REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 327 of 2006 (UR 181/2006)

REPUBLIC ……APPLICANT

AND

THE NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....……RESPONDENT

AND

EM COMMUNICATIONS LIMITED.....INTERESTED PARTY

(Applicant)

Ex-Parte

SAM ODERA

MICHELLE LISBOA

SAND OJIAMBO

ERICK AGOLLA ……..…….…….
INTERESTED PARTY

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the judgment and order of the High Court of Kenya at Nairobi (Nyamu, J.) dated 14th December, 2006

in

H.C.C. MISC. CIVIL APPL. NO. 400 OF 2006)

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RULING OF THE COURT

The application before us was filed by **M/S. E.M. Communications Ltd** (hereinafter or "EM") under ***rule 5 (2) (b)*** of the rules of this Court seeking one order that: -

"*THAT there be a stay of execution pending the hearing and determination of the intended appeal from the judgment and order of the High Court at Nairobi dated 14th December, 2006 in High Court Misc. Civil Application No. 400 of 2006.*"

The order referred to was made by the superior court, Nyamu J. on an application for judicial review filed with the leave of the court on 14th August, 2006 by four *ex parte* applicants ***Sam Odera***, ***Michelle Lisboa***, ***Sanda Ojiambo*** and ***Erick Agolla*** (hereinafter "the tenants"). We may briefly relate what problem took them before Nyamu, J: -

The four tenants are residents in a block of apartments on LR. No. 330/787 at Valley Road, Nairobi known as "Dhanjay Apartments". They gathered information in February, 2006 that EM was intending to install a Base Transceiver Station (BTS) on the roof of Dhanjay apartments. In point of fact EM had negotiated and signed a 6-year lease with the landlord with effect from 1st February, 2006 to occupy some 90 square metres of space on the 10th floor of the apartments for installation of transmission and antenna equipment. The tenants were alarmed and concerned about their health, welfare, security and broader environmental impact which may be caused by the installation as there was no information on the nature and effects of it provided to the occupants of the apartments. So, on 27th February, 2006 they wrote to the National Environment Management Agency (NEMA) to find out whether the installation was licenced and whether any Environmental Impact Assessment (EIA) had been carried out. They also wrote to EM and the landlord expressing their concerns as works on installation continued in earnest. NEMA then wrote to EM and the landlord on 15th March, 2006 drawing their attention to the relevant provisions of the Environmental Management and Coordination Act (EMCA) 1999 and informing them that an EIA was required for the project. NEMA put a STOP order on the project until the EIA was submitted to them, evaluated, and a decision communicated to EM. It was then that EM felt obliged to provide some information to all the tenants/occupiers of the apartments including a Test Quality report/certificate from the Kenya Bureau of standards and various certificates or approvals from the Communications Commission of Kenya (CCK). There was however no information on the design and specification of the equipment; health and safety impact on human beings owing to radiation levels; environmental impact; and other issues relevant and of concern to all tenants. The tenants' complaints therefore persisted but were not addressed. Instead EM submitted an EIA report to NEMA on 28th April, 2006. CCK also received the report and upon evaluating it, was of the view that a precautionary approach should be taken in the matter since international concerns had been raised on issues of public health, aesthetics and environmental degradation due to proliferation of base station installations for telecommunication. It left it to NEMA to evaluate the project and decide on its suitability. CCK clarified that it had not approved installation of the equipment at various sites but only approved the type of equipment for use by EM. In their view, mobile phone operators must of necessity seek consent of area residents before construction of any base station. After some consultation and evaluation of the EIA report, NEMA approved it on 2nd June, 2006 subject to six (6) strict and mandatory conditions. The tenants were however still dissatisfied with the entire process of evaluation of the project report which they maintained was contrary to EMCA and the Regulations thereunder and feared that NEMA would fully approve the EIA in contravention of the law. That is when they went before Nyamu J. and sought leave to apply for the following orders: -

1. THAT an order of certiorari do issue to bring to the High Court the Respondents decision made on 2nd June, 2006 approving the Environmental Impact Assessment Study Report submitted to the Respondent on 28th April, 2006 by the Interested party for the proposed installation of a telecommunication equipment at Dhanjay Apartments Valley road for the purpose of being quashed.

2. THAT the respondents whether by itself, its agents servants or however be restrained by way of an Order of Prohibition from issuing to the Interested Party an Environmental Impact Assessment Licence for the purpose of a proposed installation of telecommunication equipment at Dhanjay Apartments, Valley Road, Nairobi situate on Land Reference No. 330/787, Nairobi.

The leave was granted on 24th July, 2006 and a further order was made that the grant of leave shall operate as a stay of the decision made by NEMA on 2nd June, 2006 approving the EIA report and of the

issuance of an EIA licence pending the hearing and determination of the Judicial Review application. The substantive motion was filed on 14th August, 2006. Pending the hearing thereof however, EM made an attempt to have the order for stay vacated but the application was dismissed on 7th November, 2006. They did not challenge that ruling.

The main application fell once again before Nyamu J. who upon careful consideration of the facts and the applicable law agreed with the tenants that there was no strict or even substantial compliance with EMCA and the regulations thereunder, particularly ***section 58***, which provides for EIA reports, ***section 59*** concerning publication of the EIA and ***Regulations 17*** and ***21*** on public participation and submission of comments. The learned Judge stated in part: -

"**I find that the respondents are guilty of considerable procedural impropriety which could have compromised the applicant's right of participation. The requirements of EMCA go beyond the requirements of the rules of natural justice as traditionally understood because what is required under the Act is publication, public participation and receipt of comments. The omission is not just a mere irregularity, it touches on a major principle of environmental law i.e public participation at the relevant levels before the decision making. This principle has been given recognition in EMCA under S 59 and Regulations 17 and 21 – it is the RIO DECLARATION principle 10 which states: -**

"**environmental issues are best handled with participation of concerned citizens, at the relevant level."**

Public participation is aimed at achieving first the right to a fair hearing before decisions on environment are made or imposed on people."

He also found and held: that there should be a cautious approach to the project in view of expert opinion on the dangers of electromagnetic exposure and the provisions of EMCA on the Precautionary Principle; that there was no consideration about alternative sites for the project; that NEMA acted after the event and only upon prompting by the tenants; that NEMA was incredibly lax in its wavering or uncertainty about what the law required of the project: whether it was a project report or an EIA Study Report; that NEMA did not take all material considerations into account before making its decision on the project; and that NEMA had called for an EIA and imposed a Stop order, thus creating a legitimate expectation on the tenants that the law would henceforth be followed to the letter before approval of the project. The application was granted on 14th December, 2006 as prayed by the tenants.

Aggrieved by that decision, EM filed and served a notice of appeal. For its part NEMA felt emboldened by the decision and issued a notice to EM on 21st December, 2006 for removal of any and all equipment related to the installation of telecommunication equipment on the apartments within seven days of that notice. It also gave a directive that an EIA should be produced in strict compliance with EMCA and the Regulations thereunder if EM were still desirous of installing the telecommunication equipment on the said Apartments. The following day, EM came before this Court and filed the application now under consideration.

The twin principles which have been consistently applied by this court in applications made under ***rule 5 (2) (b)*** are that the applicant, in order to succeed, has to satisfy the court that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal; and secondly that if an order of stay or injunction, as the case may be, is not granted, the appeal or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the order. – See **Reliance Bank Ltd (in liquidation) vs. Norlake Investments Ltd [2002] 1 EA 227**. The principles will however be applied to the particular facts and circumstances of each case.

We need not belabour whether the first principle is satisfied because learned counsel on both sides are readily in agreement that the intended appeal is not frivolous or unarguable. It will be contended, amongst other issues raised by Mr. Gachuhi, learned counsel for the applicant, that the court erred and lacked jurisdiction in purporting to substitute its decision for that of the lawfully constituted institutions for that purpose; that the court erred in finding that an EIA was necessary for the intended project and in

further dismissing the study report submitted by the applicant to NEMA although the report was in compliance of the law; and that the learned Judge erred in finding that there was a breach of the rules of natural justice or that there were any health or other environmental concerns to be addressed before the project was put underway or at all.

For our part we think it is in the interests of environmental justice that the jurisprudence on the relatively new EMCA be given as wide a ventilation as possible and we would be slow to make a finding that the intended appeal was frivolous in a matter as this which gives an opportunity to the highest court in the land to pronounce itself on the issues intended to be raised. The only matter that calls for our consideration at this stage is whether the intended appeal would be rendered nugatory.

Mr. Gachuhi was emphatic that it would, because the applicant has incurred and continues to incur, heavy losses since adverse orders were issued in July, 2006. On the other hand the respondents (tenants) were suffering no prejudice as there are no health risks posed by the project. He called upon us to apply the standard of balance of convenience adopted by this Court in the ***Reliance Bank Ltd*** case (supra). That is certainly one of the elements the court would consider as it weighs the claims of both parties. Mr. Gachuhi further urged us to apply the principles set out in **Butt v Rent Restriction Tribunal [1982] KLR 417** since there was no overwhelming hindrance in this matter to discourage the court from granting a stay and in any event, there were special circumstances in the case to warrant a grant of the stay. Mr. Oriaro, learned counsel for the tenants, was similarly emphatic but of the opposite view. Granting the order of stay, he submitted, would open the way for the applicants to complete and operationalise the project. There was no knowing, in view of conflicting and uncertain scientific opinions on the effects of electromagnetic exposure, what the health conditions of the respondents would be by the time the applicants lose their intended appeal. The effects would be irreversible and uncompensable. On the other hand the applicants would at worst only suffer monetary loss in the event of success of their appeal. In his submission, the best order in all the circumstances would be the maintenance of the *status quo* until the appeal is heard and determined. Counsel for NEMA, Mr. Mutua took no position in the matter and undertook to comply with any orders the court may issue.

We have, as we must, weighed the respective claims and circumstances of the parties and we are persuaded that the intended appeal would not be rendered nugatory if the order sought is not granted. On the contrary, we think, in the special circumstances of this case which involves environmental matters and the health of human beings in particular, that the appropriate order which we should make and now make, is that the *status quo* prevailing as at the time the judgment of the superior court was delivered shall remain until the hearing and determination of the intended appeal. The costs of the application shall be in the intended appeal. Those shall be our orders.

Dated and delivered at Nairobi this 16th day of March, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.