



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. NET/002/ 2018

PROF. ALBERT MUMMA in his capacity as

CHAIRMAN LANGATA DISTRICT ASSOCIATION.....APPELLANT

VERSUS

DIRECTOR GENERAL - NATIONAL ENVIROMENTAL

MANAGEMENT AUTHORITY [NEMA].....1ST RESPONDENT

ZABLON A. MABEA..... 2ND RESPONDENT

OKENGO MATIANGI.....3RD RESPONDENT

AND

SEVENTH DAY ADVENTIST

CHURCH (E.A.) LIMITED.....INTERESTED PARTY

RULING

1. By a Notice of Appeal dated 6th February 2018, the Appellant challenged NEMA's decision to grant the 2nd and 3rd respondents an Environmental Impact Assessment (EIA) license NEMA/ NRB/ PR/5/1/10,838 (Regn No. 0044816) for construction of a church and related facilities on L.R. No. 11914/72 along Mukoma Road in Karen, Nairobi County and sought, inter alia, for the cancellation of the said EIA Licence.
2. The 1st Respondent filed a Notice of Appointment of Advocate on 19th February 2018 and the 2nd and 3rd respondents on 2nd March 2019 together with their Reply to the Appeal.
3. Following several attendances before the Tribunal the parties eventually agreed to the filing and exchange of written submissions in the main appeal.
4. Consequently, The Appellant filed submissions on 12th November 2018. The 1st Interested Party filed submissions on 26th November 2018 with the 2nd and 3rd Respondents filed their submissions on 28th November 2018..
5. When the matter came up for hearing on 6th February 2019 the parties agreed to leave the matter to the tribunal based on the pleadings, various affidavits and written submissions filed and exchanged by the parties.

THE SUBMISSIONS BY THE PARTIES

6. The Appellant submitted that the project has grave impacts on the environment and the proposed mitigation measures were insufficient. The appellant argued that the grant of license by the 1st Respondent was *ultra vires* and that the environment would be irreparably destroyed.

7. The 2nd and 3rd Respondents submitted that the EIA license was properly issued in line with Section 58 of the Environmental Management and Coordination Act. The respondents further submitted that the proposed project does not contravene zoning laws. They further submitted that appropriate measures were in place to ensure sustainable development and environmental management.

8. The Interested Party submitted that it had a right to own property as per Article 40 of the Constitution of Kenya, 2010. It stated that it was the owner of the suit property. Thus, the 2nd and 3rd Respondents simply held the suit property in trust for the Interested Party. The Interested Party further submitted that the Appeal is based on misconception of the law.

FINDINGS

9. The Tribunal has carefully considered the submissions of all parties in the matter. However, before the Tribunal could consider the issues raised in the appeal and the various submissions made it had to satisfy itself as to its jurisdiction to hear and determine the matter. The 2nd and 3rd respondents in paragraph 1 of their Reply to the Appeal had raised an objection to the Tribunal's right to hear the matter on the grounds that the appeal had been filed outside the timelines set out in the Environmental Management and Coordination Act 1999 as well as the National Environmental Tribunal Procedure Rules, 2003.

10. It is established practice that where the jurisdiction of the Tribunal is called into question then the first order of business is for the tribunal to make a determination on that issue before rendering its decision on the main points of the appeal.

11. The issue of jurisdiction had been extensively dealt with by the Court of Appeal in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited** (supra) in which Nyarangi, JA while citing Words and Phrases Legally defined – Vol. 3: I-N page 13 held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

12. With due respect the issue cannot have been better put

13. The appeal before the tribunal seeks to challenge the issuance of a license to the 2nd and 3rd respondents. It is an appeal under section 129(1) of EMCA.

14. Section 129(1) provides as follows:

(1) Any person who is aggrieved by:—

(a) the grant of a licence or permit or a refusal to grant a licence or permit or the transfer of a licence or permit under this Act or regulations made thereunder;

.....; may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such

manner as may be prescribed by the Tribunal

15. This Tribunal has on many occasions considered the effect of filing of appeals outside the time limit permitted by section 129(1) of EMCA and consistently found that the filing of an appeal outside this time limit of 60 days to be invalid and renders any appeal filed to be incompetent.

16. The present appeal was filed on 6th February 2018 and sought to challenge the licence granted to the 2nd and 3rd respondents on 20th November 2017. This was 78 days after the cause of action arose and 18 days later than the permitted statutory time line.

17. Accordingly, it is clear that the Tribunal lacks the requisite jurisdiction to determine the appeal and has no option but to decline to entertain the same. In order to not compromise any determination to be made by any other competent body that may be called upon to take cognisance of this matter, the tribunal will deliberately avoid to make any comments on the merits of this appeal.

ORDER

18. For the reasons stated, the Appeal is hereby dismissed with costs to the 1st, 2nd and 3rd respondents as well as the interested party.

19. The parties attention is drawn to the provisions of section 130 of the EMCA on the right of appeal.

DATED & DELIVERED at NAIROBI this 8th day of March 2019

MOHAMMED S BALALA.....CHAIRPERSON

CHRISTINE KIPSANG.....VICE CHAIRPERSON

BAHATI MWAMUYE.....MEMBER

WATHAKA NGARUIYA.....MEMBER

KARIUKI MUIGUA.....MEMBER



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