**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**MISCELLANEOUS APPLICATION 622 OF 2009**

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS**

**IN THE MATTER OF ENVIRONMENTAL MANAGEMENT & COORDINATION ACT, ACT NO. 8/1999**

**IN THE MATTER OF THE HOUSING ACT, CAP 117, LAWS OF KENYA**

**REPUBLIC .....APPLICANT**

**VERSUS**

**NATIONAL ENVIRONMENT TRIBUNAL .....RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY**

**FATUMA MARO, JOHN GICHANE & PAUL WACHIRA (SUING AS VICE CHAIRPERSON, TREASURER &**

**SECRETARY OF MADARAKA ESTATE HOUSING CO-OPERATIVE).....2ND INTERESTED PARTY**

**EX-PARTE**

**NATIONAL HOUSING CORPORATION**

**JUDGEMENT**

Through a letter dated 21st August, 2009 the National Environment Tribunal which is the Respondent in

these proceedings communicated to the National Housing Corporation, the Applicant herein, in the following words:-

**"TAKE NOTICE that the National Environment Tribunal (NET) has received an appeal filed by officials of Madaraka Estate Housing Co-operative Society against NEMA's decision to issue the corporation with an EIA licence for the construction of residential flats on in-fill spaces within Madaraka estate without following proper procedures.**

**Section 129 (4) of the Environment Management and Coordination Act (EMCA) of 1999 states that "upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined."**

**Consequently, you are hereby directed to <u>STOP</u> any activity of the said project until the matter is heard and determined by the Tribunal."**

The said letter spurred the Applicant to action and on 23rd October, 2009 the Applicant moved to court and obtained leave to commence judicial review proceedings. Subsequently through a notice of motion dated 26th October, 2009 the Applicant sought orders as follows:-

**(a) An order of certiorari do issue to bring to this court for the purposes of being quashed the decision contained in the Respondent's letter dated 21st August, 2009 wherein the Respondent directed the Applicant to forthwith stop any activity regarding the construction of residential flats on in-fill spaces within Madaraka Estate.**

**(b) An order of prohibition to prohibit the Respondent from hearing and/or entertaining 2nd Interested Party's Appeal No. NET/43/2009 or any such complaint relating to the Applicant's construction known as Madaraka In-fill Housing Development on L.R. 25980, Ole Sangale Road, off Langata Road.**

**(c) Costs of this suit be provided for.**

The National Environment Management Authority (NEMA) and the officials of Madaraka Estate Housing Co-operative (herein simply referred to as the Co-operative) are named as the 1st and 2nd interested parties respectively.

The application is supported by a statutory statement dated 23rd October, 2009, a verifying affidavit sworn on 23rd October, 2009 by James Wegema Ruitha the Managing Director of the Applicant and annexures to the said verifying affidavit.

The grounds upon which the relief is sought as contained in the statutory statement are that the Respondent acted in excess of its powers, surrendered its statutory powers to an unauthorized person, failed to make sufficient inquiry and the decision resulted in substantive unfairness to the Applicant.

The Respondent opposed the application by filing grounds of opposition dated 11th May, 2009. The grounds of opposition are as follows:-

**1. THAT the application is untenable and misconceived as Respondent's decision is in accordance with section 129 Environment Management and Coordination Act No. 8 of 1999.**

**2. THAT the application lacks merits and misconceived as Respondent's decision was made within jurisdiction and in accordance with the laid down procedures.**

**3. THAT the application and the evidence presented in support of it do not meet the threshold required for grant of the orders sought.**

**4. THAT the application has no basis in law, does not lie, a non-starter as the Respondent's decision did not in any way violate the principles of natural justice or ultra vires its powers.**

**5. THAT the application is untenable as the applicants/petitioners have not demonstrated any prima-facie arguable case with the chances of success to warrant the grant of orders sought.**

**6. THAT the grant of the orders sought will be contrary to public policy and interest.**

**7. THAT the application as taken out and drawn is incompetent, bad in law, fatally and incurably defective and the same should be dismissed with costs.**

The 1st Interested Party supported the application through "grounds in support of the motion" filed on 27th November, 2009. The 2nd Interested Party opposed the application through a replying affidavit sworn on 20th November, 2009 by its secretary Mr. Paul Wanjohi Wachira.

In brief, the Applicant obtained permission from the 1st Interested Party to construct on in-fills at Madaraka Estate in Nairobi. The EIA licence was granted to the Applicant on 27th November, 2008. The 2nd Interested Party later filed an appeal No. NET/43/2009 before the Respondent Tribunal. Through the already cited letter dated 21st August, 2009 the Applicant was stopped from continuing with the construction which had already commenced.

It is the Applicant's case therefore that:-

1. The Respondent had no jurisdiction under section 129 of the Environmental Management and Coordination Act 1999 (EM&CA) to entertain the 2nd Interested Party's appeal.

2. The decision conveyed through the letter dated 21st August, 2009 was made by an administrative officer employed by the Respondent and he had no power to make such a decision.

3. The status quo as at the date of the complaint was that the Applicant's project was ongoing and the Respondent had no statutory power to stop the construction on the grounds that it was exercising powers granted by Section 129(4) of EM&CA .

4. The Respondent breached the provisions of Section 129 EM&CA by entertaining an appeal outside the statutory 60 days provided by the law.

5. The Respondent usurped the role of the High Court by entertaining matters preserved for the High Court by Section 3 of EM&CA.

6. The Respondent's action is unfair to the Applicant in that the Applicant would incur losses as a result of the Respondent's stop order.

I have already reproduced the Respondent's grounds of opposition and the same clearly brings out the Respondent's case.

The 1st Interested Party supports the Applicant's case on the grounds that:-

1. The Respondent has no jurisdiction to entertain the appeal which was lodged outside the statutory period.

2. The 2nd Interested Party has no locus standi and should not have been entertained by the Respondent.

3. It (the 1st Interested Party) complied with the law when issuing the licence.

The 2nd Interested Party opposes the application on the following grounds:-

1. That though the notice of appeal was filed after the statutory 60 days the Respondent has the mandate to extend the time for filing an appeal.

2. The 2nd Interested Party was not a party to H.C.C.C. No. 360 of 2006 and was therefore not bound by the consent entered by the parties in that case namely that Madaraka Estate stakeholders would not oppose the Applicant's project.

3. The appeal before the Respondent was filed in accordance with the provisions of Section 129 EM&CA and the Respondent's order was issued within that section.

4. The Applicant did not publish a statutory notice on the intended development as per Section 59 of EM&CA thereby denying those opposed to the project an opportunity to file objections within the statutory period.

In response to the Respondent and 2nd Interested Party's arguments the Applicant submits that the 2nd Interested Party was represented in H.C.C.C. No 360 of 2006 by Madaraka Estate Stakeholders Forum. The Applicant also argues that the Respondent had no mandate to extend the time for filing an appeal. The Applicant also submits that the responsibility for publishing the statutory notice of an intended development under Section 59 EM&CA is vested upon the 1st Interested Party and not the proponent of the project. Through this particular argument the Applicant is saying that the failures of the 1st Interested Party should not be visited upon it.

I have carefully gone though the papers filed by parties in this case and I have come to the conclusion that the issues for the determination by this court are:-

1. Whether the decision by the 1st Interested Party to grant an EIA licence to the Applicant is appealable to the Respondent.

2. Whether the 2nd Interested Party has the locus standi to file an appeal with the Respondent.

3. Whether the Respondent's letter dated 21st August, 2009 contains a decision amenable to judicial review.

4. Who should bear the costs of the proceedings?

The issues for determination by the court are interconnected and I will address all of them at the same time. I will start by looking at **Section 129 (4) EM&CA** which provides that:-

**"Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined".**

This is the section quoted by the writer of the letter dated 21st August, 2009. This is the letter the Applicant seeks to quash. The Applicant argues that the said letter misconstrued the provisions of Section 129(4) by saying that the status quo meant that the ongoing construction had to stop. The Respondent submitted that the letter was written to the Applicant in compliance to the said law.

Status quo in my understanding means the current situation. It is not disputed that the prevailing situation at the time the appeal was filed by the 2nd Interested Party was that the construction of the houses was proceeding. The status quo would have meant that the construction stops at whatever level it had reached to await the outcome of the appeal. The communication on behalf of the Respondent as contained in the aforesaid letter was therefore in agreement with the law.

Did the said letter contain any decision by the Respondent? The letter in my view was purely informative. It was telling the Applicant that an appeal had been filed and as per Section 129(4) EM&CA the status quo prevailing at the time the appeal was filed was to be maintained. It would not have served any purpose if the Respondent was to hear the appeal as the construction continued. If indeed the 2nd Interested Party had raised environmental matters in its appeal then the construction had to stop so that further environmental degradation could be averted.

The other issue is whether the Respondent had jurisdiction to entertain the appeal and whether the 2nd Interested Party had the locus standi to file the appeal. Counsel for the Applicant submitted that the 2nd Interested Party did not have the locus standi to file the appeal and therefore the Respondent did not have jurisdiction to entertain the said appeal.

The jurisdiction of the Respondent is found in **Section 129 (1) & (2) EM&CA** which provides as follows:-

**"129(1) Any person who is aggrieved by:-**

**(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made there under;**

**(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;**

**(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;**

**(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;**

**(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder;**

**may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.**

**(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or committees of the Authority to make decisions, such decisions may be subject to an appeal to the tribunal in accordance with such procedures as may be established by the Tribunal for that purpose."**

Counsel for the Applicant submitted that the 2nd Interested Party was not a person aggrieved by the decision of the 1st Interested Party to award the Applicant an EIA licence and could not therefore appeal to the Respondent. He also submitted that the Tribunal cannot hear an appeal concerning the award of an EIA licence to any proponent by the 1st Interested Party. He referred me to the decisions of Mbogholi Msagha, Hannah M. Okwengu & A. O. Muchelule, JJ. in **REPUBLIC VS THE NATIONAL ENVIRONMENTAL TRIBUNAL & 2 OTHERS (2010) eKLR** and Anyara Emukule, J in **NAIROBI MISC. APPLICATION NO. 391 OF 2006 REPUBLIC VS. NATIONAL ENVIRONMENTAL TRIBUNAL & ANOTHER, EX-PARTE OVERLOOK MANAGEMENT & ANOTHER.**

In the **EX-PARTE OVERLOOK MANAGEMENT & ANOTHER** case (supra) Emukule, J considered the provisions of **129(1) & (2) EM&CA** against the other provisions of the same Act on locus standi and concluded that:-

**"The Chairman of the Respondent Tribunal and indeed counsel for the First, Second and Third Interested Parties by their various submissions seemed to subscribe to the view that the words-**

**"any person who is aggrieved by ....." in Section 129 (1) of the Act is synonymous with the words- "If any person who alleges" in Section 3(3) of the Act or the words "in proceedings brought by any person" in Section 111(1) of the Act.**

**Whereas the latter provisions allow the whole world to approach or move the court on the grounds specified in those provisions, the former provisions (Section 129 (1) or (2)) allow only a person or persons aggrieved by a decision of the Authority (NEMA), a Committee of the Authority, or its Director-General to move the Respondent Tribunal, and not the world at large."**

I agree with the said decision and hold that Section 129(1) and (2) restrict the jurisdiction of the Respondent herein to hear only appeals in respect to the matters outlined by the said section. Although the trend in environmental matters is to open the doors to any friend of the environment to move the court for orders to protect the environment, such leeway is not granted to the Respondent who can only hear appeals from those who participated in the decisions of the Authority.

The question that follows would then be whether an award of an EIA licence can be challenged by an aggrieved party through an appeal to the Respondent. In my view, Section 129(2) gives the Respondent jurisdiction to hear a challenge against the award of an EIA licence to a proponent. If an interested party has approached NEMA and submitted against the award of an EIA licence to a particular proponent and NEMA goes ahead to ward such a licence, then I think, the interested party is entitled to approach the National Environment Tribunal by filing an appeal to challenge NEMA's decision. The Respondent is composed of experts and those experts are better placed to decide if the award of an EIA licence to a proponent is merited. The fact that such an avenue is available does contravene the right provided by Section 3(3) for any person to seek redress in the High Court if he feels that his entitlement to a clean and healthy environment has been threatened.

The next question would then be whether the 2nd Interested Party had the locus standi to approach the Respondent. In the case of **EX-PARTE OUTLOOK MANAGEMENT LTD AND ANOTHER** already cited, Emukule, J was of the view that for a person to have locus standi he ought to have appeared before NEMA, a Committee or the Director General. That is a correct proposition in that only parties who have participated in the proceedings before NEMA can approach the Tribunal on appeal. The case before me is however a unique one. The 2nd Interested Party says it was not aware of the EIA study report and it could not have made its views known to the 1st Interested Party. The Applicant admits that the EIA study report was not published in accordance with the provisions of Section 59(1) of EM&CA. Its argument is that the responsibility for publishing the study report belongs to NEMA (the 1st Interested Party). I agree with the Applicant that it is not the proponent but the Authority (NEMA) which should publish a study report. The fact remains that the study report was not published. The 2nd Interested Party could not therefore have been aware of the study report. The evidence placed before the court shows that the membership of the 2nd Interested Party is made up of residents of Madaraka Estate. The 2nd Interested Party therefore had the locus standi to approach the Respondent. As will be seen in the course of this judgement, the Co-operative had written to the 1st Interested Party opposing the award of the licence to the Applicant. The Co-operative cannot therefore be termed as a busy body.

The Applicant argued that the 2nd Interested Party's appeal to the Respondent was made in bad faith since its members had through a consent reached in HCCC No. 360 of 2006 agreed not to oppose the project. The Applicant also argued that the 2nd Interested Party's members were going to be beneficiaries of some of the houses that were to be constructed by the Applicant. The 2nd Interested Party responded that it was not a party to the said High Court case.

Here comes the turning point in this case. The Applicant attached sale agreements to its application showing that some officials and members of the 2nd Interested Party were to benefit from the houses that the Applicant intended to construct. The 2nd Interested Party did not deny the existence of these agreements. How then could they have purchased houses whose construction was to lead to the degradation of the environment they lived in? The Applicant indicated that construction had taken place

for three months before the 2nd Interested Party filed an appeal with the Respondent. The 2nd Interested Party was aware about the project for a period of three months. It however waited for three months before filing the appeal. The delay in filing the appeal has not been explained. The appeal was filed long after the 60 days for filing an appeal had lapsed. The 2nd Interested Party said it was not aware that a licence had been granted to the Applicant by the 1st Interested Party. This could be true but this does not explain the fact that the 2nd Interested Party took three months after it knew the licence had been granted before filing the appeal before the Respondent. The 2nd Interested Party must have known immediately the construction started that a licence had been awarded by the 1st Interested Party.

The notice of appeal filed with the Respondent by the 2nd Interested Party turns the 2nd Interested Party's case on its head. In paragraph 4 the 2nd Interested Party gives a summary of grounds of appeal as follows:-

**"ON 6TH AUGUST 2007 50 RESIDENTS OF MADARAKA ESTATE FORWARDED TO NEMA A MEMORANDUM COMPLAINING AGAINST NHC INTENTION TO CONSTRUCT HOUSES WITHIN THE ESTATE. THE MEMORANDUM WAS RECEIVED BY NEMA ON 6TH SEPTEMBER 2007 (ATTACHED)."**

That statement alone shows that the 2nd Interested Party all along knew of the proposed development despite the fact that the 1st Interested Party failed to publish the study report as required by law. The 2nd Interested Party cannot now turn around and say it was not aware of the proposed development.

Still on the same notice of appeal the 2nd Interested Party in paragraph 6 states that the relief it is seeking from the tribunal is:-

**"TO STOP THE CONSTRUCTION. THE HOUSES HAVE BEEN SOLD AS FROM 28TH FEBRUARY, 2009 AND THE OWNERS HAVE NOT BEEN CONSULTED."**

The said prayer clearly brings out the motive behind the 2nd Interested Party's appeal to the Respondent. It wanted to have a say in the disposal of the houses that the Applicant wanted to develop. It had no prayer connected to environmental issues. Its appeal to the Respondent was only meant to block the development and not to protect the environment.

Where then does the Respondent come in? The Respondent has no jurisdiction to entertain the said appeal in that it is not an appeal touching on issues concerning the environment. It must be remembered that the jurisdiction of the Respondent is limited by Section 129 (1) & (2) of EM&CA. The appeal was filed long after the statutory period for filing such an appeal had lapsed. The appeal was made in bad faith and the Respondent should not waste its valuable time and public resources hearing an appeal not related to matters touching on the environment.

I have already stated that the letter dated 21st August, 2009 is not a decision that can be quashed by an order of certiorari. It was only communicating the fact that an appeal had been filed and the status quo needed to be maintained. The Respondent should however be stopped from further entertaining Appeal No. NET/43/2009 of August, 2009 and the Applicant's 2nd prayer is allowed as prayed.

Irrespective of the outcome of this case, it is important to note that matters of environment are matters to be taken seriously. For that reason alone I order each party to bear own costs of these proceedings.

Dated and signed at Nairobi this 16th day of May, 2012

**W. K. KORIR**
**JUDGE**