



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC APPEAL NO.3 OF 2017

ABDUL HAMEED SHEIKH & ANOTHER (*Suing for an on*

***behalf of Riverside Gardens Residents Association*).....APPELANTS**

=VERSUS=

DIRECTOR GENERAL NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....RESPONDENTS

(Being an appeal from the Ruling and Orders of the Hon. Chairlady, Jane Dwasi and members of the NEMA Tribunal Andrew Bahati Mwamuye and Waithka Ngaruiya, delivered at Nairobi on the 13th day of December, 2016 in Tribunal NET No.178/2016)

JUDGEMENT

BACKGROUND

1. The Appellants are a residents association known as Riverside Gardens Residents Association which has preferred this appeal through one of its officials Adual Hameed Sheikh. I shall hereinafter refer the association as the Appellants. The first Respondent is the Director of General of National Environment Management Authority (NEMA) (first Respondent). The second Respondent is Globe Developers Limited (second Respondent).
2. The second Respondent is owner of L.R. No. 209/4904 and 209/4905/1 which were amalgamated to form an acreage of approximately 1.35 acres. The second Respondent proposed to commence a project on the amalgamated property comprising of 9 Blocks of apartments with one Duplex unit per floor with a total of 66 three and four bedroom apartment units. The second Respondent was issued with an Environmental Impact Assessment (EIA) Licence on 9th July, 2014.
3. The Appellants who were dissatisfied with the issuance of an Environmental Impact (EIA) licence by the 1st Respondent filed an appeal being NET Appeal 172 of 2016 against the first and second Respondents. The 2nd Respondent raised a preliminary objection against the appeal. The Preliminary objection by the second Respondent was upheld by the National Environment Tribunal (NET) vide ruling delivered on 10th May, 2016 wherein the appeal as well as application for leave to file appeal out of time was dismissed.
4. On 3rd June, 2016 the appellants filed a notice of motion under NET/178 of 2016 in which they sought leave to file an appeal out of time. The application was fully heard and in a ruling delivered by the NET on 13th December, 2016, the application was dismissed and the stop order which had been given stopping the project was lifted. This is what triggered the appeal herein where the appellants have raised twelve grounds of appeal.
5. The court directed that the appeal be disposed of by way of written submissions. The appellants filed their submissions on 18th October, 2017. The first respondent filed its submissions on 24th October 2017 whereas the second Respondent filed its submission on 21st November, 2017.

Grounds of Appeal

6. I have gone through the record of appeal which contains the proceedings relating to both the appeal in NET 172 OF 2016 and NET 178 of 2016. This being a first appeal to this court, the court is obliged to evaluate the evidence adduced before the Tribunal by way of affidavits as well as the submissions therein and arrive at its own conclusions. I have looked at the grounds of appeal some of which touch on NET 172 of

2016 which was decided upon and there was no appeal against the decision of the Tribunal delivered on 10th May, 2016.

7. The grounds raised by the appellant can be condensed into four grounds namely: -

(i) That the Tribunal erred in failing to find that the reason given for delay in filing the appeal was satisfactory.

(ii) That the Tribunal failed to take into account the substantive nature of the issues sought to be raised in the appeal in denying leave to file the appeal out of time.

(iii) That the Tribunal erred in unduly faulting the appellant for raising their concerns with other agencies in pursuing their case.

(iv) That the Tribunal erred in placing undue reliance on NET no. 172 of 2016 which had been dismissed thus prejudicing the Appellants chance of fair hearing in the application filed in NET 178 of 2016.

Appellants Submissions

8. The appellants submit that the Tribunal failed to apply the correct principles as regards extension of time. The Appellants cited the case of **Nicholas Kiptoo Arap Korir Salat Vs The Independent Electoral and Boundaries Commission & Others [2014] eKLR. And Fahim Yasim Yasin Twaha Vs Timamy Issa Abdalla & 2 Others [2015] eKLR**. The Appellants also relied on the case of **Hassan Nyanje Charo Vs Khatib Mwashetani & 5 Others [2014] eKLR**.

9. The Appellants also submitted that the issue before the Tribunal was a matter touching on the environment and that the court being a partner in promoting environmental governance ought to have granted leave to appeal out of time. In this regard the appellants relied on the decision of Justice Emukule in **Kiluwa Limited & Another Vs Commissioner of Lands & Others (2015) eKLR**.

First Respondent's Submissions

10. The first Respondent has submitted that the Appellants appeal is frivolous and is otherwise an abuse of the process of court. The first Respondent contends that the Appellants failed to demonstrate that they deserved leave to appeal out of time. Their application was properly dismissed and as such the application for leave to file appeal out of time is an abuse of the process of the court. The first Respondent relied on the case of **Henry Maina Gatete Vs Jane Njoki Ngugi & Another [2014] eKLR**.

Second Respondent's Submissions

11. The second Respondent submitted that the Tribunal had no jurisdiction to extend time for filing appeal in view of the provisions of Section 129 of the Environmental Management and Co-ordination Act Cap 387(EMCA) as read together with Rule 7. In this regard the 2nd Respondent relied on the case of **Charles Kamuran Vs Grace Chelagat Kipchoim & 2 others (2013) eKLR** and **Wavinya Ndeti Vs Independent Electoral & Boundaries Commission (IEBC) & 4 others [2014] eKLR**. The second Respondent, therefore, argues that there is no proper basis upon which the Appellants can argue that the Tribunal denied them leave to file appeal out of time.

12. The second Respondent argues that the Appellants appeal should be dismissed as the Tribunal considered the grounds raised for leave to extend time and found no merit in the same. The Appellants had time to prefer their appeal but they did not do so and, therefore the Tribunal properly exercised its discretion.

Analysis and issues for determination

13. I have carefully considered the appellants appeal as well as the submissions filed herein. The main issue for determination in this appeal is whether the Tribunal properly exercised its discretion in rejecting the Appellants application for leave to file an appeal out of time. The decision whether or not to extend time within which to do a particular act is a matter of discretion of the court or Tribunal. This discretion should, however, be exercised judicially. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat Vs Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR** stated the principles which a court should considered in the exercise of its discretion as follows: -

i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.

ii) The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

iii) As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;

iv) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

v) Whether there will be prejudice to be suffered by the respondents if the extension is granted;

vi) The application should have been brought without undue delay; and

vii) In certain cases, like election petitions, Public interest should be a consideration for extending time.

14. In the instant appeal, a reading of the record of appeal shows that the appellants main reasons for not appealing within time were that firstly there was a vacancy in the office of the Association which delayed the filing of the appeal. The Appellants argued that they could not file the appeal as they did not know who would have been the office holders. Secondly, the Appellants argued that there was delay in formal communication from the first Respondent on its decision to grant an Environmental Impact Assessment (EIA) Licence. The appellants argued that the communication came to them through electronic mail on 30th November, 2015 whereas the licence in issue had been given on 9th July, 2014.

15. The Appellants filed an appeal through NET 172 of 2016 on 11th March, 2016. This appeal which was filed 20 months after the act complained of had occurred was dismissed following a preliminary objection raised by the 2nd Respondent. The dismissal was on 10th May, 2016. The application for extension of time was filed on 3rd June, 2016 a period of about three weeks after the dismissal of the appeal on 10th May, 2016.

16. The Tribunal considered the length of time taken to file the appeal. The Tribunal also considered the reasons for the delay as given and found that they were not convincing. For instance whereas the Appellants claimed that they formally became aware of the impugned decision by the first appellant on 30th November 2015, there was evidence that the appellants knew of the decision by the first appellant much earlier as shown by the minutes of the appellants association held on 10th October 2014.

17. The appellant's counsel even conceded to this and went further to say that though the appellants were aware of the decision by the first respondent early enough, the appellants were trying to contact other agencies. This was not found to be a plausible reason for not preferring an appeal in time. The Tribunal also questioned why the appellants did not file an appeal within 60 days from 30th November 2015 when they alleged they first received official communication regarding the decision made on 9th July 2014.

18. The Tribunal also considered the fact that the appellants were not opposed to the project per se but rather the manner in which change of user was obtained and the height of the proposed building. The Tribunal observed that those were not issues which should be entertained by the Tribunal and rightly so because any issue pertaining to change of user is a matter under the relevant physical Planning Department under the County Government. This is also the position as regards zoning of areas. The complaints against the project on account of sewerage and water in the area was also not within the province of NET. In paragraph 35 of the supporting affidavit to the application dated 3rd June 2016, the appellants were categorical that they were not opposed to the project. They were only concerned about the zoning regulations which according to them allowed a maximum of four floors in the area.

19. There is evidence that the appellants made complaints to the Nairobi City County which tried to review its approval given on 18th August 2015. The second respondent moved to court under judicial review where the court quashed the city county's move to stop all operations on the suit property and prohibition from reviewing the approvals which it had given early on. The appellants were named as interested parties in these proceedings relating to judicial review orders.

20. The Tribunal applied all the guidelines set out in the Nicholas Salat Case. (Supra). The delay in failing to file the appeal was unreasonable. The reasons given for the delay were unsatisfactory. Considering that the appellants were not opposed to the project itself, there was no need for granting extension. In as much as I agree that environmental litigation are of public interest in nature, the circumstances surrounding each case ought to be considered based on its own peculiar circumstances.

CONCLUSION.

21. It is clear from the analysis above that the Tribunal exercised its jurisdiction in accordance with the set down principles for exercise of discretion. There is no way the Tribunal would have concluded its ruling of 13th December 2016 without reference to NET 172 of 2016. The reference by the Tribunal to other agencies to which the appellants turned to for assistance was made as a ground to show that the appellants devoted their energies elsewhere and forgot to file an appeal within the prescribed time. The appellants were therefore unfit for the exercise of discretion in their favour. I find that the Tribunal reached a correct finding. I find no merit in this appeal which is hereby dismissed with costs to the respondents.

Dated, Signed and delivered at Nairobi on this 28th day of June 2018.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Kariuki for appellant

M/s Maina for Mr Wandabwa for 2nd Respondent

Court Clerk: Hilda

E.O.OBAGA

JUDGE