REPUBLIC OF KENYA

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

Tribunal Appeal Net/04/06/2005

PHENOM LIMITED……....……APPELLANT

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY……RESPONDENT

RIVERSIDE GARDENS

RESIDENT'S ASSOCIATION….……..……INTERVENOR

RULING

1. By Notice of Appeal dated 23rd June, 2005, PHENOM Limited, the Appellant, appealed against the Respondent's condition on its proposed housing development, which the Respondent conveyed by letter dated 19th October, 2004. The proposed development is a housing project in which the Appellant intends to construct 21 housing units in an eight-storey building on a 0.3035 hectare parcel of land known as Plot No. 209/4902, Riverside Gardens, Riverside Drive, Nairobi.

2. The Appellant's grounds of appeal initially were that: through the letter of 19th October, 2004, the Respondent expressed concern that the proposed construction had the potential of causing adverse impacts, especially on the riparian environment, yet, in the Appellant's view, no activity of the project would cause any adverse impacts; that the City Council of Nairobi has the mandate to approve all developments within the City of Nairobi and had approved Appellant's proposed construction of 4 storeys above ground level and 3 storeys below and the Respondent had no authority to interfere with, or contradict the City Council's approval; that the Respondent had, by letter dated 14th January, 2005 approved Appellant's construction of nine storeys which were subsequently scaled down to 4 floors above and 3 floors below and therefore impacts on the environment should be reduced by the down-scaling; that the world over, highrise and multi-storey dwellings and office blocks are built beside rivers; that there was a seven-storey apartment just two blocks away from the Appellant's proposed site and the Respondent was unjustly discriminatory and biased against the Appellant in restricting its proposed development to only four storeys above ground level and none below natural ground level; that Kenya's Parliament approved Sessional Paper No. 3 on the National Housing Policy for Kenya, which proposes government's facilitation of the production of 158,000 housing units in urban areas; and that the Respondent's 4th condition contained in its letter dated 25th April, 2005 contradicts the City Council's approval of construction of seven storeys. The said condition reads:

3. "The project MUST be scaled down from seven (7) levels to a maximum of four (4) storeys only from the ground level. Development of three (3) storeys/levels of dwellings below ground level is not permitted. The proponent is to observe the **35%** maximum permitted Ground Coverage and **0.75** permitted Plot Ratio specifications for residential developments in Zone **4** of the City Council of Nairobi Development Zones in which the project is located. Besides, development of more than four storeys will not comprise a structure of a scale keeping with those in the surrounding area and, hence not environmentally sound. No residential floor shall be permitted below ground level."

4. Subsequently, the Appellants' grounds of appeal were amended by letter dated 25th July, 2005 which restricted the appeal only to the Respondent's limitation of Appellant's construction to 4 floors and its prohibition of Appellant's construction of residential floors below ground level. Other grounds of appeal were expressly vacated.

5. The Respondent filed a Reply on 16th August, 2005 in which it was asserted, among other things, that the Respondent has authority to intervene in matters concerning the Appellant's proposed construction under Section 58 of the Environmental Management and Co-ordination Act (EMCA) which requires project proponents to conduct environmental impact assessment (EIA), notwithstanding any other licence that the Appellant may have received; that Regulation 4 of the Environmental (Impact Assessment and Audit) Regulations of 2003 provides that no licensing authority shall issue any licence, permit or approval prior to the issuance of an EIA and that any such licences issued are a nullity; that the Respondent has the mandate to approve projects subject to stipulated conditions to be observed by project proponents in order to facilitate sustainable development and sound environmental management, which is its statutory mandate; that it erred in authorizing the Appellant to construct nine storeys in January, 2005 and subsequently advised the Appellant to scale down the project to four floors; that upon consultation with the City Council of Nairobi, the Respondent was provided with the Council's approved planning policies and development zones which indicated the Appellant's proposed site as falling under Zone 4 of the Nairobi Planning Zones; that further, by letter dated March 31, 2005, the City Planning Department of Nairobi City Council verified that the Appellant's proposed site is located within Planning Zone 4 and was subject to the Council's Planning Policy of 1979; that the Appellant's proposed project is contrary to the City Council of Nairobi's planning policy contained in Minute 24 of 13th May, 1987 which is contained in Nairobi City Commission's Approved Planning Policies, of 1968-1991 which provides, among other things, that highrise developments in Zone 4 be limited to four floors; that therefore, the City Council's approval of the Appellant's building plan on 16th December 2004 allowing the Appellant to construct 7 residential floors was an illegality as it was against zoning policy issued by the same Council and should not be used as a justification to proceed with the project; that based on the foregoing, a review and revision of the Appellant's EIA Project Report and comments from relevant lead agencies, the Respondent issued an approval letter dated 25th April, 2005, subjecting the Appellant's proposed development to several conditions, including the condition that the number of floors must not exceed four floors and that no dwelling units should be constructed below ground level; and that since the Appellant was dissatisfied with the Respondent's condition number 4 limiting construction to only 4 floors and prohibiting construction of dwelling houses below ground level and appealed to the Tribunal, the Respondent did not issue an EIA licence.

6. Upon request to the Tribunal, Riverside Gardens residents were enjoined to the appeal as interested parties/ intervenor through the law firm of S. Musalia Mwenesi Advocates. The intervenor's objections to the proposed construction as elaborated in their comments on the Revised Environmental Impact Assessment Study by Bougainvillaea Limited are that: the Appellant's development does not respect the stipulated environment and planning regulations; that the proposed project area falls under Zone 4 of the City Planning zones where only a maximum of four storey buildings are allowed; that the roads in the area would not sustain increased traffic resulting from the Appellant's construction; that construction of 7 storeys at the proposed site would not be in line with similar developments in the area; that the proposed

construction would pose security risks, increase noise and dust during the period of construction; that Appellant did not comply with of the EIA requirements under the Physical Planning Act; and that the Appellant did not obtain change of use approval prior to obtaining approval of building from Nairobi City Council and therefore City Council's approval was irregularly obtained.

7. The Tribunal heard the appeal on seven occasions between September 20th and October 27th, 2005. At the hearing, the Appellant was represented by Mr. Murugara of Hamilton Harrison & Mathews Advocates; the Respondent by Ms. Anne Angwenyi and the Intervenor by Ms. Janet Lavuna and subsequently, Mr. Musalia Mwenesi Advocate, both of Ms. S.Musalia Mwenesi Advocates. A total of six witnesses testified. In support of the Appellant's case, Mr. Paul Mutahi Wareithi, an architect and designer who prepared the Appellant's building plan and Ms. Laura Wahome who was, statedly, the Appellant's EIA expert, testified. In support of the Respondent's case, Mr. Morris Mbegera, the Respondent's Director in charge of Compliance and Enforcement testified. For the Intervenor, Mr. George Kibuthu Ndegwa and Mr. David Campbell, both members of Riverside Gardens Residents Association testified.

8. In addition, Nairobi City Council's Director of City Planning designated Mr. John Barreh, a town planner and Acting Assistant Director in charge of urban research to the Tribunal, as a friend of the Tribunal, to explain the City Council's policies, zoning and other regulations and procedures that were applicable.

9. The Tribunal along with the parties visited the Appellant's site on September 27, 2005 at the request of counsel for the Appellant.

10. At the commencement of hearing, Mr. Murugara, counsel for the Appellant, clarified that the Appellant was only appealing against the Respondent's condition number 4 reproduced in paragraph 3 and that even in relation to that condition, the Appellant had a problem with only a portion, namely, that "the Appellant should scale down construction to four floors only" and that "any storeys below ground level are not permitted." The Appellant's counsel explained that the Appellant also sought to demonstrate that it did not intend to construct any dwelling houses underground, strictly speaking, because in actual fact, the construction would be governed by the topography of the land. He further clarified that the Appellant also sought to demonstrate that it had complied with all relevant regulations and that even if NEMA had the power to impose the condition, it could not be complied with in reality. He, therefore, as earlier stated in paragraph 9, invited the Tribunal to visit the site early in its deliberations.

11. It was the Appellant's case that the Respondent's condition that the Appellant constructs only four storeys above ground level and its prohibition of construction of any dwelling units below ground level exceeded and are contrary to requirements of the Local Government Act, Cap 265, and the Physical Planning Act, Cap 286, and is *ultra vires* the Respondent's authority under the Environmental Management and Co-ordination Act (EMCA), No. 8 of 1999. In any case, the Appellant maintained, no storeys would, strictly speaking, be constructed below ground level because in actual fact, the Appellant's construction would be governed by the topography of the land in question, which slopes downward from Riverside Drive (the main entrance) side, to the Nairobi River on the rear. Further, the Appellant reiterated that it had complied with all relevant regulations and that the Respondent had no power to impose a condition on it to construct only four storeys above ground level and that even if the Respondent had power to impose such a condition, the condition could not be practically complied with.

12. Witnesses for the Appellant testified that the proposed project site is a parcel of land measuring 0.3035 hectares whose slope is quite steep and drops downward by about 12 metres from the Riverside Drive entrance to Nairobi River on the rear side. They stated that initially, the Appellant proposed to construct nine (9) floors including a duplex but, upon submission of the building plan for approval, Nairobi City Council directed that the project be scaled down to seven floors. It was their evidence that upon scaling down construction plan as directed, the City Council approved their building plan on December 16, 2004 and conveyed its approval by letter dated January 7,

2005. The Appellant's architect stated that the technical department of Nairobi City Council approves plans and subsequently, they are forwarded to the Council which, in a meeting, approves and subsequently, a letter of approval is sent to a developer.

13. The City Council's letter of January 7, 2005 forms part of the Appellant's bundle and indicates that the Council's approval of the proposed housing development was subject to two conditions, namely: (a) submission of satisfactory structural details, including lintols and trusses; and (b) all debris and excavated materials to be dumped on sites approved by the City Engineer. The Appellant did not tender any evidence to show that the two conditions were complied with prior to their commencement of construction work.

14. It was stated by Appellant's witnesses that subsequent to the City Council's approval, electrical drawings were prepared and tenders for construction services floated and the firm of Sagar Builders won the bid. Witnesses further stated that on the advice of a structural engineer, the ground on the lower side of the Appellant's plot was broken to a depth of between 9 and 12 metres to find a solid ground on which to base the foundation of the building. All these were done before the Appellant complied with EIA regulations and it is only after the steps had been taken that the Appellant conducted an EIA through the firm of Bougainvillaea Limited. Upon submission of an EIA Project Report, the Respondent approved construction by letter dated 25th February, 2005 with the condition that the Appellant constructs only four floors and that no dwelling units should be constructed below ground level.

15. It was contended for the Appellant that the ground level is on the Riverside Drive (entrance) side of the plot and that the Respondent's condition requires backfilling of an area that slopes up to approximately 12 metres toward the river, which would be very expensive. The Appellant took the position that the ground level is at the Riverside Drive entrance to the plot and that from that level, the proponent proposes to construct four floors above, and three floors below, instead of backfilling. The Appellant maintains that in that situation, there will, in reality, be no floors underground, or below ground level.

16. Appellant's witnesses went further to testify that within the 0.3035 hectare plot, the Appellant plans to maintain six (6) metres between windows and the nearest wall. The Appellant will also provide a 1 – 2 metre staircase; an elevator within the building; a parking area for sixty (60) vehicles; a boundary wall between the parking area and the building; a borehole, a swimming pool and an underground water tank. The Appellant's witnesses explained that since sitting rooms are, by law, required to be seven metres from any wall, all sitting rooms would face the Nairobi River side of the compound (the lower side). In the architect's testimony, available space in the Appellant's proposed site that would accommodate all of the planned developments is 24 x 24 metres on the back side and 24 x 15 metres in front. There was no evidence that the Appellant had considered allowing a play ground for children on the plot and although witnesses stated that the Appellant planned to construct an underground water tank, a bore hole and a swimming pool, its architect was not sure the Appellant had obtained required permits and admitted he had not seen any letter of application or approval.

17. The Appellant's architect acknowledged that the proposed construction site falls under Zone 4 of Nairobi City Planning Zones, whose requirements under zoning regulations are a maximum 35% ground coverage and 0.75 plot ratio. He admitted that Nairobi City Council scaled down the proposed number of floors from nine (9) to seven (7) because when the Council calculated the area allowed for development under the City By-laws, it was found that the Appellant proposed to utilize a larger plot ratio than the ratio allowed. He stated that for the City Council, the ground level is where one enters the building, but witnesses confirmed that Council officials did not visit the site prior to their approval of the building plan to have a visual impression of its topography. In cross –examination, the architect admitted that without fulfilling the Respondent's conditions, approval cannot be granted.

18. On her part, Ms. Laura Wahome who was called to testify as the Appellant's EIA expert admitted

that she has not completed her master's degree in environmental studies and is neither qualified, nor registered as an EIA expert with the National Environment Management Authority; that although she prepared the Appellant's first EIA Project Report and was responsible for advising the Appellant on zoning, she was not, at the time, familiar with the City Council's zoning regulations and was not aware that buildings in Zone 4 in Nairobi should not exceed four (4) floors; that she had assumed that if the City Council approved the Appellant's building plan then it had considered all relevant issues; that she was not aware of plinth area and maximum ground coverage requirements and had not made calculations in accordance with City Council housing regulations; that she was not aware of zoning impacts on the environment until she came to the Tribunal; and that her experience at the Tribunal had been "a steep learning curve."

19. The witness for the Respondent, Mr. Mbegera, defended the Respondent's condition that the Appellant scales down its proposed housing development to a maximum of four floors. It was the witness's testimony that Section 58 of EMCA requires all developments listed under the Second Schedule to the Act to undergo EIA requirements prior to commencement and that the Appellant's proposed development falls under the Schedule and required an EIA. Further, he testified that EMCA authorizes the Respondent to ensure that project proponents undertake EIA, subsequent to which an EIA licence may be denied, granted or granted subject to conditions and that it has been the practice of the Respondent in cases where an EIA licence is to be conditioned to first convey necessary conditions to an applicant and if an applicant accepts, a conditional EIA licence is issued.

20. The witness also testified that after NEMA received the Appellant's EIA Project Report, it approved construction of nine storeys on 14th January 2005 and admitted that the approval was granted without prior consultation with lead agencies and without consideration of applicable Nairobi City Council's zoning regulations, or knowledge that zoning restrictions on the proposed project site existed. Counsel for the Respondent admits in written submissions that the approval was unfortunate.

21. The witness further testified that subsequent to the approval, the Respondent received objections to the proposed development from residents of Riverside Gardens and this prompted it to conduct a public hearing, in the process of which it emerged that there existed City Council zoning regulations and policies which restrict construction of storey buildings in the area to a maximum of four floors. The Respondent was also prompted by residents' objections to consult with the City Council in the process of which the Council provided its 1979 Zoning Policy, still in force, and Council Minute Number 24 of 13th May, 1987 which place the area of the proposed development under Zone 4 and limits high rise developments to a maximum of four floors, a plot ratio of 0.75 and ground coverage of 35%. The zoning policies and regulations form part of the Respondent's bundle of response.

22. It was further stated that upon consultations with lead agencies and consideration of the City Council's zoning policies and regulations, the Respondent discovered that the Appellant's proposed development exceeded allowable limits and directed that the Appellant revises its EIA Project Report in consideration of the City Council regulations and resident's objections. The Respondent's witness testified that the Respondent subsequently reviewed the Appellant's revised Project Report in light of existing zoning regulations and policies and on this basis, came to the conclusion that the development had to be scaled down to a maximum of four floors. The Respondent took the position that ground level was at the point of entry to the Appellant's site, on Riverside Drive side and placed a condition requiring the Appellant to begin construction of four floors from there. It was the Respondent's testimony that by cutting the ground 8-9 metres deep, the Appellant had created a new ground level and additional height to accommodate three floors "below the natural ground level" and that this could not be permitted since in their view, it would adversely affect the human environment. The witness stated that the information the Respondent received after the public meeting was held was that residents of Riverside Gardens did not object to the proposed development, provided that zoning regulations were observed.

23. Regarding compliance with other relevant laws, the Respondent's witness maintained that EMCA is a framework law that recognizes the existence of other laws that affect its operations and that the Respondent had the authority to consider those other laws. On the basis of the witness's testimony, the Respondent requested the Tribunal to uphold its conditions on the proposed development.

24. The intervenor's witnesses testified that they are residents of Riverside Gardens where the Appellant intends to develop a high-rise residential building and that they have lived there for a long time in peace and feared that the proposed development would increase traffic, pollution, insecurity and pose other negative environmental impacts. It was also likely to constrain facilities in the area, which were designed for single dwelling houses. If the development was allowed as intended, they maintained, it would also negatively impact on the value of their property. They were concerned that the Appellant had advertised for the sale of twenty six (26) units on a plot previously used for single dwelling without consulting with them prior to commencement of the proposed development and they only managed to know about the project and raise objection with the City Council and the Respondent after the Appellant commenced work.

25. Witnesses maintained that the Appellant had not complied with applicable building regulations because it had failed to obtain change of use approval for the plot in question from single residence to multi-storey residential premises. It was their testimony that the Physical Planning Act requires public participation in the process of obtaining permission for change of use and that a receipt produced by the Appellant, which was purportedly issued by Nairobi City Council upon application for change of use dated July 20, 2004, yet an advertisement by the City Council of the proposed development, which was purportedly in compliance with public participation requirements of the Physical Planning Act was published on July 21, 2004 in the Daily Nation. In any case, they maintained, the Appellant failed to produce any application for change of use, or letter of authorization of change of use from the Physical Planning Department. Moreover, they maintained, Riverside Gardens residents had not been invited to participate in hearing the Appellant's application for change of use and were therefore denied a chance to raise objections to the proposed development.

26. The witnesses further stated that after consulting with NEMA, the City Council and the Physical Planning Department, the Director of Physical Planning of the Ministry of Lands wrote a letter dated 9th November, 2004 to the Council pointing out that there already exists a borehole in the neighbourhood and that construction of another borehole as proposed by the Appellant would have negative impacts on the environment; that the development was likely to have adverse impacts on land and other types of environment in the area, that the proposed development would impact heavily on existing infrastructure; that views of local residents should be taken into consideration; that the City Council needed to consider its planning policies before approving the proposed development; and that the proposed development needed to be discussed with the Physical Planning Liaison Committee as provided in section 10(2) of the Physical Planning Act. A copy of the letter forms part of the bundle submitted by the intervenor. In the witnesses' view, the letter had nearly concluded that the proposed development was not approvable and they were surprised to see that the Appellant had commenced work.

27. Issues for the Tribunal to consider were as follows: whether the Respondent had authority to subject the Appellant's proposed housing development to conditions; whether the Respondent's condition Number 4 can be maintained; whether Nairobi City Council has zoning policies and regulations applicable to the Appellant's development; whether the Appellant complied with relevant regulations, including the requirement that a change of use approval be obtained prior to converting the plot from a single dwelling house to multi-storey residential housing units; whether the Appellant complied with requirements for obtaining change of use approval; whether the Appellant complied with the regulations; whether the Appellant's building plan for the proposed housing development was legally approved by the City Council; whether the Appellant can proceed with construction of 7 floors as proposed; and who pays costs of the appeal.

28. Mr. John Barreh, a city planner and Acting Assistant Director of Urban Research at Nairobi City Council who was designated by the Director of City Planning to testify on the Council's zoning policies and regulations, as well as its procedures for approval of building plans also gave evidence as *amicus curiae*. He testified that the Council does have zoning and planning policies and regulations. He explained that the first Master Plan of the City was developed in 1948 and that by 1979, the City was zoned in a way that Westlands and Kileleshwa areas, including the Appellant's land, fell under Zone 4 which was designated as a residential area, with a minimum plot size of ¼ of an acre, serviced on site and that most of the plots in the area were sewered. Council regulations also limited the amount of land to be developed in each plot to a vertical plot ratio of 0.75 (of plots of ¼ of an acre), meaning that one could only develop a total of 750 square metres of ¼-acre plot. Development would then cover a maximum of 35% of ground with the remainder of development to be taken up (vertically). At the time, flats and masionettes were allowed but subject to allowable plot ratio and maximum ground coverage. In addition, one was required to obtain a change of use approval from the Ministry of Lands and the City Council in case a developer wished to construct buildings for purposes other than single dwelling in parcels of land that were used for single dwelling.

29. Mr. Barreh explained that the situation prevailed until 1987 when, in a meeting of the City Council's Works and Planning Committee, it was proposed that high rise developments be permitted in zone 4, but that they be limited to four floors and that the developments (the four floors) be limited to a maximum of 10% ground coverage and a plot ratio of 0.25. He explained that the proposal was confirmed by City Commission (as it then was) Minute Number 24 of 13th May, 1987. The Minutes are contained in a document titled "Nairobi City Commission, City Planning and Architecture Department, Commission Approved Planning Policies, 1988-1991."

30. Mr. Barreh further explained that the Council policy, which was in operation by 1988, limited sizes of sewered plots in Zone 4 to 0.05 hectare (down from 0.1 hectare) and unsewered plots were to remain at a minimum of 0.2 hectare. It also permitted highrise developments in sewered areas with a maximum of four floors, with developments limited at 10% ground coverage and plot ratio of 0.25. He stated that those are the limits applicable to the Appellant's proposed development. He explained that since he joined the City Council in 1988, the practice has been to limit developments in zone 4 to 35% of ground coverage, with a plot ratio of 0.75, even though there is nothing authorizing the increase, which in itself is a departure from the 1987 policy. To him, these are administrative changes. The position is confirmed by a letter from the Director of City Planning, Mr. F.M. Ndereba to the Provincial Commissioner, Nairobi in reference to the Appellant's property dated 31st March, 2005. The letter forms part of the Respondent's bundle of Reply. Further he explained that regarding the number of floors allowed in Zone 4, the Council has adopted the British system with reference to four storeys (rather than floors) which, in effect, amount to five floors, including the ground floor.

31. Mr. Barreh explained that zoning caters for the physical and the human environment, which is why the City Council has requirements for room of 2.4 meters to be maintained between bedrooms and outside walls and ground coverage of 35% to allow landscaping and ventilation and that even drainage systems are designed based on a particular population. He stated that the issue of environmental sustainability is factored into zoning regulations.

32. Mr. Barreh applied the regulations to the Appellant's proposed development and explained that since the Appellant's plot has been indicated to be 0.3035 hectare, the area that can be developed, i.e, the plinth area, is 2276 square metres, taking into consideration 0.75 plot ratio. If an additional 10% of plinth area is allowed, as is the administrative practice of the Council, the maximum area the Appellant could be allowed to develop is 2504 square metres. Mr. Barreh explained that to the contrary, the Council, by Minute 13 (No. 25) of the Town Planning Committee of 16th December, 2004, approved the Appellant's building plan in respect of L.R. No. 209/4902, with a plinth area of 4,370 square metres. Therefore, the building plan was approved with an excess area of 1,866 square metres, a plinth area that is almost double what the Appellant could be permitted to develop in Zone 4. Mr. Barreh said that he had been unable to trace a comment sheet that should have

accompanied the Appellant's application for approval of building plan. He explained that in his view, the approval of the development plan with an excess plinth area was irregular. Mr. Barreh emphasized that had he been the one considering the Appellant's application, he would not have approved the building plan as presented, because the excess plinth area was contrary to the City Council's zoning and building regulations and policies.

33. Mr. Barreh submitted the City Council's Minute book titled, "City Council of Nairobi, Minutes of Proceedings of the Council and Several Committee Meetings Thereof for the months of November, December 2004 and January, February, March 2005, Volume LXIX, No. 2" and pointed out that on page 883 (item 25), under Minute 18, the Appellant's building plan was indicated to have been tabled before the Council by a councillor and not a member of the Town Planning Committee as required. He stated that it is unprocedural for councilors to table such technical matters and this could explain why the building plans were approved with excess plinth area, plot ratio and number of floors. In any case, he explained, the Council's approval of the Appellant's building plan was "...subject to... the technical officers ensuring that all planning by-laws requirements and also the conditions listed under Minute 7 above had been complied with" as stated by the Council on page 884 of the Minutes. Minute 7 on page 728 requires, among other things, compliance with the Council's zoning policies and approval of change of use from single dwelling units to multi-family dwelling units.

34. Mr. Barreh further stated that he had also not seen a change of use application which ought to have been applied for and obtained by the Appellant prior to its application for approval of building plan and that an approval of change of use comes first. He stated that without a change of use, approval of the building plan is not valid.

35. Mr. Barreh explained that an application for change of use is a separate application which goes to the planning implementation section. The Appellant did not provide evidence to show that a change of use application was made and approval granted except for uncertified copy of a receipt dated 20th July, 2004 purportedly obtained from the City Council. He explained that a change of use application must comply with requirements of Section 36 of the Physical Planning Act and other enabling provisions of law, which require public participation in the process of considering an application for change of use. He stated that the process requires a public notification of the application to allow comments. Further, he stated that in considering a change of use application, the visual impact of the proposed development on neighbouring property and objections raised by owners of neighbouring property must be taken into consideration. Since he had not seen the Appellant's application for change of use, he could not say much about it. He also observed that the City Council had approved the Appellant's building plan without an EIA licence and in his view, that happened because the Council had not taken into consideration the requirements of the Environmental Management and Co-ordination and the Physical Planning Acts.

36. Mr. Barreh further testified that while perusing the building file, he came across another plan submitted by the developer on 25th January, 2005, requesting an approval for alteration and extension to add two (2) more floors to be approved. This is Plan No. DW 850 and proposes an additional plinth area of 830 square metres. This alteration and extension proposal for additional 2 floors could not be approved by the Council, since the initial building plan was already in excess of what should have been approved.

37. Mr. Barreh testified that when he visited the site for the proposed development he noted that the natural ground level had been interfered with. The ground was not naturally inclining towards the river and indeed had been mechanically cut to about 8-9 meters deep to create a new ground level. He testified that such mechanical cutting is allowed in design but the architect is required to clearly show the proposed cutting in the building plans so that it can be approved together with the building plans, thus enabling the Council to make an informed decision. He further stated that when making such a cut, one can take advantage of the sloping/gradient of the land, but one must maintain the plinth area at all times. In fact for the present development, the architect had not clearly shown this mechanical cut and indeed the impression created by the building

plans/architectural designs was that this was the natural slope of the land. He further stated that in approving the building plans, the most exposed view of the building would be taken to be the ground level. In this instance the ground level would be taken to be the rear of the building (the view from the river). He further testified that it was not necessary to cut the ground that deep as this is red soil and it is not required for one to hit the hard rock.

38. He concluded that the proposed development would not match the character of the area as zoned by the Council and that the buildings should be uniform at least in height to conform to what is envisaged in Zone 4 of the City planning zones.

39. In consideration of the issues, the Tribunal relies on the evidence of witnesses of the Appellant, Respondent and the intervener as well as evidence adduced by Mr. John Barreh as a friend of the Tribunal and all applicable laws and policies and finds as follows on the pertinent issues arising:

40. The Respondent is a governmental agency that has authority under section 58 of the Environmental Management and Co-ordinations Act (EMCA), the Environmental (Impact Assessment and Audit) Regulations 4, 31 (Legal Notice No. 101 of 2003) and other enabling provisions of law, to require proponents of projects listed under the Second Schedule of EMCA to prepare environmental impact assessment study project reports. Upon review of EIA reports, the Respondent has authority to deny approval of a project, approve a project or approve a project subject to such conditions that it deems necessary to prevent and/or reduce negative environmental impacts that might result from an activity. In law, the environment has been broadly defined, particularly in section 2 of EMCA to include the physical factors of surroundings of human beings, including land, water, social factors of aesthetics as well as the natural and the built environment. Therefore, clearly, the Respondent has authority to regulate the Appellant's proposed activity and place conditions as necessary to protect the environment. For this reason, the Tribunal finds that the Respondent did not act *ultra vires* in placing conditions on the Appellant's proposed development.

41. Regarding the validity of the conditions placed on the Appellant's development by the Respondent to limit its development to four floors without any dwellings below ground level, the Tribunal presents its findings on three critical issues, namely: (i) Where exactly is the ground level of the Appellant's plot? (ii) How much space on its plot is the Appellant allowed by the City Council policies and regulations to develop? And (iii) was the City Council's approval of the Appellant's building plan lawful?

42. Witnesses for the Appellant did not clarify the Appellant's position on the ground level, or what the Appellant perceives to be the ground level for approval purposes, even though the Appellant's building plan indicates that its ground floor would be at the ground level on the lower (River) side. No evidence was adduced by the Appellant to show that the City Council officials who approved its building plan visited the proposed site prior to their approval and Mr. Barreh, the Council official who testified as *amicus curiae* confirmed that Council officials often do not visit sites before approving building plans. Without their proper appreciation of the topography, one would not expect a clear determination by the Council of what is the ground level of the Appellant's property. For the Respondent, evidence was tendered that in its prohibition of construction of dwelling houses below ground level, it took the view that ground level is at the entrance to the Appellant's property, on Riverside Drive side.

43. Further, Mr. Barreh testified that when he visited the site, he found that the natural ground had been cut up to between 8.1 and 9 metres deep and the Appellant's architect, Mr. Paul Mutahi Wareithi, admitted that the ground was cut 9-12 metres deep on the Appellant's structural engineer's advice that they should cut it until they find a solid ground on which to base the building foundation. This had therefore interfered with the natural ground topography that led to the dispute as to what the ground level was at different points, and particularly at the upper Riverside road, and at the lower (River) side. On the basis that the ground had been extensively cut and that construction would begin with the lower (River) side as the ground level, which as

Mr. Barreh emphasized (para 37 above), "the most exposed view of the building would be taken as the ground level," the Tribunal finds that the ground level is on the lower side. In the circumstances, there would, in reality and in the Tribunal's finding, be no dwelling houses below ground level as full view of the buildings would be visible by residents across the river and on two sides except the Riverside road.

44. In addressing the issue of how much space the Appellant is allowed to develop ((ii) paragraph 41 above) and therefore, how many floors, the Tribunal proceeds from the position that the determining ground level is on the lower side. From that level, the Tribunal considers City Council building policies and zoning regulations and how much of a plot they allow to be developed in Zone 4. Appellant's architect, Mr. Paul Wareithi, admitted that the Appellant acknowledges that its plot number 209/4902 on which it proposes the development in question falls under Zone 4. Further, the witness for the Respondent and the Council official who testified as *amicus curiae* gave evidence and official documents, plans and maps showing that the City Council has, a building policy and building regulations, including City Council minutes, which limit housing developments in zone 4 to a maximum of four floors, taking into consideration a maximum 35% ground coverage, 0.75 plot ratio and an additional 10% plinth area which the Council administratively allows. In consideration of these development limitations, the Tribunal finds that with a plot whose size is 0.3035 hectare (or 3035 square metres of land), the Appellant can only develop 2276 square metres. Therefore, the number of floors the Appellant can construct must not exceed four (4) floors and must cover a maximum of 2504 square metres (including 10% allowed by administrative practice), beginning on the lower side. The Tribunal notes that the fact that the plinth area approved far exceeds permissible limits was not contested as explained by the Appellant who had admittedly received more deposits from potential buyers than the 21 or 26 house units would accommodate. No doubt starting the project before pertinent permits and licenses were obtained would put the proponent into expenses and difficulties but this is the risk they took and the consequences they inevitably have to endure.

45. The Tribunal's finding in paragraph 44, on (ii) above, leads to the conclusion that the City Council's approval of the Appellant's building plan was not lawful for the reason that the plan was approved with a plinth area of 4,370 square metres, which far exceeds 2504 square metres which should have been allowed, at a maximum, taking into consideration Council regulations and policies which limit ground coverage, plot ratio and number of floors in zone 4. Moreover, the Appellant failed to produce any credible evidence to show that it obtained approval of change of use of the plot from single dwelling to multi-storey residential houses, which the law requires prior to obtaining the Council's approval of building plans. Further, the Tribunal notes that it was irregular for the Appellant's building plan to be tabled before the Council by a councillor and not a member of the Town Planning Committee thus important technical considerations were glossed over and not properly dealt with. Plainly speaking, technical work should first be done by those charged with that responsibility and not by political officials as was the case in this matter.

46. Regarding the claim that NEMA's limitation of the Appellant's development contradicts the City Council's approval of the Appellant's building plan, the Tribunal finds that under EMCA and the regulations made thereunder, particularly Sections 58, 68 and 148 and Regulations 4 and 31 of the Environmental (Impact Assessment and Audit) Regulations of 2003, the requirements of EMCA on the Appellant, as well as the Respondent's authority supercede those of the City Council and any action the Council may have taken regarding the proposed development. The Tribunal notes that the Physical Planning Act requires an EIA, prior to obtaining a change of use approval. However, there was no evidence that the Appellant complied with the Physical Planning Act's requirement of EIA and for that reason too, the EIA process conducted by the Appellant forms a proper basis on which the Respondent could take action on the Appellant's proposed development as authorized by law. In any case, the Respondent's witness adduced evidence to the effect that the Respondent consulted with lead agencies, including the City Council, to ensure that a sound decision devoid of inconsistencies was made, prior to placing limitations on the Appellant's proposed development. For these reasons, the argument that there are regimes for approval of building plans in other legislation that EMCA should not interfere with is not tenable.

47.For the reasons explained, the Tribunal unanimously finds that the appeal fails and directs that:

1. The Appellant re-draws the building plan to conform to allowable ground coverage of not more than 35% of the plot, a plot ratio of 0.75 and a maximum of four floors, starting from the river side ground level before re-submitting the revised plan to Nairobi City Council for approval.

2. Once satisfied that 1 above is fulfilled, NEMA would be at liberty to issue an EIA licence to the Appellant in accordance with applicable zoning and building regulations and policies.

48. The Tribunal has been asked to award costs. The Tribunal acknowledges that this particular

appeal was a learning process for parties and orders each party to bear its own costs.

49. The Tribunal wishes to express its profound appreciation to the Director of City

Planning for designating Mr. John Barreh who professionally and competently informed the Tribunal on all points raised with him.

50. The Tribunal draws Appellant's attention to Section 130 of EMCA.

Dated at Nairobi this 2nd day of December 2005.

Signed by:

Donald Kaniaru - Chairman

Stanley Waudo - Member

Jane Dwasi - Member

Joseph K. Njihia - Member