



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 465 of 2012

ELIZABETH NJERI HINGA.....PETITIONER

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KIBERA.....4TH RESPONDENT

JUDGMENT

1. The petitioner in this matter is an administrator of the Estate of the Bernard Njenga Hinga (Deceased) who is the registered owner of LR No. 11478 (“the subject property”) which is situated at Mirema Drive, Kasarani within Nairobi. She is the subject of two criminal cases arising from her alleged failure to carry out quarrying activity on the subject property without an Environmental Impact Assessment (“EIA”) as required by **section 58** of the *Environmental Management and Co-ordination Act, Act No. 8 of 1999* (“EMCA”).
2. The gravamen of the petition dated 11th October 2012 is that she faces two trials arising from the same facts. As a result she alleges that she will not receive a fair trial protected by **Article 50** of the Constitution. She alleges that subjecting her to two parallel trials amounts to an abuse of prosecutorial power by the respondents.
3. In *Kibera Criminal Case 1907/2012*, she is charged with an offence under **Section 58** of *EMCA* in which it is alleged that on 11th January 2011 she failed to submit a project report on quarrying activities undertaken on LR No. 11478, Mirema Drive Kasarani which she owns. The second count relates to failure, neglect or refusal to comply with an environmental restoration order issued by NEMA directing her to stop quarrying activities on LR No. 11478 and immediately undertake an EIA contrary to **section 143(a)** of *EMCA*.
4. In the second case, *Kibera Criminal Case 4429/2012*, she is charged with the same offences under *EMCA*, that is the offence arising out of her failure to submit a project EIA report contrary to the provisions of the Act and in a second count failing to comply with the environmental restoration order.
5. When I asked Mr Gitonga, counsel for the National Environmental Management Agency (“NEMA”), to explain why two cases were instituted against the petitioner, he submitted that although the first count was common in both cases, the second count in the latter case, was in respect of failure to stop quarrying activities despite an restoration order and was a continuing offence hence it was necessary to institute the

second case separately as the petitioner continued to disobey the restoration order.

6. I have considered the provisions of **sections 58 and 143(a)** of *EMCA*, and I find and hold that the offences contained therein are not aimed at continuous conduct but are aimed at a specific act of non-compliance with the provisions of the Act. In the circumstances it is not necessary to charge the petitioner in the two separate cases.

7. Although there are other cases concerning the subject property and other third parties, I think that this case is to be determined on its own merits as it solely concerns the power of NEMA to enforce its statutory mandate. It is for this reason that I declined to permit the residents of Mirema Drive to join these proceedings on 8th March 2013. NEMA is entitled to enforce the provisions of EMCA and the facts in the petition do not disclose any other basis for the Court to interfere with the prosecution except as I have found above.

8. The order of relief that is necessary to ameliorate the petitioner's grievance is therefore as follows;

(i) The charge and proceedings in *Kibera Criminal Case 1907 of 2012* be and are hereby quashed.

(ii) There shall be no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 5th day of April 2013

D.S. MAJANJA

JUDGE

Mr Okindo instructed by Rumba Kinuthia and Company Advocates for the petitioner.

Mr Gitonga, Advocate instructed by the 1st respondent.

Mr Kamau, Litigation Counsel, instructed by the State Law Office for the 3rd and 4th respondent.