



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL

AT NAIROBI

TRIBUNAL APPEAL NO. NET 19 OF 2020

THE GREENBELT MOVEMENT.....1ST APPELLANT

THE WANGARI MAATHAI FOUNDATION.....2ND APPELLANT

DANDORA COMMUNITY JUSTICE CENTRE.....3RD APPELLANT

NATURAL JUSTICE.....4TH APPELLANT

KATIBA INSTITUTE.....5TH APPELLANT

=VERSUS=

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1ST RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION (KENYA).....2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....INTERESTED PARTY

RULING

1. This matter is coming up for Ruling on the Appellants’ Notice of Motion Application filed at the Tribunal on 29th September 2020. The said Application seeks a review of the orders of the Tribunal on the manner in which the Appellants’ witnesses who are outside Kenya shall give evidence to the Tribunal.
2. The Appellants pray that the witnesses outside Kenya be sworn over video link and for them to give their oral testimony through the same medium and in the alternative, the witnesses do provide evidence via interrogatories.
3. The Appellant’s Application is supported by the affidavit of Christopher Kerkerer sworn on 29th September 2020. In the affidavit, the deponent has gone to great detail to set out the numerous attempts that the Appellants have made towards securing an appointment with any of the three Kenyan government offices in the United States of America for purposes of planning the swearing their witnesses at the said offices and the consequent adduction of evidence.
4. In brief, the deponent explains that the Appellants’ witness is situate at Eugene, in the State of Oregon. There are three Kenyan government offices in the United States of America being the Embassy of the Republic of Kenya in Washington DC, the New York Consulate General in New York and the Los Angeles Consulate General at Los Angeles which have all remained closed to physical attendances since the onset of the Covid-19 pandemic. The deponent annexed numerous correspondence and notices from the said offices which indicate that they are all closed to physical attendance of their clients, at the exception of the New York office which has been open but for emergencies only. This notwithstanding, the witness would be required to travel from his home town of Eugene in the State of Oregon to New York which is a distance of approximately 4,000 kilometers and would require to spend many hours in aeroplanes, airport lobbies, security queues at the airports, a lot of contact with different people and items at hotel accommodation et cetera, all which would greatly expose the witness who is 57 years old, to possible contact with the now wild corona virus.
5. The Appellants further stated that the Oaths and Statutory Declaration Act does not require that the oath be administered physically and the conducting of such oath by way of video link does not make any of the two oath taking ceremonies more binding as opposed to the other.
6. Finally, the Appellants were of the view that Article 159(2) of the Laws of Kenya require the administration of justice without undue

regard to procedural technicalities thus the requirement that the witness does travel to Kenya to give evidence would jeopardize the Appellants' right to a clean and healthy environment while the insistence on the oath to be administered at the Kenyan Consulate would violate the Appellants' rights to access to justice and fair hearing.

7. The 1st Respondent opposed the Application by filing a Replying Affidavit sworn on 30th September 2020 by Marrian Kioko who describes herself as the 1st Respondent's Chief Environment Officer. In her affidavit, the deponent states that the adduction of evidence by way of video link is not allowed under the Oaths and Statutory Declarations Act and there is no conflict with the Tribunal Rules on the same. Further, the deponent stated that the witness should present himself at the nearest court of law and if abroad he should go to the nearest Kenyan Embassy and if that is not possible, the Appellants should substitute the witness with another who is locally available in Kenya.

8. Finally, the 1st Respondent opposed the use of interrogatories stating that they will lead to delays in hearing the appeal due to back and forth correspondences between parties thus found it unsuitable.

9. The 2nd Respondent opposed the Application through a Replying Affidavit sworn by Shi Yuchen, the said Respondent's Deputy General Manager, on 6th October 2020. The Interested Party similarly filed a Replying Affidavit sworn by Julia Ondeyo, the Interested Party's Assistant Director of Roads, on 6th October 2020.

10. The 2nd Respondent and the Interested Party raised the same issues in their opposition to the Application. The two parties argued that the Appellants' have been causing delays in the hearing of this Appeal and deponed that the witness did not make efforts to attend to the Kenyan offices in the United States of America and only waited for 15 days to the hearing of the Appeal for him to attempt the attendance of the embassies and consulates. Further, Kenyan airspace has been opened to international travel and there is no reason why the witness cannot travel to Kenya for his evidence to be taken from the Tribunal's premises. If the witness cannot travel, he can be substituted with another witness who can be readily available. As for interrogatories, the 2nd Respondent and the Interested Party objected to the same as being cumbersome considering the nature of the Appeal before the Tribunal.

11. The Tribunal ordered that the matter be disposed of by way of written submissions in the interest of time.

Analysis

12. The Appellants have expressed the difficulties that they have encountered in trying to comply with the previous orders of the Tribunal that their witness be availed to the nearest Kenyan Embassy or Consulate for the administration of oath. It is apparent that the physical attendance of the witness, Mr. Mark Chernaik, to the nearest Kenyan Embassy or Consulate has proved difficult due to the closure of the said offices, the limitation of physical interaction between the staff and the clients as well as the obvious danger on the witness contracting coronavirus as he travels for many hours to the venue where he would be sworn and his evidence taken.

13. We have considered all the pleadings and submissions filed by the parties on the issue. The Tribunal had made orders that the witnesses be available at the Tribunal's offices or at the High Commission, Kenyan Consulate or Kenyan Embassies for the witnesses who are outside the country. The challenges that have been brought forth as alluded to by the Appellants' require that the Tribunal either reviews the earlier directions or affirms them.

14. Section 126(5) of the Environmental Management and Co-ordination Act (EMCA) provides that,

“(5) Except as expressly provided in this Act or any regulations made thereunder, the Tribunal shall regulate its proceedings as it deems fit.”

15. Section 127 (1b&c) of EMCA provides that,

“(1) The Tribunal may:-

(a)

(b) take evidence on oath and may for that purpose administer oaths; or

(c) on its own motion summon and hear any person as witness.”

16. Rule 26 (7) of The National Environmental Tribunal Procedure Rules, 2003 provides that,

“(7) The Tribunal may require any witness to give evidence on oath or affirmation and for that purpose it may administer an oath or affirmation in due form.”

17. The Covid 19 pandemic has shaken the judicial system in Kenya and many other sectors in the economy to adopt new ways of doing

things so as to limit unnecessary physical interaction between humans thereby reducing the risk of contracting deadly coronavirus. From sometime in May 2020, the Tribunal started holding virtual hearings of all its matters. The witnesses in Kenya are ordinarily sworn either at the at the Tribunal’s court room or at the nearest court of law, they give evidence and judgments have also been rendered virtually since the commencement of the virtual hearings.

18. EMCA not only allows the Tribunal to administer oaths on witnesses appearing before it but also allows the Tribunal to regulate its own proceedings. We take judicial notice of the ravaging effects of Covid 19 in the USA and the closure of the Kenyan Consulates and Embassies to physical interactions in the determinaiton of this Application. We do not find any requirement in the Oaths and Statutory Declarations Act that requires the Tribunal to deny the Appellant an opportunity to call its witness virtually and for the said witness to be sworn virtually from wherever he may be.

19. The Respondents and the Interested Party opposes the prayer for the witness to be sworn virtually and also averse to the use of interrogatories. The Respondents and the Interested Party are of the opinion that the Appellants should substitute their witnesses for a witness who is available in Kenya. We do not agree that a party has any role to play in the selection of witnesses for any other party in the proceedings. The Appellants have the right and liberty to call the witnesses who they think are useful in advancing the Appellants’ position.

Finding

20. Having previously issued directions on the taking of evidence of the witnesses based outside Kenya and cognizant of the difficulties in observing those directions and the threat to the rights to access to justice, we find that we have the authority to regulate our own proceedings and we shall review our directions on the physical attendance of the witness for purposes of giving evidence. We have also weighed the impact of using interrogatories in this case and found the same as being unsuitable due to the issues raised in the Appeal.

Determination

21. The Appellants’ Notice of Motion Application filed on 29th September 2020 is allowed in terms of allowing the witness who is outside the Republic of Kenya to be sworn virtually, in any location as he may deem convenient for him, by the Tribunal and to give evidence in the same medium.

22. Costs in the cause.

DATED AND DELIVERED AT NAIROBI, THIS 8TH DAY OF DECEMBER, 2020.

Mohammed Balala.....Chairperson

Christine Kipsang.....Vice Chairperson

Bahati Mwamuye.....Member

Waithaka Ngaruiya.....Member

Kariuki Muigua.....Member