



**REPUBLIC OF KENYA**

**NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI**

**TRIBUNAL APPEAL 10 OF 2006**

**TIM BUSIENEI.....APPELLANT**

**DR. R.N. WAMBUGU .....APPELLANT**

**ELIUD YEGO ( SUING AS CHAIRMAN, SECRETARY AND TREASURER,  
RESPECTIVELY OF ELGON VIEW RESIDENT'S ASSOCIATION).....APPELLANT**

**VERSUS**

**DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY (NEMA).....1ST RESPONDENT**

**M/S MECHAI INTERNATIONAL.....2ND RESPONDENT**

**RULING**

1. By Notice of Appeal dated 6<sup>th</sup> July, 2006 filed by Elgon View Resident's Association and subsequently amended to include names of the Association's officials as named in the title and Grounds of Appeal subsequently filed on 13<sup>th</sup> July, 2006, which the Appellants appealed against the 1<sup>st</sup> Respondent's approval of the 2<sup>nd</sup> Respondent's development of a light industry (a metal fabricating workshop) in Elgon View Estate in Eldoret on the grounds that: the approval was granted without consulting persons living in the neighbourhood; if allowed to construct the light industry, it would interfere with the residents' quiet occupation of their residences and that it was likely to make a lot of noise and emit fumes; the area where the industry was supposed to be built is purely a high class residential area and if the 2<sup>nd</sup> Respondent's development was approved, other industries were likely to come up; and that the intended industry would be a nuisance to the residents.

2. Upon Receipt of an Environmental Impact Assessment Project Report prepared by Dr. Grephas Opata on behalf of the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent had communicated its approval of the 2<sup>nd</sup> Respondent's workshop for church building ministry by letter dated 12<sup>th</sup> October, 2005 and subsequently issued an Environmental Impact Assessment Licence on 30<sup>th</sup> June 2006.

3. The 1<sup>st</sup> Respondent objected to the Appeal on grounds that it was the responsibility of Eldoret Municipal Council to designate areas for development through its Planning Department; NEMA as a distinct body from Eldoret Municipal Council has no powers of control over the Council; if NEMA acted on the basis of omissions or actions of other bodies including Eldoret Municipal Council, it would be acting *ultra vires* and such action would be void *ab initio*; NEMA has the machinery provided for in the Environmental Management and Co-ordination Act (EMCA) to deal with the facility if and when it would emit fumes and noise and that it would be premature for NEMA to act before such events occur; and that the issue at hand was not noise or fumes but construction, which was not within the ambit of NEMA's authority.

4. The 2<sup>nd</sup> Respondent filed reply on August 21, 2006 stating that all the relevant parties living close to the 2<sup>nd</sup> Respondent's development were consulted and gave their approval of the development; proper notice of the development was issued on all the necessary parties, including the Appellants but they failed to register their objections; the 1<sup>st</sup> Respondent's approval was proper,

factual and meritorious; there was no such persons as Elgon View Residents and the appeal should be dismissed on that basis; the 2<sup>nd</sup> Respondent had undertaken extensive development costing millions of shillings and the Appellant's attempt to stop the development was belated and the 2<sup>nd</sup> Respondent would suffer irreparable damage if stopped; the Appellants had failed to show any damage they stood to suffer; and that the 2<sup>nd</sup> Respondent was not building any industry as alleged by the Appellants.

5. In the appeal, parties were represented as follows: Mr. Kitiwa of Kitiwa & Company Advocates for the Appellants; Mr. Nyaberi, and subsequently Mr. Gitanda, both of Nyaberi & Company Advocates for the 1<sup>st</sup> Respondent; and Mr. Chemitei of Chemitei & Company Advocates for the 2<sup>nd</sup> Respondent. The appeal was heard, partly in Eldoret, on 10 occasions between 22<sup>nd</sup> August, 2006 and 8<sup>th</sup> June 2007.

6. A total of 10 witnesses were called to testify. The Appellants called to testify: Nicholas Macharia Wambugu, a dentist who is the Secretary to the Appellant Association and a resident of Elgon View Estate; Rena Oyugi, a teacher and a member of the Appellant Association whose house neighbours the 2<sup>nd</sup> Respondent's facility; John Mburu Karicho, a business man whose house is located about 300 yards from the 2<sup>nd</sup> Respondent's facility; Timothy Kipkorir Busienei, the Chairman of the Appellant Association who is also a resident of Elgon View Estate; Eliud Kipchirchir Yego, a Land Surveyor and resident of the same Estate; and Stella Chemutai Keino, an environmental impact assessment expert and consultant hired by the Appellants to carry out "public consultation" on behalf of the Appellants and write a commentary on what was lacking on the 2<sup>nd</sup> Respondent's environmental impact assessment Project Report submitted to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent called two witnesses, namely: Nancy Muui the District Environment Officer for Uasin Gishu District and Veronica Kimutai, the 2<sup>nd</sup> Respondent's Senior Standards Officer. The 2<sup>nd</sup> Respondent also called two witnesses, namely: James Muriuki Wamae, an Occupational Health Officer in charge of Uasin Gishu District and Soren Fyhn Kristen Pedersen, the Director of Mechai International, a missionary organization registered in Kenya in 1995.

7. In the presence of representatives of all parties and some of their witnesses, the Tribunal visited the site in Eldoret on 22<sup>nd</sup> March, 2007 and observed that the 2<sup>nd</sup> Respondent was in the final stages of constructing a warehouse measuring approximately 100 x 50 metres on land parcel number 13/444 located off Nyerere Road in Eldoret, in an area generally known as Elgon View. It was observed that the facility has a basement floor windows fitted with double glass to filter noise and another floor at ground level. Ground floor was still under construction and statedly, the 2<sup>nd</sup> Respondent planned to construct its windows with three layers of glass and if necessary, add another layer with saw dust to act as sound buffer. Noise levels were tested while a metal cutter and subsequently, a grinder and a welding machine were in operation.

8. In evidence, the Appellants faulted the 1<sup>st</sup> Respondent's approval of the 2<sup>nd</sup> Respondent's construction of a light industry in Elgon View in Eldoret on the basis that they, as residents of Elgon View, were not consulted before the development was approved by Eldoret Municipal Council, the Physical Planning Department that approved change of use of plot number 13/444 from residential to light industry and by the 1<sup>st</sup> Respondent, before approving the development; the area is zoned for residential purposes; residents of Elgon View were not consulted before the development was approved; the development had changed the beautiful appearance of an area that used to be a forest; the development was of a character not in keeping with developments in the area and if allowed to remain, would set a bad precedent and encourage industrial developments thereby altering the appearance of the area; the existence of a light industry would lower property values in the area; the facility was likely to generate noise and constitute nuisance to residents, thereby interfering with their enjoyment of their property; operations of the facility would create insecurity as its workers were likely to commit petty thefts from neighbouring houses; operations of the facility would increase traffic in a low density high class residential area; once in operation, the facility was likely to generate smoke which would interfere with residents; that the facility ought to have been located in an industrial area in Eldoret; and witnesses were suspicious that the 2<sup>nd</sup> Respondent may be planning to carry out industrial activities of a larger scale than what had been presented, feared that bigger and additional machines may be introduced at some point in time and expressed doubt about who would check on the operations. On these bases, the Appellants urged the Tribunal to revoke the 1<sup>st</sup> Respondent's approval of the development and order that the development be relocated.

9. Witnesses for the Appellants admitted that they knew of the 2<sup>nd</sup> Respondent's proposed development before construction work began, but they did not make concerted efforts to deliberate with the 2<sup>nd</sup> Respondent's representative, who is also a resident of Elgon View and a member of the Association. Neither did they raise objections with the 1<sup>st</sup> Respondent before work commenced. The 1<sup>st</sup> witness, Nicholas Macharia Wambugu stated that he saw the development coming up, even before the walls were put up. He had also seen a notice of change of user on a notice board erected on the proposed site but did not personally raise any objection. In cross-examination, he stated that having been to the site on the day of the Tribunal's visit, he would not say that what the developer would be doing there would affect him and had no fear that the facility would emit fumes. It also seemed to him that the 2<sup>nd</sup> Respondent had complied with all the development requirements. He only had fear that other industries would be located in the area

in future if the 2<sup>nd</sup> Respondent's development is allowed.

10. The second witness, Rena Oyugi stated that she got to know Mechai International was intending to construct a facility in Elgon View before construction work began but did not object to it. Instead, she started considering the matter with her neighbours. She admitted that the noise she heard when noise levels were tested during the Tribunal's visit "was not much" and she would not hear it from her house. About fumes, she asked, "which fumes" May be there will be fumes when they start operating", expressing doubt that there would be fumes at all. Her main concern was security "in the sense of small time theft by people who work in the factory." She stated that such people could steal a bicycle in her garden. The third witness, Timothy Kipkorir Busienei, had been aware of the 2<sup>nd</sup> Respondent's development and had seen it since the year 2003. He had seen an advertisement of the proposed development in Kenya Times Newspaper but had not asked the developer to allow him to go into the facility to see what was going on. Having been at the site during the Tribunal's visit, he stated that he did not and would not have a problem with noise from the 2<sup>nd</sup> Respondent's grinder. He appreciated what the 2<sup>nd</sup> Respondent is doing but his main concern was that the facility was not in the right place. He was suspicious that the machines he saw during the site visit may not be the ones the 2<sup>nd</sup> Respondent will eventually use. He had objected to change of user to both Eldoret Municipal Council and the District Physical Liaison Officer but the officers went ahead and approved the 2<sup>nd</sup> Respondent's development. He explicitly recognized that engineers in the Council's Planning Department are the ones responsible for what takes place in a particular area.

11. The fourth witness, Eliud Kipchirchir Yego, a land surveyor, had known of the 2<sup>nd</sup> Respondent's development since inception. He saw a poster on a tree on site advertising change of use before any construction work began but he did not have time to read it. He later expressed concern that the development was likely to cause environmental pollution and set a bad precedent but stated that he had nothing to show that ElgonView is zoned for residential purposes only and should have no light industries. He further recognized that "it is the Municipal Council which does town planning. It is the Council that gives change of user approval. It is true the Council should be the one organizing the town." He also stated that he is aware that the 1<sup>st</sup> Respondent carries out annual audits of on-going projects. Stella Keino was instructed to comment on the Project report submitted to the 1<sup>st</sup> Respondent on behalf of the 2<sup>nd</sup> Respondent and she wrote, stating that she did not find in the Project Report a description of the applicable regulatory framework, zoning laws, technology procedures and information on public participation, among others, but she did not visit the facility to find out what was going on there. Instead, she only walked around it before writing her comments.

12. The 1<sup>st</sup> Respondent's evidence was that the development proponent's representative, Mr. Soren Fyhn Pedersen consulted with the District Environment Officer (DEO) for Uasin Gishu District before commencing the development in question and was advised to prepare an environmental impact assessment project report, which he did. The report was submitted to the 1<sup>st</sup> Respondent, which subsequently forwarded it to the DEO, whereupon, the DEO constituted a task group comprising experts in relevant areas to look into the matter concerning the proposed development. The task group visited the site where the proponent was, at the time, operating a workshop in West Indies area in Eldoret as well as the proposed site in Elgon View in the same town, considered the proponent's Project Report, site and building plans which had been approved by Eldoret Municipal Council and Uasin Gishu Physical Planning Liaison Planning Committee and subsequently wrote a report to the 1<sup>st</sup> Respondent, indicating that they were satisfied with the proposed mitigation measures.

13. After consideration of the task force's report, the project report submitted by the proponent, a letter of objection to the development received by the 1<sup>st</sup> Respondent from some of Elgon View residents, a statement of no objection to the development from a Dr. Jakaiti, one of the proponent's immediate neighbour, a letter dated 4<sup>th</sup> September 2003 from the District Physical Planning Officer, Uasin Gishu District conveying approval of change of user of plot 13/444 in Eldoret from residential to workshop and Eldoret Municipal Council's letter dated 25<sup>th</sup> November, 2003 conveying the Council's approval on 10<sup>th</sup> November 2003 of the proposed development, the 1<sup>st</sup> Respondent issued to the 2<sup>nd</sup> Respondent a letter dated 12<sup>th</sup> October 2005 conveying its approval of the development, subject to conditions which the developer had to accept or reject. Upon acceptance of the condition's conveyed to the 1<sup>st</sup> respondent by the proponent's letter of 21<sup>st</sup> February 2006, the 1<sup>st</sup> Respondent issued to the 2<sup>nd</sup> Respondent an environmental impact assessment licence on 30<sup>th</sup> June, 2006.

14. Regarding noise, which the Appellants complained about, the 1<sup>st</sup> Respondent's evidence was that the proposed activities could generate noise. However, the proposed mitigation measures, including the planned use of sound-proofing materials and construction of a stone wall all around the 2<sup>nd</sup> Respondent's facility, were adequate to safeguard against noise. The 1<sup>st</sup> Respondent was satisfied that if the project was implemented according to proposed mitigation measures, it could co-exist with residential developments in the area and would pose no problem. In any case, once the project was approved, the 1<sup>st</sup> Respondent's DEO was required to monitor compliance. The 1<sup>st</sup> Respondent clarified that objections to development do not necessarily lead it to deny development permission.

15. Regarding the location of the proposed development, witnesses for the 1st Respondent testified that although the area where the

2<sup>nd</sup> Respondent proposed to construct a workshop, and not an industry was a low density residential area, Eldoret Municipal Council has had a problem with zoning, is still in the process of zoning the municipality, there is no industrial area and industries are scattered all over the area of the municipality. They stated that within Elgon View, a project similar to the 2<sup>nd</sup> Respondent's has been and is being operated by the Catholic Church. They maintained that the 2<sup>nd</sup> Respondent had complied with all the legal requirements and the development should be allowed to proceed.

16. Witnesses for the 2<sup>nd</sup> Respondent testified that it is a charitable organization that helps to establish churches, schools and orphanages by assisting in constructing roofs and pillars to allow early use of facilities. It was incorporated in Kenya in 1995 and since then, Mr. Soren Kristen Petersen, an Electrical and Construction Engineer, has been its director.

17. Before re-locating to Elgon View, the 2<sup>nd</sup> Respondent was operating a workshop on land belonging to someone else in an area known as West Indies within Eldoret Municipality in compliance with health, noise and safety requirements and there was no report of any problem arising from its operations there.

18. Desirous of owning premises for its operations, the 2<sup>nd</sup> Respondent's director looked for land all over Eldoret and finally found Plot Numbers 13/442; 13/443 and 13/444 in Elgon View area which it purchased, knowing that the land was residential. Subsequently, the 2<sup>nd</sup> Respondent obtained change of user from the Physical Planning Department in respect of land parcel Number 13/444 on 9<sup>TH</sup> October 2006, approval of site and building plans from Eldoret Municipal Council, development approval and EIA licence from the 1<sup>st</sup> Respondent and commenced construction work on 1<sup>st</sup> March 2004. The approvals and EIA licence were submitted to the Tribunal in evidence.

19. After work commenced, the Occupational Health and Safety Officer in charge of Uasin Gishu District also perused the 2<sup>nd</sup> Respondent's building plans, visited the site and confirmed that the 2<sup>nd</sup> Respondent was in compliance with health, safety and noise requirements and had taken noise reduction measures. It was explained that the Occupational Safety and Health Department in Uasin Gishu has a scientific way of measuring noise levels in decibels using a noise meter and could apply the measure to the 2<sup>nd</sup> Respondent's facility to ensure that the 90 decibels limit is not exceeded. The Department's officer who visited the 2<sup>nd</sup> Respondent's facility expressed satisfaction that the level of noise that the workshop was likely to generate was likely to be far below the limit and that if the workshop is operated as proposed and proposed mitigation measures implemented, it will pose no problem. The Occupational Health Officer monitors the workshop once every month and will require the developer to carry out safety and health audits every year.

20. It was the 2<sup>nd</sup> Respondent's evidence that during the change of use approval process, its director made efforts to consult with neighbours and obtained development approval from Mr. Neil Lorrens, a Reverent Joseph, Mary Kamau and Charles Jakaiti who were the immediate neighbours to the property in question. The director also published a change of user notice on a notice board which he erected on a fence at the proposed site and then invited Eldoret Municipal Council Engineer to inspect and approve it, which the Engineer did and confirmed that the notice was satisfactory. The director also issued a public notice of the proposed change of user in both Taifa Leo and Kenya Times newspapers but none of the Elgon View Resident's Association members made efforts to inquire about the proposed development, what it would be doing and how it might affect the environment, if at all. Efforts made by the 2<sup>nd</sup> Respondent's director to explain the proposed development, even through the councillor for the area, who is also Eldoret Municipality's Mayor, failed because the residents were not receptive of the director. Instead, members of the Appellant Association sued the 2<sup>nd</sup> Respondent in Eldoret CMCC No. 793 A of 2004, seeking an injunction to stop the development, but the suit was dismissed.

21. It was explained that the 2<sup>nd</sup> Respondent will utilize the basement of the two-floor workshop for cutting metal using two metal cutters and for storage of materials. To reduce noise that may be generated in the process, all the windows of the basement floor have been fitted with double glass which are expected to filter up to 98 per cent of noise. The ground floor, which is still under construction, is intended to be used for welding and joining of cut materials, for storage of materials and to display items for donors. To safeguard against noise from ground floor, the 2<sup>nd</sup> Respondent plans to construct windows with three layers of glass. If necessary, saw dust could be used to add another layer to act as noise buffer. A silencer could also be installed, should that be necessary. In addition, the facility has empty space all around it and the proponent plans to plant wattle trees in the space behind it to act as a noise buffer in addition to a stone wall that has already been built all round. The 2<sup>nd</sup> Respondent's director stated that the sound proofing measures were approved by an expert. The only smoke expected to be generated in the course of operations would be from welding and is expected to be minimal. If heavy machines are to be introduced, the 2<sup>nd</sup> Respondent will seek all necessary approvals.

22. Regarding traffic, it was explained that the roofing materials to be prepared in the facility would be light enough to be transported by 3-4-ton trucks that are readily available in Eldoret. It was indicated that the 2<sup>nd</sup> Respondent maintains a record of all workers in Elgon View; has tested and intends to test all potential employees on skills and character in addition to contacting referees to ensure that only skilled and honest people work in the facility to guard against theft. So far, the 2<sup>nd</sup> Respondent's workers have not stolen anything from it.

23. Witnesses for the 2<sup>nd</sup> Respondent maintained that Elgon View is not a purely residential area because there are schools, a Catholic workshop similar to the one the 2<sup>nd</sup> Respondent is constructing and the 2<sup>nd</sup> Respondent's immediate neighbors is constructing apartments. The 2<sup>nd</sup> Respondent's director maintained that he is also a resident of Elgon View who lives on one of the three plots he purchased, in very close proximity to the facility in question, receives visitors on a regular basis and is concerned about the safety and comfort of his visitors. If asked to re-locate from Elgon View, it would suffer total loss of the 6-7 million shillings that has already been spent on the project because the structure already built cannot be moved. On these bases, the 2<sup>nd</sup> Respondent asked the Tribunal to allow the project to proceed to completion.

24. The Tribunal has carefully considered the evidence tendered, the situation on the ground observed during its site visit and the applicable law. The Tribunal finds as follows on the pertinent issues arising:

25. 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 impacts 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, water 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 environmental media are relevant considerations.

26. 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 indicative of the nature of 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.

27. The evidence that was adduced and observations made during the Tribunal's visit of the site showed that the quality of air, the level of traffic, noise, aesthetics and other features of the environment in the locality are consistent with environmental requirements for areas used for human habitation. The evidence adduced, observations made during the site visit and demonstration of the operation of machines to ascertain noise levels conducted during the visit show that the operations of the development in question will not exceed noise, traffic, air quality, water quality and aesthetic aspects of an area used for human habitation. There was no evidence to show that the 2<sup>nd</sup> Respondent's development would adversely impact on the environment in Elgon View in ways that could not be mitigated by the measures that have been proposed by the 2<sup>nd</sup> Respondent in the Environmental Impact Assessment Project report. There was no indication, for example, that the operations of the workshop will constitute noise pollution in the area. In fact, Appellant's witnesses did agree, after demonstrations that the noise levels were low and would not affect them. The demonstration proved that the sound-proofing measures which had been adopted are effective. What appears to be of more concern to the residents is their suspicion that the developer might scale up workshop operations to higher levels, thereby constituting noise pollution, traffic problems and other environmental challenges. In that event, as rightly pointed out by witnesses for the 1<sup>st</sup> Respondent and the Occupational Health and safety Officer in charge of Uasin Gishu, mechanisms do exist in both the 1<sup>st</sup> Respondent and the Labour Department in Uasin Gishu, among others, to deal with any adverse consequences that might arise from the 2<sup>nd</sup> Respondent's operations.

28. The Appellants raised other issues, in particular, that opportunity for public participation had been denied by the 2<sup>nd</sup> Respondent. However, evidence showed that there was consultation between the 2<sup>nd</sup> Respondent's director and potentially affected neighbours, including the Appellants herein. It is unlikely that a full EIA study would have materially changed the situation. Other technical irregularities pointed out by the Appellants, for example, that the 2<sup>nd</sup> Respondent did not fully comply with the procedure for obtaining change of user approval, were also not proven by the Appellants, to the satisfaction of the Tribunal. In fact, witnesses for the Appellants acknowledged having seen a notice of change of user erected on site and public notices in Taifa Leo and Kenya Times News papers. The Tribunal does not consider these matters as vitiating the decision taken by the 1<sup>st</sup> Respondent on the central issue, that is, the development of a workshop for preparing trusses and other building materials for churches, schools and orphanages in Elgon View area in Eldoret is not likely to introduce significant adverse environmental impacts which cannot be

mitigated through appropriate measures such as those proposed in the EIA Project report. In deed, the 2<sup>nd</sup> Respondent has gone out of its way to plant over 2000 trees in the area in collaboration with Moi Teaching and Referral Hospital, is planning to plant trees in the space behind his facility and in front of the facility to screen it from the view of people passing on the road which would mitigate the aesthetic impact which the Appellant complained about, has installed noise buffers on windows on the ground floor of the facility in question, has kept the whole of its compound and a section of the nearby Rive Soi where the director is resident, in a very clean state.

29. Therefore, the Tribunal finds that the appeal fails and directs that:-

1. The 1<sup>st</sup> Respondent's approval of the development and the EIA licence subsequently issued on 30<sup>th</sup> June 2006 are affirmed.

2. The 2<sup>nd</sup> Respondent is at liberty to proceed with the development to completion.

3. Each party to bear its own costs. The Tribunal takes the view that the residents were not unreasonable in making the appeal and during the proceedings, they conducted themselves properly. Therefore, Rule 39 of the Tribunal Rules of Procedure does not apply.

30. The Tribunal wishes to draw attention of the parties to Section 130 of EMCA.

DATED at Nairobi this 18<sup>th</sup> day of June, 2007.

Donald Kaniaru - CHAIRMAN

Dwasi Jane - MEMBER

Albert Mumma - MEMBER

Stanley Waudu - MEMBER

Joseph Njihia - MEMBER



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