



**Nyumba Ten Welfare Association v National Environment Management Authority & 3 others
(Tribunal Appeal 003 of 2022) [2023] KENET 481 (KLR) (15 September 2023) (Judgment)**

Neutral citation: [2023] KENET 481 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 003 OF 2022
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
SEPTEMBER 15, 2023**

BETWEEN

NYUMBA TEN WELFARE ASSOCIATION APPELLANT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

KAJIADO COUNTY GOVERNMENT 2ND RESPONDENT

LEONARD MZEE NGUNGA 3RD RESPONDENT

MARTHA WAMBUI 4TH RESPONDENT

JUDGMENT

1. The Appellants instituted this appeal vide a Notice of Appeal dated 3rd February 2022 and filed before the Tribunal on 4th February 2022. The Appeal is brought under Rule 4 (1) of the National Environmental Tribunal Procedure Rules, 2003. Vide an application dated 11th February 2022 and allowed by this Honourable Tribunal, the Appellants amended the appeal to include the name of Leonard Mzee Ngunga and Martha Wambui as respondents in this appeal.
2. The appellants seek the following prayers from the Tribunal:
 - a. Revocation of Change of user licence no. EIA/PSL/15865;
 - b. Revision of structural drawings from six (6) stories to two (2) stories; and
 - c. An order for public participation.



PARTIES' SUBMISSIONS

3. The Appellants filed their written submissions dated 3rd March 2023 while the 1st and 2nd Respondent filed their written submissions dated 29th June 2023 and 28th June 2023 respectively. On the other hand, the 3rd and 4th Respondents filed their written submissions dated 2nd June 2023.

ISSUES FOR DETERMINATION

4. Having considered the Appellant's appeal, responses by the Respondents and submissions by the parties, the Tribunal has identified the following issues for determination:
 - a. Whether this Tribunal has Jurisdiction; and
 - b. What orders should the Tribunal make?

ANALYSIS

A. WHETHER THIS TRIBUNAL HAS JURISDICTION

5. All the Respondents in this appeal submit that this Honourable Tribunal lacks jurisdiction to address the issues brought by the Appellants.
6. 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 (E.A.) 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.”
7. Vide the amended Notice of Appeal dated 11th February 2022, the decision/action appealed against is ‘Approval of change of user licence from Agricultural land use to multiple dwelling on Parcel No. Ngong/Ngong/44181’.
8. The relief which the Appellants are seeking before the Tribunal, include inter alia:
 - a. ‘Revocation of the change of user licence no. EIA/PSL/15865.’
9. The Appellants submit, at Paragraph 39 of their written submissions, that they are challenging the Approval and issuance by the 2nd Respondent of the Change of user Licence No. EIA/PSL/15865 an end result based on an Environment Impact Assessment (EIA) Licence No. NEMA/EIA/PSL/15865 issued by the 1st Respondent Authority leading to development of a 6 storey building on Land Title Number Ngong/Ngong/44181.
10. On its part, the 1st Respondent submits that the EIA licence was applied for on 9th November 2021 and issued on 9th December 2021 whereas the change of user approval was applied for on 2nd November 2020 and approved on 29th June 2021. The 1st Respondent further submits that, the Change of User having come first, it beats logic that the EIA Licence issued at a later date would form the basis of approving the change of user.



11. In Samuel Kamau Macharia vs. 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.”

12. The Legal Framework on appeals to the Tribunal is enshrined under Section 129 of the Environment Management and Co-ordination Act No. 8 of 1999 (EMCA). 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 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.

13. Further, Section 129 (2) stipulates 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.

14. The issue of the difference between appeals brought under Sections 129 (1) and 129 (2) of the Environmental Management and Co-Ordination Act has been previously determined by this Tribunal. In Prof Albert Mumma vs Director General NEMA & 2 Others, Tribunal Appeal No. 005 of 2018, this Tribunal decided that:

‘With the 2015 amendment (to the EMCA), all appeals either challenging the grant or refusal of a license now fall under section 129 (1). Section 129 (2) is left to decisions made by the Director General, the Committees of the Authority or its agents under the Act’ (emphasis added).

15. It is evident from the Notice of Appeal and the Appellants written submissions that the Appellants are appealing against the change of user licence.



16. The Tribunal finds that there is no relationship between the change of user approval and the EIA Licence No. NEMA/EIA/PSL/15865.
17. It is the Tribunal's finding that it cannot issue orders and/or reliefs as prayed in respect of the change of user approval.
18. Accordingly, it is clear that the Tribunal lacks the requisite jurisdiction to hear and determine the appeal and has no option but to strike out the appeal.

B. ORDERS

19. For the above reasons, the Tribunal makes the following orders:
 - a. The Appeal is hereby struck out; and
 - b. Each party to bear their own costs.
20. The parties' attention is drawn to the provisions of Section 130 of the EMCA.

DATED AT NAIROBI THIS 15th DAY OF SEPTEMBER 2023

EMMANUEL MUMIA.....CHAIRPERSON

WINNIE Tsuma.....VICE CHAIRPERSON

KARIUKI MUIGUA.....MEMBER

DUNCAN KURIAMEMBER

RONALD ALLAMANOMEMBER

