



**Momanyi & another v National Environment Management Authority & another
(Tribunal Appeal 34 of 2020) [2022] KENET 725 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KENET 725 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 34 OF 2020**

**MOHAMED S BALALA, CHAIR, CHRISTINE MWIKALI KIPSANG, B
MWAMUYE, WAIUTHAKA NGARUIYA & KARIUKI MUIGUA, MEMBERS**

SEPTEMBER 28, 2022

BETWEEN

ROBIN MOMANYI 1ST APPELLANT

JANE BOSIBORI MOMANYI 2ND APPELLANT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

MOHAMED OSMAN HAJI 2ND RESPONDENT

RULING

1. On August 31, 2020, the Appellants filed a Notice of Appeal under Rule 4 (1) of the National Environment Tribunal Procedure Rules, 2003. The appeal is against issuance to the 2nd Respondent of NEMA License No NEMA/MSA/SPR/5/2/104 on July 1, 2020 .
2. The Appellant seeks the following reliefs, inter alia:
 - a. An order under certificate of Urgency that in the first instance, this Honourable Tribunal do grant a temporary order of injunction restraining the 2nd Respondent, his servants, agents and/ or employees from constructing, and or continuing with any construction works, at present or in future, of any building of a high-rise nature on all that property known as LR No MN/1/14287 situate at Nyali Estate Mombasa, pending the hearing and final determination of the application - Spent
 - b. A temporary order of injunction restraining the 2nd Respondent, his servants, agents and/ or employees from constructing, and or continuing with any construction works, at present or in future, of any building of a high-rise nature on all that property known as LR No



MN/1/14287 situate at Nyali Estate Mombasa, pending the hearing and final determination of the appeal herein. – Spent

- c. A mandatory order of injunction compelling the 2nd Respondent to demolish the construction on all that property known as LR No MN/1/6594 bearing CR
- d. A declaration that the Approval dated July 1, 2020 under Reference NEMA/MSA/SPR/5/2/104 issued by the 1st Respondent is ultra vires and violated the rules of natural justice as there was no consultation;
- e. An order revoking the Approval under EIA Licence NEMA/MSA/SPR /5/2/104 issued to the 2nd Respondent;
- f. An order that the Respondent do pay the costs of the Appeal; and
- g. Any other Relief that this Tribunal my deem fit to grant.

3. On September 3, 2020, the Appellants filed a Notice of motion application under certificate of urgency. The supporting affidavit to the Notice of Motion is sworn by Robin Momanyi. On March 1, 2021, the 1st Respondent filed it's reply to notice of Appeal and Statement of Appeal.

4. The 2nd Respondent filed a Notice of Preliminary Objection dated February 5, 2021 to be determined in limine to the Appellant's Notice of Appeal dated August 31, 2020 and the Notice of Motion filed under Certificate of Urgency dated September 3, 2020.

5. The 2nd Respondent's Preliminary Objection dated February 5, 2021 is premised on the grounds that:

- a. The appeal has been filed out of time by virtue of Section 129 of the EMCA as read together with Regulation 46 (1) of the Environmental (Impact Assessment and Audit) Regulations, 2003;
- b. This Honorable Tribunal has no jurisdiction to entertain physical planning issues which fall under the Physical Planning Act and Physical Planning Departments; and
- c. The subject Notice of Motion and consequently the Appeal is therefore defective, frivolous, vexatious and an abuse of the process of this Honourable Court for the foregoing reasons.

6. The Appellants filed their written submissions dated April 12, 2021 in respect of the 2nd Respondent's Preliminary Objection dated February 5, 2021.

Submissions By The Parties

Appellants Submissions

7. The Appellants' submissions dated April 12, 2021 in respect of 2nd Respondent's Preliminary Objection dated February 5, 2021 address the following issues for determination by this Tribunal:-

- a. Whether the Appeal is time barred.
- b. Whether this Tribunal is divested of jurisdiction by virtue of the Appeal raising physical planning issues.

8. On whether the appeal is time barred, the Appellants submit that it is undisputed that the Appellants herein filed this Appeal on August 31, 2020 and that the Appeal relates to the issuance of NEMA License No NEMA/MSA/SPR/5/2/104 to the 2nd Respondent, which license was issued on July 1, 2020. The Appellant's submit that the sixty (60) days should be counted from the date of issuance



of the license which in this case is the July 1, 2020 and the 60 days lapse on August 30, 2020 which is a Sunday.

9. The Appellants submit that the Appeal could only be possibly lodged on the next day, a Monday, being August 31, 2020.
10. On whether this Tribunal is divested of jurisdiction by virtue of the Appeal raising physical planning issues, the Appellants submit that the Appeal falls within the jurisdiction of this Honourable Tribunal due to the fact that what is being challenged is the license issued by the 1st Appellant.
11. The Appellants submit that among the things they are challenging is public participation which is an essential process in the issuance of an EIA License.
12. On this basis, the Appellants submit whereas the report states that consultations were held with members of the public, the said names are non-existent and the Appellants, being immediate neighbours of the 2nd Respondent, were not informed until construction began. The Appellants further contend that if at all public participation was conducted, the Appellants would have had the opportunity to raise the issues as enumerated in the Appeal.
13. The Appellants relied on Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 which provides that:
 1. During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
 2. In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—
 - a. Publicize the project and its anticipated effects and benefits by—
 - i. Posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
 - ii. Publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
 - iii. Making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;
 - b. Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
 - c. Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
 - d. Ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.



14. On this basis, the Appellants submit that this Honourable Tribunal has the jurisdiction to entertain this Appeal and that the Respondent's Preliminary Objection ought to be dismissed with costs.

Issues For Determination

15. Having considered the 2nd Respondent's Preliminary Objection dated February 5, 2021 and filed on March 1, 2021 and the Appellants' written submissions in respect of the 2nd Respondent's Preliminary Objection, the Tribunal has identified the following issues as arising from the Preliminary Objection:

- a. Whether this Tribunal has Jurisdiction;
- b. Whether the appeal is time barred; and
- c. What orders should the Tribunal make?

Analysis

A. Whether This Tribunal Has Jurisdiction

16. This Tribunal in *Tribunal Appeal No 2 of 2018, Albert Mumma in his Capacity as Chairman Langata District Association v Director General - National Environmental Management Authority [NEMA] & 2 others; Seventh Day Adventist Church (EA) Limited (Interested Party)* held that:

' It is established practice that where the jurisdiction of the Tribunal is called into question then the first order of business is for the tribunal to make a determination on that issue before rendering its decision on the main points of the appeal.'

17. Nyarangi JA while citing Words and Phrases Legally defined in *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited* held that:

' By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.'

18. Likewise, in *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Appl No 2 of 2011*, The Supreme Court of Kenya 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.'

19. The appeal before the Tribunal seeks to challenge the issuance of a license by the 1st Respondent to the 2nd Respondent. It is an appeal under Section 129 (1) of the EMCA.
20. Section 129 (1) provides as follows:
 - (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 its regulations;
 - (b) The imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - (c) The revocation, suspension or variation of the person's licence under this Act or its regulations;
 - (d) The amount of money required to 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.
21. The Legal framework on appeals to the Tribunal is buttressed by the National Environmental Tribunal Procedure Rules, 2003. Rule 4 (1) thereof provides 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 provides 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.'
22. The appeal herein is premised on the issuance of NEMA licence no NEMA/ MSA/SPR/5/2/104 issued on July 1, 2020 by the 1st Respondent to the 2nd Respondent. The Appellant contends that the same was issued illegally without public participation.
23. As it has been correctly submitted by the Appellants, Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003 (herein after as 'regulations') makes it a mandatory requirement that during the process of conducting an Environmental Impact Assessment study under the regulations, public participation should be conducted.
24. In the appeal herein from the sworn affidavits of the 1st Appellant herein which are on record, the Appellant depones that he is a neighbor to the 2nd respondents building that is being constructed and that he is not aware of any public participation that was conducted by the alleged Environmental Impact Assessment Experts who prepared the impugned EIA report.



25. That being the case herein, it is evident that the crux of this Appeal is the issuance of the EIA license. Therefore, the Appellant's appeal falls under Section 129 (1) EMCA and Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003 which gives this Tribunal jurisdiction to hear and determine grievances relating to the process and mode of issuance of licences by NEMA, the 1st Respondent herein. This position is trite as it has been expressed by the Court of Appeal decision in *Republic v NEMA ex parte Sound Equipment Ltd [2011] eKLR* where the court made it clear that:-

' Challenges to Environmental Impact assessment study report and/ or Environmental Impact Assessment Licences shall be made to the National Environment Tribunal established under section 125 of Environment Management and Coordination Act. The tribunal should have been given the first opportunity and option to consider the matter. The Tribunal is the specialized body with capacity to minutely scrutinize the Environment Impact Assessment study report as well as the licenses.'

26. From the forgoing it is evident that the Tribunal has the requisite jurisdiction flowing from the Constitution of Kenya 2010 and the enabling legislations thereto which confers to this Tribunal jurisdiction to handle matters of such nature as the Appeal herein.

B. Whether The Appeal Is Time-barred**

27. The Appeal in this matter shows that the licence was issued on July 1, 2020 and counting 60 days from the date of issuance the last day that this appeal should have been filed was on August 30, 2020. However, the Appellants filed this appeal on August 31, 2020 and submitted that August 30, 2020 being a Sunday there was no possible way that the appeal could be filed on that day being a day when offices, including the registry of this Tribunal are closed and that the Appeal could only be possibly lodged on the next day being August 31, 2020.

28. Regulation 46 of Environmental (Impact Assessment and Audit) Regulations 2003 states as follows:-

46 (1) Any person who is aggrieved by

- a) A refusal to grant a license or by a refusal to transfer a licence under these regulations.
- b) The imposition of any condition, limitation or restriction on a licence;
- c) The revocation, suspension or variation of a licence issued under these regulations;
- d) The imposition of any environmental restoration order or environmental improvement order on the project by the Authority; or environmental improvement order on the project by the Authority; or
- e) The approval or reinstatement by the Authority of an environmental impact assessment licence may within sixty days after the date of the decision against which he or she is dissatisfied, appeal to the Tribunal;

- 2) A person aggrieved by a decision or order of authority of an environmental impact assessment licence may within sixty days of such a decision or order, appeal against such decision or order to the High Court.
- 3) The fact that approval is given in respect of an environmental impact assessment shall not be a defence to any civil or to a criminal prosecution under any enactment.



29. From the above Regulation 46 of the Environmental (Impact Assessment and Audit) Regulations 2003 read together with the provisions of section 129 of EMCA it is evident that the 60 days appeal period cuts across the enabling provisions that gives this Tribunal jurisdiction to hear and determine Appeals.
30. In this appeal the issue that arises is the issue as regards the computation of the 60 day period and whether an aggrieved party can lodge before this Tribunal an appeal beyond the 60 day period.
31. The 60-day period within which the Appellant was required to file the appeal lapsed on August 30, 2020 which fell on a Sunday, a non-working day. The Appeal was filed the following working day on August 31, 2020.
32. Section 57 (b) of the *Interpretation and General Provisions Act* provides that in computing time for the purposes of a written law, unless the contrary intention appears, if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day. Since the Appellant's appeal was filed on the next working day following the date when the sixty days period lapsed, the Appeal was filed within time.

Orders

33. For the above reasons, the Tribunal makes the following orders:
 - a. The 2nd Respondent's Preliminary Objection is hereby dismissed; and
 - b. Each party to bear their own costs.

The parties' attention is drawn to the provisions of Section 130 of the EMCA.

DATED AT NAIROBI THIS 28th DAY OF September 2022

MOHAMMED S BALALA.....CHAIRPERSON
CHRISTINE KIPSANG.....MEMBER
BAHATI MWAMUYE.....MEMBER
WAITHAKA NGARUIYA.....MEMBER
KARIUKI MUIGUA.....MEMBER

