REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civ Appli 400 of 2006

IN THE MATTER OF: AN APPLICATION BY SAM ODERA, MICHELLE LISBOA, SANDA OJIAMBO AND FRICK

AGOLLA FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF: TH ENFORONMENTAL MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999

AND

IN THE MATTER OF: THE ENVIROMENTAL (IMPACT ASSESSMENT AND AUDIT0 REGULATIONS,

2003, LEGAL NOTICE NO. 101 OF 2003

SAM ODERA ..... 1ST APPLICANT

MICHELLE LISBOA ..... 2ND APPLICANT

SANDA OJIAMBO ..... 3RD APPLICANT

ERICK AGOLLA ..... 4TH APPLICANT

VERSUS

THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ..... RESPONDENT

AND

EM COMMUNICATIONS LIMITED ..... INTERESTED PARTY

RULING

The Interested Party, EM Communications Ltd has filed an application in these proceedings by way of a Notice of Motion dated 13th October, 2006. The application seeks to have the orders of stay made on 24th July 2006 and extended on 3rd October 2006 vacated forthwith.

The applicants are residents of an area where the Interested Party hereinafter called "IP" has installed or is in the process of installing a telecommunication base station and or equipment at Dhanjay Apartment Valley Road. Concerned about issues of radiation, health, aesthetics and environmental degradation and

lack of consultation before the project they sought leave before this court and were granted leave to apply for orders of certiorari and prohibition as per the statement filed in court on 20th July 2006. They also sought that the leave so granted do operate a stay of the decision of the respondent (NEMA) made on 2nd June, 2006 approving the (IP's) Environmental Impact Study report submitted on 28th April 2006 and a stay against the issuing of an Environmental Impact Assessment License to the Interested Party pending hearing and final determination of the application for judicial review. It is this order that is sought to be vacated unless the applicants give an undertaking as to damages.

Because the jurisdiction of this court to revisit its order has been challenged by the respondent I think it is important to set out in extenso the terms of the order of 24th July 2006. The order reads:

(1) "**I certify the application as urgent**

(2) I grant orders in terms of prayer 2 of the application

(3) I further order that such leave do operate as stay until 3rd October, 2006 when the court shall again be at liberty to extend the period at 9 00 a.m.

(4) There shall be liberty to apply

(5) Costs to abide the outcome of the main application

In their skeleton arguments filed on 25th October, 2008 the respondent contend inter-alia that the prayer to vacate the stay order goes beyond the recognized grounds for setting aside ex-parte orders in judicial review proceedings. Failure to provide an undertaking as to damages is not one of them. They also question the juridical basis for any grant by a Judicial Review Court to order the giving of an undertaking as to damages. It is also contended that the applicant (IP) having commenced the project without obtaining Environmental Impact Assessment License (EIA) and that the further progress was stopped via a Stop order from NEMA (National Environmental Management Agency) on 15th May 2006 and further that the EIA was given on 2nd June, 2006 which is the decision under challenge in these proceedings. And generally importing the principles of undertaking as to damages hook, line and sinker from private law into the public law domain lacks statutory basis in Kenya because the only remedies available are Certiorari, Prohibition and Madamuc. Other jurisdictions have moved a step further statutorily by providing for the grant of injunctions, declarations and damages where they would otherwise be available in proceedings commenced by writ. The applicants counsel has relied on the principle enunciated by the House of Lords in the case of *GOURIETV v UNION OF POST OFFICE WORKERS [1978] AC 435 at p 500:*

"**the jurisdiction of the civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To the extent that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply."**

Finally the respondents have argued that the applicant (IP) is the author of his own misfortune and should not benefit from his own wrong in that section 58 of Environmental Management Coordination Act (EMCA) requires that a project report be submitted to NEMA before any activity out of character with surroundings is undertaken and the IP had failed to do so. They add, that should the respondents be unable to provide the undertaking NEMA would give their green-light to the project and the substantive application would be rendered nugatory.

On the other hand the applicant has argued that the court ought at the leave stage require the giving of an undertaking as to damages for the reason that the party affected is not before the court and at the ex-parte hearing and there is a likelihood it may suffer substantial losses without being heard when the stay

is granted in favour of the ex-parte applicant. The Interested Party has further urged that by virtue of s 8(2) of the Law Reform Act which is the Act conferring jurisdiction on this court it has the same powers are conferred on the High Court in England. Therefore, English decisions should have considerable pursuasive authority. In this regard the court has been invited to consider and follow the famous environmental law decision of *R v INSPECTORATE OF POLLUTION & ANOR,* ex-parte Greenpeace Ltd (1994) ALL ER 321 hereinafter called the "Greenpeace Case." The IP's Counsel Mr Gachuhi contends that the situations in the two cases are almost similar. Briefly the facts in the Greenpeace case are that the High Court had been asked to grant leave for an order of certiorari. The leave was not opposed by the Interested party. The reason why the High Court refused to grant a stay was that the applicant had given no cross undertaking in damages to compensate the third party for any financial loss it might suffer and was unlikely to be able to do so. The applicant appealed against the order to give an undertaking saying it was inappropriate. The Court of Appeal dismissed the appeal holding that in granting a stay the court should look to the substance rather than the form of the application and apply the same principles as would have been applicable if the application had been for an interlocutory injunction. And as the applicant had given no cross undertaking in damages the appeal was dismissed. The applicants had the option of applying for similar relief under Section 3 of EMCA and had they done so the principles for the grant of injunctions would have been applied as the IP would have joined as a respondent (defendant). Finally, even in Australia the courts have considered the interest of third parties when asked to extend a prima facie time limit and in the current matter the IP has given an indication concerning the likely loss and the court can direct the grant of an undertaking under Order LIII rule 1(4).

I have put the above arguments on the scales of justice. I must at the outset state that in my almost 2½ years as the presiding Judge of the Constitutional and Judicial review Division I have in at least two matters imposed an order for the giving of an undertaking as to damages by applicants. I do recall that two years ago, one of the matters was this Country's annual pre-inspection, contract which ran into billions of Kenya Shillings. The dispute as usual was on procurement. I gave a conditional stay that should the applicant fail to provide an acceptable undertaking as to damages after a certain period the stay would automatically lapse and it actually did lapse because the undertaking was not given as stipulated. The stay was aimed at stopping the implementation of a new annual contract while the old one had only 30 days to expire. The alternative was to expose the country to a vacuum of inspection of goods which could have defeated a considerable public interest in ensuring continuing services while a determination was being awaited. In this matter therefore I am not reinventing the wheel.

I have no hesitation in endorsing fully the principles stated in the Greenpeace case concerning the need to look at the substance of the application and imposing an order for undertaking in appropriate cases except in relation to Government and other public authorities. An undertaking as to damages is not being imposed as a relief but as a principle of justice and commonsense. It is not therefore outside the Law Reform Act or Order 53.

However turning to the facts of this case the matter is coming up for hearing today on merit or any other appointed day in the near future. Right from the beginning the court detected a sense of urgency in the matter this being one of the environmental matters which are grounded on environmental and health concerns. Indeed when granting the interim order I had in view the need to apply the precautionary principle because if it turns out that the environmental and health concerns were well founded the damage, harm or injuries might be irreversable. At the other end of the scale, I had in mind the potential of my order affecting third parties when I gave the liberty to apply hence this application by the Interested Parties. I have no doubt that my order as set out above did contemplate an application for an undertaking in damages since my order was deliberately limited in time and I had anticipated any appropriate applications under the liberty to apply order..

The applicant now says that the project is 90% complete and that only 10% remains uncompleted and for this reason I should vacate the order should the applicants fail to furnish an undertaking as to damages. While I fully endorse the Greenpeace principles the situation before me is in my opinion different in that the hearing of the Notice of Motion has been deliberately fast tracked and secondly if it turns out at the end of the day, that the applicants concerns on the environmental degradation or danger to health by unacceptable levels of radiation, are well founded this would provide a fairly weighty reason for

not ordering the giving of an undertaking. The giving of an undertaking might affect the status quo yet in the view of the court environmental injury or health concerns might not be adequately measured in terms of shillings, pence and pounds. The interplay of the situation before me reveals that there is just something more than consideration of financial loss here. The 90% completion could turn out to be 90% loss in terms of irreversible damage to health or environmental loss today at the hearing of the main application.

Where there are threats of serious irreversible environmental damage or serious health concerns a court in my view should not be quick to order an undertaking as to damages as a condition for granting stay because in many situations where an applicant has moved to court with promptness which as often repeated is the hallmark of judicial review, an affected or aggrieved party can apply to court to have the stay set aside on the ground that no such threat exists or that there are less risky options available or the court could where this is not possible to fastrack the hearing of the main application on merits. An undertaking as to damages would in my view come in handy where these two strategies are not possible and the hearing is likely to be protracted and the ascertainment of the scientific position as far as it is practically possible will be delayed or end in further uncertainties.

Under the Kenyan EMCA (Environmental Management Co-ordination Act) a court is statutorily required to apply the precautionary principle as I did in this suit by the grant of a timed stay with liberty to extend the time so as to prevent any serious irreversible environmental damages or injury to health pending hearing on merit. In considering whether or not to order an undertaking as to damages it is important in my view for the court to understand the scope of the precautionary principle. In this regard Australia appears to have taken the lead. Thus, in Australia's 1992 Inter-Governmental Agreement on the Environment the principle has been stated that:

"**Where there are threats of serious irreversible environmental damage, lack of full scientific certainty should not be used as reason for postponing measures to prevent environmental degradation. In the application of the Precautionary Principle public and private decision should be guided by:**

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and

(ii) an assessment of the risk weighted consequences of various options

Again, the Precautionary Principle has been defined as a common sense principle long acknowledged and applied before its international proclamation. Stein J in the Australia case of *LEATCH v NATIONAL PARKS AND WILD LIFE SERVICE AND SHOALHAVEN CITY COUNCIL 8 1 LG ERA 270* defined it as follows:

"**In my opinion the precautionary principle is a statement of common sense and has already been applied by decision makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainly or ignorance exists, concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities) decision makers should be cautious."**

I think the courts should be careful not to stifle the right of access to the courts and the hearing on merit by imposing undertakings especially in matters of environment and health. The matter before me raises health concerns and it is better to err when evaluating those concerns than tolerate possible irreversible harm.

It is also important to factor in whether there has been public participation in the challenged decision before ordering undertakings as to damages because where the public have not been involved in the process leading to the impugned decision or activity such an order could stifle the right of access to the courts for example due to applicants financial inability to give an undertaking. It is therefore important to

appreciate that the RIO DECLARATION (1992) Principle 10 which has also been given statutory recognition in the Kenyan EMCA.

Principle 10 states:

"**environmental issues are best handled with participation of concerned citizens, at the relevant level."**

The principle is also reflected in the EC's 5th Environmental Action Programme (1993 – 2001) as follows:

"**Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped ."**

In the matter before me it is alleged that there was no participation as set out in the statute and the relevant regulations. This factor in my view militates against the imposition of an undertaking. Where on a prima facie basis the necessary approvals and licences including consultations have taken place but all the same there is a challenge in court on the legality or adequacy of these matters undertaking as to damages would be appropriate. It is not the case here.

I shall go ahead and appoint a hearing date if the parties are not ready to proceed now.

For the above reasons the application is dismissed. The stay order is extended until the determination of the application.

Costs shall be in the cause.

DATED and delivered at Nairobi this 7th day of November, 2006.

J.G. NYAMU

JUDGE

ADVOCATES

KAPLAN & STRATON)

ADVOCATES) for the Applicant

J. OJIAMBO & CO.)

ADVOCATES) for the Respondent

MEREKA & CO.)

ADVOCATES) for the Interested Party