



Ware Transport Limited v National Environment Management Authority (Tribunal Appeal 47 of 2022) [2024] KENET 338 (KLR) (Environment and Land) (18 March 2024) (Judgment)

Neutral citation: [2024] KENET 338 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
ENVIRONMENT AND LAND
TRIBUNAL APPEAL 47 OF 2022
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR,
DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
MARCH 18, 2024**

BETWEEN

WARE TRANSPORT LIMITED APPELLANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .. RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant moved the Honorable Tribunal by way of the Notice of Appeal and Statement of Grounds of Appeal all dated 30th November 2022 seeking the following reliefs:
 - a. An order revoking and cancelling the decision made by the Respondent on 7th September 2022 and served on the Appellant on 8th October 2022 after five years since the application for granting an Environmental Impact (EIA) License for the proposed Reclamation of Land from sea on Plot LR No. Mn/V/2407 at Kibarani Area in Mombasa County was made by the Appellant
 - b. An order directing the Respondent to issue an Environmental Impact Assessment license (EIA) to the Appellant in order to undertake the said project;
 - c. A declaration that the Respondent unduly delayed in responding to the Appellant's EIA assessment for almost Six Years;
 - d. c A declaration that the Respondent erred in law and in fact in rejecting the Appellant's EIA License



2. Contemporaneously, the Appellant filed the Witness Statement of Nazir Hussein dated 30th November 2022 and List and Bundle of Documents of similar date.
3. In summary, the Appellant's appeal is based on the following grounds:
 - a. Laxity by the Respondent to respond to the Appellant's Environmental Impact Assessment License application within three (3) months contrary to Section 58(8) & (9) of *EMCA* and in violation of the Appellant's right to a fair administrative action.
 - b. The Respondent abdicated its role to assess the EIA License Application made by the Appellant within the confines of the Environmental (Impact Assessment and Audit) Regulations, 2003 and instead made sweeping conclusions without any justifications.
 - c. The Respondent failed to coordinate, work with, consult and acknowledge the comments, efforts, recommendations, mandate and consents issued by other lead agencies being Kenya Forest Service, County Government of Mombasa, Ministry of Agriculture, Livestock and Fisheries State Department for Fisheries for the Blue Economy (Kenya Fisheries Service), Water Resource Authority, Kenya Maritime Authority all of whom have approved the Appellant's proposed project Contrary to Section 9(1) & (2) of *EMCA*.
 - d. The Respondent unreasonably delayed in issuing the Appellant with an EIA license on the basis that the public land would be lost permanently, an assertion that is unfounded since the subject project was to be developed within a Mangrove Forest Area, which the Kenya Forest Service has issued the Appellant with a 25-years' licence.
 - e. The Respondent issued the Appellant onerous orders, which are devoid of the principles of good environmental management in consonance with recommendations given by other lead agencies.
4. The appeal did not go unopposed, and in that regard, the Respondent filed its Reply to Grounds of Appeal and List of Documents all dated 4th April 2023. Further, the Respondent filed the Witness Statement of Zeppaniah Ouma dated 6th April 2023.
5. The appeal proceeded by way of oral hearing whereby all parties presented their respective witnesses who gave oral evidence.
6. Subsequently, the Tribunal directed parties to file submissions. Pursuant to the said directions, the Appellant filed its submissions dated 26th February 2024 while the Respondent filed its submissions dated 23rd February 2024.

B. Analysis and Determination

7. Upon considering all materials filed by the parties, the oral evidence, and the submissions by parties, the Tribunal has isolated the following as the only arising for determination in this appeal:

Whether the Appellant is entitled to the reliefs sought

8. It is urged by the Appellant that the Respondent unreasonably delayed in rendering a decision on its application for EIA license, a violation of the Appellant's right to an administrative action that is expeditious. This is contrary to Article 47 of the *Constitution*, which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



9. In determining whether the Respondent's delay in rendering its decision on the Appellant's application for EIA license, the Tribunal will be guided by the holding of the High Court in the case of Joseph Mbalu Mutava v Attorney General & another [2014] eKLR, where the Court held as follows:

‘The requirement for an expeditious hearing in Article 47 of the *Constitution* must of necessity be read together with the requirement of efficiency in the conduct of administrative functions, as one of the key reasons for quick and timely administrative action is to ensure that no undue prejudice is suffered by any person affected by the said actions. In determining whether an action is expeditious, the context and circumstances in which such action is being undertaken is therefore relevant both in evaluating whether in the circumstances the action was timeous, and also in light of any adverse effects on the person affected by the decision. Factors to be taken into account in determining the level of expeditiousness will include the type and complexity of the action being undertaken, and the conduct and diligence of all the parties involved.’
10. It follows that, unless there are specified timelines, what is expeditious and efficient is a question of fact and depends on the activity, matter or proceeding. It is a matter to be determined by a reasonable weighing of all the surrounding circumstances while not losing sight of the principle of alacrity that is commanded and expected. Turning to the facts at hand, we note that Section 58(8) of EMCA provides that the Respondent should respond to an application for EIA license within 3 months of receiving the application. Further, Section 58(9) provides that if the applicant/proponent does not receive any communication within 3 months, they may start their undertaking. The said provisions provide as follows:
 - (8) The Director-General shall respond to the applications for environmental impact assessment license within three months.
 - (9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.
11. The above timelines are reiterated by Regulation 23 of the Environmental (Impact Assessment and Audit) Regulations, 2003, which provides that the Respondent shall give its decision on an environmental impact assessment study report within three months of receiving the said report. The above provisions are couched in mandatory terms, and it is, therefore, our finding that the statutory period of 3 months is cast in stone, leaving no room for expansion.
12. We note that the Appellant submitted its EIA study report for the proposed reclamation of land from sea on Plot LR MN/V/2407 to the Respondent on 6th April 2017. This is acknowledged by the Respondent vide its letter dated 6th April 2017. Notably, in the said letter, the Respondent indicated it would communicate its findings within 51 to 90 working days. As such, the Respondent was aware of its mandatory obligation to render a decision on the Appellant's EIA license application within 3 months.
13. After the letter acknowledging receipt of the EIA study report, the next communication to the Appellant by the Respondent was through the letter dated 18th May 2017. The said letter was done after a site visit by the Respondent. Subsequent to this, the next communication to the Appellant by the Respondent was through the letter dated 11th January 2018, requiring the former to provide approvals from the National Land Commission, Kenya Ports Authority and the County Government of Mombasa. Further, the letter indicated that the EIA processing time will stop running until the issues raised therein are addressed.



14. It is our finding that by 11th January 2018, the statutory timeline of 3 months within which the Respondent was supposed to process and make a decision on the Appellant's EIA license application had already lapsed. Therefore, the statement by the Respondent that the EIA processing time would stop running was of no legal consequence.
15. We note that the Respondent relies on the Appellant's letter dated 25th March 2021, through which the Appellant purported to hold the application for the EIA license for reclamation of land from sea. In our view, the purported 'holding' was no legal consequence as the time for processing of the Appellant's application had already lapsed.
16. The Tribunal notes that after several back and forth the Respondent finally made its decision on the Appellant's application on 7th September 2022, more than 5 years since the Appellant submitted its EIA study report. This is way outside the statutorily prescribed timeline of 3 months, and therefore, the said decision is a nullity. The Tribunal is guided by the holding of Odunga J. (as he then was) in the case of Republic v Public Procurement Administrative Review Board Ex-parte Kenya Power and Lighting Company Limited & another [2017] eKLR, where the Learned Judge held as follows:

‘Having considered the issues raised in these consolidated applications the inescapable conclusion I come to is that the Respondent's decision having been admittedly made outside the 21 days' statutory period must be set aside.’
17. Similarly, the Court, in the case of Kate Kokumu & Another vs. University of Nairobi & 2 Others, held as follows as to the effect of a decision made out of time:

‘In my view once the 14 days allowed by Article 25(2) of the SONU constitution expired by effluxion of time, there was no matter pending before the panel which it could rule upon. The law as I understand it is that a decision made by a body outside the period prescribed for doing so is clearly a decision made without jurisdiction and is therefore a nullity’
18. We further take cognizant of the provisions of Section 58(9) which provides that if the proponent of a project does not receive a response from the Respondent within 3 months from the date of submission of their application, they may start their undertaking. Our interpretation of the said provision is that once one submits an application for EIA license and 3 months lapses without any decision from NEMA, then that application should be deemed as successful. This is so because one is allowed to start their undertaking after the lapse of 3 months.
19. Apart from the Respondent's decision dated 7th September 2022 being a nullity for being made out of time, it is our finding that the delay of over 5 years is unreasonable and the same is a violation of the Appellant's right to an expedited administrative action guaranteed by Article 47 of the Constitution. Therefore, the Respondent's decision reeks of constitutional infirmity.
20. The above notwithstanding, it is our finding that the reasons advanced by the Respondent as the basis of the refusal to grant the Appellant the EIA License for the proposed project are not merited. In its decision dated 7th September 2022, the Respondent states that the impacts of the proposed reclamation of land from the sea are impossible to mitigate to a level of no significance. We have reviewed the EIA study report, and it is our finding that the same provides adequate mitigation measures.
21. Further, the Respondent states that the project is not justifiable in consideration of the opportunity cost of losing the public land with high intrinsic value and associated benefits of mangrove ecosystem services, fisheries, livelihoods and ecological functions. Again, we have reviewed the EIA study report



and note that project has significant benefits such as employment creation, revenue generation for the government, increased land availability among other benefits.

22. Further, the Respondent failed to appreciate that the Appellant has obtained a special use License for a period of 25 years from the Kenya Forest Service. We have reviewed the said license, and note that the same imposes various conservation obligations upon the Appellant. It is therefore the Tribunal's finding that the proposed project is in line with the principles of sustainable development.
23. The upshot of the foregoing, is that that the sole issue for determination answers in the affirmative; the Appellant is entitled to the reliefs sought. It is our finding that the Appellant's appeal is merited. Consequently, the same is hereby allowed in the following terms:
 - a. The Respondent's decision dated 7th September 2022 is hereby set aside for being rendered out of time and for being in violation of the Appellant's right to a fair administrative action.
 - b. The Respondent is hereby directed to issue the Appellant with an Environmental Impact Assessment(EIA) License for the proposed reclamation of land from sea on Plot MN/V/2407.
 - c. Each Party to bear their own costs.

DATED AND DELIVERED AT NAIROBI, THIS 18th DAY OF MARCH 2024

EMMANUEL MUMIA - CHAIRMAN

WINNIE TSUMA - VICE-CHAIR

DUNCAN KURIA - MEMBER

RONALD ALLAMANO - MEMBER

