



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL

TRIBUNAL APPEAL NO. 20 OF 2020

TOM KIPNG'ETICH (Suing on behalf of the residents

of South C Mugoya Phase 4).....APPELLANT

-VERSUS-

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY..1ST RESPONDENT

AL MAJLIS AL AFRIQIA ACADEMY.....2ND RESPONDENT

RULING ON THE 2ND RESPONDENT'S PRELIMINARY OBJECTION

1. Vide a Notice of Appeal dated 8th June 2020 and filed before the Tribunal on 9th June 2020 under Rule 4 (1) of the National Environmental Tribunal Procedure Rules, 2003, the Appellant challenged what he terms as the irregular, illegal and/or unlawful issuance of the Environment Impact Assessment License NEMA/NRB/PR/5/1/13434 to the 2nd Respondent. The Appellant alleges that the 2nd Respondent is currently conducting the project which involves construction of additional classroom, offices and sanitary facilities to make the structure a two storey building. The Appellant alleges that the 2nd Respondent did not conduct a proper EIA study which requires proper public participation especially by those who will be immediately affected by the said project. The Appellant sets out a summary of the grounds of appeal in the Notice of Appeal.

2. The Appellant's Notice of Appeal was filed contemporaneously with a Notice of Motion application dated 8th June 2020 under certificate of urgency. In the application, the Appellant seeks several orders arising from the appeal.

3. The 2nd Respondent filed a Notice of Preliminary Objection dated 22nd June 2020 seeking to raise a preliminary objection to be determined *in limine* to the Appellant's Notice of Appeal dated 8th June 2020 and the Notice of Motion dated on even date on the grounds that:

a) The Honourable Tribunal is bereft of jurisdiction to hear and determine the matter herein by virtue of the express provisions of section 129 of the Environmental Management and Coordination Act, Cap 387 Laws of Kenya as read together with Regulation 46 (1) of the Environmental (Impact Assessment and Audit) Regulations, 2003, the Appellant having filed the same outside the mandatory 60 days requirement;

b) The Honourable Tribunal is deprived of jurisdiction in view of the unequivocal provision of Rule 4 (2) of the National Environmental Tribunal Procedure Rules, 2003, for reason of Limitation of Action; and

c) The subject Notice of Appeal and Notice of Motion is therefore defective, frivolous, vexatious and an abuse of the process of the Honourable Tribunal for the foregoing reasons.

4. The 2nd Respondent prays that the petition be struck out with costs.

5. The Appellant responded to the 2nd Respondent's Preliminary Objection vide written submissions dated 9th July 2020.

6. On the issue of time, the Appellant cites Rule 4(2) of the National Environmental Tribunal Procedure Rules, 2003 and submits that time starts running after the decision is given or served upon the Appellant. The Appellant alleges laxity on the part of the 1st Respondent in communicating issuance of Environmental Impact Assessment Licence NEMA/NRB/PR/5/1/13434 to the 2nd Respondent. The Appellant contends that the 1st Respondent communicated issuance of the EIA Licence on 27th May 2020 after the Appellant had made an inquiry vide a letter dated 24th April 2020 and followed up with several visits to the 1st Respondent's offices.

7. The Appellant thus submits that pursuant to Rule 4(2) of the National Environmental Tribunal Procedure Rules 2003, the decision was properly given to the Appellant on 27th May 2020 and the Appeal was filed within the stipulated timelines on 9th June 2020.

8. The Appellant cites the court decision in **Simba Corporation Limited –vs- Avic International & Another (2017) eKLR** where the court advised on the need for a clear prescriptive framework on how NEMA should notify the general public about its statutory decisions which are subject to appeals contemplated under section 129 of EMCA in order to eliminate endless litigations which adversely affects investment projects and the country’s environmental management programs. The Appellant contends that no procedure has been adopted pursuant to the decision and that the Appellant including others stands to have their appeals sacrificed at the altar of section 129 of EMCA on matters concerning time.

9. The Appellant submits that it was not notified of the issuance of the EIA Licence and it was out of its diligence and quest for ascertaining proper procedure that the appellant followed up with the 1st Respondent leading to the decision being communicated on 27th May 2020.

10. The Appellant thus submits that the appeal before the Tribunal is proper and the Tribunal has jurisdiction to hear and determine the substantive matters posed in the appeal and prays that the appeal proceeds to its logical conclusion.

ISSUES FOR DETERMINATION

11. Having considered the 2nd Respondent’s Notice of Preliminary Objection dated 22nd June 2020, the Appellant’s submissions to the Preliminary Objection dated 9th July 2020, the Tribunal has identified the following issues as arising from the Preliminary Objection:

- a) Whether the appeal is time barred; and
- b) What orders should the Tribunal make.

A. Whether the Appeal is Time Barred

12. The Environmental Management and Co-Ordination Act sets out the timelines for lodging appeals before the Tribunal. **Section 129 (1)** stipulates that:

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 the his licence under this Act or regulations made thereunder;
- (d) The amount of money required to be paid as a fee under this Act or its regulations;
- (e) The imposition against the person of an environmental restoration order or environmental improvement order by the Authority 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.

Section 129 (2) provides that:

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.

13. The legal framework on appeals to the Tribunal has further been buttressed under the **National Environmental Tribunal Procedure Rules, 2003. Rule 4 (1)** thereof stipulates that:

‘An appeal to the Tribunal shall be made by written notice and where the Tribunal has approved a form of notice for the purpose, in the form so approved.’

Rule 4 (2) further states that:

‘The appellant shall send or deliver six copies of the Notice of Appeal to the Tribunal so as to reach it not later than sixty days after the date on which the disputed decision was given or served upon him.’

14. From the above provisions of **Section 129 (1) of EMCA and Rule 4(2) of National Environmental Tribunal Procedure Rules, 2003**, an appeal to the Tribunal is supposed to be lodged within sixty (60) days of the decision that is subject of the Appeal.

15. The Appellant’s Notice of Appeal dated 8th June 2020 was filed before the Tribunal on 9th June 2020. The intended appeal seeks to

challenge issuance of an Environmental Impact Assessment Licence - NEMA/NRB/PR/5/1/13434 by the 1st Respondent to the 2nd Respondent. Thus, the intended appeal herein falls under **Section 129 (1) of EMCA** since it challenges issuance of an EIA Licence by the 1st Respondent to the 2nd Respondent. The limitation period for appeals under Section 129 (1) of EMCA is sixty (60) days as stipulated by the Act. The Tribunal shall proceed and determine whether the Appellant's appeal has been filed within the stipulated timeframe.

16. The impugned EIA Licence NEMA/NRB/PR/5/1/13434 was issued by the 1st Respondent to the 2nd Respondent on 19th September 2019. The Appellant herein filed the Notice of Appeal on 9th June 2020.

17. The Tribunal shall be guided by its decision in **Tribunal Appeal No. 006 of 2019, Runda Association –vs- National Environmental Management Authority (NEMA) & 3 Others** where it made the following decision with regards to computation of the 60 days period of filing appeals under section 129 (1) of EMCA:

'It is now trite law following a number of cases determined up to the High Court that where an appeal is brought under section 129(1) a party aggrieved by the grant or rejection of an application for a licence must do so within 60 days from the date of the occurrence of the event ie. The date of the issuance or the rejection of the licence (emphasis added). It is also now well established that the time line of 60 days in section 129(1) of EMCA cannot be extended.'

The tribunal further decided that:

'It is therefore the Tribunals finding that the appeal filed by the Appellant is one falling under section 129(1) of EMCA. Having also found that the 60 days' count of the time limit ran from 6th April 2018 to 5th June 2018, the appeal filed on 15th March 2019 was already clearly out of time. The time limit of 60 days runs from the date of issuance of the licence on 6th April 2018 and in the instant case was filed outside the statutory period (emphasis added).'

18. In the present case, the 60 days period envisaged under Section 129 (1) of EMCA and Rule 4(2) of the National Environmental Tribunal Procedure Rules, 2003 started running on 19th September 2019 when EIA Licence NEMA/NRB/PR/5/1/13434 was issued to the 2nd Respondent until 19th December 2019. The Tribunal thus finds that the appeal filed on 9th June 2020 is filed out of the stipulated 60 day period.

19. The Appellant vide his submissions dated 9th July 2020 contends that time started running when the decision on issuance of the EIA Licence NEMA/NRB/PR/5/1/13434 was served upon them on 27th May 2020. However, this position has no legal basis in light of the express provision of Section 129 (2) of EMCA and the Tribunal's decision in **Runda Association –vs-National Environmental Management Authority (NEMA) & 3 Others (Supra)**.

20. The Appellant in his prayers seeks that the Tribunal does allow the appeal to proceed to its logical conclusion. Indeed, the National Environmental Tribunal Procedure Rules provides for instances where the Tribunal may allow extension of time to do certain acts. Rule 7 thereof provides as follows:

'The Tribunal may for good reason shown, on application, extend the time appointed by these Rules (not being the time limited by the Act) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appear to it just and expedient.'

21. However, the provision is not applicable to appeals under section 129 (1) of the EMCA since the time within which to file such appeals is limited by the Act to sixty days from the date of the act or omission being appealed against. This was observed in **ELC 100 of 2015: Simba Corporation Limited vs Avic International & another**, where the court decided that:

"There is no doubt that Section 129 (1) of EMCA provides a limitation period of 60 days from the date of occurrence of the impugned event, within which the dissatisfied party is to present an appeal to NET. The framework in Section 129 (1) does not provide for extension of the 60 days' period. In the same vein, Rule 7 of the NET Procedure Rules prohibits extension of time in a scenario where the limitation period is expressly limited by EMCA. The legal ramifications of the framework in Rule 7 of NET Procedure Rules is that the extension contemplated under Rule 7 does not relate to appeals falling under Section 129 (1) because limitation period for appeals falling under Section 129 (1) is limited by the Act. The extension contemplated in Rule 7 of NET Procedure Rules therefore relates only to appeals falling under Section 129(2) because these are the only appeals in respect of which the Act does not set a limitation period."

22. The Tribunal's hands are tied pursuant to the above rule and it cannot therefore extend time beyond the 60 days envisaged under Section 129(1) of EMCA.

B. What orders should the Tribunal make?

23. For the above reasons, the Tribunal makes the following orders:

- a) The appeal is hereby dismissed; and
- b) Each party to bear its own costs.

Parties' attention is drawn to the provisions of section 130 of the Environment Management and Co-ordination Act.

DATED AT NAIROBI THIS 7TH DAY OF DECEMBER 2020

MOHAMMED S. BALALA - CHAIRPERSON

CHRISTINE MWIKALI KIPSANG - MEMBER

BAHATI MWAMUYE - MEMBER

WAITHAKA NGARUIYA - MEMBER

KARIUKI MUIGUA - MEMBER