



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. 11 OF 2019

MOSES WANJALA LUKOYE.....APPELLANT

=VERSUS=

DIRECTOR GENERAL NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

GOVERNOR, COUNTY OF BUNGOMA.....2ND RESPONDENT

SONG MEL.....3RD RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY.....4TH RESPONDENT

RULING

1. The matter before the Tribunal is a Notice of Preliminary Objection filed by the 1st Respondent on 28th June 2019. The Preliminary Objection seeks to strike out the Appellant’s Appeal filed on 26th April 2019 on the grounds that the Appeal offends the provisions of Section 129(1) of EMCA and is an abuse of the court process.

2. The Appeal was filed together with a Chamber Summons Application dated 26th April 2019 and they both seek a ‘stop order’ against the construction of Musikoma Kanduyi Dual Carriage Highway.

3. In his Appeal, the Appellant alleges that the 2nd Respondent and the 3rd Respondent has already entered into a contract for the construction of Musikoma Kanduyi Dual Carriage Highway at a cost of Kenya Shillings One Billion and Three Hundred Million (KShs. 1.3b). The Appellant states that the 3rd Respondent had started moving heavy equipment and machinery for the task of construction of the said road by the date of filing this Appeal. According to the Appellant, the road cuts through the strategic infrastructure in Bungoma town such as sewage line, water pipes, school, shops, hospitals, homes et cetera.

4. The Appellant further alleges that such a project requires an Environmental Impact Assessment License yet the County Government of Bungoma has not carried out the Environmental Impact Assessment. The Appellant states that the actions of the County Government of Bungoma and the Kenya National Highway Authority have a high likelihood of having negative impacts on the environment and the people living along the proposed highway. For those reasons, the Appellant prays that the project be stopped in its entirety.

5. The 1st Respondent raised a preliminary objection in which it states that the suit is an abuse of process as no decision has been made by the 1st Respondent as to enable the Appellant to invoke the jurisdiction of this Tribunal.

6. The preliminary objection was disposed of by way of written submissions filed by the Appellant and the 1st Respondent.

Analysis

7. The preliminary objection seeks to strike out the suit for want of jurisdiction on the part of the Tribunal. In **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi of the Court of Appeal held as follows:

‘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.'

8. The jurisdiction of this Tribunal is provided under Section 129 of the Environment Management and Co-ordination Act (EMCA) which states as follows,

“129. Appeals to the Tribunal

(1) Any person who is aggrieved by—

- a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or regulations made thereunder.
- b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;
- c) the revocation, suspension or variation of his licence 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 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.”

9. The Appellant in this case depones that the project proponent (the County Government of Bungoma) has not carried out environmental impact assessment for the project and has also annexed a letter from the County Director of Environment, Bungoma County who confirmed that the environment impact assessment report had not been forwarded to his office as at 16th April 2019.

10. This Tribunal is an appellate body where decisions of the Director General of the National Environment Management Authority are challenged as set out under section 129 of EMCA. It follows that the jurisdiction of the Tribunal can only be invoked by a party once the provisions of section 129 of EMCA are met, see *Taib Investments Limited v Fahim Salim Said & 5 Others (2016) eKLR*.

11. In the instant case, the contestation by the Appellant is that the proposed Musikoma Kanduyi Dual Carriage Highway is being constructed before the issuance of an Environmental Impact Assessment (EIA) Licence.

12. There is no contention that an EIA Licence is required for the construction of the proposed road. We have perused the pleadings and have not found any annexed EIA licence or any evidence that such a licence was ever issued.

Finding

13. Having arrived at the conclusion that the Director General of the 1st Respondent has not made any decision capable of being appealed under section 129 of the EMCA, the only outcome is that the Tribunal does not have jurisdiction to entertain the Appeal as filed by the Appellant on 29th April 2019.

Determination

11. The Notice of Motion Application dated 28th June 2019 is allowed.

12. The Appeal dated 29th April 2019 is struck out with costs to the 1st Respondent.

DATED AND DELIVERED AT NAIROBI, THIS 8TH DAY OF DECEMBER 2020.

Mohammed BalalaChairperson

Christine Kipsang.....Vice Chairperson

Bahati Mwamuye.....Member

Waithaka Ngaruiya.....Member

Kariuki Muigua.....Member

Sent electronically on 17th December 2020 in light of the Pandemic