REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 50 OF 2016

ISAAC GITOHO, PETER MANGI AND SANJEEV SHARMA (Suing as the

Chairman, Vice- Chairman and Committee member respectively of

THE RUNDA ASSOCIATION.....APPELLANT

- VERSUS -

THE DIRECTOR GENERAL, NEMA.....1ST RESPONDENT

THE GROVE LIMITED.....2ND RESPONDENT

(An appeal arising from the Ruling of the National Environment

Tribunal delivered on 9th May 2016 in NET/143 OF 2015)

JUDGEMENT

1. The appellants are officials of The Runda Association (The Association) which is duly registered under the Societies Act. The first Respondent is the head of a board which is mandated to manage the affairs of the National Environment Management of Authority (NEMA) in accordance with the provisions of the Environmental management and Co-ordination Act (The Act). The second Respondent, The Grove Limited (the Company) is the registered owner of LR No. 778/1451.

2. The company proposed to construct a low density development comprising of a Hotel, Retail Centre and Office Block on its property situate at Runda in Nairobi. The company submitted a project report to NEMA. The Company then conducted an environmental impact assessment study for purposes of obtaining an Environmental Impact Assessment Licence. NEMA reviewed the company's application in accordance with the provisions of the Environmental (Impact Assessment and Audit) Regulations made under the Act and issued a licence to the company on 25th July 2014.

3. The Association appealed against NEMA'S decision to issue an environmental impact assessment licence (EIA licence). The National Environment Tribunal (The tribunal) dismissed the appeal in a ruling delivered on 9th May 2016, prompting the Association to appeal against that decision to this Court.

4. The Association raised 14 grounds of appeal in the memorandum of appeal. A look at the grounds shows that ground 5 is a duplication of ground 4. This is the same case with ground 11 which is a duplication of ground 2. Grounds 1,2,3,and 4 can be analysed together. Grounds 4 can be dealt with

together with grounds 1,2,and 3 because it is the Association's contention that the company in its Environmental Impact Assessment Study report distorted facts and included misleading information in the same.

5. The Association contends that there was no meaningful public participation conducted. That the Association being the most affected with the project to be undertaken by the company, the Association should have been consulted and views of its members given. The Association also contends that the residents of Githogoro were not consulted. The need for consulting the residents Githogoro was because according to the Association, the area of the intended project by the company was a wetland which was the source of springs whose water is used by the residents of Githogoro.

6. I have gone through the evidence on record and the documents submitted by the parties is this appeal. There is evidence that the association was aware of the intended project by the company. There was a meeting of the officials of the Association and those of the Company. There was publication in the newspapers and the Kenya Gazatte calling for members of the public to give their views. The association raised various concerns ranging from traffic which will be in the area following the implementation of the project, security of the residents of the Association among others.

7. Isaac Njoroge Gitoho is the Chairman of the Association. During his testimony at the Tribunal, he stated that though there was consultation with the Association, this consultation was not meaningful. There was evidence that the association has a number of sub-committees. The company met with one or two of those sub-committees. According to this witness, the consultations would have been meaningful, if the company met the Association's members. There is evidence that there were efforts to meet the Association's members. The company proposed to meet the members at Sankara but the Association members preferred Lord Errol Restaurant. This was accepted and the company even accepted to foot the bill which was expected to be in the region of Kshs.350,000/=. The meeting however did not take place as one of the officials of the company could not be available as he was said to be away on the date of the proposed meeting.

8. When the Association Chairman was cross-examined by Miss Lukoba for NEMA, he conceded that he had informed the Chairman of Githogoro about the project. Asked whether the residents of Githogoro had mandated the Association to raise issues of water on their behalf, the Chairman answered in the negative but said that they were raising the issue of water as good citizens who were concerned about the same.

9. There were two questionnaires filled by two individuals namely Flo Wanjohi and Tom Gitogo. The Association contended that John Githogo was not a resident of Runda. There were even allegations that he was associated with the company. On the part of Flo Wanjohi, it was contended that she was not the Principal of Potter House School. The Manager of Runda Water claimed in his evidence that he knew the Principal of Potter House School as Florence Wanyoike. He was taken to task and could not produce any evidence to support his allegations. The Association's Counsel made an application for summons to issue to the two people who filled the questionnaires. The application was objected to and the Tribunal declined to issue summons. The association's allegations therefore remained unproved.

10. The basis of ground 4 in the memorandum of Appeal is paragraph 4.9 of the EIA study Report in which the company stated as follows:-

> ***"The EIA study entailed consultation with identified stakeholders whose recommendations were taken into consideration during the preparation of the E I A study report. This also included a presentation to the members of the board of Runda Residents Association. The negative and positive impacts of the proposed project were discussed with residents and their representatives in the neighbourhood of the site. The approach used comprised interviews, focus group discussions and administration of structured questionnaires".***

11. I have gone through the evidence adduced at the Tribunal in relation to what is stated in paragraph 4.9 of the EIA study report on public participation. I do not find anything misleading in that. The Association's lawyer in their submissions seems to take that part of the report in the context of the

meeting of 19th March 2014. This is wrong because the company was summarising the methods used in ensuring that there was public participation. There is no doubt that stakeholders were consulted. There was a presentation to a committee of the Association. The positive and negative impacts of the proposed project were discussed. The approach used to achieve this was interviews, focus group discussions and administration of structured questionnaires.

12. Two questionnaires have been attached to the report. One of the questionaires was filled by the Principal of Potter House School which neighbours the proposed site of the project. The other members who were consulted are the Association's members. The Association's contention that the company's EIA study report contained falsehoods and was distorted has no basis.

13. Public participation is very important. It is a requirement which is anchored in both the constitution and statutes. To ensure that the person to be affected by a certain activity as in the project which is to be undertaken by the company, there must be evidence that the persons to be affected are informed of the project and are afforded opportunity to comment on the same. The decision on whether those person choose to participate or not is another thing. In the instant case, there is evidence that the Association was aware of the proposed project. There was a meeting with the Association and the Company. The Association raised its concerns which were addressed. There is also evidence that the chairman of Githogoro residents was informed of the proposed project. If the residents of Githogoro had any issues to raise, they should have raised the same.

14. The Association seems to be of the view that since there was no meeting with the wider segment of the residents, then there was no meaningful public participation. I do not think that this is the position. When a group of residents with common issues have come together and elected or appointed their officials, it is much easier to deal with the officials who will then communicate to their members. The Company held a meeting with the officials of the Association. The company even made a presentation to one of the Association's sub-Committees. The Association as a stakeholder raised their issues which were then incorporated in the EIA study report.

15. One of the residents of Githogoro was called before the Tribunal. He is Henry Maina Muchiri. He stated that though he does not read newspapers, he was aware of the proposed project by the Company. The duty of a proponent of a project is to ensure that persons to be affected by the project are made aware of the project so that they give their views if any. It is not a requirement of the law that the proponent should go after those persons to solicit their views. NEMA was satisfied that there was public participation and that is why they proceeded to issue an E.I.A licence.

16. The Association is contending that there were no radio announcements made and publication notice of the EIA study report for two consecutive weeks and further that there were no at least three meetings as required by the law. The Association contends that these are mandatory requirements which should be followed. There is evidence that NEMA published the notice calling members of the public to give their views. The notice was published twice in the newspapers and twice in the Gazette Notice. NEMA sent copies of the EIA study report to key identified stakeholders for their views. None of these stakeholders sent their comments within the stipulated time. It is only the Water Resource Management Authority (WARMA) which sent its comments after the statutory period.

17. Though it is a requirement that radio announcements be made inviting comments from the public, no radio announcements were made. This however is not fatal as there is evidence that the persons affected by the project were aware of the same. The need for radio announcement is to inform the persons to be affected. If the affected persons are aware of the project from other modes of information, it would be absurd to insist that radio announcement must have been made.

18. The Association is contending that there should have been full compliance with the Environmental (Impact Assessment and Audit) Regulations of 2003 made under the Act. As I have pointed out hereinabove, some of the requirements of the regulations like radio announcements were not done. This does not mean that any action which was carried out without compliance should be invalidated. The issue of non-compliance with mandatory provisions of a statute was dealt with in the **Australian High Court**

in project Blue Sky Inc. Vs Australian Broadcasting Authority (1988) 194 CLR 355 where the court sated as follows:-

> ***"……a court determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asked itself whether compliance with the provision is mandatory or directory, and if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid….In determining the question of purpose, regard must be had to " the language of the relevant provision and the scope and object of the whole statute".***

19. In a similar case dealing with construction of a statute , **Lord Steynn** had the following to say in the case of **Regina Vs Soneji and another (2005) EK HL 49.**

> ***" In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory a failure to comply invalidates the act in question. Where it is merely directory a failure to comply does not invalidate what follows. There were refinements. For example a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance……..***
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> ***Having reviewed the issue in detail I am in respective agreement with the Australian High Court that the rigid mandatory and directory distinction and its artificial refinements have outlived their usefulness. Instead as held in Attorney General's Reference (No. 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether parliament can fairly be taken to have intended total invalidity".***

20. The Association in its submissions contend that the company did not comply with the directions contained in NEMA's letter of 25th February 2014. This letter was referring to a project report which the company presented to NEMA. A project report is what informs the decision on whether a project proponent should be asked to undertake an EIA study and file a report. The company was accordingly asked in pursuance to section 58 of the Act and the Regulations thereunder to undertake an EIA study. This was subsequently done by the Company.

21. The Association also picked a comment from a letter dated 16th July 2014 in which WARMA observed that the EIA Report lacked evidence of public participation. I do not think that this observation was made based on what had been going on. There is evidence that the Association had been communicating with the company through emails. The Association had raised its concerns and the company gave proposals on how to mitigate any negative effects. There were copies of questionnaires annexed to the report and the report at paragraph 4.9 under public participation clearly showed the manner in which the persons concerned were engaged. The comments by WARMA who in any event gave the project a go-ahead had no basis upon which it made the remarks.

22. The Association relied on the case of **Dr J S Muiru & 2 Others Vs Tigoni Treasurers Limited & 2 others (2014) e KLR.** In this case, Justice Mutungi found that there was total non-compliance with the Act and the Regulations there under. The EIA licence had been given without Tigoni Residents Association having been involved or NEMA complying with the statutory requirements. This is unlike the present case where the Association was involved and the residents of Githogoro had opportunity to present their views but chose not to do so. In the case of **Patrick Musimba Vs The National Land Commission & 4 Others (2016) eKLR** a five judge bench had this to say on public participation ,

> " ***The law with regard to public participation as has been laid out in a series of cases is relatively clear. When an entity or person is enjoined to involve the public in governance or any decision making or legislative process the person so enjoined is under a duty to ensure that adequate facilitation for such public participation is made. The public need not only be invited but must***

also be given adequate opportunity to participate. As to whether the public participates and their views taken, is truly another sphere".

23. There is no evidence that any affected person sought to be given opportunity to be heard and that that opportunity was denied. The Association complains that there was only one meeting and that two others were not held as required. As has been stated in the case from the ***House of Lords and Australian High Court*** (***Supra),*** the question which the Court should ask is whether parliament intended that any non-compliance with a statutory provision was to render an act done without compliance invalid. In the present case there is evidence that there were measures put in place for more meetings but that could not happen because of unavoidable circumstances. In some instances, meetings could not happen because the Association promised to revert on such arrangements but did not do so leading to suspicion that the Association was laying ground for complaint later. Agatha of the Association had promised to revert on one occasion but she did not. It is now clear that grounds 1,2,3 and 4 of the memorandum of Appeal must fail.

24. Grounds 5,7,8 and 9 can be dealt with together. These grounds are based on the Association's contention that the Tribunal had no basis in concluding that the proposed site of the project by the company was not a wetland. The Association further contends that the Tribunal failed to follow the recommendations of its own experts and that the Tribunal did not follow the provisions of the Water Act and WARMA Regulations. The Appeal before the Tribunal which was dismissed was that the proposed project site was a wetland which needed to be conserved. It was also the Association's case that the said wetland was the source of water which re-charged Ruaka River. There was also a contention that there was a stream which ran across the land in issue and that this stream was the source of water for use by the residents of Githogoro.

25. The Association called Henry Maina Muchiri who has lived at Githogoro since 1964. He takes care of plots within Runda but stays at Githogoro. This witness testified before the Tribunal that though there are streams in the area, none of the streams has its source of water from the land in issue. He further testified that there is one stream which starts near Porter House School. The Association appointed a hydrologist Henry Maina Njuguna. This witness stated that the area of the project is categorized as a flood plain according to maps from Mines and Geology. This witness was stood down to enable him bring the maps he was referring to. He never came back to testify and his counsel informed the Tribunal that the witness had disappeared. There was therefore no conclusive evidence from the witness as to whether the land in issue was a flood plain or wetland. There was also inconclusive evidence as to the existence or otherwise of the stream which the witness claimed to be in existence.

26. When the Tribunal made a site visit, it was observed that there was no stream running across the plot in issue as alleged. Rose Njeri Kamau is a resident of Githogoro. She testified that there is no stream emanating from the plot in issue. She only stated that there is water in a trench. This water is used to water vegetables by residents of Githogoro. Some of the resident of Githogoro have piped water. Those who do not have buy water from those who have. Henry Maina Muchiri also testified that as a resident of Githogoro, he does not have piped water but he buys from those who have. It is therefore clear that there is no stream whose source is the plot in issue.

27. M/s Alison Tabitha Wanjiku Kahumbura was engaged by the Association to critique the EIA study report by the company. She stated that she visited the plot in issue and saw a stream on the extreme southern end of the plot. From the look of the vegetation on plot in issue, she concluded that the area was wetland. During cross-examination this witness stated that she is not a hydrologist or botanist and as such she could not say whether there is a stream or not. In further cross-examination, the witness said that there is a stream which flows from Kiambu on to the plot in issue. She also changed positions that the stream was on the side of the Porter House School. Due to these contradictions, the Tribunal felt that it was necessary for a second site visit for the witness to point out the stream which she was saying was from Kiambu side and was discharging its water to the plot in issue. This second site visit was never to be as the witness declined and or refused to take calls from the Association's lawyer.

28. Dr. Margaret Akinyi Abira testified that she works with WARMA. She testified that she was asked

by the sub regional manager of WARMA Nairobi to give her professional advice regarding an EIA report which had been submitted to NEMA. There were wetland issues raised in the report. This witness is an expert on wetlands. She looked for evidence of any wetland but could not see any. There was no evidence of a stream or underground source of water. She concluded that there was no wetland in the area in issue and that there was no stream running across the plot as alleged.

29. The Tribunal analyzed the evidence presented before it and arrived at a conclusion that there was no wetland in the area. The water which floods on the area is run off water which collects from the nearby built areas which are higher than the plot in issue. The Association attacked the evidence of Dr. Abira on the ground that she was called by the company and that she did not produce any written report. Dr. Abira came in as an expert who had been asked to give her opinion because issues had been raised regarding the existence of a wetland. An expert witness can be called by either party to a dispute. It does not mean that if an expert is called by one party to a dispute, then that evidence is only in favour of the party calling the expert witness. The law is clear that evidence of an expert can only be challenged by evidence of another expert witness. In the instant case, there was no evidence to challenge the evidence of Dr. Abira. The fact that there was no written report does not vitiate her evidence. There is no legal requirement that an expert witness' evidence must be contained in a report before it can have any probative value.

30. There is a site visit report which was carried out by people from WARMA and NEMA. This report is dated 23rd June 2014 and, it gives recommendations. Among the recommendations is determination of the extent of what they called a wetland and the major impact of the project on Ruaka River. There was also need to determine the source of a stream which was along the border of Porter House School and the plot for the proposed project. It is important to note that these were preliminary reports following visits by persons who were not experts. It is some of these reports which were suggesting the existence of a wetland and streams which led the WARMA sub-regional officer Nairobi to ask Dr. Abira an expert in wetland issues to be sent to the ground. After her examination of the area, she concluded that there was no wetland. Dr. Abira in her evidence states that there is a stream which crosses the by-pass. This stream does not pass through the plot in issue This evidence is in agreement with the report of those who visited the site on 20th June 2014 and said that there was a stream at the border with Porter House School. In cross-examination the witness stated that the plot in issue is about 5 acres and the proposed project would have no impact on the stream which is at the border of the plot in issue and Porter House.

31. There was an issue raised in the Association's submissions that the verification report which concluded that there was no wetland was made two days before the EIA. licence was issued. I do not see anything wrong in this. Already an expert had found that there was no wetland. The expert's evidence was not even shaken in cross-examination. There is therefore no basis for the Association to claim that the recommendations of NEMA's experts were not followed.

32. The Association in ground 8 contends that there was failure to observe the provisions of the Water Act and WARMA Regulations. I do not see any basis of this ground .WARMA in its comment on the EIA. study report by the company was categorical that the EIA study policy, Legal and administrative framework was consistent with WARMA Rules 2007 on water quality and waste water management. It was further observed that the EIA. Study report had adequately identified impacts on water resources during the construction and operational phases of the project.

33. The Tribunal properly analyzed the evidence before it and arrived at a correct finding that the area for the proposed project was not a wetland and that there was no stream running across the plot in issue. Grounds 6, 7 8 and 9 must therefore fail.

34. Grounds 12, 13 and 14 relate to the evidence tendered before the Tribunal and the findings of the Tribunal. In ground 12, the Association contends that the Tribunal was wrong in dismissing the Appeal as there was no evidence to counter the evidence of the Association's witnesses. It was the Association's evidence that the plot in issue was a wetland. This evidence was ably countered by that of Dr. Abira an expert who concluded that there was no wetland on the pot in issue. The Association's hydrologist failed to come to court to conclude his evidence to show that there was a stream on the plot in issue. His evidence that the vegetation on the land showed evidence of a flood plain had no basis and was not

subjected to cross-examination as he did not come to complete his evidence.

35. M/S Kahumbura's evidence on the presence of streams on the plot in issue was found not to be true. She failed to come for a second visit to the site to point out the streams she was referring to. The Tribunal itself visited the site and found that there was no stream on the plot in issue. The residents of Githogoro who were alleged to be affected as the proposed project site was a source of water which they used testified and stated that there is no stream which has its source on the plot in issue. The water in bonds in the plot in issue which one of the residents referred to in her testimony was tested and it was found to be unfit for human consumption.

36. I have analyzed all the grounds of appeal raised *vis-a-vis* the evidence adduced before the Tribunal. It is patently clear that none of the grounds can succeed. The Tribunal properly analyzed the evidence presented before it and arrived at a sound finding. Its verdict cannot therefore be faulted. The association's Appeal is hereby dismissed in its entirety. Each party to bear its own costs.

Dated, Signed and delivered at **Nairobi** on this ***2nd*** day of **October, 2017.**

E.O.OBAGA

JUDGE

In the presence of :

Mr Amoko for 2nd Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE