



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENTAL TRIBUNAL

AT NAIROBI

TRIBUNAL CASE NO.28 OF 2020

KAMAU MUCUHA & 36 OTHERS.....APPELLANTS

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY....1ST RESPONDENT

LAVINGTON UNITED CHURCH.....2ND RESPONDENT

RULING ON PRELIMINARY OBJECTION

1. The Present Appeal filed on 6th July 2020 seeks the following orders:

- a. This appeal be allowed with costs to the Appellants.
- b. The 1st Respondent's decision to lift the stop order issued on or about 7th May, 2020 and permit the proposed project to proceed as set out in the letter of the Director General of the 1st Respondent dated 4th June 2020 (given by the 1st Respondent to the Appellants by email on 12th June 2020 be set aside.
- c. Environmental Impact Assessment License numbered NEMA/EIA/PSL/8582 (Application) No. NEMA/PSR/13978 be set aside; and
- d. The 2nd Respondent do undertake a full Environmental Impact Assessment Study of the proposed project and submit a comprehensive project report to the 1st Respondent.
- e. Such further or other consequential orders as the Tribunal deems fit.

2. Upon being served with the present Appeal and Notice of Motion Application under Certificate of Urgency by the Appellants, the 1st Respondent, filed its Notice of Appointment of advocates and simultaneously a Preliminary Objection on 27th July 2020 seeking the following orders:

- a. That this Tribunal lacks jurisdiction to hear and determine the matters raised in this appeal and the application in view of the provisions of Section 129 of the Environmental Management and Coordination Act No. 8 of 1999.
- b. That this Appeal should be struck out and dismissed as the same is bad in law and contravenes the provisions of the Environment Management and Coordination Act No. 8 of 1999
- c. Consequently, the Application and Appeal should be dismissed with costs to the 1st Respondent.

3. The 2nd Respondent filed a Notice of Appointment of Advocates on 4th August 2020 and subsequently filed Written Submissions dated 4th August 2020 in support of the 1st Respondent's Preliminary Objection on 12th August 2020.

4. The 1st Respondent further filed written submissions and List of Authorities dated 31st July 2020 in respect of the Preliminary Objection on 14th August 2020.

5. The Tribunal has considered the written submissions of all the parties herein, the following issues are for determination.

- a. Whether this Tribunal has jurisdiction to determine the appeal; and?
- b. Who bears the costs of this Preliminary Objection?

Whether this Tribunal has jurisdiction to determine the appeal

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

“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 regulations made thereunder.**
- (b) the imposition of any condition, limitation, or restriction on his license under this act or regulations made thereunder.**
- (c) the revocation, suspension, or variation of his license 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, appeal to the Tribunal, in such manner as may be prescribed by the Tribunal.”

7. Section 129(3) of EMCA further 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 development and an order for costs, as it may deem just. (Emphasis mine).**

8. The present Appeal challenges the Environmental Impact Assessment License numbered NEMA/EIA/PSL/8582 (Application) No. NEMA/PSR/13978 issued to the 2nd Respondent by the 1st Respondent. The 1st Respondent contends that the Appellants are out of time and the Appeal is incompetent for being filed out the stipulated period of sixty days and there is no extension is allowed under this provision of the Act.

9. All parties agree that the Environmental Impact Assessment License numbered NEMA/EIA/PSL/8582 Application Reference No. NEMA/PSR/13978 was issued on 24th October 2019 for the construction of new 5no. Storey for Lavington United Church comprising pastoral offices, vestry, washrooms, basements parking water tanks associated facilities and amenities on LR Nos. 3734/614,3734/613 and 3734/3/361 within Lavington Shopping centre in Lavington Area, Nairobi County.

10. As stated earlier in this ruling, Section 129 (1)(a) of the EMCA provides that, **“Any person who is aggrieved by—**

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 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.”

It is therefore necessary to compute the days to ascertain whether the Appellants lodged this Appeal within the required time under the law. From 24th October 2019, 8 days since we have 31 days in the month of October 2019. In November 2019 we have 30 days and in December 2019 we have 31 days. From January 2020 has 31 days. February 2020 has 29 days, March 2020 has 31 days, April 2020 has 30 days, May 2020 has 31 days June 2020 has 30 days and July has 6 days up to the date of filing. The total is 257 days and when you subtract the required 60 days you find that this appeal has been filed more than 196 number days after the required time has elapsed.

11. In the case of **Owner of Motor Vessel Lilian S vs Caltex Oil (Kenya) Ltd** the Honorable 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 down tools in respect of the matter before it the moment it holds the

opinion that it is without jurisdiction.”

12. 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.”

13. 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”.

14. Accordingly, as this appeal was filed out of time the inevitable conclusion is that this Tribunal has no jurisdiction to entertain this appeal

15. The Notice of Preliminary Objection dated 27th July 2020 is therefore hereby upheld.

Who bears the costs of this Preliminary Objection?

16. This Tribunal has upheld the Preliminary Objection raised by the 1st Respondent. The Tribunal awards the costs of this Preliminary Objection and Appeal to the 1st Respondent and 2nd Respondent.

ORDERS

- a. The 1st Respondent’s Preliminary Objection is upheld, and consequently this appeal is hereby dismissed.
- b. The costs of this appeal are awarded to the 1st Respondent.

17. This Tribunal draws attention of the parties to Section 130 of EMCA.

DATED and DELIVERD AT NAIROBI THIS 24TH DAY OF DECEMBER 2020.

MOHAMMED S. BALALACHAIRPERSON

CHRISTINE MWIKALI KIPSANG’ ...VICE-CHAIRPERSON

BAHATI MWAMUYE MEMBER

WAITHAKA NGARUIYA MEMBER

KARIUKI MUIGUA MEMBER