



Case Number:	Tribunal Case Net 16 of 2018
Date Delivered:	07 Dec 2018
Case Class:	Civil
Court:	National Environment Tribunal - Nairobi
Case Action:	Ruling
Judge:	MOHAMMED S. BALALACHAIRPRESON, BAHATI MWAMUYE-MEMBER, KARIUKI MUIGUA-MEMBER
Citation:	Jyoti Hardware Limited v National Environmental Management Authority [NEMA] [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO. NET 016 of 2018

(CONSOLIDATED WITH NET 17, 18, 19, 22 & 23 OF 2018)

JYOTI HARDWARE LIMITED.....APPELLANT

-VERSUS-

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY [NEMA].....RESPONDENT

RULING

(On the Consolidated Appellants' Notice of Motion Application Dated 24th October, 2018; Filed On 25th October, 2018)

1. By Notices of Appeal dated 23rd October, 2018 and filed on 23rd October, 2018 with respect to NET 16, 17, 18 and 19 of 2018; and Notices of Appeal dated 6th November, 2018 and filed on 6th November, 2018 with respect to NET 22 and 23 of 2018; the Consolidated Appellants/Applicants herein challenged the Respondent's issuance of Improvement Notices with respect to each of them and their individual properties, all situated along Dar-es-Salaam Road in Nairobi's Industrial Area; issued on the uniform ground of alleged "encroachment on the six (6) metres riparian reserve from the highest water mark contrary to the Law."

2. The Consolidated Appellants/Applicants are represented by a common Counsel, and the reliefs sought in their respective Notices of Appeal are uniform. They are, *verbatim*:

a. An Order under Certificate of Urgency that in the first instance this Honourable Tribunal do grant status quo ex parte to stay and stop the Respondent from enforcing its improvement notice in relation to the Appellant's property whatsoever and to stop the Respondent from demolishing any structure on the Appellant's property pending the hearing and determination of the Appeal herein;

b. A Declaration that the improvement notice issued by the Respondent violates the legitimate expectation of the Appellant and is therefore null and void *ab initio*;

c. An Order setting aside in its entirety the improvement notice served in respect of the Appellant's property; and

d. An Order that the Respondent do pay the Appellant's Costs of Appeal herein.

3. The Notices of Appeal were followed by the Notice of Motion Application herein, dated 24th October, 2018 and filed on 25th October, 2018 under Certificate of Urgency, which Application was made in the lead file being Net 016 of 2018 which was the lead file pursuant to the Orders of Consolidation issued by the Tribunal on 24th October, 2018 upon the Appellants/Applicants' ex parte Application for the same dated 23rd October, 2018 and filed on even date. The Application was supported by the Supporting Affidavit of Amrish N. Patel dated 24th October, 2018 and filed on 25th October, 2018.

4. The Notice of Motion Application herein, dated 24th October, 2018 and filed on 25th October, 2018 sought orders, *inter alia*, that:-

a. This Honourable Tribunal be pleased to issue an injunction/stay order restraining and/or prohibiting the Respondent jointly and severally by itself and/or through its agents, servants and/or employees or otherwise whatsoever from enforcing the improvement notices served to the respective Appellants and/or in any way howsoever interfering with the building, wall, compound and quiet

enjoyment of the Appellants' respective properties all situated along Dar es Salaam Road, Industrial Area, Nairobi; pending hearing and determination of the Application herein. [Prayer No. 3]

b. This Honourable Tribunal be pleased to issue an injunction/stay order restraining and/or prohibiting the Respondent jointly and severally by itself and/or through its agents, servants and/or employees or otherwise whatsoever from entering, breaking, demolishing, destroying, evicting, defacing, flattening, removing and/or in any way howsoever interfering with the building, wall, compound and quiet enjoyment of the Appellants' respective properties all situated along Dar es Salaam Road, Industrial Area, Nairobi; and/or enforcing the improvement notices served to the respective Appellants pending hearing and determination of the Appeal herein. [Prayer No. 4]

5. The crux of the Consolidated Appellants identical cases against the uniform Respondent are stated in the respective Notices of Appeal and are mirrored in the instant Application is that they have all been the registered owners of their respective properties and constructed the structures that are the subject of the improvement notices as far back as the year 1987, with the most recent being in the year 2005. They contend that the improvement notices are arbitrary, illegal, issued without regard to the Right to Fair Administrative Action and Due Process, amount to a retrospective application of the Law, have been issued without evidence of actual encroachment on a riparian reserve and have been issued contrary to the Consolidated Appellants/Applicants' Legitimate Expectation. These points, and the additional point of irreparable losses should the improvement notices be enforced, were fleshed out in the Supporting Affidavit of Amrish N. Patel dated 24th October, 2018 and filed on 25th October, 2018.

6. The uniform Respondent in the Consolidated Appeals opposed the Consolidated Appellants/Applicants' Notice of Motion Application dated 24th October, 2018 *vides* the Replying Affidavit of Mr. David Ong'are dated 5th November, 2018; filed on even dated. Mr. David Ong'are swore that Replying Affidavit in his capacity as "*the Director in charge of compliance and enforcement of environment laws in the service of the Respondent.*"

7. The Replying Affidavit of Mr. David Ong'are centered around the following points:-

a. That on 12th and 15th October 2018, my officers visited the properties of the Appellants situate in Industrial Area and found that their boundary walls were all encroaching onto the riparian reserve and thus issued Improvement Orders. [Paragraph 6]

b. That the operation was made on over 10 properties where the rest of the affected persons have since visited my office and entered into a negotiated plan for compliance which has included an extended time to comply and assistance in marking the riparian area for purposes of clearance. [Paragraph 8]

c. That the law on riparian reserves provides for a minimum of 6 metres and a maximum of 30 metres from the highest recorded flood level of a river. [Paragraph 10]

d. That I am informed by my officers who visited the site, that some of the boundary walls in issue were over time extended ostensibly to 'make use' of the riparian space as the owners did not attach any value to riparian land.

8. In response to the Respondent's Replying Affidavit dated 5th November, 2018; the Consolidated Appellants/Applicants filed and served a Further Affidavit sworn by Kiran Chandubhai Patel on 13th November, 2018 and filed on the same date. The main thrust of the Further Affidavit was the introduction into evidence of annexed photographs showing "NEMA" demolition markings on the interior walls of building owned and occupied by the some of the Consolidated Appellants/Applicants.

9. The Consolidated Appellants/Applicants' Further Affidavit dated 5th November, 2018 elicited a Supplementary Replying Affidavit titled " Further Reply of the Respondent" , sworn by Samuel Nganga on 27th November, 2018 and filed on the same date. Chiefly, that 'Further Reply of the Respondent' brought out the following points:-

a. That in response to para 2 thereof [of the Further Affidavit of Kiran Chandubhai Patel sworn on 13th November, 2018] on the issue of building erected before the year 2000, the proponents of such buildings were still enjoined under the then applicable laws to protect the riparian reserves and no approval or permission to encroach has been produced. [Paragraph 9]

b. In response to paragraph 4 [of the Further Affidavit of Kiran Chandubhai Patel sworn on 13th November, 2018] f the Further Affidavit of Kiran Chandubhai Patel sworn on 13th November, 2018], the river in issue is not the Nairobi but the Ngong river. The

same also requires protection. [Paragraph 17]

c. That further to the foregoing, it has not been denied that the appellants' structures are near a river and that the respondent has a legal mandate that includes protection of river reserves. [Paragraph 20]

10. After exchanging the aforementioned documents, the Parties appeared before the Tribunal [PANEL: Mohammed S. Balala – Chairperson, Bahati Mwamuye – Member, Kariuki Muigua – Member] on 3rd December, 2018 for the Hearing of the Application. The Consolidated Appellants/Applicants were represented by their Counsel, Mr. Anthony Thuo Kanai, while the common Respondent in the Consolidated Appeals was represented by its Counsel, Mr. Erastus K. Gitonga.

11. At the Hearing of the Application, Counsel for the Consolidated Appellants/Applicants adopted the grounds of the Appeals, the grounds of the Notice of Motion Application, and the Affidavits sworn in support of the Application. Counsel for the Consolidated Appellants/Applicants cited the criteria set out in the seminal case of *Giella –v- Cassman Brown and Co. Ltd* [1973 EA 358] regarding the principles for Interlocutory Injunctions. Counsel for the Consolidated Appellants/Applicants did so by adducing the same through laying before the Tribunal the Ruling of the High Court of Kenya at Nyeri in Civil Suit No. 28 of 2015 delivered by the Hon. Mr. Justice John M. Mativo on 6th January, 2016.

12. With regard to the Fair Administrative Action, Estoppel, Due Process and Legitimate Expectation; Counsel for the Consolidated Appellants/Applicants laid before the Tribunal the Judgment of the High Court of Kenya at Nairobi in *Judicial Review Cause No. 470 of 2016 [Republic –v- The Principal Secretary Ministry of Mining, ex-parte Airbus Helicopters Southern Africa (PTY) Ltd]* and the Judgment of the Environment and Land Court at Mombasa in *Constitutional Petition No. 43 of 2015 [Japheth Nzila Muangi –v- The Minister for Land and Environment of the County Government of Mombasa & Anor]*.

13. With regard to non-retroactive application of the Law, the Counsel for the Consolidated Appellants/Applicants cited the Court of Appeal at Nairobi's Judgment in Civil Appeal No. 29 of 2005 [Commissioner of Income Tax –v- Pan African Paper Mills (E.A.) Limited]. The authorities laid before the Tribunal as articulated under Paragraphs 12 and 13 herein above were used by the Counsel for the Appellants to buttress his argument that the first of the *Geilla* limbs had been met, namely, there was a *prima facie* case.

14. Counsel Thuo Kanai submitted that the Orders of Injunction pending the Hearing and Determination of the Consolidated Appeals were merited because, as per the Principles applicable to Interlocutory Injunctions, the following criteria had been met:-

a. A *Prima Facie* case had been exhibited due to the Consolidated Appellants/Applicants showing a number of weighty legal arguments and strong evidence, which would require the Respondent to rebut;

b. The Consolidated Appellants/Applicants stood to suffer irreparable harm that cannot be compensated by an award of damages; and

c. The balance of convenience lies in favour of the Consolidated Appellants/Applicants as *bona fide* property owners who have been in occupation for many decades.

15. On his part, Counsel for the common Respondent in the Consolidated Appeals in opposing the Application adopted the Respondent's affidavits, and the grounds articulated therein. Counsel Gitonga submitted that:-

a. No *prima facie* case had been established by the Consolidated Appellants/Applicants, due to the fact that they had not denied that they are in contravention of the law with regard to the riparian reserves;

b. A *prima facie* case cannot be established based on an admission of illegality, for the purposes of the grant of injunctive relief;

c. The Tribunal should decline to issue the Injunctive Orders sought in the present case as the Respondent is merely exercising its statutory mandate with regard to the protection of the environment; and

d. Other property owners adjacent to the Consolidated Appellants/Applicants were in compliance with their Improvement Notices, showing that they had conceded the legality and probity of the same, and as such the Consolidated Appellants/Applicants cannot be

deemed to have a strong case.

16. In brief rejoinder, Counsel for the Consolidated Appellants/Applicants invited the Tribunal to note that while the Consolidated Appellants/Applicants had adduced evidence comprising photographs, maps and plans; the Respondent had not done so. Further, Counsel argued that the Consolidated Appellants/Applicants had raised novel and intriguing points of law on the retrospective application of riparian regulations; a point that Counsel submitted has not been determined by the Tribunal in any past case. Lastly, Counsel Thuo Kanai submitted that the inconvenience of demolishing the structures in question and the consequent disruption to embedded businesses and livelihoods that have been in place for decades was of such a nature and magnitude that they could not be compensated by damages.

17. Both Counsel prayed for the award of the Costs of the Application to their Client(s).

ANALYSIS AND FINDINGS

18. Interlocutory Applications for Injunctive Orders are a mainstay of civil litigation in Kenya, as well as in other jurisdictions. The principles for Interlocutory Injunctions are well-known and settled. The *Giella* Principles have been affirmed by our Nation's Apex Court and been applied without deviation by all the Courts and Tribunals that lie below it in the hierarchy of Courts.

19. The *Giella* Principles have been simplified in a number of other celebrated including the famous cases of *R.J.R. Macdonald –v- Canada* [(1995) 3 S.C.R. 1999] in which the Supreme Court of Canada enunciated a three-pronged test, being:-

- a. A serious triable issue or issues have been advanced by the Applicant, outlining a *prima facie* case that merits rebuttal by the Respondent;
- b. The Applicant will suffer irreparable harm if the injunction is not granted, for which harm damages are not an appropriate or adequate remedy; and
- c. Which party would suffer the greater harm with regard to the grant or refusal of the Application for injunction, i.e., the balance of convenience"

20. Without delving into the relative merits and demerits of the main matter pending before the Tribunal in these Consolidated Appeals, on the face of it the Consolidated Appellants/Applicants have established a *prima facie* case with a probability of success at full Trial, which necessitates rebuttal by the Respondent. A number of intriguing legal and factual arguments have been made by both the Consolidated Appellants/Applicants as well as the Respondent common to all the Consolidated Appeals, and the grant of interlocutory injunctive reliefs would preserve the subject matter of the Consolidated Appeals from being rendered nugatory by enforcement of the Improvement Notices by the Respondent.

21. With regard to whether the Consolidated Appellants/Applicants could be compensated by damages in lieu of the grant of interlocutory injunctive relief, the Tribunal finds that were the Consolidated Appellants/Applicants to succeed in these Matters, damages would not be an adequate compensation for the losses they would suffer should the Respondent be allowed to proceed with enforcement. The Tribunal further notes that were damages to be paid in these matters, they would be borne by the Taxpayer, given that the Respondent is a Public Body.

22. Lastly, the Tribunal finds that the balance of convenience swings in favour of the Consolidated Appellants/Applicant. The Respondent has not pointed to an immediate, ongoing and/or direct harm to the Environment that necessitates the immediate enforcement of the Improvement Notices in the matters herein. The Tribunal notes that Consolidated Appellants/Applicants' contention that their structures have in place since 1987 in some cases was not rebutted by the Respondent. Without immediate, ongoing and/or direct harm to the Environment, the Respondent cannot and has not pointed to any prejudice that it or the Environment shall suffer from the grant of interlocutory injunctive relief.

23. In the present circumstances; it is fit, right and proper that the Consolidated Appellants/Applicants be granted interlocutory injunctive orders pending the hearing and determination of their substantive Appeals, with the interests of the Respondent being catered for by these Matters being heard on a Priority Basis.

24. Accordingly, it is our finding that the Consolidated Appellants/Applicants' Notice of Motion Application Dated 24th October, 2018 [Filed On 25th October, 2018] is merited.

ORDER

25. For the reasons stated above, the Tribunal issues the following Orders:

a. [That an injunction be and is hereby issued against the Respondent by itself and/or through its servants, agents, cohorts or howsoever otherwise from enforcing the Improvement Notices that are the subject matter of the Consolidated Appeals herein, until the Consolidated Appeals herein are heard and determined;](#)

b. That an injunction be and is hereby issued against the Respondent by itself and/or through its servants, agents, cohorts or howsoever otherwise from interfering with any building, structure or area within the premises of any of the Consolidated Appellants herein without the leave of this Tribunal, pending the hearing and determination of the Consolidated Appeals herein;

[\[CK1\]](#)

c. The Parties are directed to move with speed and take steps to fix the Consolidated Appeals for full hearing and determination, with NET No. 16 of 2018 being the lead file in which all Pleadings and Documents by the Parties shall be filed;

d. That pursuant to (c) above, the Consolidated Appellants shall have seven (7) days from the date hereof to file and serve on the Respondent any additional documents and witness statements/affidavits with regard to the Main Suit;

e. That further to (d) above, the Respondent shall have twenty-one (21) days from the date of being served by the Consolidated Appellants to file and serve on the Consolidated Appellants the Respondent's Reply to the Appeal (if any) together with any Witness Statements/ Affidavits and Documents in support thereof;

f. That further to (e) above, the Consolidated Appellants shall have seven (7) days from the date of being served by the Respondent to file and serve any responses to the Respondent's Reply to the Appeal (if any) and any Witness Statements/ Affidavits and Documents in support thereof;

g. Pleadings shall close upon the expiry of the time period set out under (f) above and all timelines as above shall strictly apply;

h. The Parties herein shall appear before the Tribunal on Thursday, 31st January, 2019 to take a Hearing Date(s) for the Consolidated Appeals herein, as well as take such directions as the Tribunal shall issue; and

i. The Costs of this Application shall be in the Course.

26. Right of Appeal of thirty (30) days.

DATED & DELIVERED at NAIROBI this 7th Day of DECEMBER, 2018

MOHAMMED S. BALALA.....CHAIRPERSON

BAHATI MWAMUYE.....MEMBER

KARIUKI MUIGUA.....MEMBER

[\[CK1\]](#)It will be prudent to indicate the LR numbers of the parcels so as to make the orders specific and enforceable.



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