



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL

AT NAIROBI

TRIBUNAL APPEAL NO. NET 30 OF 2019

IMARA STEEL MILLS LIMITED.....APPELLANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA) RESPONDENT

RULING

1. The Present Appeal filed on 22nd November 2019 seeks the following orders:

- a) Set aside the order closing the factory pending the inspection by the Respondent's compliance team for immediate re-opening of the factory.
- b) An order directing the Director General NEMA or his compliance team to visit and inspect the Appellant's factory and file its report and if satisfactory under the restraining order issue a compliance certificate and allow the factory to continue operations; and
- c) An order for costs of this Appeal and indemnity for loss of business for days the factory has remained closed.

2. The Appellant further filed a Certificate of urgency, Notice of Motion Application and supporting Affidavit on 22nd November 2019 seeking orders that:

- i) Spent
- ii) That upon hearing this application, this Honourable Court be pleased to grant an interim order staying the Respondent Restoration Order dated 14th October 2019 pending the hearing and determination of this appeal interpartes.
- iii) The cost of this application be provided for.

3. The Respondent filed Notice of appointment of an Advocate on 2nd December 2019 and Respondent's Statement of Reply to this Appeal on 4th December 2019 and later filed Respondent's statement by Rhoda Parantai and Respondent's list of documents on 11th November 2020. The Respondent seeks to have the appeal dismissed on the ground that the Appellant's establishments are irregular and unlawful, not conforming with health and safety standards, encroaching on a road reserve and contravenes the provisions of the Environment Management and Coordination Act No. 8 of 1999 hence the restoration order issued for compliance.

4. The Appellant subsequently filed a list of documents dated 17th August 2020 and later filed a Statement by John Mark Murimi Karuria on 20th January 2021.

5. The Appellant filed written submissions on 20th January 2021 while the Respondent filed written submissions on 2nd March 2021 in respect of the Notice of Motion Application dated 22nd November 2019.

6. Having considered the Notice of Motion Application and submissions of the Appellant and the Respondent the Tribunal finds the two issues for determination as follows:

- a. Whether the Appellant is entitled to an interim order for stay of the Restoration Order; and
- b. Who bears the costs of the application"

Issue No. 1 – Whether the Appellant is entitled to an interim order for stay of the Restoration Order

7. The Tribunal has power to make the following orders as provided for under Section 129(3) of EMCA provides that:

(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).***

8. This Appeal and the interim application have similar prayers and essentially challenge the Restoration Order that was issued on 14th October 2019 which was issued after the site visit on 2nd October 2019 due to various complaints dated 6th August 2020 by Ilngosuani village residents about pollution caused by the Appellant's activities resulting in grievous environmental impacts which were not being mitigated.

9. The Appellant's premises were opened after the lifting of the Restoration order on 21st November 2019 after Imara Steel Ltd wrote a letter showing the mitigation measures undertaken as directed under the Restoration Order issued by NEMA and further two site visits to check compliance of the Emission license conditions.

10. The law regarding Restoration Orders is found under Section 108(1) of EMCA which gives NEMA the mandate to issue and serve an Environmental Restoration Order on any person. Under the provisions of Section 108(4) (a), (b), (c) & (d), the order may require a person on whom it is served to-

- (a) Take such action as will prevent the commencement of continuation or cause of pollution.***
- (b) Restore land, including the replacement of soil, the replanting of trees and other flora and the restoration as far as may be, of outstanding geological, archaeological, or historical features of the land or the area contiguous to the land or sea as may be specified in the order.***
- (c) Take such action to prevent the commencement or continuation or cause of environmental hazard.***
- (d) Cease to take any action which is causing or may contribute to causing pollution or an environmental hazard. (Our emphasis)***

11. The law specifically provides about the contents of an Environmental Restoration order under Section 109(1) of EMCA as follows-

(a) the activity to which it relates.

(b) the person or persons to whom it is addressed.

(c) the time at which it comes into effect.

(d) the action which must be taken to remedy the harm to the environment and the time, being not more than thirty days or such further period as may be prescribed in the order within which the action must be taken.

(e) the powers of the Authority to enter any land and undertake the action specified in paragraph (d).

(f) the penalties which may be imposed if the action specified in paragraph (d) is not undertaken.

(g) the right of the person served with an environmental restoration order to appeal to the Tribunal against that order, except where the order is issued by a court of competent jurisdiction, in which case the right of appeal shall lie with superior courts.

12. It is common ground that NEMA has statutory authority under Section 108 of EMCA to issue the Environment Restoration Order and the provisions of Section 109(4) of EMCA.

“An environmental restoration order shall continue to apply to the activity in respect of which it was served notwithstanding that it has been complied with.”

13. And Section 110(1) EMCA provides that:

“At any time within twenty-one days after the service of an environmental restoration order a person upon whom the order has been served may, by giving reasons in writing, request the Authority to re-consider the order.”

14. These two provisions of the law provide a channel by which one can raise questions on the procedure used or the decision reached by NEMA whose effect is to enhance the administrative fairness of the process because NEMA can re-look at its decisions at an early opportunity. The Appellant did take steps to comply with the Restoration Order and should continue to provide and implement mitigation measures because running a business or having operations of an economic activity is not meant to be injurious to the environment.

15. The Restoration Order as observed in Paragraph 9 above was lifted by the Respondent upon implementation of mitigation factors by the Appellant and thus there is nothing to stay now in this application.

16. In the case of **NET 016 OF 2019 Dobs Entertainment vs NEMA** this Tribunal held that,

“A proponent served with a Restoration Order is bound to observe the contents of the order notwithstanding that it has been complied with or lifted following compliance, so the Appellant must adhere to the provisions regarding Noise and Excessive Vibrations, he cannot simply adhere to it in reaction to the order and then resume the very same breach once the order is lifted. “ An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation.” (Wade & Forsyth, “Administrative Law” 10th Edition at page 450). There could not have been a legitimate promise made by NEMA that the lifting order would insulate the Appellant from all future breaches in respect to the matters specified therein or generally.” In the same measure Imara Steel is duty bound to operate within the parameters that provide clean and healthy environment to all those being affected by the activities and NEMA has a public duty to enforce the conditions in cases of non-compliance.

17. Given the environment needs to be maintained in a clean and healthy state it is prudent to disallow the prayer sought and maintain the status quo and order this appeal be fixed for hearing on priority basis as the parties have filed their pleadings.

Issue No. 2 – Who bears the costs of this application"

18. On the last issue of costs, the Tribunal finds that all environmental matters are brought in public interest and each person bears the duty of ensuring that there is clean and healthy environment by ensuring there is intra generational equity. Therefore, each party shall bear its own costs of this application.

Orders

19. The Tribunal now makes the following orders:

- a) The Appellant's application is disallowed.
- b) As a Precautionary measure the Respondent is hereby directed to file a current Compliance Report on the status of compliance within seven (7) days from the date of this ruling.
- c) Parties to fix a date for hearing this appeal within seven (7) days from the date of delivery of this ruling.
- d) Each Party to bear its own costs of this application.

DATED AND DELIVERD AT NAIROBI THIS ...1ST ... DAY OF ...OCTOBER... 2021

Mohammed S. Balala Chairperson

Christine Mwikali Kipsang' Vice-Chairperson

Bahati Mwamuye Member

Waithaka Ngaruiya Member

Kariuki Muigua Member



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