



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENTAL TRIBUNAL IN NAIROBI

TRIBUNAL CASE NO. NET 212 OF 2017

DAVID AWORI, PAUL OWORA, MBETI MICHUKI On behalf of
GIGIRI VILLAGE ASSOCIATION.....APPELLANTS

-VERSUS-

DIRECTOR GENERAL (NEMA).....1ST RESPONDENT

IKONO INVESTMENTS LIMITED.....2ND RESPONDENT

IRENE KEINO (LEAD CONSULTANT).....3RD RESPONDENT

RULING ON PRELIMINARY OBJECTION

BACKGROUND

1. On 22nd August 2017, the Appellants filed a Notice of Appeal under Rule 4 (1) of the National Environment Tribunal Procedure Rules, 2003. The appeal is against the issuance of NEMA license No. 0034241 to Ikono Investments Limited on Plot 91/47 which the appellants allege was issued without observance of the law.
2. On 13th September 2017, the 2nd Respondent filed a Notice of Preliminary Objection dated 12th August 2017 in which it sought to raise a Preliminary objection on points of law to be heard and determined *in limine*, to the effect that this Honourable Tribunal lacks jurisdiction to entertain, hear and/or determine the suit (*sic*).
3. The 2nd Respondent cited the following grounds in the Notice of Preliminary Objection:
 - a) That the appeal is statute barred in accordance with section 129 of the Environmental Management and Co-ordination Act No. 8 of 1999;
 - b) That the subject matter of this Appeal is the subject matter in **Nairobi ELC Civil Suit No. 473 of 2017 Rajni Patel & 10 Others vs. Ikono Investments Ltd & 2 Others**, and this Appeal will prejudice the aforesaid proceedings and embarrass both the High Court and this Honourable Tribunal; and
 - c) The Claimant's Appeal before this Tribunal is a deliberate abuse of process by invoking a multiplicity of proceedings for the collateral purpose of imputing an otherwise lawful process.
4. On 21st September 2017, the 1st Respondent filed a Notice of Preliminary Objection dated 15th September 2017, in which it sought to raise a preliminary objection at the hearing of the Appellant's appeal filed on 22nd August 2017 on the following grounds:

- a) That the appeal is statute barred by dint of Section 129 (1) of the Environmental Management and Co-ordination Act, No. 8 of 1999 and Section 4 (2) of the National Environment Tribunal procedure rules, 2003; and
 - b) That the appeal lacks merit, fatally defective and is a clear abuse of judicial process as it is malicious, frivolous and vexatious.
5. The 1st Respondent however withdrew its Preliminary Objection vide a Notice of Withdrawal dated 21st June 2018 in view of the decision of this Honourable Tribunal in NET 213 of 2018.

SUBMISSIONS BY THE PARTIES

APPELLANTS' SUBMISSIONS

6. Vide its written submissions dated 28th May 2018 and filed before this Honourable Tribunal on 29th May 2018, the Appellant submits that the framework in sections 129 (1) and 129 (2) relate to two different categories of appeals: **the framework in section 129 (1) relates to an appeal by a person who was party to a decision or determination made by NEMA within the framework of EMCA; and section 129 (2) provides a framework for an appeal by a person who was not a party to a decision or determination made by NEMA within the framework of EMCA.**
7. The Appellants argue that they were neither part of any stakeholder's meeting nor any subsequent decision made by the 1st Respondent thereto. Therefore, any order issued to allow the EIA license in favor of the 2nd Respondent was not a decision arrived at with their participation contrary the provisions of the Environmental Management and Co-ordination Act.
8. The Appellants further submitted that they are not parties to **Nairobi ELC Civil Suit No. 473 of 2012** being **Rajni Patel & 10 others vs. Ikono Investments Ltd**, hence the appeal is competently before the Tribunal.
9. On the issue of the 60 days limitation period within which an appeal is to be filed before this Tribunal under section 129 of the EMCA, the Appellants submit that time starts to run for the purpose of Rule 4 (2) and Rule 7 of the National Environment Tribunal Rules, 2003 only after the disputed decision is given to or served upon the Appellant. The Appellants argue that to hold the view that the limitation period for a Section 129 (2) appeal starts running before the decision is given to or served upon an Appellant would fly in the face of the unambiguous provisions of Rule 4(2) and would defeat the philosophy underpinning the doctrine of limitation. The Appellants submitted that it was incumbent upon the 1st Respondent to place before the Tribunal evidence to satisfy the Tribunal that the impugned decision was given to or served upon the Appellant more than 60 days prior to filing of the appeal.
10. The Appellants further submit that in order to effectively make a decision on the issue, the Tribunal may have to pronounce itself on the exact date when the time started running and when the limitation period lapsed.
11. In their submissions, the Appellants contend that the Respondents ought to have moved to the Tribunal by a substantive motion as opposed to a preliminary objection. They submitted that to determine whether or not an appeal is time barred, the Tribunal would have to look at the evidence confirming the date when the disputed decision was given to or served upon them. Therefore, the efficacy of a bare Notice of Preliminary Objection as a mechanism for disposing off an appeal on the ground of limitation under Rule 4 (2) of the NET Procedure Rules is doubtful. They argued that a substantive motion supported by an affidavit together with relevant evidence would be more efficacious and would afford the opposing party the opportunity to respond to the motion.
12. In conclusion, the Appellants submit that under Section 129 of EMCA and Rule 4 (2) of NET Procedure Rules, there is an implied obligation on the part of NEMA to give to or serve upon Interested Parties notices of the statutory decisions it makes within the framework of EMCA. They submitted that the Appeal should be allowed (*sic*) to allow them to ventilate their issues, having tried severally to approach the 1st Respondent. Moreover, it is argued, this Tribunal is the only recourse left for them and it is only just that their case be heard and determined.

RESPONDENTS SUBMISSION

13. The 1st Respondent withdrew its Preliminary Objection vide a Notice of Withdrawal dated 21st June 2018 and filed before this Tribunal on even date. However, the 2nd Respondent did not file written submissions on its Preliminary Objection. The Tribunal shall thus proceed on the basis of the grounds set forth in the 2nd Respondent's Notice of Preliminary Objection dated 12th August

2017 and the Appellants' reply thereto vide their submissions dated 28th May 2018.

ISSUES FOR DETERMINATION

14. Having considered the 2nd Respondent's Preliminary Objection filed before the Tribunal on 13th September 2017 via a Notice of Preliminary Objection dated 12th August 2017 and the Appellants' submissions dated 28th May 2018, the Tribunal has identified the following issues for determination:

- a) Whether the appeal is time barred;
- b) Whether it was appropriate to bring the matter by way of a preliminary objection;
- c) Whether the matter is Sub Judice; and

Whether the Appeal is Time Barred

15. The legal framework with regard to appeals lodged in the National Environment Tribunal is set out under **section 129 of the Environmental Management and Co-ordination Act (EMCA), No. 8 of 1999. Section 129 (1)** thereof stipulates that:

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;

(b) The imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) The revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) The amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) The imposition against him of an environmental restoration order or environmental improvement order by the Authority 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.*

Section 129 (2) further states that;

Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

16. The Right of Appeal to the Tribunal is further entrenched under **Rule 4 of the National Environmental Tribunal Procedure Rules, 2003. Rule 4 (1) states that:**

'An appeal to the Tribunal shall be made by written notice, and where the Tribunal has approved a form of notice for the purpose, in the form so approved.'

Rule 4 (2) further states that:

'The appellant shall send or deliver six copies of the Notice of Appeal to the Tribunal so as to reach it not later than sixty days after the date on which the disputed decision was given to or served upon him.'

17. From a reading of Section 129 (1) of the Environmental Management and Co-Ordination Act, No. 8 of 1999 and Rule 4 (2) of the National Environmental Tribunal Procedure Rules, 2003, it is clear that an appeal to the Tribunal is to be filed within sixty days of the occurrence of the act/omission being appealed against.

18. The Appellants filed a Notice of Appeal before this Tribunal on 22nd August 2017 in which they sought to institute an appeal against issuance of National Environment Management Authority (NEMA) license no. 0034241 to the 2nd Respondent herein. The license was issued on 28th July, 2016. The period between issuance of the NEMA license no. 0034241 on 28th July, 2016 and filing of the Notice of Appeal on 22nd August 2017 is more than one year. Therefore, the Appellants' appeal was lodged outside the 60 days period.

19. The Appellants contend that since the appeal is brought under section 129 (2) of the EMCA, the Act does not set a limitation period. Further, the time within which an appeal may be filed can be extended under Rule 7 of the National Environmental Tribunal Rules, 2003. In addition they submit that under Rule 4 (2) of the NET Rules, 2003, the 60 days period within which to file the appeal starts running when the decision, the subject matter of the appeal, is served upon an Appellant.

20. The issue of the difference between appeals under section 129 (1) and 129 (2) of EMCA was considered in **Tribunal Appeal No. NET/005/2018, Prof Albert Mumma vs. Director General, NEMA & 2 others**, where the Tribunal held that;

'With the 2015 amendment (to the EMCA), all appeals either challenging the grant or refusal of a license now fell under section 129 (1). Section 129 (2) was left to decisions made by the Director General, the committees of the Authority or its agents under the Act.'

The Tribunal further cited the case of **Republic v NET ex parte Abdulhafidh Sheikh Zubedi, Misc Civil Application 155 of 2012**, where it was held that:

'Since Section 129 (1) of the Act deals with issuance of a license and the conditions attached thereto, that section cannot be said to cover the acts and omissions of the Director General or a committee of the Authority or even the Authority itself in matters not covered under section 129 (1), section 129 (2) deals with appeals other than appeal covered under section 129 (1) as long as the same are not otherwise expressly provided.'

21. The substance of the Appellants appeal is the decision by the National Environment Management Authority (NEMA) to grant NEMA license no. 0034241 to the 2nd Respondent. This falls within the ambit of Section 129 (1) (a) of EMCA which allows any person who is aggrieved by 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 the Act or regulations made thereunder to appeal against such a decision within sixty days of the decision being made. This is the position that was adopted in **Tribunal Appeal No. NET/005/2018** cited above where it was held that:

'Any appeal that seeks to challenge or touch on matters surrounding, inter alia, the grant or refusal to grant a license falls within the ambit of section 129 (1). Section 129 (2) covers appeals against acts or omissions of the Director General or the committee of the authority or its agents on matters outside the issue of license.'

22. The Appellants in their submissions contend that the Tribunal can invoke its powers and extend time within which to file an Appeal under Rule 7 of the National Environmental Tribunal Procedure, Rules 2003. The said rule states that:

'The Tribunal may for good reason shown, on application, extend the time appointed by these Rules (not being the time limited by the Act) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appear to it just and expedient.'

The rule envisions situations where the Tribunal may allow extension of time for doing certain acts or taking any proceedings **except time limited by the Act**. This provision is not applicable to appeals under section 129 (1) of the EMCA as the time within which to file such appeals is limited by the Act to sixty days from the date of the decision/act the subject of the appeal.

The efficacy of approaching the Tribunal by way of Preliminary Objection

23. The Appellants in their submissions raised concerns on the propriety of bringing this objection as a preliminary objection as

opposed to a substantive motion supported by affidavit, it is the Tribunal's position that for all intents and purposes a Preliminary Objection should be used on a pure point of law that would require the Tribunal to determine that question of law without resort to contested facts.

24. It has been held that a Preliminary Objection is one which touches on jurisdiction and is based on a point of law that does not require the judicial body to delve into the facts of the case. In **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696**, the court stated that:

'A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.'

25. In the present case, the date when the EIA license was issued is apparent from the appeal itself. There is no contention about that date. At the time of filing the appeal and the Preliminary Objection, it was possible to identify the time lines so in order to state precisely when the license was granted and thereby make a determination whether the appeal is incompetent or not.

26. Since the appeal is one brought under section 129 (1) (a) of EMCA, rule 4 of the National Environment Tribunal Procedure Rules, 2003 is inapplicable as it covers appeals under section 129 (2) and the question when the Appellant became aware or had knowledge of the decision is immaterial in determining whether the appeal is competent or not.

27. Accordingly, in the instant case, the Preliminary Objection is properly taken and founded.

Whether the matter is Sub Judice

Having found that the appeal is incompetent before the Tribunal, we do not need to delve into this issue.

ORDER

28. For the reasons stated, the Tribunal makes the following orders:

- a) the 2nd Respondent's Preliminary Objection is allowed
- b) the appeal is hereby dismissed with costs to the Respondents.

Parties' attention is drawn to the provisions of section 130 of the Environmental Management and Co-ordination Act.

DATED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2018

MOHAMMED S BALALACHAIRMAN

CHRISTINE KIPSANG MEMBER

BAHATI MWAMUYEMEMBER

WAITHAKA NGARUIYAMEMBER

KARIUKI MUIGUAMEMBER



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