REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 307 of 2006

KISERIAN ISINYA PIPELINE ROAD RESIDENT ASSOCIATION (KIPRRA) …… 1ST APPELLANT

KENYA WILDLIFE SERVICES (KWS)……..…… 2ND APPELLANT

KITENGELA ILPARAKUWO LAND OWNERS ASSOCIATION ……...…...…….…….. 3RD APPEALLANT

FRIENDS OF THE NAIROBI NATIONAL PARK (FONNAP) ……..…...…….. 4TH APPELLANT

THE WILDLIFE FOUNDATION…….……. 5TH APPELLANT

DUPOTO E. MAA …….…..…….. 6TH APPELLANT

SIMBA MAASAI OUTREACH ORGANIZATION (SIMOO) ……..……. 7TH APPELLANT

VERSUS

JAMII BORA CHARITABLE TRUST ….……. 1ST RESPONDENT

JAMII BORA CHARITABLE TRUST REGISTERED TRUSTEES..….……. 2ND RESPONDENT

RULING

The main issue before this Court, at this time, is whether this Appeal is incompetent and should, therefore, be struck out on the grounds that (i) the Appellants (except the Second Appellant) have no legal capacity to file this Appeal; and (ii) all the Appellants, not having been "parties" in the matter before the

Lower Tribunal, are non-suited to bring this Appeal. In the case of the Second Appellant, it is also alleged that it has not exhibited its Board Resolution authorizing the filing of this Appeal, rendering the same incompetent before this Court.

The events giving rise to this Appeal are briefly as follows:

By a decision dated the 14th January, 2005, the National Environment Management Authority (NEMA) denied the Respondents an Environmental Impact Assessment (EIA) License in respect of its proposed project to construct two thousand low-cost housing units for some ten thousand of its members. The Respondents appealed against this decision to the National Environment Tribunal (hereinafter "the Tribunal") which, by its Ruling handed-down on the 12th April, 2006, overturned the decision of NEMA, and ordered the issuance of EIA Licence to the Respondents, subject to certain conditions.

Now, at the commencement of the hearings before the Tribunal, some ten parties or organizations applied for leave to "intervene" in the proceedings as "Interested Parties". As none of the principal parties to the Appeal had any objections to these organizations coming in as Interested Parties, the Tribunal allowed their application in accordance with Section 3 of the Environmental Management and Coordination Act (EMCA). The Tribunal asked these organizations to produce their certificates of registration. According to paragraph 5 of its Ruling dated 12th April, 2006, some of these organizations did, indeed, deliver their certificates, but others did not. There is no indication of the names of the organizations that did not. Nonetheless, these organizations continued their participation in the hearings of the Tribunal as "interveners." Seven of these organizations were unhappy with the Tribunal's decision to award the EIA License to the Respondents, and filed this "Appeal" before this Court.

So, then, who is a proper party to file an "Appeal" to this Court from the decision of the Lower Tribunal or Court?

Mr. Macharia Njeru, Counsel for the Respondents/Applicants has submitted that all the Appellants (except the Second Appellant) are "organizations" without any legal capacity to sue and be sued, and their Appeal is, therefore, incompetently before this Court. He relies on the cases of ***Simu Vendors Association v. The Town Clerk, City Council of Nairobi & Another*** (2005) eKLR and ***Erick Wango Amoth and Others v. NSSF*** (HCCC No. 365 of 2005 – Milimani). As for the Second Appellant, Mr. Njeru argues, that it has not exhibited a valid Board Resolution authorizing it to institute these legal proceedings, and accordingly its Appeal should be struck out. He relies on the case of ***Affordable Homes Africa Limited v. Ian Henderson & 2 Others*** (HCCC No. 524 of 2004).

Mr. Njeru further submits that none of the Appellants were "parties" to the proceedings before the Tribunal. They were only interveners, or Interested Parties, and therefore have no capacity to "Appeal" against the Lower Tribunal's decision. If they are aggrieved by such a decision, their remedy is to seek redress by way of filing a suit in the High Court, but not by filing an "Appeal".

The Respondent's Counsel, Mr. Naikuni, relies on Section 3 of Environmental Management and Coordination Act to give the Appellants the right of Appeal before this Court. He relies on the case of ***Shah Vershi Devshi & Co. Limited v. the Transport Licensing Board*** (HCCC Misc. No. 89 of 1969).

He further submits that the Tribunal having granted the Appellants leave to join as Interested Parties, the Appellants had the right to "Appeal" against its decision.

Having heard submissions of the parties, and having perused the depositions on file, it is my considered view that the right of Appeal to this Court, from the decision of a Lower Court or Tribunal, belongs only to those who were "parties" to the proceedings before the Lower Court, and to those who have the "legal capacity" to file proceedings before this Court.

Clearly, NEMA and the Tribunal are guided by different considerations and procedures in determining issues before them. They may hear any party who has a complaint or an interest in the matter before them as "intervenors" or "Interested Parties" in order to arrive at a just resolution of the environmental issues

before them. That does not give such a complainant or an interested party the locus standi to file an Appeal against the decision of the Tribunal. That decision belongs to the "parties" to the proceedings, and only those parties, in this case the Respondents, and NEMA, the right of Appeal to this Court. If any of the complainants, or intervenors, or interested parties, call them whatever you wish, are aggrieved by any decision of the Lower Tribunal, they have every right to file proceedings in the High Court to seek whatever redress they wish, against the offending party. If, indeed, every "complainant" before the Tribunal conferred upon himself or herself "the right of Appeal" to this Court, from a decision of the Lower Tribunal, this would lead to an unwieldy situation, resulting in the filing of numerous Appeals, some by persons without legal capacity. That would further result in the High Court sitting as an Appellate Court, making decisions on important issues based on legal submissions only, as is the case with hearing Appeals, instead of hearing witnesses in a trial.

Secondly, and more importantly, none of the Appellants have demonstrated that they have either the legal capacity to file this Appeal, or have the legal mandate to do so. Appellant Nos.1,3,4,5,6 and 7 are organizations without the legal capacity to sue, or be sued. In other words, they are not "legal persons".

Here is what Justice Bosire (as he then was) said in ***Free Pentecostal Fellowship in Kenya v. Kenya Commercial Bank*** (HCCC No. 5116 of 1992(O.S.):

"***The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.***

In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name."

My brother Ibrahim, J came to the same conclusion in ***Simu Vendors Association v. Town Clerk, City Council of Nairobi***, (2005) KLR, as did Azangalala, J in ***Erick Wango Amoth and Others v. NSSF*** (HCCC No. 365 of 2005 – Milimani). I am persuaded by these decisions, **and I find that Appellant Nos. 1,3,4,5,6 and 7 had no legal capacity to bring this Appeal and the same is struck out.**

With regard to the Second Appellant, being a body corporate established under statute, it does indeed have the legal capacity to file law suits, but it needs to demonstrate that it has the mandate of its Board to file suit. Indeed, this Court ordered this Appellant to file a Board Resolution, authenticating such mandate. It has failed to do so. Instead it filed Board Minutes, which is completely unhelpful. I find, therefore, that the Second Appellant has not shown that it had the Board approval to file this Appeal.

Accordingly, and for all the reasons outlined, I find this Appeal incompetent, and the same is struck out with costs to the Respondents. Any interim orders herein are hereby vacated.

Dated and delivered at Nairobi this 21st day of March, 2007

ALNASHIR VISRAM

JUDGE