RESPONDENT

KIBERA RESIDENT MAGISTRATE.....2ND RESPONDENT

EX-PARTE

PHILIP KISIA &

CITY COUNCIL OF NAIROBI

JUDGMENT

The 1st ex-parte Applicant, Mr. Philip Kisia was at the time material to these proceedings the Town Clerk of the 2nd ex-parte Applicant, the City Council of Nairobi. Through summons dated 29th October, 2011 the 1st ex-parte Applicant was required to appear before the 2nd Respondent, Kibera Resident Magistrate's Court to answer charges preferred against him by the 1st Respondent, the National Environment Management Authority (NEMA). NEMA is a body corporate established under Section 7 of the Environmental Management and Co-ordination Act 1999 (EMCA) and its principal objective is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of the Government of Kenya in the implementation of all policies relating to the environment.

When the 1st Applicant appeared before the 2nd Respondent he was charged with two counts. In Count 1 he was charged with failing to exercise due diligence and efficiency to ensure compliance contrary to Section 145(1) as read with Section 144 of Environmental Management and Co-ordination Act No. 8 of 1999. The particulars of the charge allege that on diverse dates between 13th June, 2011 and 28th September, 2011 at Enterprises and Lunga Lunga road, in Makadara District of the Nairobi Province being the Town Clerk of the City Council of Nairobi the 1st Applicant failed to exercise due diligence and efficiency to ensure compliance by not collecting domestic waste at the collection sites thereby causing pollution to the environment thus contravening the EMCA. In the 2nd Count the 1st Applicant was accused of failing to comply with a lawful order by an environmental inspector contrary to Section 137(b)

of the Environmental Management and Coordination Act No. 8 of 1999. The particulars of the offence are that on 13th September, 2011 at City Hall within Starehe District of the Nairobi Province the 1st Applicant being the Town Clerk of the City Council of Nairobi, failed to comply with a lawful order issued by an environmental inspector namely Sophie Mutemi directing him to stop illegal dumping and restore the environment along Enterprises Road and Lunga Lunga Road in contravention of EMCA.

The 1st Applicant is of the view that NEMA's decision to prosecute him was unlawful and malicious. He moved to this Court and obtained leave to commence judicial review proceedings. The Court when granting leave directed that the leave should operate as stay of the criminal proceedings before the 2nd Respondent. On 31st October, 2011 the applicants filed the substantive notice of motion in which they seek orders as follows:-

> **"I. An Order of Certiorari directed at the National Environment Management Authority do issue to bring to the High Court and quash the decision of the Authority to institute and undertake criminal proceedings against the 1st Applicant Phillip Kisia for purported offence of failing to exercise due diligence and efficiency to ensure compliance in purported contravention of Section 145 (1) as read with Section 144 of the Environmental Management and Coordination Act No. 8 of 1999 and purported offence of failing to comply with a purported lawful order by an Environmental Inspector in purported contravention of Section 137 (b) of Environmental Management and Coordination Act No. 8 of 1999 as contained in the Charge Sheet dated 29th September 2011 in Kibera Magistrate's Court Criminal Case No. 3944 of 2011.**
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> II. **An Order of Prohibition directed to the Resident Magistrate at Kibera Law Courts to prohibit him from admitting the charges proffered by the Director of Prosecution against the 1st Applicant Phillip Kisia for purported offence of failing to exercise due diligence and efficiency to ensure compliance in purported contravention of Section 145 (1) as read with Section 144 of the Environmental Management and Coordination Act No. 8 of 1999 and purported offence of failing to comply with a purported lawful order by an Environmental Inspector in purported contravention of Section 137 (b) of Environmental Management and Co-ordination Act No. 8 of 1999 in Resident Magistrate's Court at Kibera in Criminal Case No. 3944 of 2011 and from proceeding with the prosecution of the 1st Applicant or compelling him to take Plea therein.**
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> III. **An Order for costs."**

It is the applicants' case that the decision to charge the 1st Applicant is unlawful, Wednesbury unreasonable, illogical, and actuated by malice on the grounds that:-

> **"I. The 1st Respondent has proffered charges on the basis of a non-existent or otherwise unspecified offence under EMCA;**
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> **II. No lawful order was issued upon the Applicant to warrant the bringing of charges under Section 137 (b) of EMCA;**
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> **III. The purported exercise of power under Section 118 of EMCA has been done *ultra vires* the statute as no advise and/or guidance from the Attorney General was sought and/or obtained before proffering the impugned charges;**
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> **IV. The purported prosecution is contrary to the object, letter and spirit of EMCA which require partnership, consultation, cooperation and complimentary partnership between the 1st Respondent and the Respondents (1stapplicant?) as a Lead Agency under the Act and CEO thereof;**
>
> **V. The decision is informed by irrelevant factors being the motivation of the 1st**

Respondent to cover up and shift blame for its failure to meet its statutory obligations under EMCA to among other things act as the government's principal instrument of implementation of environmental policies;

VI. The decision was arrived at without considering relevant factors including the capacity of the 2nd Respondent to ideally meet the waste and garbage management needs of the City and the efforts presently being made by the Respondents to correct the situation;

VII. The purported prosecution is unlawful since under Section 87 of the Local Government Act Cap 265 Laws of Kenya the Applicant enjoys exemption from personal liability for the acts or omissions of the Council;

VIII. It is simply illogical that one government enforcement agency should prosecute another for purported failure to meet responsibilities that are under statute expected to be met in partnership of the two agencies;

IX. The intended prosecution is contrary to public policy as it pits a government agency against another in criminal proceedings;

X. Neither the Applicant nor the Council was given an opportunity to make representations about the intended prosecution or action by the 1st Respondent before the decision to prosecute the Applicant was arrived at;

XI. The 1st Respondent has acted maliciously, unreasonably and unlawfully by overlooking the provision of Section 12 of the EMCA which requires that the 1st Respondent when dealing with matters Lead Agencies such as the Council should first notify the Council of an intended directive, thereafter issue the directive requiring compliance failing which the 1st Respondent is permitted to remedy the situation and claim a civil debt against the Council;

XII. The 1st Respondent has acted maliciously by engaging the 1st Respondent in negotiations then proceeding behind the Applicant's back to push for the continuance of the criminal proceedings."

The 2nd Respondent did not file any reply to the application. NEMA opposed the application through a replying affidavit sworn by Jeremia Wahome on 13th February, 2012 and a supplementary affidavit sworn by the same deponent on 18th February, 2012. In the said affidavits, he identified himself as an Environmental Inspector with NEMA gazetted vide Gazette Notice No. 757 of 2011. He averred that sometimes in June, 2011 environmental inspectors from NEMA Nairobi Provincial Office and NEMA Police Unit conducted a tour of inspection and established that what ought to be solid waste transfer/collection sites had been left un-cleared over time and the said transfer/collection sites had as a consequence been illegally converted into disposal sites, thus constituting illegal waste disposal on Lunga Lunga Road and Enterprise Road. An appropriate Restoration Order was issued in accordance with Section 137 of EMCA to the 1st Applicant in his capacity as the Chief Executive Officer (CEO) of the 2nd Applicant. The applicants did not clear the sites as directed. Letters were exchanged but nothing happened. It is the 1st Respondent's case that the institution of Criminal Case No. 3944 of 2011 before the 2nd Respondent was done in accordance with provisions of EMCA, pursuant to appropriate procedure and the charges have not been actuated by malice.

Considering the arguments of the parties in this matter, it is clear that the main issue for the determination of this court is whether NEMA acted unlawfully and maliciously in having the 1st Applicant charged in court. The applicants have in their skeletal submissions dated 2nd April, 2012 and filed in court on 3rd April, 2012 clearly identified the reasons which make them believe that the charges against the 1st

Applicant should be terminated. I will reproduce those grounds as captured in the submissions before proceeding to make my decision on each of these issues. The grounds are:-

- **Before bringing the charges the 1st Respondent did not take into account the fact that the City Council of Nairobi and NEMA hold complimentary roles under the Act and in actual fact in matters of protection of the environment among other relevant factors.**
- **No Environmental Restoration Order was ever issued upon the clerk or the Council as alluded under the 2nd charge. The approval of the Attorney General (now DPP) was not sought or obtained as is mandatorily required under EMCA before bringing the charges.**
- **The 1st Respondent did not explore the statutory alternative remedy under Section 12 of the Act and there is no justification in failing to do so.**
- **The Town Clerk has statutory immunity from the charges as brought pursuant to the provisions of Section 87 of the Local Government Act Cap 265 Laws of Kenya.**
- **The 1st Respondent's decision to prosecute the Town Clerk is actuated by malice.**

The applicants submitted that according to EMCA, NEMA is supposed to work in cooperation, consultation and complementation with the 2nd Applicant in so far as environment management is concerned. The applicants contend that the preamble of EMCA recognizes that improved legal and administrative co-ordination of the diverse sectoral initiatives is necessary in order to improve the national capacity for the management of the environment. They submit that a reading of Section 9 of EMCA clearly shows that NEMA is mandated to co-ordinate all environmental management activities by lead agencies which by virtue of the definition in Section 2 of EMCA includes the 2nd Applicant. They also argue that NEMA is expected to undertake, in cooperation with lead agencies, programmes intended to enhance environmental education and public awareness on sound environmental management. NEMA is also required to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection so as to enable them carry out their responsibilities satisfactorily. The applicants therefore argue that the decision by NEMA to prosecute the 1st Applicant is unlawful and contrary to the letter and spirit of EMCA. They also submit that it is against public policy to charge the 1st Applicant since NEMA and the applicants are supposed to work in harmonious partnership.

In reply to this argument NEMA submitted that it does not hold complimentary roles with the 2nd Applicant under EMCA as regards coordination and enforcement of environmental protection. NEMA asserts that the mandate to protect the environment falls on it by virtue of the provisions of sections 7 and 9 of EMCA.

I have considered the arguments on this issue and I agree with the applicants that lead agencies (government ministries; departments; parastatals and state corporations; and local authorities) which are per law mandated to control or manage the environment or natural resources should cooperate with NEMA in the preservation and protection of the environment. NEMA is, however, given the mandate to "exercise general supervision and coordination 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"- see Section 9 of EMCA. By virtue of Section 9(2) (l) of EMCA, NEMA shall:-

> **"monitor and assess activities, including activities being carried out by the relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given."**

The EMCA is therefore clear that the buck stops with NEMA as regards environmental matters. NEMA assists and guides lead agencies in the preservation and protection of the environment but when a lead agency fails to comply with the directives given by NEMA then NEMA has no option but to engage the powers granted to it by EMCA. The 2nd Applicant's attempt to elevate itself to the same status with NEMA is therefore untenable. The attempt by the applicants to escape liability by upgrading their roles in the preservation of the environment fails.

The second argument in support of the applicants' case is that NEMA ought to have resorted to the alternative remedy provided by Section 12 of EMCA before having the 1st Applicant charged. The applicants argued that under Section 12 of EMCA, NEMA is mandated to give reasonable notice to a lead agency directing it to carry out a responsibility under the Act. If a lead agency fails to comply then NEMA is mandated to carry out the responsibility and later recover the costs from the lead agency as a civil debt. Section 12 of EMMCA provides that:-

> **"12. The Authority may after giving reasonable notice of its intention so to do, direct a lead agency to perform, within such time and in such manner as it shall specify, any of the duties imposed upon the lead agency by or under this Act or any other written law, in the field of environment and if the lead agency fails to comply with such directions, the Authority may itself perform or cause to be performed the duties in question, and the expense incurred by it in so doing shall be a civil debt recoverable by the Authority from the lead agency."**

A reading of the above provision clearly shows that NEMA is granted the option of directing a lead agency to perform a duty imposed on the lead agency by the EMCA. Where the lead agency fails to comply, NEMA can carry out the duty at the expense of the lead agency. As can be seen, all these powers are optional and they do not therefore compel NEMA to exercise the powers under Section 12 before exploring other options provided by the EMCA. I therefore do not find any merit in the argument by the applicants that NEMA ought to have taken over its responsibilities as a lead agency instead of prosecuting the 1st Applicant. This particular argument is therefore rejected.

The third argument in support of the application is that NEMA ought to have sought and obtained the consent of the Attorney General before opening charges against the 1st Applicant. Section 118 of EMCA is cited in support of this argument. Section 118 provides that:-

> **"118. Subject to the Constitution and the directions and control of the Attorney-General, an environmental inspector may, in any case in which he considers it desirable so to do:—**
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> **(a) institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court-martial) in respect of any offence alleged to have been committed by that person under this Act; and**
>
> **(b) discontinue at any stage with the approval of the Attorney-General, before judgement is delivered any such proceedings instituted or undertaken by himself."**

The applicants contend that the prosecution of the 1st Applicant was commenced without the permission of the Attorney General/Director of Public Prosecution (DPP) being sought. By virtue of the 2010 Constitution, the duties of the Attorney General in relation to prosecution of criminal cases have been taken over by the DPP. It is the applicants' case that the DPP did not approve the prosecution of the 1st Applicant and this is contrary to the provisions of Section 118 of the Act.

In reply NEMA argued that the institution of proceedings does not require the consent of the DPP. NEMA argues that the consent of the DPP is only required where an environmental inspector wishes to discontinue a prosecution.

I agree with NEMA that the role of the DPP when it comes to the prosecution of matters under NEMA is supervisory in nature. The actual prosecution is left to an environmental inspector but the DPP can, if necessary, exercise the powers granted under Article 157(6) of the Constitution. If indeed Parliament had intended that the consent of the DPP was required before prosecution of offences under EMCA, then Parliament would have clearly said so. The "directions and control" referred to in Section 118 is meant to ensure that an environmental inspector does not become an untamable monster. In fact the DPP wrote a letter dated 25th October, 2011 to NEMA and from the tone of the letter it can be gleaned that the DPP is exercising a supervisory role. In my view therefore, Section 118 of EMCA cannot come to the aid of the

1st Applicant and their argument is therefore rejected.

The applicants also argued that the 1st Respondent was charged without being given a hearing and this clearly contravened the right to a fair hearing as provided by Article 47 of the Constitution. Can one say that Article 47 of the Constitution was breached? I do not think so. The rights of a person undergoing a criminal process are those found in Articles 49-51. The 1st Applicant has not identified any breach of any of these rights. The applicants' complaint that the constitutional rights of the 1st Applicant were breached cannot therefore be sustained.

The fourth argument in support of the application is that the decision to charge the 1st Applicant contravened the provisions of Section 87 of the Local Government Act, Cap 265 which allegedly protects a member or officer of a local authority from personal liability for anything done in the cause of duty. Section 87 states that:-

> **"87. No matter or thing done or omitted to be done and no contract entered into by a local authority, and no matter or thing done or omitted to be done by any member or officer of a local authority, shall, if the matter of thing were done or omitted to be done or the contract were entered into in good faith for the purpose of this Act, or of any other written law conferring powers or imposing duties on the local authority, its members or officers, subject any such person personally to any action, liability claim or demand whatsoever; and any expense incurred by a local authority or any such person in consequence of such action shall be paid by the local authority out of its revenues:**
>
> **Provided that nothing in this section shall exempt any such member, officer or other person aforesaid form liability to be surcharged by the inspector under Section 236."**

The applicants argue that the immunity contained in Section 87 is formulated with the purpose of securing autonomy of the officers of local authorities. They argue that the charging of the 1st Applicant is an arbitrary breach of such autonomy. NEMA contended that Section 145 of EMCA provides for the charging of employees of a body corporate and the applicants cannot take cover under Section 87 of the Local Government Act.

Looking at the provisions of Section 87 of the Local Government Act, it is clear that the immunity does not extend to criminal liability. A reading of the Local Government Act shows that every local authority is a body corporate. By virtue of Section 145 of EMCA, the principal officers of local authorities can be charged for committing offences under EMCA.

Finally, the applicants argued that the prosecution of the 1st Applicant was commenced in the absence of a restoration order as envisaged by sections 108 and 109 of EMCA. The applicants also submit that a reading of the two counts which the 1st Applicant was being asked to plead to do not disclose any offence.

In Count 1 the 1st Applicant is charged with failing to exercise due diligence and efficiency, to ensure compliance contrary to Section 145 (1) as read with Section 144 of the Environmental Management and Co-ordination Act No. 8 of 1999. Section 145(1) provides that:-

> **"145. (1) When an offence against this Act, is committed by a body corporate the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence."**

Section 144 of EMCA states:-

> **"144. Any person who commits an offence against any provision of this Act or of regulations made there under for which no other penalty is specifically provided is liable, upon conviction, to imprisonment for a term of not more than eighteen months or to a**

fine of not more than three hundred and fifty thousand shillings or to both such fine and imprisonment."

Section 144 provides a general penalty for offences in EMCA for which no specific penalties have been provided. Section 145 (1) does not create any offence. It simply extends criminal liability to principal officers of a body corporate. In my view, the offences are the ones found in sections 137-143. I agree with the applicants that Section 145(1) or Section 145 in entirely does not create any offence. The applicants are therefore right when they assert that the 1st Applicant is being asked to undergo trial for an offence which is not recognized or created by the laws of this country. Count 1 is therefore an unlawful charge and it would be a waste of judicial time to refer back this matter to the magistrate for an acquittal under Section 210 of the Criminal Procedure Code.

In Count 2 the 1st Applicant is accused of failing to comply with a lawful order by an environmental inspector contrary to Section 137 (b) of the Environment Management and Coordination Act No. 8 of 1999. In order for this count to be proved, there must be an order that has been issued by an environmental inspector. One can argue that this is not an area for judicial review but the work of the trial court to find out if indeed an order was issued. The answer is that the applicants are challenging the lawfulness of the charges facing the 1st Applicant. The applicants assert that no restoration orders were issued by NEMA and there is therefore no basis for the charge in Count 2. NEMA produced two letters dated 29th April, 2011 and 13th June, 2011 to show that the 1st Applicant was given restoration orders to comply with. Section 109(1) of EMCA provides the contents of an environmental restoration order as follows:-

"109. (1) An environmental restoration order shall specify clearly and in a manner which may be easily understood—

(a) the activity to which it relates;

(b) the person or persons to whom it is addressed;

(c) the time at which it comes into effect;

(d) the action which must be taken to remedy the harm to the environment and the time, being not more than thirty days or such further period as may be prescribed in the order within which the action must be taken.

(e) the powers of the Authority to enter any land and undertake the action specified in paragraph (d);

(f) the penalties which may be imposed if the action specified in paragraph (d) is not undertaken;

(g) the right of the person served with an environmental restoration order to appeal to the Tribunal against that order, except where the order is issued by a court of competent jurisdiction, in which case the right of appeal shall lie with superior courts."

The two letters adduced by NEMA do not comply with the provisions of Section 109. The letter dated 13th June, 2011 is in near compliance with the said provision but NEMA has not indicated to the applicants that it can enter the collection sites and restore those sites – see Section 109(1)(e). There is therefore no valid or proper environmental restoration order which the 1st Applicant can be said to have disobeyed. The end result is that there is no legal basis for charging the 1st Applicant with Count 2.

An attack on the liberty of a person should be premised on the law. Where the attack is not grounded on the law, one is tempted to say the prosecution is based on malice. It would not serve any purpose to take the 1st Applicant through a trial process that will not result in a conviction. This is not about the evidence

that will be adduced against the 1st Applicant. It boils down to whether the charges are based on the law and I agree with the applicants that the two counts facing the 1st Applicant are unlawful. The applicants are therefore correct when they say that the prosecution of the 1st Applicant was commenced for reasons other than the protection of the environment. The prosecution amounts to an abuse of power by the environmental inspector.

I therefore agree with the applicants that this application should succeed. The application is allowed as prayed with no order as to costs.

Dated, signed and delivered at Nairobi this 26th day of September , 2013

W. K. KORIR,

JUDGE