



**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: THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999**

**AND**

**IN THE MATTER OF: THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003, LEGAL NOTICE NO. 101 OF 2003**

**SAM ODERA ..... 1<sup>ST</sup> APPLICANT**

**MICHELLE LISBOA ..... 2<sup>ND</sup> APPLICANT**

**SANDA OJIAMBO ..... 3<sup>RD</sup> APPLICANT**

**ERICK AGOLLA ..... 4<sup>TH</sup> APPLICANT**

**VERSUS**

**THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY....RESPONDENT**

**AND**

**EM COMMUNICATIONS LIMITED.....INTERESTED PARTY**

**JUDGMENT**

The application before the court is dated 14<sup>th</sup> August 2006 and filed on the same day. It is premised on a statement and Verifying Affidavit sworn by Sanda Ojiambo on 19<sup>th</sup> July 2006.

The application is opposed as follows:

1. Respondents grounds of opposition dated 4<sup>th</sup> September, 2006
2. Replying Affidavit sworn by Beyami Malwa Lawyer on 28<sup>th</sup> September 2006
3. Interested Party Affidavit sworn by Edwin Muthi on 15<sup>th</sup> September 2006.

The main facts are that the Interested Party Messrs EM COMMUNICATIONS LTD hereinafter called the I.P. intended and still intends to erect, place and install a telecommunication base station and/or equipment on the 10<sup>th</sup> Floor of Dhanjay Apartments situated in Valley Arcade in the City of Nairobi which apartments are built on LR 330/987.

On or around February 2006 the I.P. began construction of the base station apparently without seeking any environmental approvals.

Following complaints by a substantial majority of the Dhanjay apartment residents the respondent was prompted by the residents to take action. Following the prompting, on 15<sup>th</sup> March 2006 the respondents informed the I.P. that a project of that nature required approval from the respondent which approval was to be preceded by the Proponents submission of an Environmental Impact Assessment Report (EIA) to the respondent. As a result the construction was stopped by the respondent by issuing a stop order on the same day, stopping the installation.

On 28<sup>th</sup> April 2006 the I.P. submitted to the respondents an Environmental Impact Assessment Report.

After the submission of the Report the respondent sought views from what it calls relevant stakeholders namely the Communication Commission of Kenya, The National Communications Secretariat, The Radiation Protection Board and the householders of Dhanjay Apartments.

The respondents claims that after consultations with the relevant stakeholders it proceeded to approve the project subject to six preconditions which the I.P. agreed to meet.

On 2<sup>nd</sup> June, 2006 the respondent approved the Environmental Impact Assessment Study Report.

On 20<sup>th</sup> July 2006 the applicants sought leave to apply for orders of certiorari and prohibition seeking to quash the decision of 2<sup>nd</sup> June 2006 approving the Environmental Impact Assessment Study Report and order of prohibition seeking to prohibit the respondent from issuing to the I.P. an Environmental Impact assessment Licence. Leave was on the same day granted and the court further ordered that such leave do operate as stay.

On 14<sup>th</sup> August 2006 an application for judicial review now before the court was filed.

The grounds upon which relief are sought are:

- (a) That the respondent has acted in breach of the rules of natural justice contrary to regulation 1(1) of the Environmental Impact Assessment and Audit Regulations 2003 and s 58(7) of the Environment Management Co- ordination Act (hereinafter called EMCA).
- (b) That the respondent is guilty of procedural impropriety by failing to follow the laid down regulations before approving the Environmental Impact Assessment study Report submitted by the IP contrary to s 58(7) of EMCA (Act 8/1999)
- (c) That the respondent failed to take into account relevant considerations in particular policy directives from the Communications Commissioner of Kenya (CCK) as regards consent of the residents
- (d) The Respondent acted mala fide by ignoring the plight of the applicants and reasons advanced for resisting the project
- (e) That the respondent took into account irrelevant considerations while approving the Environmental Impact Study Report.

In answer to the above the respondent in its skeleton Arguments filed on 2<sup>nd</sup> October, 2006, contends that

what the IP conducted was an Environmental Impact Project Report and not an Environmental Impact Assessment Study Report. The IP did this pursuant to Regulations 7 and 8 of the Environmental (Impact Assessment and Audit) Regulations 2003. It argues that the approval given was pursuant to Regulation 10 which deals with approval of project reports.

It is however strongly contended by the applicants that what was obtained by the IP was an Environmental Impact Assessment Study Report and that Regulations 17 and 21 of the Environmental (Impact Assessment and Audit) Regulations 2003 which deal with Public participation and submission of comments ought to have been enforced by the respondents before giving the challenged approval. This argument has in the view of the court considerable weight in that the Report actually submitted and which has been annexed as an exhibit in prominently labeled “*Environmental Impact Assessment Report for proposed installation of Telecommunication equipments at Dhanjay Apartments*”. Indeed the contents confirm that it is an EIA and having been submitted as such must conform to the EIA statutory and regulatory requirements. NEMA, the respondent did by their letter of 15<sup>th</sup> March 2006 exhibited as 505, confirm the following:

**“any new project enlisted in the second schedule is required to undergo Environmental Impact Assessment (EIA) more specifically ‘any structure of a scale not in keeping with its surroundings must undergo an Environmental Impact Assessment.’”**

Surely the project having started without the submission of a project report, NEMA by virtue of the above letter must be deemed to have made a decision to have an EIA done under the provision of s 58(2) and not a Project Report under s 58(1) because time for presenting a Project Report this was long gone. NEMA even stopped the project by the same letter. To now argue in the skeleton arguments that what was submitted was a project report is not a call to integrity in the face of the above evidence. Section 2 of EMCA defines “Project Report” as a *summary statement of the likely environmental effects of a proposed development referred to in section 58*”

On the other hand “Environmental Impact Assessment” has been defined:

**“a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment”**

At the time NEMA intervened in the process it was no longer a proposed project. It had commenced and substantial portion implemented and there is no way one could reasonably call what was ordered to be done a project report as contended without doing violence to the relevant language and the law.

From the above it follows just as the day follows the night that the respondents should have followed the provisions of s 59 of the EMCA concerning publication of the EIA and Regulations 17 and 21 on Public Participation and Submission of comments. Questionnaires or an exchange of letters as exhibited is not in the view of this court sufficient nor can the comments of the lead Agencies be a substitute for the intended statutory and regulatory procedure.

I find that the respondents are guilty of considerable procedural impropriety which could have compromised the applicant’s right of participation. The requirements of EMCA go beyond the requirements of the rules of natural justice as traditionally understood because what is required under the Act is Publication, public participation and receipt of comments. The omission is not just a mere irregularity it touches on a major principle of environmental law i.e. public participation at the relevant levels before the decision making. This principle has been given recognition in EMCA under s 59 and Regulations 17 and 21 – It is the *RIO DECLARATION* principle 10 which states:

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

Public participation is aimed at achieving firstly the right to a fair hearing before decisions on environment are made or imposed on people. This is at the heart of Principle I of the *RIO*

*DECLARATION ON ENVIRONMENTAL DEVELOPMENT* which state that:

**“Human beings are at the Centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”**

And secondly to ensure that the citizens are able to prepare their objections and where they can afford seek expert opinion. Thus in many jurisdictions now experts are giving evidence on environmental matters. Therefore where as in this situation public participation is denied the chances of a different view are eliminated. This cannot assist in the guarantee or enhancement of justice in environmental matters.

The need for public and open participation becomes even more visible where as in this case, NEMA – which is the environmental watchdog appears to waver between two decisions after waiting to be prompted by the applicants. In such a situation the court becomes the last frontier in ensuring that heightened scrutiny is given to the process followed in decision making. Thus as I observed in the earlier application seeking an order for an undertaking as to damages the EC’s 5<sup>th</sup> Environmental Action Programme (1993 – 2001) hit the nail on the head by stating:

**“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 efficiently enforced and illegal practices stopped.”**

There is a possibility that if the process were to start all over again the same decision could be arrived at with the participation of those concerned or a different decision reached following an authoritative opinion from an expert hired by the affected persons. The courts have a responsibilities to ensure that the procedure that maintains the required balance is maintained. More so especially where the Communications Commission has specifically said that experts in other jurisdictions have come up with an inconclusive report on the effect of electromagnetic exposure the need for the decision makers to adopt a cautious approach becomes absolutely necessary. The siting of the project in an area next to the residents water tanks calls for further scrutiny.

The other factor which invites the court’s intervention is the fact that the EIA did not touch on alternative sites. Surely this new technology was not devised to depend on tall buildings and whether any thought was given to alternative safe and non controversial sites was given is a major omission which should in every project report or every EIA report I regard this as a grave omission which should not have been overlooked by NEMA as the watchdog. The court cannot overlook it in the circumstances and at the time when a respected lead agency in this area has said firstly the studies have been inconclusive as regards environmental impact and secondly when they have confessed that they are still working on guidelines in this field. Thus again underlines the importance of being cautious. As I quoted in the related ruling on the issue of undertaking as to damages the Australian 1992 Inter Governmental Agreement on the Environment the precautionary principle which has been incorporated in EMCA to guide the court should also guide all decision makers on environmental issues including NEMA and governmental agencies. It was stated thus:

**“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 makers 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**

In this matter it could be argued that there are less risky options that will not hinder this wonderful invention that will considerably ease communication. Its benefits appear real! Judge Stein in the Australian case of *LEATCH v NATIONAL PARKS* cited in the earlier decision in this case defined the

precautionary principle in terms of common sense:

**“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 situation of scientific uncertainty. Its premise is that where uncertainty or ignorance exists, concerning the nature or scope of environmental harm (whether this follows from policies decisions or activities) decision makers should be cautious.”**

By overlooking the necessary statutory procedures and Regulations, NEMA has in the view of the Court thrown caution to the wind and in turn justice demands that they undertake the exercise again with a cautionary mind.

## OVERALL ASSESSMENT

In a judicial review application touching on an environmental matter I am aware that the court must undertake an overall assessment of all the matters including the economic benefits of the project which must legally be taken into account by a decision maker in granting planning permission or an environmental impact assessment licence. However in this matter although lead agencies were consulted after the project had commenced and they have generally filed positive reports – see the reports from the Radiation Board the National Communications Commission of Kenya, the later namely the CCK has said that environmental impact is uncertain or inconclusive as per the studies conducted elsewhere. To my mind this in turn means that the respondent in its decision making process ought to have adopted a proactive and cautious approach before approving the project. This is not reflected in the way the respondent (NEMA) handled the matter.

- (i) it was only able to act in the first place by being prompted by the applicant's after the commencement of the project. While it is not physically possible for NEMA to be present everywhere it should have an inspectorate system that would be able to track down illegal projects of this nature anywhere in the country. It is not enough to act after the event. It cannot effectively discharge its mandate under the Act
- (ii) after issuing a stop order and coming to the conclusion that the project needed an EIA – it was not sure what it had asked the proponents i.e. (the IP) was a Project report or an EIA Study Report yet the 15<sup>th</sup> March stop order specifically mentions an EIA. Under s 58 (1) a Project Report is required before the commencement of any project under schedule 1 and 2 of EMCA. Once a project has commenced under the provisions of EMCA for the projects caught by the schedule only an EIA or a further EIA can be demanded. Moreover the wavering or uncertainty by NEMA on exactly what it demanded the IPs to undertake is an indication it did not grasp or clearly understand its role in the process and therefore the chances of having failed to take into account all the relevant considerations are real. A body like NEMA which has been given the statutory mandate to oversee environmental matters the uncertainty as to whether it had ordered a Project Report or an EIA reveals incredible laxity in the discharge of its mandate in this matter.
- (iii) In the circumstances NEMA had not sufficiently demonstrated that it did adopt the precautionary principle in its decision making.
  - a. In my view a Project Report is the one that accompanies the application for approval and before the commencement of the Project and since the project had already commenced what was demanded must have been an EIA under s 58 and 59 of EMCA and it follows that the requirements of the two sections including the Environmental Impact Assessment Audit Regulations 2003 should have been met including all the stipulated procedural safeguards under the Act.

## EIA

The question arises what is an EIA. Both the EMCA and the 2003 Regulations define it as under:

**“A systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment”**

It follows therefore that there are two aspects to EIA namely:

- (i) the process itself
- (ii) the issues which EIA raises for the courts e.g. whether a planning application or a project as in this case should have had an EIA

To elaborate on the two ingredients of an EIA it can be described as a process of gathering the information which is carried out by a Proponent and other bodies, so that NEMA can determine the environmental impact of the project or development before making the necessary decision or giving approval. In other words the process of EIA is the same as having to take all material considerations into account.

Responsibility of a decision maker such as NEMA

In the view of this court for NEMA/respondent to demonstrate that it had discharged its mandate or legal obligations under the Act and the regulations as a decision maker it only have to prove that it did actually take all material considerations into account when making its decision of 2<sup>nd</sup> June 2006. Failure to do so would justify a challenge under the Act and would directly invite judicial review of the decision.

While it is convenient for NEMA/respondent to call the report a Project report, the legal requirements under the Act clearly describe it as an EIA. I would therefore adopt the reasoning in the case of *BELWAY v GILLESPIE* (2003) where a proposed housing development was to be built on an old gas works site and residents successfully challenged the Secretary of State’s decision that an EIA was not needed. The Court of Appeal in England held that mitigating measures should be considered as part of the EIA process and the decision maker could not dispense with the need for an EIA on the grounds that conditions can be imposed on the grant of planning permission which will prevent significant environmental effects.

EIA and ESTOPPEL

While agreeing with counsel for the I.P. Mr Gachuhi that there cannot be estoppel against a statute, NEMA having come to the conclusion that the project needed an EIA, and imposed a stop order until an EIA had been produced, the imposition of an EIA did create a legitimate expectation on the part of the applicants that the elaborate public participation, procedures contemplated by s 59 of EMCA and Regulations 17 and 21 of the 2003 Regulations made under the Act would be put in place and this could have enabled them to effectively articulate their objection to the project.

It cannot be a satisfactory answer in law for NEMA to say that they have consulted the relevant Lead Agencies who have filed positive reports in favour of applicant. Failure to take into account the requirements of public participation, as required in law is fatal to the decision. In addition it is clear to the court that one of the major considerations in an EIA and which was not considered at all or reflected is whether there were other options of sitting the project away from a substantially residential apartment. This should have been addressed and it was not. The questions were only addressed to a few tenants yet about 34 tenants of the apartment were generally opposed to the project. The method used to create awareness was not in the view of the court adequate and it fell far short of the requirements of public participation required in environmental matters.

CONCLUSION

The courts intervention is therefore necessary:

- (a) for lack of consideration of alternative sites which in effect failure to take into account a relevant an important consideration

(b) for procedural impropriety in disregarding the requirements of s 58, 59 of EMCA and Regulations 17 and 21 of the 2003 Regulations made under EMCA

I also rely on a telecommunications transmitters and health risk case of *R v FIRST SECRETARY OF STATE, MAVANT BC, HUTCHIISON 3G (UK) Ltd* 2003 which concerned a challenge over the grant of planning permission for a mobile mast by a concerned local resident. The challenge was based on the English s 288 of Town and Country Planning Act 1990 and the challenge was allowed by the Judge on the grounds of procedural unfairness as the mast company had not considered other alternative sites as required by PPG8.

In the result the order for certiorari shall forthwith issue and hereby quash the decision made on 2<sup>nd</sup> June, 2006 approving the EIA Study Report by the "IP". Order to be in terms of prayers (1)

In addition a prohibition order shall forthwith issue in terms of prayer 2 of the application dated 14<sup>th</sup> August, 2006.

I further order that the costs of the application be paid by the respondent to the applicants.

It is so ordered.

DATED and delivered at Nairobi this 14<sup>th</sup> day of December, 2006.

**J.G. NYAMU**

**JUDGE**