



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 52 OF 2015

Formerly HCC 164 of 2012

HOSEA KIPLAGAT..... 1ST PLAINTIFF
ISAAC CHEBON.....2ND PLAINTIFF
CAROLINE J. KOMEN.....3RD PLAINTIFF
PAUL T.A. KANGOGO..... 4TH PLAINTIFF
ELIMA P. ARGUT..... 5TH PLAINTIFF
SARA J. KIPCHUMBA.....6TH PLAINTIFF
JUSTINE K. BEIMOK..... 7TH PLAINTIFF

VS

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY NEMA & 2 OTHERS.....1ST
DEFENDANT**

RULING

Hosea Kiplagat and 6 others hereinafter referred to as the plaintiffs have commenced this matter by way of plaint against National Environment Management Authority and the others hereinafter referred to as the defendants.

The bone of contention is that the plaintiffs are owners of Kabarnet residential Plots No. 182, 189, 184, 187, 188, 185 and 186 respectively and are the most immediate neighbours of the 2nd defendant who is the owner of plot No. 183.

The 2nd defendant purportedly obtained change of user of the plot from residential to commercial without consulting the plaintiffs in February 2014 or thereabouts and in May 2014, the 3rd defendant started to consult persons who are not neighbours to approve for him the building of a Nursing Home and Doctors Plaza within the estate, a project that is not compatible with a settlement area.

The plaintiffs shall state that when they learnt about it they complained and have since opposed the project resting with the meeting held on 15th November, 2014.

The 2nd defendant colluded with the 1st and 3rd defendants and proceeded to approve the project and by 30th January, 2015, the 2nd defendant started to gather building materials and is now in the

process of digging the foundation in preparation to commence the project.

The plaintiffs have discovered that the 2nd defendant through the 1st defendant and on the professional advise of the 3rd defendant was granted an Environment Impact Assessment License on 8th January, 2015.

It is the contention of the plaintiffs that the project cannot meet the conditions set out in the License and the Environment Management and Co-ordination Act.

Particulars are that waste management is incapable of being controlled by the 2nd defendant because the place is rocky and there is no open sewer in Kabarnet to empty the waste

The plot is very small about a quarter ($\frac{1}{4}$) of an acre and incapable of accommodating a project of such a magnitude without creating conflict.

There is no exit road hence parking and turning of motor vehicles shall be a big problem and source of conflict with neighbours.

Air pollution is inevitable.

The plaintiffs' privacy shall be compromised as the Nursing home shall be open to the public.

The project will devalue the area.

The project shall expose the plaintiffs and their children with risk of contracting diseases and unfamiliar and scaring noise wailing and groans associated with a healthy facility.

The location is totally unsuitable for the kind of project.

The plaintiffs shall state that the project does not meet the threshold set out in the Act and general reasonableness and shall state that the subsequent advise of the 3rd defendant and approval by the 1st defendant lacks professional credence and highly compromised and the defendants shall be put to the strictest proof.

The plaintiffs shall state that unless the defendants are restrained by an order of this Honourable Court, the 2nd defendant shall engage in an unviable project in a residential area.

Further the plaintiffs shall state that the 2nd defendant is a businessman highly motivated by material gain and shall not be trusted because his initial proposal included a mortuary facility in the heart of a residential area and is likely to operate such a facility in future to the detriment of the plaintiffs.

The plaintiffs claim against the defendants is for an order of an injunction restraining the 2nd defendant by himself, his servants, and/or employees from constructing, gathering building materials or in any other way interfering with Plot No. 183 save for residential purposes and the 1st defendant to cancel the Environmental Impact Assessment License and further to injunct the 3rd defendant from misleading the 2nd defendant by giving a compromised professional advise.

The plaintiffs aver that there is no other suit pending and there have been no previous proceedings in any court between the plaintiffs and the defendants over the same subject matter.

Despite demand and notice of intention to sue given, the 2nd defendant is determined to proceed with construction thereby rendering the filing of this suit necessary.

This honourable court has jurisdiction to hear and determine this suit.

The plaintiffs pray for Judgment against the defendants for an order for an injunction restraining

the 2nd defendant from constructing a health facility, gathering building material, digging foundation or in any other way interfering with Plot No. 183 Kabarnet.

An order of an injunction restraining the 1st defendant from authorizing or licensing or approving further construction of a health facility on Plot No. 183 Kabarnet.

An order of an injunction restraining the 3rd defendant from giving professional advise to the 2nd defendant for the building of a hospital on Plot No. 183 Kabarnet or within the suit plots on the ground that the location is not suitable.

An order that the professional advise of the 3rd defendant and the 1st defendant is compromised and cannot meet the threshold set in the Act.

A cancellation of the Environmental Impact Assessment License.

An order that the project is unsuitable on Plot No. 183.

Costs of the suit.

Any other relief that this Honourable Court may deem fit to grant.

The 1st defendant has taken out a preliminary objection against the suit that this honourable court is not the appropriate forum to hear this matter by dint of section 129 of the Environmental Management and Coordination Act, 1999 and section 13 of the Environment and Land Court Act. The 1st defendant pleads the issue of jurisdiction and will rely on several decided cases of superior courts.

That the 1st defendant was served with these proceedings within less than the statutory 7 clear days rule provided in the Civil Procedure Rules.

The 2nd and 3rd Defendant have also taken out a preliminary objection on grounds that the filing of the entire suit offends the provisions of Sec. 22 of Environment and land Court Act 2011 and order 1 rule 13 (1) and (2) of the civil Procedure Rules 2010 since the 3rd plaintiff purports to be duly authorized to represent the other plaintiffs yet there is no authority at all.

That this honourable court is not vested with the Jurisdiction to hear and determine this suit since it touches on issues of physical planning, change of user and issuance of license which the National Environment Tribunal has the Mandate to hear and make decision on the same.

That the 2nd and 3rd defendants shall pray that this Honourable do dismiss the Entire suit with costs.

Mr. Sitonge in support of the preliminary objection argues that the High Court does not have jurisdiction to hear matters of environment and land as provided by Articles (2) b and Articles 165 (b) of the constitution. I agree with this submission but find that this matter though intuited as having been filed in the High court, was filed in the Environment and Land Court at Eldoret hence the submission lacks substance. Moreover, this court is guided by Article 159 of the constitution hence it cannot take undue regard.

Moreover, Mr. Gitonga argues that the High Court is not the court of 1st instance.

Matters under section 129 of the Environmental Management and Co-ordination Act But exercises appellate jurisdiction only in such matters as National Environment Tribunal is to proper judicial forum for this matter and therefore the court lacks jurisdiction to hear this matter. His argument is bolstered by the provision of Section 125, 129 (2) 125 (c) and (d).

The 2nd and 3rd defendant reiterate to argument of the 1st defendant and argue that the 1st

defendant issued a licence No. NEMA/EIA/1098 on the 8/1/2015 to the 2nd defendant and the same shall not be revoked or cancelled by this honourable court unless by way of Appeal by the parties aggrieved by the tribunals decision as provided under section 130 of the Act. He submits that the parties have not exhausted the laid down procedure and mechanism and therefore the court lacks jurisdiction.

In response to the preliminary objection the plaintiff argues that the Environment and Land Court as established pursuant to Article 162 (2) b of the constitution is the only court empowered to deal with environment cases specifically regarding use of land, occupation of land and title to land.

He argues that Section 129 (1) of the Environmental Management and Co-ordination Act is specific on matters that can be handled by the National Environment Tribunal and more of the issues in this case fall into the jurisdiction of the Tribunal and therefore the tribunal is misplaced. He argues that the issues before the court are not issues before the tribunal. The use of land falls squarely before the Environment and Land Court. He submits that the authorities cited before this court in this matter are not relevant because they referred theor a restriction order. He argues that where NEMA has taken action the court has no jurisdiction but in this case the NEMA has not taken action. He finally submitted that the matter before Justice Waithaka was referred to NEMA instead of striking out .

I have listened to the submission by the defendant and the reply by the plaintiffs and do find that the application for an impact assessment licence as contemplated by Section 58 of Section 58-67 of the Environmental Management and Co-ordination Act is a lengthy process which begins with the submission of the project report to the Authority, in presented form, giving the prescribed information and prescribed fee.

The proposal does an Environment Impact Assessment study and prepares a report on the same. The E.I.A study and prepares a report on the same. The Environmental Impact Assessment study report is submitted to the authority in the prescribed form and with the prescribed fee.

Section 59 (1) provides for publication of the Environmental Impact Assessment study report for the successive weeks in the Gazettee and in a newspaper circulating in the area or proposed area of the project. Members of public are allowed to make written and oral comments on the study report.

Moreover, head agencies are given opportunity upon request by Director General, to comment on the aforesaid study report.

The Authority may after being satisfied as to the adequacy of an Environmental Impact Assessment licence on such terms and conditions as may be appropriate and necessary to facilitate and sustain development and sound Environmental Management Section 67 provides for revocation suspecting or cancellation of Environmental Impact Assessment licence but only on advice of the standards and enforcement review committee

Part XII of the Act Section 128 – 138 provide for the National Environment Tribunal. The relevant section in this matter is section 129(2) of Environmental Management and Co-ordination Act It provides

“...that unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or committees of the Authority to make decisions, such decisions may be subject to an appeal to the tribunal in accordance with such procedures as may be established by the Tribunal for that Purpose.”

This court finds that section 129 (2) should be read together with section 129 (1) of the Act. And agrees with Mr. Kipkinei that section 129(1) of the Environmental Management and Co-ordination Act is specific on matters that can be handled by the National Environment Tribunal. The plaintiff are seeking a cancellation of the Environment Impact Assessment licence whilst Section 129(1) a deals with refusal to grant a licence or to transfer a licence under the Act or regulation made thereunder.

In my mind the sections 129(1) and 129 (2) do not envisage to members of public moving the Tribunal to challenge the granting of licences as envisaged under Section 63 of Environmental Management and Co-ordination Act it envisages refusal to grant licence, revocation and such like things.

Part 11 of the Environmental Management and Co-ordination Act Sections 1, 2, 3 of the said Act, give the court power to deal with issues relating to entitlement to a clear and health environment. This power cannot be taken away. I do find that the Preliminary objection is an attempt to take away this power from court.

On this issue raised by Mr. Tarus that there is no authority given to the 3rd plaintiff by the other plaintiffs to swear affidavit do find that this failure does not in any way prejudice the defendant case. Moreover, the plaintiffs have signed and filed statements in the matter. Furthermore, Article 159 of the constitution guides the court not to put undue regard to procedural technicalities. This appears one of such technicalities.

The matter to proceed for hearing.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF APRIL 2015

JUSTICE OMBWAYO ANTONY

ENVIRONMENT AND LAND COURT AT ELDORET