



REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO. 21 OF 2019

PARKWOOD INVESTMENT LIMITED.....1ST APPELLANT

DERBY HOLDINGS LIMITED.....2ND APPELLANT

=VERSUS=

NATIONAL ENVIRONMENT MANATEMENT AUTHORITY....1ST RESPNDENT

MAJESTIC LIMITED.....2ND RESPONDENT

FINESSES HELTH & BEAUTY CLINIC.....3RD RESPONDENT

EASTWOOD ESTATES LIMITED.....4TH RESPONDENT

KUASHIK L. SHAH.....5TH RESPONDENT

KEVAL SHAH.....6TH RESPONDENT

BHARAT LAKHANI.....7TH RESPONDENT

JOSEPH TANK.....8TH RESPONDENT

RULING

1. This is an appeal from the ruling and orders of the National Environment Tribunal dated 8th March 2019 in tribunal case No. 002 of 2019. The tribunal dismissed an appeal which the Appellants had challenged the 1st Respondents grant of licence No. NEMA/EIA/PSL/6998 to the 2nd respondent in the ground that the appeal filed on 23rd January 2019 was filed out of the sixty (60) day period stipulated under Section 129(1) of Environmental Management & Co-ordination Act.

2. The appellants have also filed a notice of motion dated 4th April 2019 under Section 3 and 130 of the Environmental Management & Co-ordination Act seeking orders that:-

a. Spent.

b. Spent

c. Pending the hearing and determination of this appeal, an order be issued directing the 2nd respondent to stop all construction activities on LR No. 1870/III/150, Matundu Lane, Nairobi.

d. Costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (i) to (viii).

4. The application is supported by the affidavit of Kiran Kaur a manager of the 1st and 2nd Appellant sworn on the 4th April 2019 and a supplementary affidavit sworn on 23rd July 2019.

5. The application is opposed there is a replying affidavit sworn by Njoki Mukiri the county director of environment, Nairobi County and employed by the 1st respondent, sworn on the 4th July 2019. There is also a replying affidavit sworn by Wilfred Murigi, a NEMA registered expert on Environmental Impact Assessment and a consultant of the 2nd respondent in the project, sworn on the 20th June 2019. There are also grounds of opposition filed by the 2nd respondent dated 18th June 2019.

6. On the 25th June 2019, the court directed that the notice of motion be canvassed by way of written submissions.

The Appellant's submissions

7. The submissions are dated 23rd July 2019. They submitted that in dismissing the appellant's appeal the tribunal failed to appreciate that the appellants became aware of the licence issued to the 2nd respondent when the 2nd respondent started felling trees at the suit premises in mid January 2019, and then filed the appeal immediately. That the grounds of appeal were that the 1st respondent issued an Environment Impact Assessment Licence to the 2nd respondent without public participation. The tribunal ought to have interrogated whether the appellants participated in the process leading to the issuance of the Environment Impact Assessment Licence to the 2nd respondent. That would have entailed a determination as to whether there was public participation.

8. This court has jurisdiction to issue the orders sought, placing reliance on Articles 42 and 70 of the Constitution, Section 3 (3) of Environmental Management & Co-ordination Act and Section 13(7) of the ELC Act. This application is based on the appellant's right to a clean and healthy environment. The Appellants seek to stop the construction pending the hearing and determination of the appeal. They have put forward the cases of **Douglas Onyancha Omboga & 32 Others vs Joseph Karanja Wamugi & 4 others [2019] eKLR; Joseph Leboo & 2 others vs Director Kenya Forest Service & Another [2013] eKLR.**

9. Under Article 70(3) of the Constitution, an applicant does not have to demonstrate that he/she has incurred loss or suffered injury. The 1st respondent issued an Improvement Order to the 2nd respondent directing it to stop the activities on the suit property and to organize a meeting with the project affected persons to deliberate on the issues of concern and submit a report to NEMA. The said order has never been lifted yet the 2nd respondent has not complied.

The 1st Respondent's submissions

10. The 1st respondent's submissions are dated 14th July 2019. They support the 2nd respondent's submissions. It has relied on the cases of **Hon. P. A. Nyongo & 2 Others vs the Minister for Finance & Another, Civil App No. Nairobi 237 of 2007; Raymond M. Omboga vs Austine Pyarn Maranga Kisu HCCA No. 15 of 2010; Muhamed Yajub & Another vs Mrs Baidur Civ App. No. 285 of 1999; Machira ta Machira & Co. Advocates vs East African Standard [2002] KLR 63.**

The 2nd Respondent's submissions

1. The tribunal dismissed the appeal for being statute barred by Environmental Management & Co-ordination Act. The tribunal did not decide on the grounds raised by the Appellants on public participation but merely dismissed an appeal on a preliminary basis hence the grounds of appeal are misconceived and incompetent. They have relied on the case of Abraham **Lenauila Lenkeu vs Charles Katekeyo Nkaru [2016] eKLR.** Courts have held that procedure is meant to advance the rules of natural justice not to circumvent them; so disregard without any reasonable justification amounts to abuse of court process.

12. Section 3 and 130 of the Environmental Management & Co-ordination Act does not relate to the issuance of injunctive orders or stay of proceedings as sought in the application. It has put forward the case of **Nakumatt Holdings Ltd vs NEMA [2005] KLR (E & L).** Any injunctive reliefs or stay pending appeal must be made within a substantive matter of the appeal and the substantive matter of the present appeal must emanate from the decision of the Tribunal to dismiss the appeal for being time barred. There is nothing arising out of the dismissal to be stayed or enforced by an injunction. The dismissal is negative order incapable of being stayed or restrained by an injunction. It prays that the notice of motion be dismissed with costs to the 2nd respondent.

13. I have considered the notice of motion, the affidavits, in support and the annexures. I have considered the replying affidavit and the annexures plus the grounds of opposition. I have considered the written submissions of counsel, the oral highlights and the authorities cited. The issues for determination are:-

i. Whether the appellants' application meets the threshold for grant of temporary injunctions.

ii. Who should bear costs?

14. At this juncture it is necessary to briefly examine the legal principles governing the application of this nature. In an application for injunction, the onus is on the application to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358. In the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] KLR 125,** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

15. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another 1990 KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

It is the applicant’s case that there was no public participation culminating into the issuance of the EIA Licence by the 1st respondent to the 2nd respondent.

16. In answer to this, Ms Njoki Mukiri the 1st respondent’s County Director of Environment, Nairobi County in paragraph 12 of the replying affidavit states:-

“That on 16th October 2018, the Westlands Association withdrew their objection citing the fact that they had met the 2nd respondent, and addressed their concerns. The said letter is annexed to the affidavit and marked “NEMA A5”.

Similarly paragraph 33 of the affidavit of Wilfred M. Murigi, a NEMA registered expert in charge of the 2nd respondent’s project stated:-

“That after the consultation forums and discussions on sustainable solutions the Westlands Association Ltd wrote to the 1st respondent withdrawing the objection after being satisfied that the issues raised in the objections were sufficiently addressed by the 2nd respondent (Annexed and marked NM‘8’ is a copy of the withdrawal of the objection).”

17. The above averments have not been controverted. It cannot be true for the appellants to claim there was no public participation. In the case of **Nakumatt Holdings vs NEMA [2005] 1KLR (E & L) J Mutungi** observed that:-

“My perusal of what happened is that the tribunal issued no orders or ruling...there are no orders issued by the Tribunal.....”

18. The appellants admit that no orders were issued by the tribunal. I find that they have failed to establish a prima facie case with a probability of success at the appeal. They have also not demonstrated that they will suffer irreparable loss which cannot be compensated by an award of damages.

19. In case where damages could be an adequate remedy an injunction should not be granted. In **Husbury’s Laws of England, 4th Edition Volume 24, paragraph 953**, it is stated:-

“On an application for injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve the property without waiting for the right to be finally established. This depends upon a variety of circumstances and it is impossible to lay down any ground rule on the subject by which the court ought in all cases to be regulated but in no case will the court grant an interlocutory injunction as of course.”

In the present case the applicant ought to have demonstrated that it deserves the orders sought.

20. The 2nd respondent did all it did culminating in the issuance of the Environment Impact Assessment Licence. The appeal not having been filed within sixty (60) days. I find that the balance of convenience tilts in favour of the 2nd respondent. The 2nd respondent will be greatly prejudiced if the construction is stopped.

21. The provisions for time limits under Section 129(1) of Environmental Management & Co-ordination Act serves to make the process of judicial adjudication fair, just, certain and even-handed. In the case of **Patrick Musumba vs National Land Commission & 4 Others Nbi HCCC Pet No. 6310 of 2014** the court relied on the Court of Appeal decision in **Republic vs NEMA Experte Sound Equipment Ltd, [2011] eKLR** where the court made it clear that: **“challenges to EIA study report and/or EIA Licences should be made to the National Environment Tribunal established under Section 125 of EMCA. The Tribunal should have been given the first opportunity and option to consider the matter. The Tribunal is the specialized body with the capacity to minutely scrutinize the EIA study report as well as any licences”.**

22. I have relied on the above case to show that the Appellants lost the opportunity to present their case before the Tribunal by filing the appeal late. I am by no means stating that the Appellants have no arguable appeal.

23. All in all I find no merit in this application and the same is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 24th day of October 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the for the Appellants

Mr. Onderi for Sakai Mosota for the 1st and 2nd Respondents

Kajuju - Court Assistant