



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. 002 OF 2021

FESTUS MAATO.....APPELLANT

=VERSUS=

IMPRESTA CONSTRUCTION GIUSEPPE M (ICM SPA).....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

RULING

1. The Appellants herein filed a Notice of Appeal on 9th February 2021 in which he sought ‘temporary injunctions and payment of destroyed properties occasioned by blasting in quarry’. The Notice of Appeal does not have any other prayers and is not supported by any other grounds.

2. On 3rd March 2021, the 2nd Respondent (NEMA) filed a Notice of Preliminary Objection (P.O) dated 22nd February 2021 seeking for the dismissal of the whole Appeal on the grounds that:

a. The Appeal is *sub judice* in respect to **KAJIADO CMCC ELC NO. 136 OF 2020, FESTUS MAATO vs IMPRESSA CONSTRUCTION GIUSEPPE & NEMA;**

b. The Tribunal lacks jurisdiction under section 129 Environment Management and Co-ordination Act (EMCA), Rule 3 and Rule 4(3) of the National Environment Tribunal Rules to hear and determine the Appeal; and

c. The Appeal is time barred and contravenes the provisions of EMCA.

3. The P.O was disposed of by way of written submissions and from the Tribunal’s record, we note that the Respondents filed their submissions but the Appellant did not file his submissions.

Analysis

4. We have considered the submissions filed by the Respondents as well as all the pleadings that have been filed in this matter and found that there are ~~two~~ three issues for our determination:

i. Whether the Appeal is time barred;

ii. Whether the Appeal has been filed in compliance with Rule 4(3) of the National Environment Tribunal Rules; and

iii. Whether the appeal is *sub judice* in respect of **KAJIADO CMCC ELC NO. 136 OF 2020, FESTUS MAATO vs IMPRESSA CONSTRUCTION GIUSEPPE & NEMA.**

(i) Whether the Appeal is time barred

5. The jurisdiction of this Tribunal to hear matters of Environmental Impact Assessment (EIA) licences issued by NEMA, flows from section 129 of EMCA which provides as follows:

“129. Appeals to the Tribunal

(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.

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. (Emphasis supplied)

(2) 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.”

6. Rule 3 of the of the National Environment Tribunal Rules provides that,

“Any person who is aggrieved by any determination or decision of the Authority or any of its Committees or officers as specified in subsections (1) and (2) of section 129 of the Act may appeal to the Tribunal in accordance with these Rules.”

7. The EIA license that is contested by the Appellant herein is addressed to the 1st Respondent and is dated 9th August 2019, being a licence for the excavation of the underlying rock into stones of different sizes for construction materials.

8. 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.”

9. The jurisdiction of the Tribunal with respect to issuance of ~~an~~ EIA licences is a matter that has been well settled by the courts and this Tribunal. An Appeal filed after the lapse of ~~the~~ 60 days since the date an EIA license is issued is time barred and the Tribunal does not have jurisdiction over such a matter. In this case, the time for filing the Appeal started running on 9th August 2019 and lapsed at the expiry of 60 days thereafter. The Appeal herein was filed on 9th February 2021 which period is obviously way outside the 60 days provided in EMCA for filing the Appeal.

10. Having established that the Appeal was filed after the lapse of the 60 days, the same is terribly out of time and the Tribunal does not have jurisdiction to hear it.

(ii) Whether the Appeal has been filed in compliance with Rule 4(3) of EMCA.

11. Rule 4 (3) of the of the National Environment Tribunal Procedure Rules provides that:

“(3) The notice shall include—

(a) the name and address of the appellant(s);

(b) the particulars of the disputed decision; and

(c) a statement of the purpose of the hearing and a short and precise statement of the grounds of the appellant’s dissatisfaction with the decision which is the subject of the appeal.”

12. The Notice of Appeal filed by the Appellant contains the names of the parties, their addresses of the 1st Respondent and the relief sort. The particulars of the decision as well and the grounds of the Appeal are not set out in the Notice of Appeal as required under Rule 4(3) of the National Environment Tribunal Procedure Rules.

13. The National Environment Tribunal Procedure Rules were enacted for ease of access of justice to the consumers of the services of the Tribunal and to guide parties on the salient requirements when filing their appeals. The Respondents in any appeal also deserve to know the complaints that have been lodged against them to enable them file their responses to the Appeal. The word used in the Rules is ‘*shall*’, which makes it mandatory for the said particulars to be included in the Notice of Appeal.

14. The Appeal as filed fails to meet the mandatory requirements of Rule 4(3) of the Rules thus renders itself ripe for striking out.

(iii) Whether the appeal is *sub judice* in respect of KAJIADO CMCC ELC NO. 136 OF 2020, FESTUS MAATO vs IMPRESSA CONSTRUCTION GIUSEPPE & NEMA.

15. The objection to the appeal on the grounds that the Appeal is *sub judice* has been pleaded as a ground in the P.O and we have been urged to strike out the Appeal on that ground. The Respondents have also submitted to us at length on the matter of the *sub judice*.

16. The question of the Appeal being *sub judice* is a matter of fact which requires that we peruse the pleadings of the suit that is said to have been filed at Kajiado Law Courts. Unfortunately, the parties did not deem it fit to file an Application to plead those facts and bring the said suit as an annexure to their affidavits.

17. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, the court held as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

18. It is improper for the Tribunal to determine factual matters on the basis of a preliminary objection. The parties ought to have filed an Application to challenge the factual existence of a similar suit that is alleged to be under consideration in another court. This ground of the P.O is declined.

The finding

19. Considering the above the Tribunal finds that the Appeal was filed out of time and the Tribunal cannot hear the Appeal. In any event, even if the Appeal had jurisdiction, the Notice of Appeal could still have been struck out for failure to meet the requirements of Rule 4(3) of the Rules.

ORDER

- i. The Tribunal strikes out the Notice of Appeal filed on 9th February 2021 for failure to meet the mandatory requirements of Rule 4 (3) of the Rules;
- ii. The Tribunal does not have jurisdiction to hear and determine the Appeal filed on 9th February 2021 as the Appeal was filed after the lapse of 60 days from the date of the grant of the EIA licence;
- iii. The Respondents shall have costs of the Notice of Preliminary Objection dated 22nd February 2021.

DATED AND DELIVERED AT NAIROBI, THIS 7TH DAY OF JULY , 2021.


MOHAMMED S BALALA.....CHAIRMAN

CHRISTINE KIPSANG.....VICE CHAIR

BAHATI MWAMUYE.....MEMBER

WAITHAKA NGARUIYA.....MEMBER

KARIUKI MUIGUA.....MEMBER

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