



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Tribunal Appeal Net 01/02/2005

NAKUMATT HOLDINGS LIMITED – APPELLANT

VERSUS

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY – 1ST
RESPONDENT**

GREAT PROPERTIES LIMITED – 2ND RESPONDENT

RULING

By letter dated 16th February, 2005 the Appellant appealed against the 1st Respondent's approval of the EIA Project Report submitted by the 2nd Respondent in support of its application for an EIA licence for the development of a housing estate to be known as Eagle Plains Housing Estate on plot L.R. No. 209/10829, Nairobi. The land on which the estate is proposed to be developed adjoins the headquarters of the Appellant and lies in an area off Mombasa Road. Prior to seeking an EIA license the 2nd Respondent had commenced construction of the project, apparently unaware of the requirements of the Environmental Management and Coordination Act, 1999, but on being informed of the need for an EIA licence it stopped construction.

The 1st Respondent's approval, which led to this appeal, had been communicated by letter dated 3rd February, 2005 following the submission by the 2nd Respondent of an EIA Project Report. Consequently, the 2nd Respondent was not required by the 1st Respondent to carry out a full EIA Study.

The Appellant's objection was that the proposed residential project would not be in harmony with the existing industries surrounding the plot, of which the Appellant's activity is one. The Appellant claimed that air pollution levels in the area are higher than the WHO standards for long term human exposure and that the heavy traffic density and 24 hour industrial operations produce high noise levels for a residential development. In addition the Appellant argued that the proposed development, which was a proposal to construct a 350 unit housing estate inside an area in which no less than 13 industries were located, was "out of character with its surroundings." Consequently, it could not be approved on the basis of the Project Report alone, and required a full Environmental Impact Assessment Study.

The Appellant objected to the decision by the 1st Respondent not to require the 2nd Respondent to carry out a full EIA Study. Among the key benefits which the Appellant saw as arising from the conduct of a full EIA Study prior to a decision whether or not to grant an EIA license was the opportunity which it would provide to potentially affected parties, such as the Appellant, to air their views in the context of public consultation, which is a mandatory requirement of a full EIA Study. The Appellant argued that in approving the project on the basis of a Project Report alone, the 1st Respondent had denied the Appellant

an opportunity to provide comments. The Appellant subsequently took the position, however, that even if a full EIA Study had been conducted, it would not materially have affected the Appellant's objection to this Project.

The Tribunal heard the matter on three occasions between 23rd June, 2005 and 28th July 2005. A total of four witnesses testified. The Appellant called Dr. Jacob Kibwage, its EIA Consultant to give evidence. The 1st Respondent called to give evidence Mr. Maurice Mbegera its Director of Compliance, who is responsible for EIA licensing, while 2nd Respondent called Mrs. Hellen Nzainga, the EIA consultant who had led the preparation of the EIA Report as well as Mr. Jumaa Makopa, the Associate EIA expert, responsible in this case for studying the air quality, noise levels and water quality implications of the proposed project. The Tribunal also visited the site of the proposed project on 29th July 2005. Final submissions were heard on 3rd August 2005.

In evidence the Appellant faulted the EIA Project Report on the ground that it had proceeded on the basis that the only relevant consideration was the potential impact of the project on the environment in the area in which the proposed project was to be located. On this basis, the Report had come to the conclusion that there were no potentially significant adverse impacts which the project was likely to inflict on the environment in its locality that could not adequately be mitigated. In the Appellant's view, this was completely the wrong premise on which to have proceeded.

What the EIA team should have done, in the Appellant's view, was to look at the potential impact on the proposed project of the environment in the locality. Had they done so, they would have realized that an area with industrial activities, an allegedly high air and traffic noise pollution levels, the perceived risk of explosions arising from the manufacture of gas cylinders, possible danger from the manufacture of vaccines thought to be going on in the vicinity, and radiation arising from mobile phone transmitters located nearby, was not an appropriate area in which to locate a major residential estate. But because the EIA Study team had not approached the matter in this way, they had not found it necessary to collect the relevant data that would have demonstrated the inappropriateness of this location for the proposed project.

The witnesses for the Respondents defended the decision to grant approval on the basis of the Project Report alone. They argued that the area in which the project was to be located is designated in the physical planning laws as zone 9, in which both light industrial and residential development are allowed. They pointed out that the relevant regulatory authorities, including the Ministry of Lands and the City Council of Nairobi, had granted the required permits for the proposed development. They sought to introduce in evidence a document titled: "A Guide of Nairobi City Development Ordinances and Zones" but this was resisted by the Appellant for the reason, among others, that it is merely a draft document whose authenticity is uncertain. The witnesses further gave evidence of actual mixed developments that are to be found in the area in question, among them residential estates, a hotel, godowns, other commercial establishments and also light industries.

During the hearing of the matter it was said and admitted by the Appellant's witness, Dr Kibwage, that the primary reason which led the Appellant to object to this proposed development was the concern that the proposed development would introduce a conflict between the commercial activities carried out by the Appellant within its premises and the use of neighboring property for residential purposes.

The Tribunal findings on the pertinent issues arising are set out below.

The purpose of the EIA licensing process as prescribed by Part VI of the Environmental Management and Coordination Act of 1999 and the Environmental (Impact Assessment and Audit) Regulations, Legal Notice No 101 of 2003 which are made thereunder is to assess the likely significant impacts of a proposed project on the environment. In deciding on the nature of likely impacts, account must be taken of the status of the environment within which the proposed project will be undertaken. Consequently, the levels of air pollution, traffic noise and other features of the environment in the area off Mombasa Road on which this proposed development is to be carried out are relevant considerations.

The status of that environment is not determined by the fact alone that the area is designated as an industrial area, or even as an area for mixed development. Since the Tribunal is not sitting on appeal on the decisions of the physical planning authorities, such a designation, if it exists, is only indicative of the nature of environmental considerations that might arise. What is critical for these proceedings is to ascertain the actual status of the environment in the locality.

The evidence that was adduced showed that the. For this purpose, in the absence of statutorily prescribed limits, Kenya relies on World Health Organization standards. The claims by the Appellant's witness that residence within this locality would expose those living in the proposed estate to serious health risks on account of the high levels of pollution in the area were not substantiated by credible evidence.

The Tribunal also finds that no evidence adduced by the Appellant's witness or anyone else showed that this project would adversely impact on that environment in ways that could not be mitigated by the measures that had been proposed by the project proponent in the EIA Project Report. In addition to the proposed mitigatory measures, the 1st Respondent and other regulatory authorities can resort to provisions available in the Environmental Management and Coordination Act of 1999 and other laws, among them, the requirement for regular environmental audit, to require that the activities being carried on in the area within which the proposed project is to be located do not cause unavoidable environmental degradation. Accordingly, there are mechanisms in place for managing the potential adverse environmental impacts that might arise from this project.

Further, before taking the decision, the 1st Respondent had consulted lead agencies as well as a number of potentially affected neighbours, including the Appellant. The Tribunal noted that the Appellant's views had been communicated to the 1st Respondent by letter dated 18th November 2004, which was written on its behalf by Dr Kibwage. The Appellant's argument that in not requiring a full EIA Study interested parties had been denied an opportunity to provide comments on the proposed project is thus not sustainable.

Therefore, the Tribunal finds that the 1st Respondent was justified in approving the proposed project on the basis of the Project Report alone. Consequently, the Tribunal rules that the Appellant's appeal against the 1st Respondent's approval of the EIA Project Report fails.

The Appellant pointed to a number of technical irregularities in the Project Report, among them the failure to date the Report, the failure to show evidence that the form of submission of the Report was signed by the project proponent, and the inclusion in the Project Report of matters, which in the Appellant's view, went beyond the requirements of the Environmental (Impact Assessment and Audit) Regulations 2003 L.N. No. 101. The Tribunal notes that the same Project Report to which the Appellant objected formed the basis of these proceedings, including this Appeal and the actions that had been taken by the Respondents.

The Tribunal is of the view that these irregularities do not vitiate the decision taken by the 1st Respondent on the central issue, that is, that the development of a residential estate in the proposed location is not likely to introduce significant adverse environmental impacts which cannot be mitigated through appropriate measures, such as those proposed in the EIA Project Report.

The Tribunal therefore unanimously finds that the appeal fails and directs that:-

- 1) The Stop Order issued by the Tribunal on 9th May, 2005 by letter ref: NET/APLS/1/1/VOL. (1) be and is hereby lifted.
- 2) NEMA is at liberty to issue an EIA license to the 1st Respondent as prayed.

The Tribunal was asked by the Parties to award costs. The Tribunal finds that the Appeal was well founded and is not frivolous. In making this finding the Tribunal has not overlooked the fact that the Appellant had objected to this project mainly because of its concern that a large residential estate next to

its commercial headquarters would introduce a conflict with the Appellant's activities being carried out next to that location. Despite this, the Appeal raised real issues falling within the jurisdiction of this Tribunal, in particular whether the proposed project should not be licensed for being out of character with its surroundings. For this reason, the Tribunal rules that, in accordance with rule 39 of the National Environment Tribunal Rules, Legal Notice No. 191 2003, each party shall bear its own costs.

The Tribunal notes that licensing this activity in no way takes away the rights of the parties under the general law to seek a remedy in nuisance should any of the licensed activities be carried out in a manner which would be remediable under the law of nuisance. This is the essence of the decision in Wheeler & Another v. J Saunders Ltd (1995) 2 All E.R, 697, to which the Tribunal was referred. Neither does such licensing restrict the powers of the regulatory authorities to control adverse impacts, if any, of such activities.

The Tribunal draws the attention of Parties to the provisions of section 130 of the Environmental Management and Coordination Act, 1999.

Finally, the Tribunal expresses its appreciation to Mr. O. K. Odera, Counsel for the Appellant, Ms. Anne Angwenyi who appeared on behalf of the 1st Respondent, and Mr. Adil Khawaja and Mr. Gitonga Murugara, Counsels for the 2nd Respondent for the diligent manner in which they conducted the matter.

Dated at Nairobi this 12th August, 2005.

Signed:

Donald Kaniaru - **Chairman**

Albert Mumma - **Member**

Stanley Waudu - **Member**

Jane Dwasi - **Member**

Joseph Njihia - **Member**