



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC APPEAL NO. 20 OF 2016**  
**[FORMERLY HCCA NO. 717 OF 2009]**

**JANE NGONYO MUHIA .....**  
**APPELLANT**

**VERSUS**

**1. DIRECTOR GENERAL, NATIONAL  
ENVIRONMENTAL MANAGEMENT AUTHORITY**

**2. A. ABDALLAH, CHAIRMAN & GEORGE MWANGI,  
SECRETARY DONHOLM PHASE 5 RESIDENTS ASSOCIATION .....**  
**RESPONDENTS**

**JUDGMENT**

**Background**

1. The appellant is registered as the leasehold proprietor of all that parcel of land known as **Nairobi/Block 82/6259** which is situated at Donholm Phase 5 within Nairobi City County (*hereinafter referred to as "the suit property"*). In the year 2008, the appellant wanted to develop the suit property. For this purpose, the appellant prepared building plans. From copies of the plans on record, the appellant intended to put up a three storey residential building. It is not clear from the material on record whether the said building plans were approved by the City Council of Nairobi. She commenced construction of the said building in March 2008. The appellant started construction before obtaining **Environmental Impact Assessment Licence ("EIA Licence")** from the **National Environmental Management Authority ("NEMA")**. As a result of this omission, NEMA stopped the construction works. At the time NEMA served the appellant with a stop order, the construction had reached the first floor.
2. From the evidence on record, the appellant stopped the construction and instructed an environmental impact assessment expert to prepare an **Environmental Impact Assessment Report ("EIA project report")** for submission to NEMA so that it could issue her with an EIA Licence. The report was prepared by one Donald Muigai Ng'iru and was submitted to NEMA on 14th August, 2008. According to the report, the project was said to involve the construction of a three storey flat comprising of 16 units of a single bedroom, sitting room, kitchen and a toilet and 4 units of single rooms with a kitchen and toilet. Upon reviewing the EIA project report, NEMA informed the appellant that the area where her project was situated was meant for the construction of single dwelling houses and not multi-dwelling houses.
3. The project was subsequently approved by NEMA on 17th November, 2008 subject to several

conditions. Among the conditions was that the appellant would obtain a change of user of the property from the City Council of Nairobi. The appellant accepted the conditions which were imposed by NEMA in a letter which was received by NEMA on 21st November, 2008. The appellant also applied to the City Council of Nairobi for change of user of the property from single dwelling to multi-dwelling and the council granted its approval in December 2008. On 2nd December, 2008, NEMA issued the appellant with EIA Licence. According to the said licence, the appellant was authorized to carry out the construction of 16 housing units. Upon receipt of this licence, the appellant resumed construction works.

4. On 21st April, 2009, the 2nd respondent lodged an appeal at the National Environmental Tribunal (“NET”) against the decision of NEMA granting the appellant an EIA Licence. The grounds upon which the appeal was brought were set out in a handwritten notice of appeal dated 19/4/2009 and lodged at the NET on 21/4/2009 as follows:

***“This development was stopped by NEMA last December (2008) until the developer got change of user from NCC and residents objections addressed. When change of user was obtained NEMA issued a licence to continue without consulting us. Our grievances not addressed or ignored.”***

5. The reliefs sought from NET by the appellant were set out in paragraph 6 of the notice of appeal as follows:

***“1. NEMA licence to be cancelled.***

***2. Stop the development.***

***3. Demolish the building forthwith or convert it to a bungalow/maisonette of one storey as per our complaints letter.”***

6. In the appeal, the 2<sup>nd</sup> respondent herein was the appellant, NEMA was the 1<sup>st</sup> respondent and the appellant herein was the 2<sup>nd</sup> respondent.

7. The 2<sup>nd</sup> respondent herein filed supplementary grounds of appeal at the NET dated 26<sup>th</sup> June 2009. The supplementary grounds of appeal contained the following further grounds:

*i. That the members of the 2<sup>nd</sup> respondent were not consulted before EIA Licence was issued to the appellant.*

*ii. That the appellant had obtained the change of user irregularly and the conditions under which the same was issued was not being complied with by the appellant.*

*iii. That the building the appellant had proposed to put up was not in conformity with Donholm Phase V estate development plan as it exceeded one storey.*

*iv. That the proposed building was likely to interfere with the sewer reticulation system.*

*v. That proposed building was unlikely to conform with Water Quality and Solid Waste Management Regulation 2006.*

*vi. That the proposed building was being constructed hurriedly in a manner that was likely to compromise its stability.*

*vii. That the proposed building was blocking sunlight from reaching some houses.*

*viii. That the proposed building was being constructed at night.*

- ix. *That the proposed building was likely to lead to overcrowding and insecurity.*
- x. *That the appellant had not provided parking for the tenants who would occupy the building.*
- xi. *That the increase in population would lead to traffic pile up.*
- xii. *That the proposed building did not have architectural design similar to those of the houses in the neighborhood and would cause the said houses to lose value as a result of overcrowding.*
- xiii. *That the proposed building could not be accommodated on the parcel of land on which it was being built.*

8. The appellant filed a statutory declaration sworn on 23<sup>rd</sup> July 2009 in reply to the 2<sup>nd</sup> respondent's grounds of appeal. In her response the appellant stated that:

- i. *The appeal was mischievous and constituted an abuse of the process of NET.*
- ii. *The appeal was intended to frustrate her development of the suit property.*
- iii. *The appeal did not raise environmental issues that warranted NET's intervention.*
- iv. *The construction work was being undertaken by professionals and as such the safety concerns that were raised by the 2<sup>nd</sup> respondent had no basis.*
- v. *The construction was not being undertaken at night.*
- vi. *The appeal was brought in bad faith since there were similar and even more taller and larger buildings in the neighbourhood.*
- vii. *The 2<sup>nd</sup> respondent had refused to participate in the process of public consultations which were undertaken before the grant of change of user by the City Council of Nairobi and the issuance of EIA License by NEMA.*
- viii. *The appellant had complied with all the conditions which had been imposed by NEMA and City Council of Nairobi.*
- ix. *The 2<sup>nd</sup> respondent has not adduced any evidence that the neighbouring multiple high-rise apartments in the area where the appellant's building was being put up had brought the problems and challenges the 2<sup>nd</sup> respondent had raised against the appellant's project.*
- x. *The number of the occupants of the building the appellant was putting up was insignificant having regard to the level of population already in the estate.*
- xi. *There was no evidence that the tenants in the building would all have cars and in any event off-street/street-side parking was already a common feature in the estate.*

9. At the hearing at the NET several witnesses gave evidence. The 2<sup>nd</sup> respondent called two witnesses in support of its appeal, the 1<sup>st</sup> respondent called one witness and the appellant gave evidence and called two witnesses. After the close of evidence, the advocates who appeared for the parties made closing submissions.

10. NET thereafter considered the appeal, and delivered a ruling on 7<sup>th</sup> December, 2009. In its ruling, NET ordered the appellant to demolish the two topmost of the five floors of the building she had put up, which NET held had been constructed without NEMA approval.

11. NET directed further that the building should not be occupied until the demolition ordered had been undertaken. NET thereafter heard the parties on the issue of costs and delivered a ruling on 27th January, 2010 condemning the appellant to pay the costs of the appeal in the sum of KShs.352,132/=. In its ruling on costs, the NET made a finding that the appellant had acted in a vexatious manner and that her conduct in pursuing the appeal was unreasonable because she had defied the order that had been given to her by NET to stop construction and had constructed the building to completion while the appeal was pending before NET.

## **Appeal**

12. It is against those two rulings of NET that the appellant has brought the present appeal. The appellant has challenged those decisions on 16 grounds which are set out in her Amended Memorandum of Appeal dated 11th May 2010. The appellant has put forth the following grounds of appeal:

- i. The tribunal had erred in law and fact in failing to find that the appellant had obtained EIA Licence irrespective of the stage at which the construction had reached.*
- ii. The tribunal erred in law and fact in not finding that the appellant's building plans had been approved.*
- iii. The tribunal erred in law and fact in finding that two floors in the appellant's building were constructed without NEMA approval and in contravention of the law.*
- iv. The tribunal erred in law and fact in failing to take into account the fact that there were other buildings in the neighbourhood which were similar to the one which was being put up by the appellant.*
- v. The tribunal erred in law and fact in failing to find that its officers should have inspected the building during the construction, an act which would have saved the appellant the expense of putting up the two floors in contention.*
- vi. The tribunal erred in law and fact in failing to find that the appellant had acquired the EIA Licence lawfully.*
- vii. The tribunal erred in law and fact in failing to find that there was no evidence of service of the tribunal's stop order upon the appellant.*
- viii. The tribunal erred in law and fact in failing to take judicial notice of the temporary orders which had been issued in ELC Case No. 285 of 2009 between the appellant and the 1<sup>st</sup> respondent.*
- ix. The tribunal erred in law and fact in its interpretation of the relevant provisions of Management and Co-ordination Act, 1999 (EMCA) and the Environment Impact Assessment and Audit Regulations 2003.*
- x. The tribunal erred in law and fact in ordering the appellant to demolish two floors of her building without due regard to the fact that the same was already occupied by tenants who were not given a hearing.*
- xi. The tribunal erred in law and fact by making an incomplete ruling which omitted the issue of costs.*
- xii. The tribunal erred in law and fact in its finding that the appellant had acted vexatiously and her conduct in pursuing the appeal was unreasonable.*
- xiii. The tribunal erred in law and fact in its finding that the appellant had defied the tribunal's stop order.*

xiv. *The tribunal erred in law and fact in condemning the appellant to pay costs amounting to Kshs.352,132/- to the 2nd respondent.*

xv. *The tribunal erred in law and fact in allowing some items of costs without production of supporting receipts.*

xvi. *The tribunal erred in law and fact in dismissing the appellant's appeal.*

13. The appeal was argued by way of written submissions. The appellant filed submissions on 1st October 2015, the 1st respondent on 13th November 2015 and the 2nd respondent on 21st October 2015.

14. We have perused the proceedings of NET and the rulings which are the subject of this appeal. We have also considered the appellant's grounds of appeal and the parties' respective submissions. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before NET. See, the case of VERANI T/A KISUMU BEACH RESORT V PHOENIX OF EAST AFRICA ASSURANCE CO LTD, [2004] 2 KLR 269 and SELLE V ASSOCIATED MOTOR BOAT CO LTD, [1968] E.A 123 on the duty of the first appellate court.

15. An appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See PETER V SUNDAY POST LTD, [1958] E.A 424 and MAKUBE V NYAMURO, [1983] KLR 403.

16. From the grounds of appeal which were lodged at the NET by the 2nd respondent and the appellant's and the 1st respondent's response to them, we are of the view that the only issues which arose for determination before NET were three: 1] *whether the appellant complied with the terms of the EIA Licence issued by the 1st respondent; 2] whether the 2nd respondent was entitled to the reliefs it had sought; and 3] what was the appropriate order on costs?*

17. It was not contested that the appellant had commenced construction of the building in question before obtaining EIA Licence and that as at the time the construction was stopped by the 1st respondent for want of the said licence, the building had reached the 1st floor level. There is also no dispute that after the construction was stopped, the appellant applied for and obtained EIA Licence from the 1st respondent. It is this licence that was challenged by the 2nd respondent at the NET on the grounds which we have referred to earlier in this judgment. What the NET was to determine was whether the grounds which had been put forth were sufficient to nullify the EIA Licence that had been issued to the appellant, and if so, whether the 2nd respondent had proved or established those grounds.

18. From the decision of NET, we are of the view that NET considered and determined the 2nd respondent's appeal on grounds and issues which were not raised in the 2nd respondent's grounds and supplementary grounds of appeal. NET also granted a relief which was not sought by the 2nd respondent. We are alive to the purposes which are served by EIA licensing process provided for under the ***Environmental Management and Co-ordination Act, 1999 (EMCA)*** and the regulations made thereunder. It is to assess the possible substantial impacts of a proposed project on the environment. In the case of TIM BUSIENEI & 2 OTHERS V DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY & ANOTHER, TRIBUNAL CASE NO. 10 OF 2006 [2007] eKLR, NET stated as follows:

***"The purpose of an EIA licensing process prescribed by Part VI of the Environmental Management and Co-ordination Act(EMCA) of 1999 and the regulations made thereunder (Legal Notice 101 of 2003) is to assess the likely significant impact of a proposed development project on the environment. In deciding on the nature of likely impacts, account must be taken of the status of the environment within which the proposed project will be undertaken as well as the negative impacts that the proposed project are likely to have on the environment. In that regard, existing air quality, traffic, noise, aesthetic and other features of the environment in the***

***area in which the development is proposed to be carried out, as well as the likely impacts of the project on the environment media are relevant considerations. The status of the environment is not determined by the fact alone that an area is designated as a residential area, a high class residential area or even as an area of low population density. The Tribunal is not sitting on appeal from a decision of the Physical Planning Authority in Uasin Gishu, or Eldoret Municipal Council. Therefore, if a designation of Elgon View exists, that designation can only be an indicative of the nature of the environmental considerations that might arise. What is critical is to ascertain the actual status of the environment in the locality and the likely impacts of the development in question on the environment.”***

19. We fully agree with the foregoing statement. As we have stated earlier, the 2nd respondent had raised in its appeal issues such as lack of consultation, irregularity in the change of user approval, violation of designated development plans for Donholm Phase 5, interference with sewer reticulation system, violation of water quality and waste management regulations, stability of the building, blockage of natural light, overcrowding, insecurity, inadequate parking spaces and decrease in property values in the neighbourhood due to overcrowding. From the outset, it is clear that some of these issues which were raised by the 2nd respondent related to physical planning and were beyond the mandate of NET. The rest were to be subjected to the test as to whether they existed and if so, whether they would have significant impact on the environment of the area where the appellant's proposed project was to be undertaken and whether the mitigation measures that had been proposed could remedy the impact.

20. As we have stated above, in its ruling, NET considered and based its decision on issues which were not raised by the 2nd respondent in its grounds of appeal and which in our view did not touch on the central question which was before it, namely, the status of the environment and the impact the proposed development was going to have. NET considered issues such as the fact that the appellant had obtained EIA Licence after she had commenced construction, a fact which was admitted and was not raised as an issue in the appeal, and the fact that the appellant was putting up a five storey building instead of a three storey building in respect of which she had obtained EIA Licence. NET's decision was also influenced to a large extent by its finding that the appellant had disobeyed its stop order.

21. NET made a finding that the appellant had obtained EIA License after commencing construction, had failed to conduct adequate stakeholder consultation, and had breached the terms of EIA Licence. What then did NET grant as a remedy? It ordered demolition of two floors of the building without reverting to the key regulatory players in the building industry. While we are in agreement with NET that the appellant had obtained EIA Licence after she had commenced construction, that was not an issue raised in the grounds of appeal before NET and NET did not attempt to explain the impact, if any, it had on the EIA licensing process in this particular case.

22. NET's finding that the appellant did not conduct adequate stakeholder consultation was in our view not correct. The 2nd Respondent's witness admitted in his evidence that some of the 2nd Respondent's members were consulted. The appellant's witness stated that he sought comments from the residents of the area of the project and distributed questionnaires to a number of houses. This evidence was not rebutted. The said witness's testimony that he visited the houses of the Chairman and Secretary of the 2nd respondent and that they declined to fill the questionnaires was not rebutted. NET did not explain why it chose to believe the evidence of the 2nd respondent's witness as against the evidence of the appellant and the appellant's Witness Number 1 on the issue of public consultation. In any event, NET's finding on this issue had no correlation with its final decision on the appeal.

23. On the issue of costs, ***Rule 39 of NET's Rules of Procedure, 2003*** provides that NET would not normally award costs but can award costs against a party when it reaches a finding that such a party had acted frivolously or vexatiously or where a party's conduct in making, pursuing or resisting an appeal is wholly unreasonable. NET made a finding that the appellant acted vexatiously and that her conduct in pursuing the appeal was unreasonable because she had defied NET's stop order. We are of the view that NET's finding that the appellant had acted vexatiously was not supported by any evidence. From the record, the appellant was only a respondent in the appeal before NET. She was served with a Notice of Appeal and she came to NET to defend herself. There is nothing on record showing that the appellant

brought frivolous or vexatious applications before NET with a view to scuttle the proceedings or to delay the same. The fact that the appellant disobeyed NET's stop order on the other hand was not a valid ground for condemning the appellant to pay costs of the appeal to the 2nd respondent. Disobedience of an order from NET is a criminal offence and could have been dealt with as such.

24. In view of the foregoing, it is our finding that NET decided the appeal that was before it on issues which were not raised in the appeal. It also granted reliefs which were not sought by the 2nd respondent. It is also our finding that NET erred in condemning the appellant to pay the costs of the appeal before it. In the final analysis and for the foregoing reasons, it is our finding that the appeal before us has merit and we allow the same on the following terms:

***a) The rulings of NET made on 7th December, 2009 and 27th January, 2010 are hereby set aside.***

***b) To protect public interest, and in exercise of this court's powers under Section 13 (7) of the Environment and Land Court Act, we hereby order that the two top floors of the building on the suit property, Nairobi/Block 82/6259, which the appellant constructed without NEMA authority shall not be occupied, and if they are occupied, they shall be vacated within 90 days from today.***

***c) The appellant shall thereafter apply for approvals and certification of the two floors by all the relevant regulatory authorities within the applicable regulatory framework before they are occupied.***

***d) In the event that the appellant fails to cause the above order to be implemented within 120 days from today or the said two floors are not certified and or approved for human habitation, the same shall be demolished under the supervision of the relevant regulatory authorities.***

***e) Each party shall bear its own costs of this appeal.***

**Dated, signed and delivered at Nairobi on this 13<sup>th</sup> day of October, 2017.**

**S. OKONG'O**

**B M EBOSO**

**JUDGE**

**JUDGE**

**In the presence of:**

Mr. Mureithi: Advocate for the Appellant

No appearance: Advocate for the 1<sup>st</sup> Respondent

Mr. Kiprono h/b for Makumi: Advocate for the 2<sup>nd</sup> Respondent

Halima Abdi: Court Assistant

Catherine: Court Assistant