



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL

TRIBUNAL APPEAL NO. 158 OF 2015

SIMBA CORPORATION LIMITED.....APPELLANT

VERSUS

THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY..... 1ST RESPONDENT

AVIC INTERNATIONAL REAL ESTATE (EA) LTD 2ND RESPONDENT

RULING ON NOTICE OF MOTION APPLICATION

DATED 26th FEBRUARY 2018

1. The Appellant filed the Notice of Motion application dated 26th February 2018, through the firm of Mohamed Muigai and company advocates and sought orders to:

(a) Spent,

(b) allocation of a hearing date on priority basis,

(c) the 2nd Respondent to be held in contempt of and in deliberate and contumelious disregard of the Stop Order issued by the Tribunal on 16th September 2015 under Section 129 (4) of the Environmental Management and Co-ordination Act, 1999;

(d) the 2nd Respondent to show cause why its senior management should not be jailed for a term not exceeding six (6) months for the deliberate disregard of the Tribunal orders; the 2nd Respondent's senior management including **Mr Zhang Feng** be committed to civil jail for a term not exceeding six months for wilfully disregarding the Tribunal's Stop Order issued on 16th September 2015; the 2nd Respondent be barred from taking further part in these proceedings unless and until such time as they purge their contempt and disregard of the Stop Order issued by the Tribunal on 16th September 2015;

(e) issuance of such further and other orders as will meet the ends of justice to ensure the obedience of the orders and directions issued by the Tribunal in furtherance of the rule of law and finally costs of this application be borne by the 2nd Respondent.

(f) the Supporting Affidavit to this application is sworn by **Rita Mwangi** and Contains the following statements among others; that upon filing the appeal

The Tribunal issued a Stop Order directed at the 2nd Respondent to stop all construction activities on the project site pending the

hearing and determination of the appeal and that in the intervening period the Tribunal issued a decision on a Preliminary Objection raised by the 2nd Respondent dismissing the appeal;

(g) She also stated the decision by the Tribunal was set aside by the Environment and Land Court by a judgement delivered by Mr Justice Eboso on 20th December 2017; the Environment and Land Court directed that this appeal be heard and determined on merit.

2. The 1st Respondent did not file either a Replying Affidavit or Grounds of Opposition and or submissions to Appellant's application at all.

3. The 2nd Respondent filed a Replying Affidavit by Mr Zhang Feng in his capacity as the Deputy Manager of administration department of the 2nd Respondent and making the following statements; he is aware that on 16th September 2015 the Tribunal did issue a letter stating that a Stop Order was in force pursuant to the provisions of Section 129(4) of the Environment Management and Co-ordination Act and this was as a result of the Appellant filing this appeal against the 2nd Respondent and on 18th December 2015, the Tribunal dismissed the Appellant's appeal such that the Stop Order issued on 16th September 2015 ceased to have effect;

4. He stated that the Appellant filed an Appeal in the **Environment and Land Court Civil Appeal No.100 of 2015 Simba Corporation Limited vs The Director General National environment Management Authority & Avic International Real Estate (EA) Limited** against the Tribunal's decision to dismiss the appeal; the Appeal was allowed by the Environment and Land Court by the judgement dated 20th December 2017 with the directions that this Appeal before the Tribunal be heard on merit;

5. He further stated that the neither the High Court Environment Land Court sitting as an appellate court nor this Tribunal issued any other Stop Order or otherwise issued directions to revive the initial Stop Order that had been issued on 16th September 2015 and the Respondent has not been served with any formal order requiring it to comply with any conditions;

6. As regards concerns on noise dust and traffic management raised by the Appellant in the application and ultimately in this Appeal have been adequately catered for in the general construction operational and notification conditions attached to the environmental and Impact Assessment Licence issued to the 2nd Respondent by the 1st Respondent and that the application has been brought with the ulterior motive of delaying the resolution of the substantive dispute between the parties and that the application is without merit and should be dismissed with costs.

7. On 20th March 2018, the Appellant filed written submissions in support to the Notice of Motion Application dated 26th February 2018.

8. The 1st Respondent did not file any submissions as aforesaid.

9. The 2nd Respondent filed written submissions on 3rd April 2018 in opposition to the Notice of Motion Application dated 26th February 2018 filed by the Appellant.

The Appellant's Written Submissions

10. *Mohammed Muigai advocates* for the appellant submitted the jurisdiction of the Tribunal to punish for contempt is provided for under Section 133 (2) of the EMCA is not limited to contempt on the face of the Tribunal since the threshold is on the acts and omissions which amount to contempt and this section provides; It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish such person for contempt in accordance with the provisions of this Act.

11. They also quoted and relied on the case of **Patrick Mutune Katubi v General Manager Harambee Cooperative Savings & Credit Society Ltd & Another (2012) eKLR** which held;

'the dispute resolution mechanism in the Tribunal should be self-sufficient so that once disputes are filed and heard in the Tribunal which is in charge of enforcing its own orders and decrees either through the execution procedures in the Civil Procedure Act and Rules or by punishing for contempt of court parties who deliberately disobey its orders'.

12. They further relied on case of **Secretary General & Another v Salah Yakub Farah (2017) eKlr** the Honourable court held;

'That both sections donate unlimited powers to the Magistrates court Co-operative Tribunal to punish for contempt.'

13. The Appellant further submitted that the ODPP is concerned with prosecution and not punishment for offences.

14. They further submitted that under Section 129(4) of the EMCA it provides that *'Upon any appeal to the Tribunal under this section the status quo of any matter or activity which is the subject of the appeal shall be maintained until the Appeal is determined.'*

15. The Appellant's advocates also submitted the reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice and the 2nd Respondent had sufficient notice and knowledge of the Stop Order.'

16. Finally, they argued that Under Section 143(1)(d) of EMCA which provides;

Any person who fails neglects or refuses to comply with any order made by the Tribunal commits an offence and shall be on conviction be liable to imprisonment for a term of not less than one year and not more than four years or to a fine of not less than two million shillings and not more than four million shillings or to both such fine and imprisonment'.

The 2nd Respondent's Written Submissions

17. *Coulson Harney advocates* on the other hand, submitted on behalf of the 2nd Respondent's and raised two main issues namely; the jurisdiction of the Tribunal to punish for contempt of court and that the Tribunal does not have power to punish for contempt save for contempt on the face of the court.

18. They relied on **The Owners of the Motor Vessel Lilian S vs Caltex Oil (Kenya) (1989) eKLR 1** 'Jurisdiction is everything without jurisdiction a court has no power to make one more step. A court of law must down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

19. They argued that there is no Stop Order in effect that is enforceable against it. The Stop Order has not been revived following the judgement in Environment and Land Court Civil Appeal No.100 of 2015 that was issued on 23rd December 2017.

20. They also quoted and relied on the case of **NET 200 of 2017 Okiya Omtatah & Another vs NEMA & 8 others** that the this Tribunal held that the Stop Order did not meet the formal requirements of an enforceable order and argued that there are no lawful and valid orders from this Tribunal that the 2nd Respondent is obligated to comply with.

21. The 2nd Respondent's further quoted and relied **In Justus Kiniu Muindi & 4 others v Senior Resident Magistrate -Kitui & 2 others (2017) eKlr** whereby the Court of Appeal held that the decision of an improperly constituted Tribunal rendered any award made null and void for all intents and purposes and also incapable of protection of the law.

22. Finally, they argued that the Contempt of Court application is unconstitutional since a party has a right to fair hearing under Article 50 and which might have led to amendment of Section 129 of EMCA in order for a party to make an application for orders to maintain status quo. The Application lacks merit and should be dismissed with costs to the 2nd Respondent.

ANALYSIS

23. In determining the application, the Tribunal has fully considered the submissions by the Appellant and 2nd Respondent. It has also perused the Appeal filed by the Appellant and Replies thereof in light of the applicable law and rules.

24. The issues for determination are as follows:

(a) Whether this Tribunal has jurisdiction to punish for contempt of court; and

(b) Whether the 2nd Respondent is entitled to claim costs.

We shall tackle each of the issues of determination one after the other.

Whether this Tribunal has jurisdiction to hear and determine this application

25. According to **Black's Law Dictionary**, Sixth Edition, **Jurisdiction** is defined as follows: - "A term of comprehensive import embracing every kind of judicial action. It is the power of the Honourable Court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties.(Emphasis mine).

(1) Also *Halsbury's Laws of England 4th Edition, Volume 10, Paragraph 314*, defines jurisdiction as:- "By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision."

(2) *Under the Constitution of Kenya 2010 Article 159 provides*

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) Justice shall be done to all, irrespective of status Justice shall not be delayed; Alternative forms of dispute resolution including reconciliation, Mediation, arbitration and traditional dispute resolution mechanisms Shall be promoted, subject to clause

(3); justice shall be administered without undue regard to procedural technicalities; and The purpose and principles of this Constitution shall be protected and Promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) Contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are Repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

28. In the recent case of Constitutional Petition no 87 of 2017 Kenya Human Rights Commission vs Hon.Attorney General & Law Society of Kenya Honourable Chacha J held that

'The fact that the power to punish for contempt is inherent and not granted by statute, follows the recognition by the constitution in Article 159 that judicial authority is derived from the people and vests in, and is exercised by the courts and tribunals established by or under the Constitution. Judicial authority having been derived from the people, the judiciary serves the public and courts make pronouncements for and on behalf of the people. In doing so, courts act only in accordance with the constitution and the law as demanded by Article 160(1) of the Constitution. In that respect, therefore, the powers of the courts must be viewed from the supremacy clause in Article 2(1) of the constitution.

29. *Under Section 133 of EMCA, it provides that:*

'It shall be an offence for any person to engage in acts or make omissions amounting to contempt of the Tribunal and the Tribunal may punish such person for contempt in accordance with the provisions of this Act. This Tribunal has jurisdiction to punish for contempt of court, however it is necessary to look at what entails Contempt of court.'

30. According to the *Black Law Dictionary 10th Edition*, there is direct and indirect contempt of court.

'Contempt in the face of the court facia curia otherwise known as direct contempt is defined as contempt committed in the immediate vicinity of the court this includes any word spoken or act done in or in the precincts of the court which obstructs or interferes with due administration of justice or is calculated so to do. These acts include assaults committed in court insults to the court; interruption of court proceedings; and refusal on the part of a witness to be sworn or having been sworn, refusal to answer. On the other hand, indirect contempt or contempt ex facie curiae is defined as contempt committed outside the court. This includes: words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice. Common examples of such contempt are: publications which are intended or likely to prejudice the fair trial or conduct of criminal or civil proceedings; publications which scandalize or otherwise lower the authority of the court; and acts which interfere with or obstruct persons having duties to discharge in a court of justice.'

31. The Contempt of Court Act No. 46 of 2010 was recently declared invalid and thus not applicable in determining the issue of contempt of court. In *Constitutional Petition no 87 of 2017 Kenya Human Rights Commission vs Hon. Attorney General & Law Society of Kenya* under paragraph 63, the Honourable Judge quoted that; ***"punishing through contempt of court is the means by which courts sanction non-compliance with its orders, judgments and decrees, and a court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community. Without such protection, courts of justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible"***. (James Francis Oswald, *Oswald's Contempt of Court: Committal, Attachment, and Arrest upon Civil Process* (Butterworth & Company, 1910, p. 9.)

32. In *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015). Nkabinde, j observed that: ***"The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."***

33. In the case of *Canadian Metal Co. Ltd v Canadian Broadcasting Corp (N0.2)* [1975] 48 D.L.R (30), the court stated that; ***"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society."***

34. In same case quoted at paragraph 60 above ,the Honourable Chacha judge observed that;

"Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in *Carey v Laiken* [2015] SCC17 that; ***"Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect"***

*'It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (*Louis Ezekiel Hart v Chief George I Ezekiel Hart* (-SC 52/2983 2nd February 1990). And in *Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another* [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of*

rule law and administration of justice.

35. The Tribunal has power therefore to punish for contempt of the Tribunal. However, in the present application for contempt of court before us, the Appellant filed the present Appeal. Then Section 129(4) of EMCA took effect by operation of the law. The 2nd Respondent in response to the appeal filed a Preliminary Objection which was heard and determined the appeal at the Tribunal. The Appellant thereafter appealed the decision of the Tribunal to the Environment and Land Court. The Appellant admits the Environment and Land Court did not grant any orders during the hearing and determination of the appeal. The acts of alleged Contempt of Court complained of relate to violation of Section 129(4) of EMCA by the 2nd Respondent after the Preliminary Objection was upheld by this Tribunal which in essence determined the appeal.

36. The Appellant's appeal at the Environment and Land Court Tribunal succeeded and thereafter the Appellant failed to move the Tribunal for appropriate order and therefore this Tribunal makes a finding that there are acts which would constitute contempt of court as envisaged under Section 133 of EMCA for this Tribunal to exercise its powers. We therefore disallow the application with no orders as to costs.

37. The Tribunal observes that it is necessary to hear and determine this matter expeditiously and we hereby direct the parties to fix this matter for hearing forthwith.

ORDER

For the reasons explained in the foregoing paragraphs the Tribunal hereby makes the following orders:

- a) The Appellant's Notice of Motion Application dated 26th February 2018 for contempt of court is dismissed with no orders as to costs.
- b) The directions for hearing this Appeal shall be taken immediately after delivery of this ruling.
- c) The parties' attention is drawn to the provisions of Section 130 of EMCA.

DATED and DELIVERED at Nairobi this 5th day of December 2018

MOHAMED BALALACHAIRPERSON

CHRISTINE KIPSANG.....VICE CHAIRPERSON

KARIUKI MUIGUAMEMBER

WAITHAKA NGARUIYAMEMBER

BAHATI MWAMUYEMEMBER



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