



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO.142 OF 2015

MUTHIGA RESIDENTS FORUMAPPELLANTS

VERSUS

THE DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....1ST RESPONDENT

MENENGAI STORES LIMITED.....2ND RESPONDENT

JUDGMENT

1. The Appellants filed the present appeal seeking revocation of NEMA licence NEMA/EIA/PSL/1072 dated 14th January 2015 based on the following grounds of Appeal.

a) That the Constitution of Kenya and EMCA Act of 1999 guarantee every Kenyan a clean and healthy environment, cognizant of both inter and intra generational equity. The above NEMA Licence of 14th January 2015 interferes with the enjoyment of the said rights by the community around this location and is therefore in contravention of the above law.

b) That the figure of Kshs 74 million quoted on the Licence under general conditions, reference 1.1 as the cost of putting up the said storage go-downs on the subject plot, has no basis, rendering the licensing irregular and the License null and void.

c) That under Construction Conditions ref 2.1 on the License the Proponent has not provided approved drawings for the said storage go-downs or before licensing, rendering the process irregular.

d) That following an exhaustive EIA process in which Muthiga Residents Forum fully participated, the Director General of the 1st Defendant, vide his letter dated 10th November 2014, declined the proponent's application NEMA/PR/KMB/5/2/1172 for the development of go-downs on the subject plot.

e) The residents subsequently and consistently reiterated to the Director General, their objection to new applications for the developments.

f) The Gichecheni-Magana road serving the subject plot gravelled with a width of 4.6 meters and is hardly enough to accommodate vehicular traffic anticipated due to the above development.

g) The Appellants state the go-down application is a smoke screen for the development of aluminium-based smelting factory in our village.

h) The Scale and structure of the proposed industrial development is out of character and not in keeping with the surroundings.

i) The revocation of the license will safeguard both health and environment

j) The residents have no objection to the development of residential houses on the subject property a project that would enhance both the character of the surrounding and the value of existing neighbouring investments.

2. The 1st Respondent filed its Reply to the Appeal on 17th July 2015 based on the following grounds among:

a) The 1st Respondent avers the Appellant's appeal is devoid of any merit as same is based on mere conjecture and is void of both factual and legal grounding.

b) The 1st Respondent decision to grant the license the 2nd Respondent for the construction of three (3no.) Go-downs for storage of goods at its property known as LR No. Dagoretti /Kinoo/4835 in Kiambu County was after lawful and judicious consideration of the said application which included a site visit inspection of the proposed site review of comments from Lead Agencies Consultation with public and review of possible impacts of the proposed development on the environment

c) The public were notified through Kenya Gazette and local dailies ,Public hearing was held where it emerged the members were opposed to the construction of aluminium based factory but no member of the public opposed to construction of go-downs on the proposed site.

d) The 1st Respondent reconsidered its decision of initially rejecting the issuance of the EIA license and issued a EIA license for both the construction of an aluminium based factory and the construction for go downs and thus issued EIA License No. NEMA/EIA/PSL/1072 for the construction of 3 No. Go -Downs on its LR No. Dagoretti /Kinoo/4835 due to immense approval from members of public including members of Appellant's Association.

e) The Appellant's claim the EIA License will be used to construct an aluminium smelting factory is baseless and unfounded as mere apprehension on the part of the Appellant cannot be a ground to deny the 2nd Respondent on EIA license.

3. The 2nd Respondent filed its reply to the Appeal on 17th July 2015 on the following grounds:

a) That the Nema License issued does not interfere with the enjoyment of the appellants right to a clean and healthy environment and the second respondent followed the required procedures in making the application for the license including filing the requisite application and paying fees as well as public participation through consultative meetings

b) The license was regularly issued after following due process

c) The Second Respondent drawings were approved by Kiambu County Government on 14th May 2014 and the Change of User was effected prior to the grant of the NEMA license. Certificate of compliance was issued by National Construction authority which can be issued when there are approved drawings and further the construction of the go-downs was approved through public participation.

d) The Second Respondent filed an addendum and approved by the first respondent after public participation and consent of residents who held consultative meetings on 22nd December 2014 and 5th January 2015.

e) The Second Respondent avers the letter attached to the appeal as MRF5(a) is by Kihumo Residents Welfare Association and not the Appellants thus invalid for the purpose of these proceedings. Moreover the attendants at the meeting all endorsed the project and the appellants wrote a no objection letter signed by the Chairman and the Secretary of the Appellants in regard to the construction of go downs to the Second Respondent on 16th July 2014.

f) The go -downs will not be converted into factory use since any possible mischief is taken care of by the Second Schedule to the EMCA

g) The Structural plans were approved by the planning authority after grant of change of user and the go downs project will increase the value of land does not lower it.

THE APPELLANT'S SUBMISSIONS

4. The Appellants in their submissions give a background on the entire EIA process that was undertaken in regard to building of aluminium smelting factory and go-downs on Land Reference number Dagoretti/Kinoo/4835 and take issue with a letter that was written by the 1st Respondent to the 2nd Respondent on 16th December 2014 to guide its decision making process seeking for

a) "full disclosure of the new intended location for the earlier proposed steel rolling mill.

b) Discuss in detail the number and sizes of the go downs you propose to construct, and what they will be used for. It must be re-emphasized that the intended use must strictly conform to light inoffensive land use and must be compatible with the surrounding residential character.

c) Undertaking comprehensive consultations with the immediate neighbours of the site, particularly Kihumo Residents Association and Muthiga Residents Forum who have raised objections to the project so that a Zone of Possible Agreement may be reached, and social acceptability achieved.

5. The Appellants also extensively submitted on a letter written on 23rd December 2014 by the Appellant to the 1st Respondent in regard to Mr Ngumbi collecting signatures and another letter written on 12th January 2015 by the 2nd Respondent to the 1st Respondent in reference to a further consultative meeting which was held on 5th January 2015

6. The Appellant further submit that on 14th January 2015 the 1st Respondent certified that an Environmental Impact Assessment Study Report had been received from the 2nd Respondent and on that basis issued a license for the construction of three (3) go-downs for storage of goods and being unaware of the issuance of the license, the Appellant wrote to the 1st Respondent on 21st January 2015

7. The Appellant is aggrieved by the issuance of the license to the 2nd Respondent and appeals against that decision and raises four issues for determination as follows:

- a) Did the 2nd Respondent comply with the conditions set by the 1st Respondent on 16th December 2014"
- b) Were there comprehensive consultations with a view to reaching a ZOPA"
- c) The lack of drawings and plans for the go downs in the EIA Report
- d) Zoning
- e) Did the 1st Respondent abdicate its responsibility and duties"

8. The Appellants raised the issues of lack of public consultation and participation in the EIA process relying on Principle 10 of the Rio Declaration, Agenda 21 of the United Nations Conference on Environment and Development *Rio de Janeiro* Brazil 1992, Article 69(d) and Article 42 of the Constitution, Section 3(5) of EMCA Regulation 17 of EIA and Audit Regulations

9. The Appellants relied on the cases of **A. Abdallah, Chairman, Donholm Phase 5 Residents' Association & another v Director General NEMA & another Tribunal Appeal No. NET/38/2009**, This Tribunal found that the project proponent had "failed to properly conduct stakeholder consultation and thereby denied the stakeholders public participation. "*In New Muthaiga Residents' Association v Director General NEMA & Gemini Properties Limited Tribunal Appeal No. NET/24/2007*, the tribunal had found that the EIA process in respect of the development was "fundamentally flawed". In *Peter A. Mugoya & Another v NEMA & 2 others NET Appeal No 99 of 2012*, the Appellants challenged NEMA's irregular approval of the construction of a building within a community forest that also serves as a water catchment area and contains cultural sites. The approval was argued to be irregular as the project report was inadequate because, inter alia, public consultation was woefully inadequate and there were no mitigation measures. Also, NEMA did not consult critical lead agencies. *In Tourism Promotion Services (Kenya) Limited v NEMA & 2 others, NET/34/2008*, the Tribunal found that NEMA did not consult the Kenya Wildlife Service, which is the governmental agency responsible for wildlife management, or the Appellant, a key stakeholder, before approving the development. On this basis, inter alia, the Tribunal cancelled the EIA license as it found it "curious that in NEMA's process of approving the development in question, it did not at all consult the Kenya Wildlife Service, which is a key government agency with overall responsibilities over wildlife management in the country." It therefore directed the developer to conduct a full EIA study for the project.

10. The Appellants also submit that the approval of the license did not comply with international principles and best practices on maintenance of a healthy environment, the use and maintenance of character and environment of land set aside for human habitation. On this question, the Rio Declaration on Environment and Development sets out the following key principles that incorporate best practices on the use and character of land: (1) the precautionary principle; (2) the preventive principle; (3) the polluter pays principle; (4) the principle of intergenerational equity; (5) the principle of integration; and (6) the principle of sustainable development. Despite these principles being interrelated, the most relevant ones, applicable to this case are the precautionary principle and the principle of sustainable development. These principles are also referred to in Part II, section 3(5) of the EMCA.

11. They submit that the granting of an EIA license to the 2nd Respondent to construct an industrial site in the middle of a residential area contravenes the sustainable development principle as it changes the character of the land use, which is specifically listed as an agricultural/residential area under zoning laws

THE 1ST RESPONDENT'S SUBMISSIONS

12. The 1ST Respondent submitted the Appeal involves its decision to issue EIA License NEMA /EIA/PSL/1072 on 14th January 2015 to the 2nd Respondent and its exercise of that decision was in accordance with EMCA

13. The 1st Respondent further submitted their only witness Beatrice Kanani Wanjohi an environmental officer testified that the decision was for the license in respect of three go downs for storage of goods on LR NO DAGORETTI/KINOO/4835 after EIA process was done. The members of public were opposed to the construction of aluminium-based factory and not construction of go downs.

14. There was public participation and public views were collected during the public hearing and the appellants were part of those who were sampled as affected persons.

15. The 1st Respondent posted the issues for determination as follows

- a) Whether the 1st Respondent followed the law in issuing the EIA License to the 2nd Respondent's project
- b) Whether there was enough public participation prior to granting of the EIA License
- c) Whether the project was approved contrary to the applicable zoning policy

16. The 1st Respondent relied on *Mui Coal Basin Local Community and 15 Others vs Permanent Secretary Ministry of Energy & 17 others (2015) EKLr* on the issue of six elements as minimum basis for public participation and *NET 200 of 2017 Okiya Omutatah Okiiti vs NEMA and 8 others* on the issue of incorporation of the public views in the EIA license conditions .

17. Further the 1st Respondent submitted the Zoning issue was done by County Government of Nairobi and as such any question on zoning can only be dealt in a different forum and urged the Tribunal to dismiss the Appeal with costs to the 1st Respondent.

THE 2ND RESPONDENT SUBMISSIONS

18. The 2nd Respondent submitted that before submission of the two EIA reports to NEMA, the proposed site being LR NO Dagoretti/Kinoo/4835 had a change of user which was applied and approved on 1st December 2011. The first EIA report was submitted on 7th April 2014 under reference number NEMA/PR/KMB/5/2/1172 for the proposed construction of go-downs .The

Second EIA report was submitted on 14th May 2014 was under reference number NEMA/PR/KMB/5/2/1229 for the construction of a sufuria factory.

19. The 2nd Respondent submitted that the 1st Respondent rejected the proposal for construction of aluminium based factory on 10th November 2014 and the 2nd Respondent appealed making a proposal to be allowed to construct go downs for storage of raw materials and this resulted in issuance of EIA license NEMA/PSL /1072.

20. The 2nd Respondent has opposed the Appellant's appeal by filing its Reply on 17th July 2015 and responded to the ten grounds raised in the Appellants' Appeal.

21. The 2nd Respondent submits the EIA process was followed and the EIA license was issued regularly and similarly the process of approving drawings for building plans was followed on 10th September 2014. Public participation and consultation was done.

22. The 2nd Respondent submitted that Appellant's appeal being filed 18 days beyond the 60 days required time allowed under Section 129(1) EMCA and thus questioned the jurisdiction to determine the Appeal.

23. The 2nd Respondent submits there is lack of jurisdiction on the part of the Tribunal and relied on the case of **NET 002 OF 2018 CHAIRMAN LANGATA DISTRICT ASSOCIATION VS DIRECTOR GENERAL (NEMA) and 2 others** where the Tribunal held that filing an appeal outside the time limit of 60 days to be invalid and renders any appeal to be incompetent.

24. The 2nd Respondent urges the Tribunal to dismiss the Appeal with costs.

Analysis and Determination

25. Having considered the evidence and the evidence and submissions of the Appellants and the 1st Respondent and 2nd Respondent the Tribunal finds the twin issues for determination as follows.

- a) Does the Tribunal have jurisdiction this Appeal"
- b) What are the factors to consider in revoking the EIA license"

26. The Tribunal is minded dealing with issue of Jurisdiction first. This Tribunal is established by statute. Under section 125 of EMCA and the powers of the Tribunal are provided for Under Section 129 EMCA noting this section has undergone several amendments however prior to 2015, section 129 (1) of EMCA read as follows: -

"Any person who is aggrieved by: -

- (a) a refusal to grant a license or to the transfer of his license under this Act or regulations made thereunder.*
- (b) the imposition of any condition, limitation, or restriction on his license under this act or regulations made thereunder.*
- (c) the revocation, suspension, or variation of his license 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."

27. The Tribunal under the same Statute can make the following orders as provided under Section 129(3) of EMCA as follows.

(3) Upon any appeal, the Tribunal may: -

a) Confirm, set aside, or vary the order or decision in question

b) Exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the Appeal is brought; or

c) Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just. (Emphasis mine).

28. Jurisdiction is key and no court or Tribunal can act or adjudicate in any matter without jurisdiction. *In Milimani HC Judicial Review Misc. Application 217 of 2015: Ex parte Athi Water Services Board: Rep. vs. National Environmental Tribunal and 2 others* the issue of locus and jurisdiction of the Tribunal were extensively addressed by the learned Judge. The Court held that:

*“78. Although subsection 129(1) of the Act in its opening seems to permit any person to appeal to the Tribunal a reading of the clauses thereunder seems to limit the appeal thereunder only to a person who has applied for a license. I therefore agree with the decision in **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** (supra) that under section 129(1) of EMCA, a person who did not participate in the EIA study process for the development in question, in the NEMA’s process of approval of the development or complaint by the PCC cannot be said to have been aggrieved by the process which led to the issuance of the license as no decision could be said to have been made against him hence could not challenge the decision by way of an appeal to the Tribunal and if the Tribunal purports to entertain such an appeal under the aforesaid section, the Tribunal would be acting ultra vires its authority hence its decision would be liable to be quashed.”*

The Supreme Court of Kenya in *Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others*, Civil Appl. No. 2 of 2011, observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

29. In *Re Continental Credit Finance Ltd Nairobi (Milimani) HCCC No. 29 of 1986 [2003] 2 EA 399*, the Court held that:

“If the Court has no jurisdiction over the subject matter of the litigation, its judgements and orders, however precisely certain and technically correct, are mere nullities, and not only avoidable; they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which they were rendered, but shall be declared void by every court in which they may be presented and jurisdiction cannot be conferred on a Court by consent of the parties and any waiver on their part cannot make up for lack or defect of jurisdiction and the point of jurisdiction may properly be taken in an appellate court and decided there even if it was not raised at the original trial”.

30. The Appeal in this matter shows that the licence was issued on 14th January 2015 and counting 60 days from date of issuance the last day that this appeal should have been filed was on 14th March 2015 and yet the Appellants who had participated in the EIA process as affected persons chose to file this appeal on 30th June 2015. Counting from 14th January 2015 it is a total of 138 days from date of issuance of the EIA license and the Tribunal agrees with the 2nd Respondent that it is 78 days after the required 60 days limit. All appeals that fall under Section 129(1) EMCA does not allow any extension of time by an application of a party or the Tribunal on its own motion.

31. This Tribunal in *NET 161 of 2015 Elizabeth Maruma Mrema & Anor vs National Environment Management Authority & 2 others* held that.

“Appeals filed under section 129 (1) of the Act are limited in time and sadly, the Act does not provide for enlargement of time within which the appeal should be filed no matter how good the reasons for delay are. We wish the legislature would address the lacuna in law to cover for situations where project proponents obtain EIA licences and fail to take any step on the project site for 60 days hence the parties who would ordinarily be interested to protest the grant of that licence will inadvertently be out of time to approach the Tribunal for reprieve”

32. Having found that the Appellants’ Appeal was filed out of time Tribunal hereby strikes out with costs to the 2nd Respondent. The Tribunal finds no reason to delve into the matters raised in the appeal since the appeal was filed out of time and the tribunal lacks the requisite jurisdiction to take any further step.

33. Parties attention is drawn to Section 130 of EMCA.

34. This Judgement has taken a considerable period to be delivered a regrettable situation which was beyond the Tribunal and we unreservedly apologise to the parties and Counsel.

DATED and DELIVERD at NAIROBI This 3RD DAY of JUNE 2020.

Mohammed Balala Chairperson

Christine Mwikali Kipsang’Vice-Chairperson

Bahati MwamuyeMember

Waithaka NgaruiyaMember

Kariuki Muigua Member



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