



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 478 OF 2008

GEMINI PROPERTIES LIMITED..... APPELLANT

VERSUS

NEW MUTHAIGA RESIDENTS ASSOCIATION..... RESPONDENT

RULING ON JURISDICTION

This appeal arises from the ruling of the Chairman and members of the National Environment Tribunal (NET) (Mr Donald Kaniaru, Ms Jane Dwasi, Mr Stanley Waudu, Mr Joseph Njihia and Mr Tom Ojienda delivered on 15th August 2008 in (NET) appeal No. NET/24/2007.

The appeal to the National Environmental Tribunal by New Muthaiga Residents Association followed the Director General NEMA's approval and licensing of the 2nd respondent (Gemini Properties Ltd) conversion of plot No. LR 209/9295 in New Muthaiga Estate in Nairobi from residential to commercial centre by construction thereon of a shopping complex. Among the grounds raised for opposing the approval and licensing of change of user are:

- i. The area is an exclusive residential area and is inappropriate to have a commercial centre in its midst;
- ii. The proposed construction would increase noise pollution in a generally quiet and serene area;
- iii. The proposed construction would increase air pollution due to dust emanating from construction works and vehicular traffic during and after construction;
- iv. If not properly managed, waste water generated from the proposed facility would pollute water used by residents of New Muthaiga Estate for domestic purposes.

x.....the 1st respondent allowed the erection of four cellular phone masts in one concentrated area on the plot in question, which constitutes a health hazard for residents and school children due to radioactive emission.

From the above particulars or grounds of appeal, it is clear that the claim herein relates to environment and the use of land.

That being the case, it is my humble view that this court (High court) is divested of jurisdiction to hear and determine such claims/appeals.

The jurisdiction thereof is vested in the Environment and Land Court, as established under Section 4 of the Environment and Land Court Act, 2011 being a Superior Court of record with the status of the High

Court.

The jurisdiction of that court is contained in Section 13(1) of the Act, which confers both original and appellate jurisdiction on the court to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of the Act and any other law applicable in Kenya relating to environment and land.

Section 2 thereof is clear that in exercise of its jurisdiction as espoused in Article 162(2) (b) of the Constitution, the court shall have power to hear and determine disputes relating to:

- a. Environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuation, mining, minerals and other natural resources;
- b. Any other dispute relating to environment and land.

The issue of change of user and the alleged pollution is a purely land use planning and environmental issue.

Consequently, albeit this appeal was lodged in 2008 before the effective date and before the establishment of the Environment and Land Court, this court could only proceed to hear and determine this appeal in the transitional period pursuant to Part 5 Section 22 of the transitional and consequential provisions of the Constitution on administration of justice, pending establishment of the corresponding court.

That transitional period is also recognized under Section 30 of the Environment and Land Court Act, 2011.

However, the Environment and Land Court is now fully established and operationalised with the appointment of competent judges to preside over the court. That being the case, and with Article 165 (5) (b) of the Constitution expressly ousting the jurisdiction of the High Court from hearing and determining disputes that fall within the jurisdiction of the Supreme Court and the courts contemplated in Article 162(2) of the Constitution, this court holds that the transitional period is over and I must therefore down my tools, for without jurisdiction I can do no more than refer this matter to the appropriate court as contemplated in Section 30(1)(2) of the Environment and Land Court for further hearing and determination.

I therefore place this file (appeal) before the Environment and Land Court Presiding Judge for further directions as to its hearing and disposal .

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 5th day of October 2015.

R.E. ABURILI

JUDGE