



**Vaiani v National Environment Management Authority (Tribunal Appeal
30 of 2023) [2023] KENET 1371 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KENET 1371 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 30 OF 2023
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
DECEMBER 15, 2023**

BETWEEN

ABDUL GAFOOR VAIANI APPELLANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.. RESPONDENT

JUDGMENT

BACKGROUND

1. The appeal before the Tribunal was instituted on 3rd December 2021. A brief chronology of the facts leading to the dispute is necessary. On 9th November 2016, the Respondent granted the Appellant EIA license No. NEMA/EIA/PSL/3997 for the construction of a boundary wall around his property described as plot L.R No. 299/III.MN (original No. 957/1) at Kanamai, Kilifi County. Upon the issuance of the EIA license, for reasons the Appellant only describes as ‘unforeseen problems’, he was unable to construct the boundary wall.
2. About two years and four months after the lapse of the EIA license, the Appellant, in a letter dated 19th March 2021 to the Respondent, sought an extension of the validity of the EIA license. In response to the Appellant’s application, the Respondent directed the Appellant to submit a comprehensive addendum that addressed the following items: the status of the project site since the project borders the sea, current baseline information on the minimum sea front setback distance, development trends, infrastructure in place to support the development, the area land use, as well as evidence of current public consultation with the affected persons.
3. Upon reviewing the submitted addendum, the Respondent, in a letter dated 4th October 2021, declined to issue the Appellant with a certificate of variation of EIA license No. NEMA/EIA/PSL/3997 on account of two observations made by the Respondent’s Environmental Inspector and a



multi-agency team deployed by the Respondent to the site. The two observations were: the proposed project borders the sea and has its beacons just at the edge of the highest water mark, and the general observation shows that after the pegging is done, the remaining portion of land outside the riparian zone might be inadequate for the proposed project.

4. Upon reading the letter, the Appellant formed the impression that the communication was irrational and elected to move this Tribunal by way of a Notice of Appeal dated 3rd December 2021. To the appellant, it was incomprehensible that the Respondent could provide two conflicting decisions over the same subject matter in a span of about four years.
5. The face of the Notice of Appeal contains four prayers, which we reproduce below:
 - a. This Appeal be allowed with costs to the Appellant;
 - b. The Respondent's decision and refusal to issue a certificate of variation pursuant to an application for variation as set out in the letter of the Director General of the Respondent dated 4th October, 2021 be set aside;
 - c. The Respondent be ordered to review and issue the certificate of variation to the Appellants forthwith.
 - d. Such further or other consequential Orders as this Tribunal deems fit and just to grant in the circumstances.
6. In opposition to the appeal, the Respondent filed a Notice of Preliminary Objection dated 28th February 2022, urging that the appeal was time-barred. The Tribunal considered the Notice of Preliminary Objection and found it lacking in merit in a decision delivered on 15th April 2023.
7. Subsequent to the Tribunal's Ruling, the Respondent filed their Response to the Appeal dated 2nd October 2023. On 20th November 2023, the Appellant filed his Reply to the Respondent's Response dated 20th November 2023.
8. At the hearing of the Appeal, the parties agreed to canvass the appeal by way of written submission. In support of the Appeal, the Appellant filed submissions dated 24th November 2023, while the Respondent, in opposition to the appeal, filed submissions dated 5th December 2023. The Tribunal has also sighted the Appellant's Reply to Respondent's Response.

Issues for determination

9. Having considered the Appellant's appeal, responses by the Respondent and submissions by the parties, the Tribunal finds that the only issue falling for determination is whether the Respondent's decision communicated in the letter dated 4th October 2021 met the threshold of fair administrative action.

Whether the Respondent's decision communicated in the letter dated 4th October 2021 met the threshold of fair administrative action

10. Article 47 of *the Constitution* crystalises the right to fair administrative action. To operationalise Article 47 of *the Constitution*, Parliament enacted the *Fair Administrative Action Act*.
11. Section 2 of the Act constitutes the actions of the Respondent as 'administrative action'. The relevant section describes "administrative action" in the following manner;
 - i. the powers, functions and duties exercised by authorities or quasi- judicial tribunals; or



- ii. (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
12. That the Respondent must act in an ‘expeditious, efficient, lawful, reasonable and procedurally fair manner’ cannot be gainsaid. The succeeding part of this Judgment looks into whether the Respondent’s decision contained in the letter of 4th October 2021 met the threshold of fair administrative action.
13. The Respondent submitted that its decision rejecting a variation and/or extension of the EIA license issued to the Appellant was motivated by its obligation under section 9(2) of EMCA to promote sustainable development. In support of this position, the Respondent relied on the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) 1997 WL 1168556 (ICJ).
14. We do not dispute the solemnity with which the Respondent has assumed its obligation to champion sustainable development. Indeed, we find it commendable. The concerns raised by Respondent in its letter of 4th October 2021 are weighty. Given the statutory mandate of the Respondent under section 9(1) of EMCA, those concerns cannot be wished away.
15. However, that does not mean that as a Tribunal, ours is to sit idly by and rubber stamp the decisions of the Respondent. We hold the view that the drafters of section 129(1) of EMCA were of a different persuasion, a persuasion that is paid homage in a long line of decisions handed down by this Tribunal.
16. The concerns raised by the Respondent following the site visit conducted on the Appellant’s Property on 8th September 2021 are no different from the concerns raised in the site visit conducted on 26th January 2016.
17. The observations arising out of the site visit conducted on 26th January 2016 were as follows
- The proponent should be advised to review the boundary wall plans to ensure its design and construction is only limited to the area outside the riparian zone (60 m away from the highest water mark). The revised plans and design should be re-submitted to NEMA for further review. Verification of the extent of the revised design on the ground should be an integral part of the review
 - In case the proponent finds the site outside the riparian zone inadequate for the proposed project, it is recommended that the developer should find an alternative site for the project
18. On the other hand, the observations arising out of the site visit conducted on 8th September 2021 were as follows: The proposed project site has to be pegged by Water Resources Authority (WRA) to establish the riparian distance and the portion of land that will be left for development to guide the proponent accordingly. The general observation shows that after the pegging is done, the remaining portion of land outside the riparian zone might be inadequate for the proposed project.
19. To cure the concerns arising from the site visit of 26th January 2016, the Appellant submitted revised drawings of the proposed boundary walls, which the Respondent established preserved the riparian zone and a recommendation was thereafter made by the Respondent to license the project.
20. The recommendation in the site visit conducted on 8th September 2021 reads as follows: ‘the general observation shows that after the pegging is done, the remaining portion of land outside the riparian zone might be inadequate for the proposed project.’
21. Having established in 2016 that the portion of land outside the riparian zone is adequate for the proposed boundary wall, we hold the view that in the absence of evidence of pegging by the Water



Resource Authority, a dissimilar finding is suspect and grossly violates the Appellant's right to fair administrative action.

22. No evidence has been placed before the Tribunal indicating that actual pegging was indeed done. We, therefore, agree with the Appellant that his application for variation of the EIA license was rejected based on the Respondent's speculations.
23. The Respondent had an obligation to justify its decision to depart from its earlier finding contained in its decision of 9th November 2016. A speculative finding applied as a basis for varying an earlier decision issued by the Respondent when facts presented to them have not materially changed fails the justification test. It fits very squarely into the test of Wednesbury's unreasonableness.

Orders

24. Having established that the Respondent's decision communicated in the letter of 4th October 2021 went contrary to the tenets of fair administrative action and conscious of the statutory mandate of the Respondent as outlined earlier in this Judgment, we make the following orders:
 - a. The Respondent is directed in liaison with the Water Resources Authority to carry out a pegging exercise on the Appellant's property within 10 days of this Judgment;
 - b. In the event, that it is established after the pegging exercise that the proposed boundary walls preserve the riparian zone, the Respondent is directed to issue the Appellant with a Certificate of Variation of license within 10 days of the conclusion of the pegging exercise.
 - c. There shall be no order as to costs

DATED AND DELIVERED AT NAIROBI, THIS 15TH DAY OF DECEMBER 2023

EMMANUEL MUMIA - CHAIRMAN

WINNIE TSUMA - VICE-CHAIR

KARIUKI MUIGUA - MEMBER

DUNCAN KURIA - MEMBER

RONALD ALLAMANO - MEMBER

