THE REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL

AT NAIROBI

TRIBUNAL APPEAL NO. 09 OF 2019

WEMALI BENSON.....1ST APPELLANT

ALI MWAKUNYAPA.....2ND APPELLANT

RASHID KARUNGU.....3RD APPELLANT

ALI MWAKUNYAPA.....4TH APPELLANT

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY (NEMA).....1ST RESPONDENT

MOMBASA GAS TERMINAL LIMITED.....2ND RESPONDENT

RULING

1. The Ruling herein relates to a Notice of Motion Application dated 13th March 2020 seeking the following orders:

a. Spent

b. THAT the Honourable Tribunal be pleased to suspend the operation of EIA License No. NEMA/EIA/PLS/7383 issued by the 1st Respondent to MOMBASA GAS TERMINAL LTD, the 2nd Respondent herein in relation to the construction, operation and management of a Liquefied Petroleum Gas (LPG) Storage Terminal Plant of 22,000 metric tons capacity intended to be located on Plot Mombasa/Block XLVIII MBARAKI, Ganjoni Ward within Mombasa County in the Republic of Kenya pending to (sic) the hearing and determination of the Application herein.

c. THAT this Honourable Tribunal be pleased to vary and/or review and set aside the Honourable Tribunal (sic) Orders issued on 5th December, 2019.

d. THAT the costs of this application be provided for.

2. The background facts as understood from the averments of the parties and their pleadings are that, the Appellant filed this Appeal against the Respondents on 24th April 2019, seeking for *inter alia*, an order challenging the Environmental Impact Assessment License (EIA licence) issued to the 2nd Respondent on 19th February 2019 and a permanent prohibition order restraining the 2nd Respondent from establishing, building or setting up any LPG storage plant within any residential area in Mombasa County or its surroundings.

3. Upon service of the Notice of Appeal, the 2nd Respondent filed a Notice of Preliminary Objection dated 27th May 2019 in which it sought to strike out the Appeal for having been filed after the lapse of sixty (60) days thus offending the provisions of section 129 of the Environmental Management and Co-ordination Act (EMCA). The Tribunal delivered its Ruling on 5th December 2019 in which it allowed the Preliminary Objection and struck out the Appeal for having being filed out of time.

4. The Appellants approached the Tribunal again through a Notice of Motion Application dated 13th March 2020 in which they seek a review of the orders of the Tribunal against the striking out of the Appeal on the basis that the 1st Respondent issued an EIA licence which had not

specified the parcel number on which the project was going to be undertaken but has now obtained information as to the correct parcel number where the project was to be undertaken. The Appellant states that after the Appeal was struck out, they obtained information the project was going to be undertaken on a plot number that had not been indicated on the EIA licence. It is this information that the Appellant allege to have been discovery of new and important evidence which meets the threshold for review of the decision of the Tribunal to strike out the appeal for lack of jurisdiction.

The Appellants' case

5. The Appellants depone that on 11th February 2020, they wrote to the 1st Respondent seeking to know the exact plot numbers where the project was going to be situate as the EIA licence as issued did not identify the plot number. Upon receipt of the said letter, the 1st Respondent replied vide a letter dated 19th February 2020 in which it partly stated as follows:

> *"The Authority acknowledges issuing an EIA license No. NEMA/EIA/PSL/7383 to Mombasa Gas Terminal Limited on the 19th February 2019 after the submission and processing of an EIA Study Report by the said proponent. The Authority noted that there was an error on the L.R indicated on the license as plot L.R No Mombasa/Block XLVIII contrary to the submitted EIA study report and the documents attached therein.*
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> *"Considering that EIA is a site specific undertaking, the Authority communicated to the proponent vide a letter dated 04th March 2019 (copy attached) pointing out the error on the L.R indicated on the EIA License. They were further informed that the proposed project needs to be implemented on plot L.R No. Mombasa/Block XLVIII/45 at Mbaraki in Ganjoni Division, Mombasa County while adhering to the conditions issued on the EIA license No. NEMA/EIA/PSL/7383."*

6. The Appellants annexed the 1st Respondent's letter dated 4th March 2019 which was addressed to the 2nd Respondent and stated in part:

> *"The Authority has realized an error on the L.R No. indicated on the license as Plot L.R No. Mombasa/Block XLVIII. Note that the correct L.R No. for the proposed project is Plot L.R No. Mombasa/Block XLVIII/45 as applied for in the Environmental Impact Assessment Study Report and the documents attached therein.*
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> *Noting that Environmental Impact Assessment is site specific, please ensure that the project is implemented on Plot L.R No. Mombasa/Block XLVIII/45 at Mbaraki in Ganjoni Division, Mombasa County while adhering to the conditions issued on EIA License No. NEMA/EIA/PSL/7383."*

7. The Appellants argued that the communication of 4th March 2019 in which the 1st Respondent clarified that there was an error in the EIA licence and the subsequent disclosure of the exact plot number of the project situation was new information which would have assisted the Tribunal to reach an entirely different conclusion when determining the Preliminary Objection on the jurisdiction of the Tribunal. They proceeded to state that the information in that letter of 4th March 2019 had the effect of extending the time to file the Appeal to 5th May 2019.

8. The Appellant cited the case of **Republic v Public Procurement Administrative Review Board & 2 Others (2018) eKLR** in which the court held that:

> *"The power to review a judgment or an order can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule.*
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> *Where the application is based on sufficient reason it is for the Court to exercise its discretion."*

9. The Appellants further relied on the cases of the ***Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 (1963) EA*** and ***Mohamed Abdulrahiman Said & Another -vs- Republic, Mombasa Cr. Misc Application Nos. 66A and 66B of 2001 (unreported)***.

10. It was the Appellants' case that the Tribunal has ancillary powers under section 129(3) to make such orders as it may deem fit, including review of its decisions.

The 1st Respondent's case

11. The 1st Respondent filed Grounds of Opposition and written submissions in which it stated that the Tribunal lacks jurisdiction to entertain an Application for review because the National Environment Tribunal Rules do not provide for review of the Tribunal decisions.

12. The 1st Respondent further argued that even if the Civil Procedure Rules were to be considered, the Application would still fail as it does not meet the legal threshold set under Order 45 thereof. The Tribunal heard that the letter of 4th March 2019 by the 1st Respondent does not amount to a decision under EMCA and in any event the matters in the said letter were within the knowledge of the Appellants at the time of filing the Appeal.

13. Finally, the 1st Respondent submitted that the Appellants did not carry out any due diligence to obtain the alleged 'new and important information' during the hearing of the arguments for the preliminary objection thus the instant Application ought to be denied. Counsel for the 1st Respondent relied on the case of ***Taib Investments Limited v Fahim Salim Said & 5 Others (2016) eKLR*** to buttress his point that an appeal to the Tribunal should be based on the issuance or denial of an EIA licence. He submits that the only appealable decision was the grant of the EIA licence and not the correction of the errors of omission in the licence.

The 2nd Respondent's case

14. The 2nd Respondent filed Grounds of Opposition in which it challenged the jurisdiction of the Tribunal to issue orders of review thus the only available reprieve is to file an appeal at the Environment and Land Court. It stated that the Application is fatally defective for failure to annex the order that it seeks to review.

15. In further opposition, the 2nd Respondent states that there is no new and compelling evidence, there is no error apparent on the face of the record, the Application violates the doctrine of finality of the orders of the Tribunal and that the Application is *res judicata*.

16. The 2nd Respondent argued that the letter dated 19th February 2020 was communicating a correction of a purported error on the EIA licence which communication had been made earlier on 4th March 2019 and according to the 2nd Respondent, the letter of 4th March 2019 amounted to a separate and distinct action by the 1st Respondent and cannot be construed as extending time for challenging the decision to issue an EIA licence to the 2nd Respondent. Finally, the 2nd Respondent argued that the Appellant ought to have challenged the decision to correct the said error if it felt offended by the correction but not to deem the correction to be extension of time to file the appeal. As a consequence, the 2nd Respondent asked that the Application for Review be dismissed with costs.

ANALYSIS

17. The Application was disposed of by way of written submissions which were filed by the Appellant and the 1st Respondent. The 2nd Respondent did not file its submissions despite being allowed time to do so.

18. We have perused the pleadings and documents filed by the parties in this matter and derived the following issues:

a. Whether the Tribunal has powers to review its orders; and

b. Whether the Appellant has met the legal threshold for review of orders issued earlier by the Tribunal.

a. Whether the Tribunal has powers to review its orders;

19. The jurisdiction of the Tribunal is set out under section 129 of EMCA but the most relevant parts of the said section as far as this Application is concerned is section 129 (3) thereof which provides as follows:

> *"(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 governance and an order for costs, as it may deem just."*

20. The Appellant has filed an Application seeking a review of the orders of the Tribunal issued on 5th December 2019. The Appellants submit that the Tribunal has ancillary powers to make orders such as review of the decision but the Respondents disagree.

21. Section 129(3) of EMCA appears to give latitude to the Tribunal to make wide ranging orders which are obviously geared towards enhancement of the environment and to deliver justice to the parties who appear before it.

22. The Tribunal in its course of dispensing justice makes numerous orders, some of which are reviewed in the course of the hearing of matters. Whereas the NET Rules do not have a Rule similar to Order 45 of the Civil Procedure Rules, section 129 (3c) provides some leeway to make decisions that may guide the dispensation of justice. It would be a legal absurdity for the Tribunal to find that it cannot review its decisions including errors that may be apparent on the face of the record or any other orders in the course of taking proceedings and instead ask the parties to proceed on appeal.

25. The purpose of existence of the Tribunal is to save on time, resources, formalities and to make justice more accessible to all and sundry. A finding that the Tribunal cannot review its own decision would be an erosion of the purpose of existence of the Tribunal.

24. We find that the Tribunal has powers under section 129(3c) to review its decisions and do not find any hindrance to us exercising the power to review such decisions once sufficient cause for such review is established, therefore, the instant Application is properly before us.

b. Whether the Appellant has met the legal threshold for review of orders issued earlier by the Tribunal.

25. The gravamen of the Application before the Tribunal is the letter written by the 1st Respondent on 4th March 2019 and communicated to the Appellant on 19th February 2020. The Appellant argues that the letter amounted to a decision which enlarged the time within which the Appeal ought to have been filed.

26. In ***Peter Ndung'u Njenga Vs Sophia Watiri Ndung'u, Civil Appeal No. 2 of 2000***; the Court of Appeal granted orders of review after the trial Judge allegedly failed to apply the correct law, by treating a claim made under a resulting trust, as a claim made under section 17 of the Married Women's Property Act of 1882. That the Tribunal of Appeal stated that:-

> ***"It is clear however that the Learned Judge decided the suit on the basis of the remedy as contemplated by section 17 of the Married Women's Property Act of 1882 of England. It was clearly an error apparent on the face of the record when the learned Judge proceeded to treat a claim made under an implied or resulting trust as a claim made under section 17.***
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> ***It was also an error apparent on the face of the record when the learned Judge proceeded to divide the suit lands as if he was dealing with a succession cause when the appellant is still alive. We note that all the Respondent's children, by the Appellant are adults and the issue of children's interest apparently was brought in the suit as a red herring.***
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> ***It was also an error apparent on the face of the record when the learned Judge said that although there was no evidence of customary law relating to division of properties amongst spouses (there can be none when the spouses are alive) he was obliged to make a finding based on section 17 aforesaid.***
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> ***The remedy of review of a Judgment or order is available to an applicant if there is a mistake or error apparent on the face of the record and as we have pointed out, the Learned Judge did fall into such manifest errors that it cannot be said that the remedy of review was improperly invoked".***

27. In the case of; ***Northumberland Compensation Appeal Tribunal Exparte Shaw;*** The Court held that, the remedy for review would be granted where an error of law appears on the face of the record. The Applicant prayed that the Application be allowed as prayed, in the interests of justice.

28. The Court of Appeal in the case of, ***Pancras T. Swai VS Kenya Breweries Limited (2014) Eklr*** held that:

> ***"The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence.***
>
> ***The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the Tribunal is deemed to be alive to."***

29. In **Republic v Public Procurement Administrative Review Board & 2 Others (2018) eKLR** *(supra)* in which the court held that:

> ***"The power to review a judgment or an order can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" means a reason sufficiently analogous to those specified in the rule. Where the application is based on sufficient reason it is for the Court to exercise its discretion."***

30. The question that begs at this stage is whether the information contained in the letter of 4th March 2019 constitutes new and important facts which was not within the knowledge of the Appellant at the time of filing the Appeal and the subsequent hearing of the Preliminary Objection to dismiss the Appeal for want of jurisdiction on the part of the Tribunal.

31. Rule 23 of the Environmental (Impact Assessment And Audit) Regulations, 2003 (EIA Regulations) provides that,

> *"Where the Authority approves an environmental impact assessment study report under regulation 23, it shall issue an environmental impact assessment licence in Form 3 set out in the First Schedule to these Regulations on such terms and conditions as it may deem necessary."*

32. A perusal of Form 3 as set out in the First Schedule indicates that the locality of the property where the project is supposed to be undertaken is clearly spelt out as a requirement in the licence format.

33. Rule 18 (1a) of the EIA Regulations provides that the EIA Study Report shall provide the location of the project and it is this location that guides the process of public participation and is eventually published on the EIA licence. As a matter of fact, the 1st Respondent ordinarily requires a proposed project proponent to furnish it with a copy of title for the purpose of identifiability of the project location which buttresses the importance that the 1st Respondent attaches to identity of the project location and such title numbers do appear in the EIA

licences.

34. The EIA licence issued on 19th February 2019 indicates that the project is located at ***'Plot L.R No. Mombasa/Block XLVIII at Mbaraki, Ganjoni Division in Mombasa County'***. In its letter dated 4th March 2019, the 1st Respondent indicates that, ***"…the correct L.R No. for the proposed project is Plot L.R No. Mombasa/Block XLVIII/45…"***

35. The title number as communicated in the letter of 4th March 2019 definitely had a bearing on the identity of the proposed site for the project. The EIA licence as issued on 19th February 2019 was clearly incomplete as it did not have the full citation of the title for the project site. The said incompleteness of the EIA licence was only cured through the communication of the full citation of the title number.

36. The information about the clarification of the title number was only made available to the Appellant vide the letter of 19th February 2020 but the said information was available to the Respondents as early as 4th March 2019 but they chose to withhold it from the Tribunal during the hearing of the Preliminary Objection dated 27th May 2019 challenging the jurisdiction of the Tribunal.

37. We find that the information on the specific property number as communicated through the 1st Respondent's letter dated 4th March 2019 to be important matter as an appeal against the issuance of an EIA licence is based on an identified property and clearly defined in the EIA Licence. The change in the title number of the property is a fundamental change in the EIA Licence and has an impact on the way a party chooses to address itself to the contents of such a licence including moving the requisite forum for redress of the right to a clean and healthy environment.

38. The exercise of the discretion as to whether or not **to vary, set aside or review earlier orders is a judicial discretion, which should only be invoked if to do so, will serve useful purpose. (See *Nuh Nassir Abdi v. Ali Wario & 2 others (2013) e KLR EP No.6 of 2013)***

39. The Appellants submitted that there was material non-disclosure of an important matter that led to an erroneous decision being delivered by the Tribunal. The non-disclosure was caused by the Respondents and had the effect of driving the Appellants away from the seat of justice. It would be unfair to leave the situation as it is.

40. Relying on the courts words in **Nuh Nassir Abdi v. Ali Wario & 2 others (2013),** it is clear that a useful purpose would be served by allowing the Appellants to prosecute their appeal on merits. The Appellants could not be condemned for playing in an arena set by the Respondents who failed disclose the letter of 4th March 2019.

41. In its opposition to the Application by the Appellants, the 2nd Respondent has stated that the order which the Appellants seek to set aside is not annexed to the Application. We have perused the said Application and found that the disputed Ruling has been annexed which in this case obviously serves the same purpose as the order.

42. Accordingly, in the interest of justice and fairness we find that the EIA licence for the contested project was issued on 4th March 2019 and the days for any action to challenge the said EIA licence would only run from that date.

Determination

43. The Notice of Motion dated 13th March 2020 is allowed by setting aside the orders of the Tribunal issued *vide* the Ruling of 5th December 2019.

44. The Appeal dated 18th April 2019 is hereby reinstated.

45. Costs will be in the cause.

46. Parties may proceed to take directions on the hearing of the substantive appeal.

DATED and DELIVERED at NAIROBI on this 8th DAY of December 2020.

MOHAMMED BALALA.....CHAIRPERSON

CHRISTINE KIPSANG'.....VICE-CHAIRPERSON

BAHATI MWAMUYE ….……MEMBER

WAITHAKA NGARUIYA ……...MEMBER

KARIUKI MUIGUA …….MEMBER

This ruling was sent by way of electronic transmission on 17th December 2020.