REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

JR NO. 34 OF 2018

REPUBLIC.....APPLICANT

AND

NATIONAL ENVIRONMENTAL TRIBUNAL.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

ELIZABETH KATISYA.....1ST INTERESTED PARTY

CAROLINE KATISYA.....2ND INTERESTED PARTY

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....3RD INTERESTED PARTY

AND

COCONUT CAVE LTD.....1ST EXPARTE APPLICANT

MILIKI LIMITED.....2ND EXPARTE APPLICANT

JUDGMENT

(Judicial Review motion seeking orders inter alia to quash the decision of the National Environment Tribunal (NET); various grounds raised including that the party sued at the NET was non-existent; objection raised that this case is non-suited as the ex parte applicants ought to have filed an appeal; argument by the ex parte applicants that they could not have filed an appeal as they were not parties at the NET; Section 130 of EMCA on who can file an appeal against a decision of NET; the law providing that for any person aggrieved to file an appeal; right of appeal against the decision of NET thus not limited to the persons who were parties before the NET; whether or not the ex parte applicants could thus file judicial review; the right to file a judicial review proceeding not taken away by the right of appeal; leave however required before filing a judicial review motion meaning that the Court has discretion to assess whether or not a party ought to appeal or be allowed to commence judicial review proceedings; ex parte applicants thus properly before court; appeal before the NET being an appeal against issuance of an EIA licence; the person sued before the NET not being the person to whom the licence was issued and neither was she the owner of the suit property where the project was intended to be undertaken; evidence tendered that in fact no such entity existed; important for NET to ensure that the correct parties are before it before proceeding to hear an appeal; no valid proceedings were thus conducted at the NET and the proceedings and decision quashed)

1. Through an application dated 23 August 2018, the ex parte applicants applied for, and on 27 August 2018, obtained, leave to commence judicial review proceedings seeking the following orders :-

> *(i) Certiorari bringing into this Honourable Court the 1st respondent's orders issued on 8 June 2018 in the Nairobi National Environmental Tribunal Appeal No. 100 of 2012 for purposes of quashing and to quash the same; and*
>
> *(ii) Prohibition prohibiting the 1st respondent from hearing the 1st and 2nd interested parties or any other party other than Anthony*

2. The main motion was subsequently filed on 31 August 2018. No order of stay of the decision was made by the court, but on 17 September 2018, parties agreed that the status quo be maintained on the ground, meaning that there be no developments or demolitions on the suit property pending the determination of the substantive suit.

3. The facts as explained in the supporting affidavit of Josef Brunlehner, a director of the 1st ex parte applicant, is that the 1st ex parte applicant (Coconut Cave Limited), was in the year 2012 contracted by the 2nd ex parte applicant (Miliki Limited) to carry out a development project in the land parcel LR No. MN/I/7664 situated in Tudor Creek. The land is owned by the 2nd ex parte applicant. The project entailed the building of residential apartments of six floors. An application was made to the National Environment Management Authority (NEMA) for an EIA licence, which was issued on 2 August 2012, being EIA Licence No. 0011390. Aggrieved by the decision of NEMA, one Anthony John Dickson lodged an appeal to the National Environment Tribunal (NET) being Appeal No. 100 of 2012. It is mentioned that the said Anthony abandoned the appeal as he had sold off his house and relocated from the area and never appeared before the Tribunal.

4. On 26 January 2015, the 1st and 2nd interested parties (Elizabeth Katisya and Caroline Katisya), filed an application to substitute the appellant and amend the pleadings to include their names and be allowed to take over the appeal. It is claimed that the application for joinder/substitution was never heard or determined, but nevertheless, the 1st and 2nd interested parties proceeded to file an Amended Appeal on 17 February 2018, which included a substitution of the parties. It is the position of the ex parte applicants that such appeal was filed outside the 60 days period given to appeal and could thus not be determined.

5. The appeal was heard and judgment delivered on 8 June 2012. The judgment annexed is titled "Judgment of the Majority" and it is signed by the Chairman of the Tribunal (Mohamed Balala) and a Member (Christine Kipsang). The name of Dwasi Jane appears as "dissenting" but there is no signature by Ms. Dwasi in the judgment and no dissenting judgment is annexed. It is not clear to me if one was ever made.

6. The ex parte applicant has listed 16 grounds to support the motion, but I can compress them into 8, as follows :-

(i) That the appeal was against Carneval Apartment which is not a legal person, yet the property was owned and was being developed by the ex parte applicants who were not enjoined in the proceedings before the Tribunal.

(ii) That the matter was heard and determined without the requisite quorum.

(iii) That in the absence of a dissenting judgment, duly signed by the dissenting member, the impugned judgment is ultra vires for lack of jurisdiction.

(iv) That in absence of an order of joinder of the 1st and 2nd interested parties, and absence of leave to amend, there was no proper appeal capable of being prosecuted by the 1st and 2nd interested parties.

(v) That it was wrong for the Tribunal to hold in its judgment that the interested parties were made parties to the appeal "by conduct of the parties" which act or expression is unknown in law, hence the procedure adopted by the Tribunal was procedurally ultra vires.

(vi) That the 1st and 2nd interested parties filed their appeal out of the 60 day period given in the statute.

(vii) That the 1st and 2nd interested parties did not take part in the Environmental Impact Assessment Study and hence were not "aggrieved parties" and had no locus standi to lodge an appeal before the Tribunal.

(viii) That the Tribunal based its decision on irrelevant considerations, by considering as evidence, opinions of the interested parties in respect of possible harm to the environment, which matters required expert evidence.

7. The 1st respondent filed Grounds of Opposition to oppose the motion. The main ground in my view is the assertion that the ex parte applicants have not exhausted the existing remedies of appeal and have acted prematurely in bringing this suit.

8. The 2nd interested party filed a replying affidavit on her own behalf and on behalf of the 1st interested party. She affirmed that the appeal was originally lodged by Anthony John Dickinson who was their neighbour. She stated that before the appeal could be heard, Anthony sold his land and relocated. She deposed that Anthony had filed the appeal in a representative capacity, and upon his exit, it became important for the other appellants to be disclosed in the suit. She has deposed that they are beneficial owners of the Plot No. MN/I/4000 which is an adjacent property. She refuted the allegation that the ex parte applicants were denied an opportunity to be heard, and pointed out that Mr. Josef Brunlehner, testified on behalf of Carneval Apartments in his capacity as developer of the project, and was represented by counsel. She has further deposed that upon delivery of the judgment, an appeal was lodged by Carneval Village Apartments, being Mombasa ELC Appeal No. 12 of 2018. She avers that the ex parte applicants have failed to disclose the pendency of this appeal and are abusing the court process.

9. I invited counsel to file submissions, which they did, and I further requested counsel to address me on the issue of whether this suit is moot, given that the EIA Licence in question was issued on 2 August 2012 for a duration of two years. I have taken note of the submissions filed.

10. Before I go too far, I need to address the preliminary issue that was raised, that the ex parte applicants are wrongly before this court through a judicial review motion, and instead, the correct avenue ought to have been an appeal to this court. Ms. Kabole, learned counsel for

the 1st and 2nd interested parties, referred me to Section 130 (1) of the Environment Management and Coordination Act (EMCA) which provides for an appeal to this court from a decision of the Tribunal. She submitted that a judicial review court does not function as an appellate court. In reply, Mr. Bwire, learned counsel for the ex parte applicants submitted that the ex parte applicants were not parties to the appeal before the Tribunal and are not parties to Mombasa ELC Appeal No. 12 of 2018. It was also submitted that filing an appeal is not a bar to judicial review proceedings. None of the advocates provided authorities on this important issue.

11. Section 130 (1) of EMCA relates to appeals from decisions of the NET and the same provides as follows:-

> *Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.*

12. There would be no problem with the above interpretation if we are dealing with an appeal filed by the parties. The issue here is whether the ex parte applicants, despite not being parties before the Tribunal, ought to have filed an appeal, rather than a judicial review motion, as they have done here. The other related question is whether the sole remedy of a party aggrieved by a decision of NET is an appeal and whether there is bar to filing a judicial review motion.

13. Let me first deal with the question of who may file an appeal to the ELC from a decision of the NET. It will be seen that Section 130 gives the right to appeal to "any person aggrieved." In my view, the right to appeal is thus not restricted to the parties that were before the Tribunal. I already mentioned that none of counsel on record provided me with any authority, but in conducting research over this issue, I came across a decision in the case of *Kiserian Isinya Pipeline Road Resident Association (KIPRRA) & 6 Others vs Jamii Bora Charitable Trust & Another, Nairobi High Court Civil Appeal No. 307 of 2006 (2007) eKLR*. In that case, NEMA had denied the respondents an EIA licence to construct some two thousand or so low cost housing units. The respondent appealed this decision to the NET. The NET overturned the decision of NEMA and ordered NEMA to issue the EIA licence. Within the hearing of the matter before the Tribunal, the Tribunal did allow some Associations, who were neither the appellants nor the respondents at the Tribunal, to participate as "interveners." Some of the Associations introduced as "interveners" were aggrieved by the decision of the Tribunal and filed an appeal to the High Court. An objection was raised that the appeal is incompetent and should be struck out inter alia on the ground that none of the appellants were "parties" to the proceedings before the Tribunal. It was argued that they were only "interveners", or "interested parties", and had no capacity to appeal the decision of the Tribunal. Visram J, who heard the objection, held as follows :-

> *Clearly, NEMA and the Tribunal are guided by different considerations and procedures in determining issues before them. They may hear any party who has a complaint or an interest in the matter before them as "intervenors" or "Interested Parties" in order to arrive at a just resolution of the environmental issues before them. That does not give such a complainant or an interested party the locus standi to file an Appeal against the decision of the Tribunal. That decision belongs to the "parties" to the proceedings, and only those parties, in this case the Respondents, and NEMA, the right of Appeal to this Court. If any of the complainants, or intervenors, or interested parties, call them whatever you wish, are aggrieved by any decision of the Lower Tribunal, they have every right to file proceedings in the High Court to seek whatever redress they wish, against the offending party. If, indeed, every "complainant" before the Tribunal conferred upon himself or herself "the right of Appeal" to this Court, from a decision of the Lower Tribunal, this would lead to an unwieldy situation, resulting in the filing of numerous Appeals, some by persons without legal capacity. That would further result in the High Court sitting as an Appellate Court, making decisions on important issues based on legal submissions only, as is the case with hearing Appeals, instead of hearing witnesses in a trial.*

14. For the above and other reasons, the appeal was struck out.

15. The above decision is not binding on me but is only of persuasive value. With utmost respect, I disagree with the findings. My own view of the matter is that the wording given in Section 130 of EMCA, that is, "any person aggrieved", is wide enough to accommodate persons who were not parties before the Tribunal to file an appeal if they are aggrieved by the decision of the Tribunal. If that were not the case, then Parliament would have been careful enough to have the text of Section 130 of EMCA drafted in a way that an appeal would only lie to the persons who were parties at the Tribunal.

16. Section 130 above, though not quite similar, is close in drafting to Rule 75 of the Court of Appeal Rules, which provides as follows:-

> *Notice of appeal*
>
> *(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.*

17. It will be seen that Rule 75 (1) above refers to "any person" who desires to appeal and does not state that the right to appeal is limited to those who were parties. This provision was interrogated in the case of *Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 287 of 2016 (ruling of 19 October 2017) (2017)eKLR*. In that case, the appellant was not a party before the High Court but filed an appeal to the Court of Appeal against the High Court's judgment. A motion was filed to strike out its notice of appeal. The court addressed its mind to Rule 75 (1) and held that it creates no *doubt "that a person, association, body corporate or an unincorporated body, have the locus standi, not only to institute original proceedings but also appellate proceedings provided that such a party is aggrieved by the decision intended to be challenged."*

18. If under Rule 75 (1) of the Court of Appeal Rules, a person who was not party to the original proceedings is given liberty to appeal, I do not see how it can be argued, given the drafting of Section 130 of EMCA, that the right to appeal is limited only to the parties who were before the Tribunal. I think so long as a person can demonstrate that he is aggrieved by the said decision, and demonstrates nexus between himself and the decision, then he/she ought to be allowed to appeal.

19. I am not therefore persuaded by the argument of counsel for the ex parte applicants that his clients could not appeal the decision of NET.

Being directly affected by the decision, they could have, and they had the right to file an appeal to the Environment and Land Court, to have the decision set aside.

20. But was the right to file judicial review proceedings precluded? I do not think so. The right to file judicial review proceedings was also a right vested upon the ex parte applicants, if they were aggrieved by the decision of NET. The right to appeal did not negate the right to file judicial review proceedings. It should however be remembered that judicial review proceedings are in the discretion of court, so that a court may decline leave to the filing of judicial review proceedings, and instead refer the litigant to the provided appellate mechanism, if satisfied that this would be the better avenue to take to address the grievance being raised. In the instance of this case, the Court (Olola J) thought it fit to grant leave to commence these proceedings. It means that the Court was satisfied that it is appropriate for the ex parte applicants to file the proceedings, and since the mechanism of judicial review was not precluded by law, I cannot fault the ex parte applicants for coming to court seeking judicial review remedies.

21. For the above reasons, I do find that the judicial review proceeding is properly before court and the fact that there was a right of appeal did not take away the right of the ex parte applicants to seek the discretionary remedies under judicial review. I will thus proceed to the merits of the case.

22. Various issues have been raised in this appeal but I opt to straight away interrogate the question whether the appeal was filed against the correct party. If I find in the negative, then the entire proceedings and the decision will automatically need to fall by the wayside for there would be a violation of the right to be heard.

23. The impugned EIA licence was issued on 2 August 2012 to Coconut Cave Limited. The licence is in relation to a proposed construction and operation of Carneval Village Apartments, a five storeyed residential block, within the Plot No. MN/I/7664 (the suit property). There is an annexed search, to the affidavit of Mr. Brunlehner, which shows that the suit property is owned by Miliki Limited. The appeal before the Tribunal was lodged against Carneval Village Apartments, which is now said not to exist as a legal entity and could not be sued.

24. It is the argument of the ex parte applicants that the proceedings were thus a nullity. I do not see how the respondents and the interested party can surmount this contention. Indeed, all they have said is that the right to be heard was not violated because Mr. Josef Brunlehner testified on behalf of the respondent before the Tribunal. There is a great distinction between a party and a witness, and I do not see how the fact that Josef Brunlehner testified on behalf of a non-existent entity called Carneval Village Apartments, can be used to infer that Coconut Cave Limited and Miliki Limited were parties before the Tribunal. If the interested parties, or indeed any person aggrieved by the grant of the subject EIA licence had an issue to raise on it, then such person needed to sue the holder of that licence, and maybe the owner of the land where the project is being undertaken. In the instance herein, neither the holder of the EIA licence, nor the owner of the land where the project was going to take place were sued. Instead, a stranger, Carneval Village Apartments, was the entity that was sued. Carneval Village Apartments neither held the EIA licence in issue nor title to the land. I am at a loss as to how proceedings were allowed to be conducted against an entity bearing the name Carneval Village Apartments. There is no evidence presented by the respondents or interested parties to challenge the claim that the entity sued is in fact non-existent, and I have no reason to doubt the averments of the ex parte applicants that no such entity exists. The result is that the entire proceedings before the Tribunal were a non-starter. It was incumbent upon the Tribunal, to undertake a basic procedural function, that of confirming that it had the correct parties before it, before proceeding with the appeal. It is apparent that the Tribunal did not do so. Given that position, I have no hesitation to find that the entire proceedings before the Tribunal were null and void for having been against a non-existent party, or being against a party who did not hold the EIA licence that was in question in the appeal. For this reason alone, the entire proceedings of the Tribunal and its decision rendered on 8 June 2018 must be quashed and the same are hereby quashed.

25. Having quashed the proceedings and judgment, it is not really necessary for me to address the many other points that have been raised in this appeal, important as they may be. I believe the correct opportunity to canvass them will arise in the course of time. The only issue that I need to address is the EIA licence and whether it is still alive.

26. The EIA licence was issued on 2 August 2012. The licence was to subsist for a period of two years. It is now 9 years ago since that licence was issued. My opinion is that the said EIA licence is now no longer valid. For it to be valid, an extension of the licence must be granted by NEMA, and this has not happened. But even then, giving an extension after close to 9 years would not be prudent as issues relating to the environment are under constant mutation. What the issues were in the year 2012, when the EIA licence was issued may not be the issues at this point in time. Thus, if the ex parte applicants, or other persons, wish to undertake the developments which were the subject of the EIA licence of 2 August 2012, or commence any other project, then they need to apply for a new EIA licence, so that an assessment, having in mind the current position regarding the environment, can be considered. So that there is no doubt, I hold that the EIA licence herein has been overtaken by effluxion of time and cannot be used to undertake any development.

27. The last thing that I need to address myself is on costs. I would readily have awarded costs to the ex parte applicants but their conduct militates against me making any award of costs in their favour. Josef Brunlehner, who is the director of the ex parte applicants, did testify at the Tribunal, and while there, his evidence was that he is a Director of Carneval Village Apartments. If he knew that no such entity exists, he had a duty to say so, rather than first wait for a decision, and seek to quash it, on the same reason that no such entity exists. He must also have been the person who filed, on behalf of Carneval Village Apartments, an entity that he now affirms never existed, the appeal Mombasa ELCA No.12 of 2018. He had a duty of disclosure throughout the Tribunal proceedings which he did not discharge. Such conduct cannot be applauded and for that reason, I decline to award costs to the ex parte applicants. Instead, I order each party to bear his/her own costs.

28. Judgment accordingly.

DATED AND DELIVERED THIS 17TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA