



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO NET 001 OF 2021

JOSEPH MUCHIRI.....1ST APPELLANT

DR CHARLES MURIITHI.....2ND APPELLANT

DAVID KIMANI3RD APPELLANT

VERSUS

SIGMA SEEDS LIMITED.....1ST RESPONDENT

NEMA KAJIADO COUNTY.....2ND RESPONDENT

DEPARTMENT OF ENVIRONMENT,

NATURAL RESOURCES & CLIMATE CHANGE.....3RD RESPONDENT

RULING ON PRELIMINARY OBJECTION DATED 4TH FEBRUARY 2021

1. By a Notice of Appeal dated 22nd January 2021, the Appellants sought the following orders:-
 - a. A declaration that the mining and/ or quarrying activities on all parcel of land known as KJD/KITENGELA/2829 is unlawful, illegal, null and void.
 - b. A permanent stop order restraining the 1st Respondent, its servants and/ or agents or otherwise from mining and/ or quarrying of ballast the property known as KJD/KITENGELA/ 2829.
 - c. A stop order restraining the 3rd Respondent from issuing any license to the 1st Respondent for quarrying and/ or mining of Ballast on all that parcel of land known as KJD/KITENGELA/ 2829.
2. The Appellants allege to be residents in the properties adjoining the 1st Respondent's quarry. The Appeal alleged that an EIA License for implementation of a proposed quarrying of ballast project had been issued to the 1st Respondent by the 2nd Respondent on 19th December 2019. Following the issuance of license blasting had been ongoing affecting the Appellants' properties.
3. The Appeal was accompanied by a Notice of Motion Application for interim relief and supported by the affidavit of the 1st Appellant.
4. The 1st Respondent filed a Notice of Preliminary Objection (the Preliminary Objection) dated 4th February 2021 challenging the jurisdiction of the Tribunal to hear the dispute for having been filed outside the statutory period of 60 days from the date of issuance of the license.

5. Following directions from the Tribunal on 5th February 2021, the 1st Respondent (Sigma Seeds) filed written submissions through the firm of Rachier & Amollo Advocates on 15th February 2021.

6. The Appellants in turn filed their Submissions to the Preliminary Objection on 23rd March 2021.

7. Having considered the pleadings and submissions filed, the Key issues for determination are whether the Tribunal has jurisdiction under Section 129 of the Environmental Management and Coordination Act (EMCA) and whether the tribunal should have regard for the appeal being filed out of time.

8. This Tribunal is established under Section 125(1) of EMCA and its jurisdiction is provided for under Section 129(1) of EMCA which provides as follows.

“Any person who is aggrieved by: -

(a). the grant 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.”

9. The EIA license referred to in the Appeal was issued on 19th December 2019. The Appeal was filed 27th January 2021 more than 1 year after the occurrence of the event, to wit the grant of licence, and far exceeding the sixty day limited prescribed by the Act for challenge of any activity relating to a license.

10. In the case of **Owners of Motor Vessel Lilian S vs Caltex Oil (Kenya) Ltd** the Honourable Court held:

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. 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.”**

8. 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”.

9. We therefore make a finding that this Tribunal does not have jurisdiction to hear and determine this appeal for the reason that it was lodged outside the timelines provided under section 129 (1) of EMCA. The tribunal being strictly bound by this limitation cannot even consider the reasons for delay or even extend the time for filing of an appeal.

10. In addition, a cursory perusal of the grounds of appeal and prayers as framed also reveal that whereas the appellants felt aggrieved by the manner in which the EIA Licence was issued, they have not sought its cancellation. Despite the appeal being based on a licensing issue which had already been issued in December 2019, the Appellants have sought an order restraining the 3rd Respondent (who is not the licensing authority) from issuing any licence to the said Sigma Seeds. The Tribunal does not have the power to restrain the said 3rd Respondent.

11. We have also considered the issue of costs and find that even though the prayers in the Appeal are not within the scope of the Tribunal's jurisdiction, we find that the appeal was not frivolous as to warrant the award of costs. Accordingly, we restrain ourselves from awarding costs against any party.

ORDER

For the above reasons, this Tribunal makes the following orders:

- a) The Preliminary Objection dated 4th February 2021 is allowed.
- b) The Appellants' Appeal is hereby Struck Out.
- c) Each party to bear the costs of the Preliminary Objection and the Appeal.

The Parties' attention is hereby drawn to provisions of Section 130 of EMCA.

DATED & DELIVERED AT NAIROBI THIS 8TH DAY OF JULY 2021

MOHAMMED S BALALA.....CHAIRMAN

CHRISTINE KIPSANG..... MEMBER

BAHATI MWAMUYE.....MEMBER

WAITHAKA NGARUIYA.....MEMBER

KARIUKI MUIGUA..... MEMBER



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