



**Endesk Properties Limited v Director General National Environment Management Authority & another (Tribunal Appeal 12 of 2023) [2023] KENET 1251 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KENET 1251 (KLR)

**REPUBLIC OF KENYA**  
**IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI**  
**TRIBUNAL APPEAL 12 OF 2023**  
**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI**  
**MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**  
**DECEMBER 14, 2023**

**BETWEEN**

**ENDESK PROPERTIES LIMITED ..... APPELLANT**

**AND**

**DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT**  
**AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KOPOA DEVELOPERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Honorable Tribunal is the Applicant's Application dated 9<sup>th</sup> November 2023 seeking the following orders:
  - i. The Honorable Tribunal conducts a site visit of the ongoing construction by the 2<sup>nd</sup> respondent pending its final determination of the Appeal herein.
  - ii. The costs of the Application be borne by the Respondents.
2. The Application is supported by the affidavit of Reffin Turana sworn on 9<sup>th</sup> November 2023. The 2<sup>nd</sup> respondent is opposed to the Application through its Replying Affidavit sworn by Liu Jiangang on 1<sup>st</sup> December 2023.
3. The Application was canvassed by way of written submissions, and in that regard, the Applicant filed its submissions dated 8<sup>th</sup> December 2023 while the 2<sup>nd</sup> respondent filed its submissions which are undated.
4. Having considered the Applicant's Application together with the supporting affidavit thereto, the 2<sup>nd</sup> Respondent's Replying Affidavit and the parties' respective submissions, the Tribunal is of the firm



view that the sole issue arising for determination is Whether the Applicant is entitled to the orders sought.

5. The Power of the Tribunal to conduct a site visit is provided for under Rule 22(6) of the National Environmental Tribunal Procedure Rules, 2003. The said Rule provides as follows:

‘(6) Subject to this rule, the Tribunal may, if it thinks fit to do so, visit any site with or without any or all of the parties and may hold an oral hearing at such site on the day of such visit.’

6. In advancing its case for a site visit, the Applicant argues that one of the issues for consideration in this appeal is whether the ongoing construction is observing the regulation on plot density to estimated plot ratio. As such, the Appellant argues that a site visit will help the Tribunal to ascertain the facts on the ground before reaching its final decision in the matter.
7. In opposing the Application, the 2<sup>nd</sup> respondent argues that all parties were granted ample opportunity to present their evidence, and as such, allowing a site visit at this juncture will serve to introduce new evidence, and the same would be prejudicial to its position and in any event, the Applicant has not sought to re-open its case. Further, the 2<sup>nd</sup> respondent argues that the Application is a fishing expedition, and the Tribunal should not be drawn to the evidentiary quest. Lastly, the 2<sup>nd</sup> respondent posits that the role of the Tribunal is adjudicative, not investigative.
8. In addressing our minds to the 2<sup>nd</sup> Respondent’s arguments, the Tribunal notes that as provided under Section 26(1) of EMCA it is not bound by strict rules of evidence. This is in line Article 159(2)(d) of *the Constitution* which provides that the justice should be administered without undue regard to procedural technicalities.
9. Regarding the argument that the Tribunal’s role is adjudicative and not investigative, it is the Tribunal finding that the same is misguided. That line of argument is not appreciative(sic) of Section 126(2) of EMCA which clothes the Tribunal with inquisitorial powers. The said provision provides as follows:

‘The Tribunal shall, upon an appeal made to it in writing by any party or a referral made to it by the Authority on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make decisions thereon, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the Authority or any relevant committee thereof, as the case may be’

10. From the foregoing provision, it is clear that the Tribunal is not just a passive observer. The Tribunal is clothed with fact finding powers, and in our view one of the ways through which the Tribunal can exercise this power is by conducting a site visit. Further, observation of the site will help the Tribunal better understand the dispute before making its final decision on the appeal. As stated by the Court in Ibrahim Musa Mohamed v Amina Hassan Suleiman & 6 others [2018] eKLR;

‘I have carefully considered the Application and submissions. While I agree that there is need of an expert such as a surveyor to visit such site and file a report, I still believe that since the court is not an expert in the matter, the court’s lay observation of the site would help the Court to better understand the dispute. Secondly, the Applicant is the owner of the case at hand, and to the extent judicially possible, the Court would grant his wish for the Court to visit the site. I do not think that the site visit is abuse of the Court Process. Neither is it a waste or imprudent use of judicial time’



11. In the premises, the Tribunal finds the Applicant's Application dated 9<sup>th</sup> November 2023 to be meritorious and the same is hereby allowed in the following terms:
- a. The Tribunal to conduct a site visit of the ongoing construction by the 2<sup>nd</sup> respondent on 11<sup>th</sup> January 2024.
  - b. In the meantime, in order to preserve the subject matter of the suit any further construction on the suit property be stopped pending the delivery of the Judgment,
  - c. Each party to bear their own costs.

**DATED AND DELIVERED AT NAIROBI, THIS 14<sup>TH</sup> DAY OF DECEMBER 2023**

**EMMANUEL MUMIA - CHAIRMAN**

**WINNIE TSUMA - VICE-CHAIR**

**KARIUKI MUIGUA - MEMBER**

**DUNCAN KURIA - MEMBER**

**RONALD ALLAMANO - MEMBER**

