



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MISC. CIVIL APPLICATION NO. 21 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION BY  
ORATA INTERNATIONAL LIMITED**

**AND**

**IN THE MATTER OF ARTICLES 47, 50 (1), 60, 69 & 70 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION (AMENDMENT) ACT 2015**

**AND**

**IN THE MATTER OF THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY DECISION ON ENVIRONMENTAL  
RESTORATION ORDER FOR CLOSURE OF LIMESTONE – TERRALO PRODUCTS CRUSHING FACTORY AT  
KITENGELA, NEAR SAVANA CEMENT**

**BETWEEN**

**ORATA INTERNATIONAL LIMITED.....APPLICANT**

**VERSUS**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT**

**RULING**

What is before me for determination is the Applicant's Chamber Summons dated the 12<sup>th</sup> March, 2019 and the Respondent's Notice of Preliminary Objection dated the 26<sup>th</sup> March, 2019. In the Application dated the 12<sup>th</sup> March, 2019, the Applicant seeks for leave to institute judicial review proceedings against the Respondent's Order dated 5<sup>th</sup> March, 2019, while the Preliminary Objection is premised on the ground that the suit herein is barred in law, defective and offends the provisions of section 129 of the Environmental Management and Coordination Act.

Both the Applicant and the Respondent filed their respective submissions that I have considered.

**Analysis and Determination**

Upon consideration of the Application dated the 12<sup>th</sup> March, 2019 and the Respondent's Notice of Preliminary Objection dated the 26<sup>th</sup> March, 2019 including the submissions filed herein, the following are the issues for determination:

- Whether the suit herein is barred in law, defective and offends the provisions of section 129 of the Environmental Management and Coordination Act.
- Whether the Applicant should be granted leave to institute judicial review proceedings against the Respondent's Order dated 5<sup>th</sup>

March, 2019.

As to whether suit herein is barred in law, defective and offends the provisions of section 129 of the Environmental Management and Coordination Act (EMCA). The Applicant filed the instant application seeking leave to institute judicial review proceedings in respect of the Respondent's environmental restoration order dated 5<sup>th</sup> March, 2019 for closure of the Limestone – Terrazo Products Crushing Factory at Kitengela. The said order is attached to the application as annexure 'D' in Jacob Iyadi's affidavit. I note the said order directed for closure of the Applicant's factory within 24 hours until the same was fully relocated and in full compliance with section 143 (a) & (b) of the EMCA Act. Further that the Applicant was expected to undertake decommission within comprehensive decommissioning plan submitted and approved by the Respondent. The Respondent granted the Applicant a right of Appeal against the Restoration Order to the National Environment Tribunal (NET). The Applicant was aggrieved by the Restoration Order and filed the instant application claiming the Respondent did not adhere to the Fair Administrative Action Act when it made its decision as it was not accorded a hearing. In its submissions, the Applicant relied on various judicial authorities including *Judicial Review No. 622 of 2017, PRAVIN GALOT V CHIEF MAGISTRATES COURT AT MILIMANI LAW COURTS; TAIB A. TAIB VS THE MINISTER FOR LOCAL GOVERNMENT & OTHERS MOMBASA HC MISC A NO. 158 OF 2006* to buttress its arguments.

The Respondent on the other hand insists the Applicant had a recourse to proceed to National Environmental Tribunal and not the ELC court as it has done. It relied on section 129 of Environmental Management and Coordination Act (EMCA) to buttress its arguments. It further relied on the judicial authorities including *JOSEPH OWINO & ANOTHER VS NEMA & AFRICA PLYSACK LTD (2014) eKLR; NAIROBI CONSTITUTIONAL PETITION NO. 461 OF 2012 ISAAC NGUGI VS NAIROBI HOSPITAL & ANOTHER (2013) eKLR; NAIROBI CONSTITUTIONAL PETITION NO. 73 OF 2014 RICH PRODUCTIONS LTD KENYA PIPELINE LIMITED AND PUBLIC PROCUREMENT OVERSIGHT AUTHORITY (2014) eKLR; CA NO 84 OF 2004 DAMIAN BELFONTE VS THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO; and THE SPEAKER OF THE NATIONAL ASSEMBLY Vs JAMES NJENGA KARUME CA CIVIL APPEAL NO. 92 OF 1992 (NBI)* to support its arguments.

I note in annexure 'B' of the Jacob Iyadi's affidavit, the Applicant had annexed an improvement order dated the 25<sup>th</sup> October, 2016 which they had done in response to the Respondent's Improvement Order dated the 25<sup>th</sup> October, 2016. In the said Order, the Applicant had actually indicated that it was in the process of relocating the factory to an alternative site in Athi River, although this was an expensive venture.

Section 129 (1) ( e) of EMCA provides that: ' (1) Any person who is aggrieved by— (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.

(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.'

Section 129 (2) of Environmental Management Coordination Act (EMCA) provides as follows: Any person who is aggrieved:- Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions as may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.'

Section 13 (1) of the Environment and Land Court Act confers jurisdiction to the ELC and stipulates as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'

The above provisions are distinct in terms of jurisdiction of the National Environment Tribunal and the Environment and Land Court.

In the case of The Owners of the Motor Vessel Lilian 'S' Vs. Caltex Kenya Limited (1989) KLR 1 the Court of Appeal held 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.....'

I note the Applicant is seeking leave to file an application to quash the decision of the Director General in respect of the Restoration Order claiming that it was not given a chance to respond to the complaints alleged in the said order before closure of the factory culminating in their incurring losses. From the two letters I have referred to above, I note the Applicant had actually been aware of the complaints as it have been given a chance from 2016 to put in place mitigating measures to curb dust and noise and decommission the plant.

In the case of Matanga Tea & Coffee Company Limited Vs. Shikara Limited & Anor (2015) eKLR it was held that: ' The reason why the Constitution and the law establish different institutions and mechanisms for dispute resolution in different

sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under article 165 to supervise bodies such as the 2nd Respondent, such supervision is limited in various respects, which I need, not go into here, Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.’

Further, in the case of JOSEPH OWINO & ANOTHER VS NEMA & AFRICA PLYSACK LTD (2014) eKLR Justice Tuiyot held that Constitutional redress should be resorted to only where the available remedies are not efficacious or adequate. Further in the case of **National Environmental Tribunal v Overlook Management Limited & 5 others [2019] eKLR**, the Court of Appeal held that: ‘ ..... where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the Act, such a party may as of right appeal to the appellant. Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3<sup>rd</sup> respondent, its Director-General or its committees, then such a party may lodge an appeal pursuant to sub-section 2 of that provision.’

In relying on the facts above and the three authorities, I find that in so far as the Environment & Land Court Act gives original and appellate jurisdiction on environment and land matters to the Environment & Land Court, the prayers sought in the instant application cannot hold at this juncture as the Applicant has a remedy to refer the complaint to the National Environment Tribunal first before an appeal can lie to the Environment and Land Court (ELC). . Since there is already an established avenue under Environmental Management and Coordination Act (EMCA) to deal with the Applicant’s complaint. I am unable to grant him leave but direct him to lodge an Appeal with NET. Since I have already made my findings above, I will not deal with the second issue.

In the circumstances, I uphold the Preliminary Objection and proceed to strike out the application dated the 12<sup>th</sup> March 2019.

Costs will be in the cause.

**Date signed and delivered in open court at Kajiado this 2<sup>nd</sup> day of July, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**