



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENTAL TRIBUNAL

AT NAIROBI

TRIBUNAL APPEAL NO. 4 OF 2020

CLEOPHAS BARASA SIMIYU.....1ST APPELLANT

CALEB LUVANGA.....2ND APPELLANT

-vs-

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

HUNAN INTERNATIONAL LIMITED.....2ND RESPONDENT

-and-

SAMUEL MAHERI.....INTERESTED PARTY

JUDGMENT

1. On 21st January 2020, dated 26th Thursday 2019 (sic) the appellants filed an appeal seeking, inter alia, the following prayers:
 - a. The 1st Respondent to proceed to the project area and carry out a full impact assessment of the 2nd Respondents activities in the neighbourhood within 60 days
 - b. The 2nd Respondent be compelled to drain the water and fill up the galley in the project site
 - c. The 2nd Respondent be compelled to repair the cracked houses and other structures affected by the impact of its blasting activities
 - d. The Wetland be declared a protected area
 - e. The 2nd Respondent be compelled to pay a reasonable cost for this appeal
2. Alongside the typed Statement of Appeal the Appellants , the Appellants also filled out the standard Notice of Appeal form and introduced a prayer seeking for an order to revoke the EIA License PR0249/ Reg no. 0020957.
3. Attached to the Notice of Appeal were Certificates of Transfer of EIA License 0020957 from Zou Changwei to Zhongmei Engineering Group Limited dated 8th April 2019 and a Certificate of Transfer of the same EIA License from Zhongmei Engineering

Group Limited to Hunan International Limited (the 2nd Respondent) dated 10th January 2020. The original EIAL License was issued to Zou Changwei on 14th July 2014.

4. The Appeal was originally filed by the Appellants allegedly for and on behalf and for the protection of the Ndarbaranach Community.

5. Following the filing of the Appeal, several members of the community disowned the authority to file the Appeal. This was vide letters of 18th March 2020, 7th August 2020 and 8th August 2020.

6. The Appellants therefore filed an amended Notice of Appeal dated 16th October 2020 excluding the community and sought to prosecute the appeal on their individual behalf.

7. The amended appeal dated 16th October 2020 vacated the entire original prayers that formed the basis of the appeal and instead sought the following new relief:

a) A Declaration that the 1st Respondent's Issuance of EIA License No. 0020957 as well as its variation and subsequent transfer to the 2nd Respondent was improper and contravened the provisions of Section 58 and the Second Schedule of the Environmental Management and Coordination Act as well as the Environmental (Impact Assessment and Audit) Regulations of 2003

b) An Order stopping the 2nd Respondent from continuing to operate its Quarry situated on Land Parcel MOI'S BRIDGE/ZIWA BLOCK 16(CHABARUS)/1259 or from carrying on thereat any quarrying activities, including excavating, blasting, processing and transporting ballast of any processed quarry materials or rocks from the said quarry, until a full Environmental Impact Assessment has been conducted and a fresh EIA license duly issued in accordance with the provisions of Section 58 and the Second Schedule of the Environmental Management and Coordination Act (EMCA) as well as the Environmental (Impact Assessment and Audit) Regulations of 2003 and all the relevant provisions of the law.

c) An environmental restoration order compelling the 2nd Respondent to restore its quarry site on land parcel MOI'S BRIDGE/ZIWA BLOCK 16(CHABARUS)/1259 to the original state or to as near as possible to its original state or to the satisfaction of this Honourable Tribunal.

d) The said Environmental Restoration Order in (c) above be supervised by the Principal Secretaries of the Ministry of the Environment and the Ministry of Public Works or their nominees, and their Reports filed in this Honourable Tribunal within 60 days, for further directions.

e) Costs of this appeal be borne by the 2nd Respondent.

8. The 2nd Respondent filed an amended statement of reply on 26th October 2020. The 2nd Respondent stated that the amended appeal is misconceived, frivolous, oppressive, discriminative, lacks merit and exclusively designed to frustrate the 2nd Respondent. The 2nd Respondent stated that it has employed about 50 people from the local community who depend on it for their source of livelihood. Further, that a transfer of License does not require the 1st Respondent to conduct a fresh Environmental Impact Assessment. The 2nd Respondent denied acquiring an illegal license or that the same was transferred irregularly or illegally.

9. The 1st Respondent filed its amended reply dated 12th November 2020.

HEARING

10. The hearing of the appeal commenced with the appellants giving their evidence. The appellants through their witness alleged that there was no public participation and that the 2nd respondents license was unlawful in the circumstances.

11. The 1st and 2nd Respondents evidence was that public participation had indeed taken place and there were minutes to support the meeting that took place.

12. Both parties relied on the statements filed by their respective witnesses.

APPELLANT'S SUBMISSIONS

13. The Appellants filed submissions dated 18th March 2021 with the following arguments:

- a. The transfer of License was conducted without public participation.
- b. The transfer was granted without any prior environmental impact assessment study.
- c. The transfer was issued in contravention of Rule 25 of the EIA and Audit Regulations of 2003.
- d. There was no EIA License at the time of the transfer.

1ST RESPONDENT'S SUBMISSIONS

14. The import of the 1st Respondent's submissions is:

- a. The issuance of the EIA License 0020957 as well as the subsequent transfer to the 2ND Respondent was proper and regular pursuant to Section 58 of the EMCA 1999.
- b. The License 0020957 was valid and had not expired at the time of the transfer
- c. The License 0020957 was properly transferred to the 2nd Respondent pursuant to Section 65 of the EMCA 1999. The transfer did not require a fresh EIA project report under Section 64 of the EMCA 1999.
- d. The 1st Respondent acted within the law when issuing the License 0020957.

2ND RESPONDENT'S SUBMISSIONS

15. The 2nd Respondent filed submissions dated 6th April 2021 with the following salient points:

- a. The Appellants have failed to demonstrate that they are aggrieved in the manner envisaged by Section 129 of EMCA 1999. The License in question was issued on 14th July 2014 yet the amended appeal was lodged on 16th October 2020 – a period of 6 years instead of the 60 days provided under statute.
- b. The EIA License No. 0020957 dated 14th July 2014 had not expired at the time of the transfer.
- c. The transfer of the EIA License No. 0020957 from Zhongmei Engineering Group Ltd to the 2nd Respondent in 2020 by the 1st Respondent was neither illegal nor irregular.
- d. There was no variation of the said License and no contravention of the same by the 2nd Respondent.

ANALYSIS AND DETERMINATION

16. Having considered the pleadings and submissions of the Appellant and the Respondents the Tribunal addressed the jurisdictional issues that arose out of the pleadings and submissions of the parties on the question of jurisdiction.

17. The prayers in the amended appeal reveals the Appellants desire to challenge the issuance and subsequent transfer of an EIA

License under Section 129(1) of the EMCA 1999. Section 129(1) of the EMCA 1999 provides as follows:

129. Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a) the grant of a License or permit or a refusal to grant a License or permit, or the transfer of a License or permit, under this Act or its regulations;

..... may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

18. The powers of the Tribunal in issuing any orders prayed for under Section 129(1) of the EMCA 1999 are limited by the temporal jurisdiction in the said section of the statute.

19. The decision of the Tribunal in **NET 202 of 2017- David Mereka vs DG NEMA and Kenya Council of Catholic Bishops** considered the nature of an appeal under Section 129(1) EMCA 1999 but even more succinctly, the court in **ELC 100 of 2015: Simba Corporation Limited vs Avic International & another**, addressed the question as follows:

“In the jurisprudence interpreting the two categories of appeals filed to the NET under Section 129 (1) and (2) the NET and the superior courts of record have held 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 a 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.

20. The License herein was issued on 14th July 2014. The appeal was filed on 21st January 2020. This a lapse of close to 6 years in stark contrast to the time limit of 60 days provided under EMCA 1999. Accordingly, any challenge on the EIA License itself was not permitted before the Tribunal.

21. The appellants in their amended appeal sought to also challenge the transfer of the EIA License. From the evidence, the certificate of transfer of EIA License was concluded on 10th January 2020 being the date the 1st Respondent issued the certificate of transfer. As with the challenge to the EIA License, an appeal challenging the said transfer ought to have been filed within 60 days of the 10th January 2020.

22. Whereas the appeal itself as originally framed was filed on 21st January 2020 it did not at that stage challenge the transfer of EIA Licence despite the appellant being aware of the said transfer as seen through the documents they filed when filing the notice of appeal. It sought other prayers unrelated to the transfer of the license. The appeal was amended on 26th October 2020 to now include a raft of new prayers substituting the original prayers it had asked for and in doing so effectively altering the entire cause of action. Having altered the cause of action the entire appeal was now materially different from the original cause and tantamount to filing an appeal albeit hopelessly out of time.

23. Whether the appeal attempted to challenge the EIA license of 2014 or its transfer in January 2020, it did so after the time permitted for doing so had expired. Both the appeal as originally drafted and the subsequent amendment did not meet the strict time requirements of law.

24. In addition, as the original appeal was filed outside of the tribunals jurisdiction, the appeal was rendered void and no application after that could be made to cure the deficiency. In *Macfoy v United Africa Company limited* (1961) 3 All ER 1169 (PC) Lord Denning at 1172 held that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to

stay there. It will collapse.”

25. That is the case here.

26. The jurisdiction of the Tribunal with respect to issuance of an EIA License is a matter that has been well settled by the courts and this Tribunal. An Appeal filed after the lapse of the 60 days from the date of issuance (and the date of transfer in this case) is time barred and the Tribunal does not have jurisdiction over such a matter.

27. 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.”

28. Having established that the Appeal was filed after the lapse of the 60 days, and the amendment to the appeal was also defective in attempting to cloth the amended appeal with legitimacy and considering the strict provisions of the statute, we find that the Tribunal does not have jurisdiction to hear it nor powers to make any determination on the substance of the appeal itself.

29. Notwithstanding the Tribunal’s finding on this matter, we feel it is important to clarify a point raised on the requirements to be undertaken in the process of transfer of EIA License. An application for transfer of an EIA License cannot reopen inquiry into the manner in which the original EIA License was issued when the time permitted for challenge of that original EIA License had expired. There is a presumption that such EIA License was validly issued and the only object of challenge is the transfer of the same. The activity for which the License had been issued cannot be an issue unless it is part of an ongoing environmental audit to ensure compliance with the EIA License conditions.

30. As such, a transfer of an EIA License need go through the entire process of issuance of EIA License as that would be a duplication of effort and reopening of a licensing process long concluded. A transfer of EIA License is only to be notified so that parties aggrieved with an activity the subject of a License may know who to have recourse to should there be a breach of the License conditions.

31. We will say no more on this issue.

32. In the circumstances and in light of our finding on lack of jurisdiction, we have no choice but to dismiss this appeal with costs to the Respondents and the Interested Party.

Parties are advised of their rights to appeal this decision under section 130 of the EMCA.

DATED & DELIVERED AT NAIROBI THIS1ST DAY OF ...OCTOBER.....2021

MOHAMMED S BALALA.....CHAIRMAN

CHRISTINE KIPSANG.....MEMBER

BAHATI MWAMUYE.....MEMBER

WAITHAKA NGARUIYA.....MEMBER

KARIUKI MUIGUA.....MEMBER



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