IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, THE REGISTRATION OF

TITLES ACT, CAP. 281 AND THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: NEMA LICENSE NO. CP/PR/1/1/1171 FOR RESIDENTIAL DEVELOPMENT ON PLOT NO. 3593/1/MN

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

AND

MICHAEL HUGHES.....1ST INTERESTED PARTY

NAIMI SHAH.....2ND INTERESTED PARTY

GEORGE P. NESBITT.....3RD INTERESTED PARTY

JAMES WILDE AND MARIA WILDE.....4TH INTERESTED PARTY

BROWNE ONDEGO AND IRIS ONDEGO.....5TH INTERESTED PARTY

T. M. KUDRATI.....6TH INTERESTED PARTY

ROHIT DEVANI AND NILA DEVANI.....7TH INTERESTED PARTY

PAUL JULIAN FAY AND PENELOPE ANNE HOLDING..... 8TH INTERESTED PARTY

BULKON BUILDERS LTD.....9TH INTERESTED PARTY

SIORENZO CASTELLANO.....10TH INTERESTED PARTY

HILESH SHAH AND SAPNA SHAH .....11TH INTERESTED PARTY

AND

CORAL DRIVE LUXURY HOMES LTD.....EX PARTE APPLICANT

RULING

(1) By a Chamber Summons dated 2nd December 2011, the Ex parte Applicant sought leave to apply for orders of Certiorari to quash the respondent Authority's decision of 28th November 2011 ordering stoppage of construction works on LR No. 3593/1/MN after it had earlier granted its approval on 24th October 2011 and for Prohibition to prohibit the Respondent from interfering with the Approval in respect of development on the said property. In addition, the Ex parte Applicant sought orders that the grant of leave to apply for Judicial Review do operate as a stay against the Respondent and named Interested Parties from interfering with development works taking place on the property pursuant to the Approval aforesaid No. NEMA/CP/PR/1/1/1171.

(2) On the 2nd December 2011, the court granted the Ex parte Applicant leave to file Judicial Review proceedings as prayed and ordered that the prayers for leave granted to operate as a stay be considered upon hearing inter partes. Before applications for orders that leave granted do operate as stay could be heard inter partes the Interested Parties lodged a Preliminary Objection dated 13th December 2011 on matters of law. The Respondent also filed Grounds of Opposition to the application, some of which it offered as preliminary points in further support of the Interested Parties' Preliminary Objection. Counsel for the Parties – Mr. Ochwa for the Interested Parties, Mr. Gitonga for the Respondent and Mr. Gikandi for the Ex parte Applicant made oral submissions on the Preliminary Objection and cited case law and statutory authorities in support of their respective contentions.

(3) For the Interested Party, two points of law were taken, namely (a) that the Verifying Affidavit accompanying the Chamber Summons of 2nd December 2011 was not sworn under seal of the company as required under Order 4 rule 1 (4) of the Civil Procedure Rules 2010 and (b) that the court has no jurisdiction to deal with the environmental law matter in view of Article 165 (5) of the Constitution which granted jurisdiction to the Environment and Land Court established under Article 162 (2) of the Constitution by Act No. 19 of 2011, the Environment and Land Court Act, and the elaborate procedure for appeal to the National Environmental Tribunal under Section 129 of Environmental Management and Coordination Act (EMCA). In view of the alternative remedy under the EMCA, counsel for the Interested Parties contended that the Judicial Review procedure was unavailable to the applicant and prayed that the Chamber Summons be dismissed with costs.

(4) In supporting the Preliminary Objection by the Interested Parties, counsel for the Respondent urged grounds 1 and 3 of its Grounds of Opposition dated 14th December 2011, respectively that the Applicant's case should have been filed through the statutory procedure of appeal as provided under section 129 of the EMCA as opposed to Judicial Review and that the Chamber Summons was fatally defective as the Republic was erroneously shown as the Applicant in the application for leave rather than upon grant of leave at the Notice of Motion stage.

(5) In response to the points of objection taken by the Interested Parties and the Respondent, counsel for

the Ex parte Applicant took the following positions:

(a) That the objections relating to the procedure could be remedied by Article 159 of the Constitution and sections, 1A and 1B of the Civil Procedure Act on substantial justice without regard to technicalities of procedure and the overriding objective to ensure fair resolution of disputes, contending out that the Judicial Review proceedings were sui generis unaffected by the provisions of Order 4 rule 1 of the Civil Procedure Rules and

(b) That the jurisdiction on the matter before the court lies with the High Court rather than the Tribunal under EMCA because

(i) The Environment and Land Court established under Article 162 (2) of the Constitution and created by the Environment and Land Court Act No. 19 of 2011 is not yet operationalised.

(ii) The new Constitution of Kenya 2010 does not establish a Tribunal but only an Environment and Land Court with the status of the High Court under Article 162 thereof and accordingly the Tribunal under EMCA must be deemed to have been abolished by the Constitution.

(iii) Section 3 of the EMCA provides for access to the High Court without prejudice to any other action available to the Applicant.

(6) I have considered the rival contention of the parties and find that two issues arise for determination in the Preliminary Objections argued by the Interested Parties and the Respondent, as follows:

(a) Whether the Chamber Summons of 2nd December 2011 is competent when intuled with the Republic as the Applicant and supported by the verifying affidavit of the alleged Managing Director of the Ex parte Applicant without a company seal as required by Order 4 rule 1 (4) of the Civil Procedure Rules and

(b) Whether the court has jurisdiction to entertain the dispute relating to Environment Impact Assessment approval in view of the establishment of the Environment and Land Court by Act No. 19 of 2011 and the existence of statutory appeal procedure under section 129 of the EMCA.

(7) **Whether the Chamber Summons of 2nd December 2011 is competent.**

Of course, the objection as to the incorrect intulement of the Chamber Summons in the name of the Republic as Applicant may be erred by amendment without any prejudice to the parties. Further the matter is past that post because leave of the court has been granted and all that remains is for the Applicant to file the Notice of Motion in the name of the Republic which is deemed to have an interest in the lawful administration of the organs of the State. Moreover, under Order 2 rule 14 of the Civil Procedure Rules **“no technical objection may be raised to any pleading on the ground of want of form.”**

As regards the requirement under Order 4 rule 1 (4) of the Civil Procedure for the affidavit on behalf of a company to be sworn under the company seal, the object is a salutary one seeking the demonstration of the company’s authority to swear the affidavit. Whether default is fatal or one that can be waived or remedied by a supplementary affidavit would depend on the circumstances of the case. As held in the decision of **Hunker Trading Co. Ltd v. Elf Oil Kenya Ltd (2010) eKLR** cited by the Interested Parties the overriding objective principle of civil litigation applies to different situations depending on the facts of each case and is **“double faced and for litigants to thrive under its shadow they must place themselves on the “right side.”** Where the Applicant is clearly on the wrong side, as the court held with regard to the Applicant in that case, **“the principle must work against it.”** In the absence of any contest by the Interested Parties or any of the directors or shareholders of the ex parte Applicant company that the deponent Managing Director had no authority of the company to swear the affidavit, I do not find that the objection is well founded. It is an objection that can be remedied by the lodging of a supplementary affidavit demonstrating the deponent’s specific authority. This is the course which was taken by the Court

of Appeal in the two decisions involving Supplementary Record of Appeal to incorporate essential documents not previously incorporated in the Record, being **Housing Finance Company of Kenya v. Rose Wangari Ndegwa C.A. (Application) No. 83 of 2008 and Kenya Anti-corruption Commission v. Ahmed Mwidani Civil Appeal (Application) No. 114 of 2008** in both of which the court relied on the Article 159 principle. In the latter decision the court at p. 5 referred to its previous decision in **Indombi Wasike v. Benson Wamalwa Khisa & Another NAI Civil Application No. 87 of 2004** where a certified copy of the decree was omitted from the record but the court all the same gave leave for a supplementary record to be filed incorporating the omitted document in the spirit of the overriding objective. The court said:

"We fully endorse the Indombi case, supra and reiterate that even if we were to find that there was no proper decree this court would still have been at liberty to give leave to the parties to file a proper decree or order so that the appeal is finally heard on merit. This approach has the high authority of Article 159 (2) (d) of the Constitution which states:

'(d) Justice shall be administered without undue regard to procedural technicalities.

(c) The purposes and principles of this Constitution shall be protected and promoted'

Concerning submissions made in section 3A and 3B [similar in terms to sections 1A and 1B of the Civil Procedure Act] of the Appellate Jurisdiction Act, we consider that we are under a statutory duty to apply the overriding objective in every situation before us because it is the whole object of the Act its provisions and rules."

I therefore hold in accordance with the Article 159 of the Constitution and section IA and IB of the Civil Procedure Act, respectively on the substantial justice and overriding objective principles, that the Applicant's default in making the verifying affidavit under seal of the Applicant Company is remediable by a supplementary affidavit demonstrating the specific authority of the Applicant Company to the deponent's affidavit. In the circumstances, I reject the Interested Parties' and Respondent's objections on the Applicant's Chamber Summons dated 2nd December 2011.

(8) **Whether the court has jurisdiction to entertain the dispute relating to environment matters.**

It was common ground that the new Environment and Land Court though established pursuant to Article 162 of the Constitution by the Environment and Land Court Act No. 19 of 2011, was not operational. In the circumstances, it is the High Court in accordance with a line of decisions, namely **R v. The Returning Officer, Kamukunji & Another exparte Ng'ang'a Mbugua Misc. Appl. No. 13 of 2008; Bishop Joseph K. Methu & 34 Others v. AG Nairobi H.C Petition No. 55 of 2009; and Bishop Joseph Kimani & 2 Others v. AG & 2 Others, Msa H.C Petition No. 669 of 2009,** all whose reasoning I agree with, which has jurisdiction under its original and unlimited jurisdiction. This position has also received statutory underpinning under section 30 of the Environment and Land Court Act No 19 of 2011 which provides that the court will proceed to deal with environment and land matters until the new court is operational.

Did the new Constitution of Kenya 2010 abolish the Tribunal under the Environmental Management and Coordination Act, 1999? The National Environment Tribunal is established under section 125 of the EMCA with a jurisdiction under section 129 of the Act to determine appeals to the Tribunal by any person aggrieved by decisions, made under the Act or regulations made thereunder, by the Director General, the Authority or Committees of the Authority, with a second appeal to the High Court whose decision on appeal shall be final.

I do not agree with the argument of the counsel for the ex parte Applicant that the new Constitution, in creating a new Environment and Land Court with the status of the High Court under Article 162 of the Constitution abolished all inferior tribunals dealing with environment and land matters. Article 162 (2) (b) provides for the establishment of a court with status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The same Article 162 by its

sub-article (4) provides for establishment of subordinate courts under Article 169 or by Parliament in accordance with that Article. Article 169 (1) provides that subordinate courts are: -

(a) the Magistrates Court;

(b) the Kadhi's Courts;

(c) the Courts Martial; and

(d) **any other court or local tribunal as may be established by an Act of Parliament, other** than courts established as required by Article 162 (2)

The term "local tribunal" is not defined and I would accept it as a tribunal localized either to a particular region, object, purpose or Act of Parliament establishing it. I therefore find that the National Environment Tribunal is contemplated under Article 169 (1) (d) of the Constitution as a local tribunal with jurisdiction on the matters contained in the Environmental Management and Coordination Act, 1999. The continued operation and application of statutes in existence before the promulgation of the new Constitution is saved by Clause 7 of the Transitional and Consequential Provisions under Schedule 6 of the new Constitution of Kenya 2010 in these terms:

"7(1). All Law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations qualifications and exceptions necessary to bring it into conformity with this Constitution."

I accordingly find that the National Environment Tribunal remains in existence by virtue of Clause 7 of the Transitional and Consequential Provisions saving the EMCA law and with jurisdiction to deal with environmental law matters as provided and that Act and as envisaged by section 13 (4) of the Environment and Land Court Act No. 19 of 2011 which provides:

"13 (4) In addition to the matters referred to in sub-sections (1) and (2) the court (ELC) shall exercise jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court."

Section 3 of EMCA relates to a different situation where an Applicant seeks to enforce his right to clean and healthy environment through an originating cause in the High Court and has no relevance herein.

(9) Having found that the High Court has jurisdiction to deal with matters relating to the environment and land, I am obliged to dismiss the Preliminary Objection raised by the Interested Parties and supported by the Respondent with costs to be in the cause.

(10) It is clear now that the objections which the Interested Parties and the Respondent argued as a Preliminary Objection should really have been argued as grounds of opposition to the Motion. In accordance with the leading decision on Preliminary Objections **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696** the Preliminary Objection ought to have been a pure point of law which would dispose of the entire dispute and does not call for the exercise of discretion on the part of the court. Indeed, the decision of the Court of Appeal in **R v. NEMA ex parte Sound Equipment Ltd (2011) eKLR** is to the effect that where there is a statutory procedure it is only in exceptional circumstances that judicial review will be granted, but it is not denied that the court has jurisdiction to grant judicial review. The court said: **"The principle [is that] where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."**

The true dispute herein is whether the Respondent has acted ultra vires its power under section 58 of EMCA. That is a matter of legality of the Respondent's decision. Discussing the issue of availability of alternative remedy as a bar to judicial review, the learned authors of **H.W.R. Wade & C.F. Forsyth, Administrative Law, 9th ed. 2004 at p. 703** observe that:

"In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal,..."

The determination as to whether the court will grant judicial review must be taken upon the hearing of the dispute on the merits upon the filing of the Notice of Motion. It may be that upon hearing of the Notice of Motion, the Ex parte Applicant may demonstrate compelling reasons for the grant of the judicial review order sought.

(11) At this stage, the ex parte Applicant has leave to lodge the Notice of Motion for judicial review and its complaint is expressed as being that the Respondent has no authority to revoke or cancel an approval once granted under section 58 of the EMCA. The Interested Parties have filed a replying affidavit in response to the application for leave to operate as a stay. I consider that if the stay sought is to suspend the order for stoppage of construction work to enable the ex parte Applicant to proceed with the development of the suit property on the basis of the approval granted by the Respondent, the same may be prejudicial to the Respondent's and Interested Parties' respective cases. I would accordingly direct that the main Motion be heard inter partes rather than the application for leave to operate as a stay.

(12) For the foregoing reasons, I dismiss the Preliminary Objections raised by the Interested Parties and the Respondent herein and direct that the Ex parte applicant's Notice of Motion upon leave granted be filed for hearing inter partes on a date to be fixed in consultation with the parties. Costs in the cause.

EDWARD M. MURIITHI
JUDGE

Dated and delivered this 24th September 2012.

F. TUIYOTT
JUDGE
In the presence of:

Nyamewa holding brief Gikandi for Ex parte Applicant

Gitonga for Respondent

Ms Anyumba holding brief Wafula for Interested Parties

Miss Moriasi - Court Clerk