



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 8 OF 2016

KENYA POWER & LIGHTING COMPANY.....APPELLANT

VERSUS

NJUMBI ROAD RESIDENTS ASSOCIATION.....RESPONDENT

(An Appeal from the Ruling of the National Environmental Tribunal

delivered on 1st March, 2013 by the Honourable Chair Donald Kaniaru and

Members in Tribunal Appeal Number 67 of 2011)

RULING

The Appellant filed the application dated 12/2/2016 seeking to have the court make an order allowing it to maintain the project power substation in a serviceable and usable state pending hearing and determination of its appeal. The National Environmental Tribunal (NET) in its decision given on 1/3/2013 cancelled the Environmental Impact Assessment licence that had been issued to the Appellant and directed the Appellant to relocate its electricity power substation elsewhere from Lavington along Chalbi Drive. Being aggrieved by NET's decision, the Appellant filed an appeal on 2/4/2013 at the Civil Appeals Division of the High Court which was subsequently transferred to Environment and Land Court on 19/11/2015.

The Appellant argues that as a result of NET's ruling, all works at the power project substation have continued to be held in abeyance thereby jeopardizing the donor funding from the World Bank which was financing the project. The Appellant is also apprehensive that future funding of its projects may also be jeopardized.

The Appellant argues that the continued delay in the admission, hearing and determination of this appeal exposes it to substantial costs accruing as a result of the un-decommissioned contractor and consultant contracts, the maintenance of its staff on site and the cost of safeguarding and maintaining the inactive expensive equipment at the substation construction site while the appeal is pending. The court notes that the Appellant has not taken steps to progress the appeal from 2/4/2013 when it lodged it in court.

The Appellant also argues that the appeal is of great importance and public interest since it is intended to supply electric power to the residents of Nairobi County and its environs. It argues that the prevailing status has led to the deterioration and damage to the expensive and delicate equipment at the site due to exposure to the elements of nature for a prolonged period of time before the commissioning of the substation.

The application is opposed by the Respondent who relied on its Grounds of Opposition. It urges that the orders sought by the Appellant are premature and misconceived as the appeal has not been admitted by

the court pursuant to Section 79B of the Civil Procedure Act read with Order 42 Rules 12 and 13 of the Civil Procedure Rules. According to the Respondent, the application amounts to arguing the appeal before it has been admitted by the court.

Both parties filed their Written Submissions which the court has carefully considered. Under section 79B of the Civil Procedure Act, a Judge is required to peruse the appeal and if he considers that there is no sufficient ground for interfering with the order appealed from he may reject the appeal summarily. Order 42 Rule 13 (2) allows objections to the jurisdiction to be raised before a Judge gives directions on the appeal. The Respondent objects that the appeal was filed more than 30 days after the date of the decision yet Section 130 of the Environmental Management and Coordination Act states that a person aggrieved by NET's decision may appeal within 30 days of the decision to the High Court. The decision was made on 1/3/2013 while the appeal was filed on 2/4/2013. The Appellant contends that 2/4/2013 was the last date for filing the appeal but that since 1/4/2013 was Easter Monday and not a working day it could not file the appeal.

The court has considered the rival arguments. The court notes that NET applied the precautionary principle regarding the risks that the development of the Appellant's sub-station posed to nearby residents. NET observed as follows: -

“We do not have to wait until another fire breaks out with actual or potential negative impacts on human health and/or the environment to take action to properly locate electricity power sub-stations. The Tribunal notes that as a public utility company, the 2nd Respondent has ample statutory avenues available to it for acquisition of land to safely and securely locate its power installations, including compulsory acquisition under the Land Act of 2012.”

The court is enjoined to balance the public interest in having the Appellant perform its function of distributing electricity to all parts of the country on the one hand, and the constitutional right of every person to a clean and healthy environment on the other hand. NET found that the Appellant's sub-station posed a risk to nearby residents and potential fire outbreaks.

The court is of the view that allowing the Appellant to maintain the subject power sub-station in a serviceable and usable state at the current site would amount to allowing the appeal before it has been admitted and heard. Maintenance denotes the care and work put into the equipment to keep it operational. This will entail repairing, replacing, servicing, inspecting and testing the equipment which inevitably will result in operating the equipment. The Appellant has not shown how it will deal with potential negative impacts on human health and environment that may result if it is allowed to carry out the routine maintenance and service of the equipment in the sub-station. The Appellant can move the equipment to another site for safekeeping where it can carry out the routine maintenance and service before the appeal is heard.

The court dismisses the application and directs the parties to set down the matter for directions on the appeal.

Dated and delivered at Nairobi this 27th day of September 2017.

K. BOR

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Ongicho for the Respondent

Mr. V. Owuor- Court Assistant