



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. 40 OF 2020

SAMWEL MAHERI ANDAMBI.....APPELLANT

VERSUS

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

DIRECTOR/CHAIRMAN MOI'S BRIDGE QUARRY CO. LTD.....2ND RESPONDENT

RULING

1. The Tribunal has been invited to render a Ruling on a Preliminary Objection (P.O.) dated 4th November 2020 filed by the 2nd Respondent. The gist of the P.O. is that the Appeal is fatally defective and ought to be dismissed *in limine* as the Tribunal lacks jurisdiction to entertain the Appeal dated 7th October 2020 for the reason that the issues raised therein are not contemplated by section 129(1) of the Environmental Management and Co-ordination Act (EMCA). The 2nd Respondent further states that there is no decision of the National Environment Management Authority (NEMA) being challenged by the Appellant, thus the Tribunal does not have jurisdiction.

2. The P.O. was disposed of by way of written submissions by order of the Tribunal. We note that the 1st Respondent neither entered appearance in the matter nor filed any pleadings, including any written submissions for disposal of the P.O.

3. The Appeal as framed in the Notice of Appeal states that the decision appealed against is that, “The 2nd Respondent is carrying out mining and quarrying activities in total disregard of environment that is threatening and compromising the protection and the value of the Ndabarnach public swamp (L.R 1826) and its ecology with the blessings of the 1st Respondent.”

4. The pleadings presented by the Appellant are that the 2nd Respondent has been undertaking quarrying activities in violation to environmental laws and has been causing harm, destruction and death to humans, rivers, neighboring farms and is generally an affront to the environment.

5. We have considered all the pleadings on record and the submissions made by the parties in this Appeal and find that the singular issue for determination with respect to the P.O. is whether this Tribunal has jurisdiction to hear and determine the Appeal.

6. Substantial quantities of judicial ink have been spilt on the question of jurisdiction of a Court or Tribunal to dispose of a matter and we do not find it necessary to rehash the extensive jurisprudence on this issue. In **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, Justice Nyarangi at 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.’

7. The P.O. filed by the 2nd Respondent challenges the Tribunal’s jurisdiction to hear and determine this Appeal on the basis that the grievances raised by the Appellant do not fall under section 129(1) of EMCA and there is no EIA licence that is being challenged by the Appellant.

8. The jurisdiction of this Tribunal is set out in Section 129 of the Act as follows,

“Section 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 has not exhibited an Environmental Impact Assessment (EIA) Licence in his Appeal, or cited the reference number for the said licence, or the date when it was issued, if any. The Record also shows that the Appellant wrote a letter to the 1st Respondent dated 7th October 2020, which is the same date as the Notice of Appeal. The letter addressed to the Director General of the 1st Respondent was a request that the Director General furnishes the Appellant with the EIA Licences specified as the ‘Moi’s Bridge Quarry Co. Ltd EIA Operational Licences’, which is the contested project site.

10. We have also observed that none of the parties has exhibited any EIA licence issued by the 1st Respondent over the contested project. In his pleadings, the Appellant contends that the Appellant is carrying out a project in ‘total disregard to the EIA environmental requisite laws and other relevant environmental regulations, provisions and policies’. We have not seen any response to the said letter or any averment by any party confirming the existence of an EIA licence.

11. Section 58 of EMCA provides that:

“1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeding with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.

3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.”

12. Quarrying of ‘large scale commercial stone and slate’ is listed under the second schedule of EMCA as one of those activities that require an Environmental Impact Assessment Study Report before the issuance of an EIA Licence; which is the legal prerequisite for such an undertaking to begin.

13. The law leaves no doubt that the contested project is one that requires an EIA licence to be granted before quarrying activities can be carried out. The effect of the above conclusion is that an Appeal to contest the quarrying activities being carried out at the project site ought to have been instituted under section 129(1) of EMCA, if an EIA Licence had been issued, and such an Appeal is subject to the provisions of EMCA on the institution of Appeals at the Tribunal.

14. In the event that no EIA Licence had been issued, the Appellant ought to have approached the 1st Respondent for purposes of forwarding his complaints about what he deems to be the unlawful activities of the 2nd Respondent and seek for action to be taken on those complaints, under the relevant procedures set by the 1st Respondent. It is only upon the issuance of a decision by the 1st Respondent that the Appellant could have invoked the jurisdiction of this Tribunal under section 129(2) of EMCA.

15. We have perused all the pleadings that have been filed in this suit and we have neither seen an EIA Licence for the project nor any decision of the 1st Respondent on the project.

Finding

16. This Tribunal, having been invited by the Appellant to exercise its appellate jurisdiction over the disputed project, finds that there is no decision for its consideration by way of an Appeal and has no option than dismiss the Notice of Appeal dated 7th October 2020. That notwithstanding, the Tribunal notes that the issues raised by the Appellant are weighty and are likely to be subject of litigation in future; hence we shall not delve into the merits of the matter to avoid causing any prejudice to any of the parties who may want to interrogate the issues substantively at a later date at an appropriate time and forum.

Determination

17. The Notice of Preliminary Objection dated 4th November 2020 is allowed.

18. The Appeal dated 7th October 2020 is struck out.

19. Each party shall bear own costs.

DATED AND DELIVERED AT NAIROBI, THIS 8TH DAY OF JULY 2021.

Mohammed Balala Chairperson

Christine Kipsang.....Vice Chairperson

Bahati Mwamuye.....Member

Waithaka Ngaruiya.....Member

Kariuki Muigua.....Member