



Yusuf & another v Director-General, National Environment Management Authority & another (Petition 23 of 2023) [2023] KENET 493 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KENET 493 (KLR)

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
PETITION 23 OF 2023
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
SEPTEMBER 27, 2023

BETWEEN

BAKARI SAID YUSUF 1ST APPELLANT

ROSEMARY MUCHANGI 2ND APPELLANT

AND

THE DIRECTOR-GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT

THE TRUSTEES OF NASSEPURIA MEMON JAMA REGISTERED 2ND
RESPONDENT

RULING

1. On 23rd August 2023, the Appellants lodged a Petition before this Tribunal dated 18th August 2023. The Petition is brought by Bakari Said Yusuf and Rosemary Muchangi. As per the averments gleaned from the body of the Petition, this Petition is brought by the Appellants on their own behalf and on behalf of the residents residing at Kidogo Basi near Mombasa fire station within Mombasa County.
2. A perusal of the petition reveals the following prayers:
 - a. That the License No; NEMA/EIA/PSL/2622 under Application Ref No: NEMA/EIA/PSR/41117 on plot LR No Mombasa/Block XVII/1155 in Kikowani along/off Maalim Juma Road Mombasa County issued to the 2nd Respondent by the 1st Respondent on the 9/6/2023 be revoked/cancelled forthwith.
 - b. That an order be issued that the whole project be reviewed/forthwith and/or in the alternative be reviewed with conditions.



- c. An order for compensation to the sum of Kenya Shillings Ten Million Kshs. 10,000,000/= for the damage so far done and for their infringement of their rights and their families respectively.
3. In response to the Petition, the 2nd Respondent filed a notice of preliminary objection dated 30th August 2023. The preliminary objection is based on the following grounds: The Petition is time barred pursuant to section 129(1) of EMCA which provides that an aggrieved party ought to file an appeal within 60 days of the issuance of the EIA license. The Petition is incurably defective for non-compliance with rule 3 of the National Environment Tribunal Procedure Rules which sets out the correct pleadings to be filed by an aggrieved party before the Honorable Tribunal. The Appellants have moved this Honorable Tribunal by filing a Petition and not a Notice of Appeal as set out in the National Environment Tribunal Procedure Rules. That the Petition does not enclose an authority from the Appellants authorizing the firm on record to act on their behalf. The Petition does not attach the license subject of complaint. The 2nd Appellant one Rosemary Muchangi confirms that she is not privy to the existence of the instant Petition and that she did not append her signature on any such related documents. The Petition is a fraudulent document having no legal basis. The Honorable Tribunal lacks jurisdiction to hear and determine the instant Petition and should dismiss it in its entirety with costs to the Respondent.
4. Contemporaneous to the filing of the Preliminary objection, the 2nd Respondent filed an affidavit sworn by Abdulwahid Mohamed Aboo on 30th August 2023.
5. The Appellants and 2nd Respondent filed written submissions both dated 13th September 2023.
6. Having considered Petition, the 2nd Respondent's notice of preliminary objection and affidavit, the Tribunal has distilled the following as the only issue for determination at this juncture-

Whether the 2nd Respondent's Preliminary Objection dated 30th August 2023 is merited.

7. From the onset the *locus classicus* case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, is instructive that;

‘---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.....;

...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop’

8. Thus, a preliminary objection must be based on a pure point(s) of law. Turning to the instant case, we note that the first ground upon which the preliminary objection is premised is that the Petition is time barred for being filed outside the statutory period of 60 days, and therefore, the Tribunal is bereft of jurisdiction to hear and determine the same. This is a pure point of law warranting determination at a preliminary stage.
9. The jurisdiction of the Tribunal is to be found in section 129 of EMCA which provides as follows:



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 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.

- 10. The import of the above provision is that any challenge on the issuance of an EIA license must be lodged with the Tribunal within 60 days from the date of issuance. As per the prayers in the Petition, the Appellants are seeking revocation of License No; NEMA/EIA/PSL/2622 under Application Ref No: NEMA/EIA/PSR/41117 on plot LR No Mombasa/Block XVII/1155 in Kikowani along/off Maalim Juma Road Mombasa County issued to the 2nd Respondent by the 1st Respondent on 9th June 2023.
- 11. We note that whereas the Appellants did not annex the said license on the Petition, the same has been annexed on the 2nd Respondent's affidavit dated 30th August 2023. A perusal of the same confirms that the license was issued on 9th June 2023.
- 12. The record reveals that the Petition was filed on 23rd August 2023, yet the EIA license was issued on the 9th June 2023. This means the Appeal was filed 15 days beyond the statutory set timeline of 60 days. It is a long-settled position that the Tribunal does not have the power or discretion to extend time for the for filing an appeal that falls within the ambit of section 129(1) of [EMCA](#).
- 13. Having established that the Petition was filed after the lapse of 60 days, the same is out of time and the Tribunal does not have jurisdiction to hear it. Having found, the Tribunal does not have jurisdiction to hear the Petition, no useful purpose will be served by the considering the other grounds raised.
- 14. Deriving from the foregoing, we find that the 2nd Respondent's Notice of Preliminary Objection dated 30th August 2023 is merited. Consequently, the same is hereby upheld.

ORDERS:

- a. The Petition dated 18th August 2023 is struck out:
- b. Each party bears their own costs

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2023

EMMANUEL MUMIA

.....



CHAIRPERSON

WINNIE TSUMA

.....

VICE-CHAIRPERSON

KARIUKI MUIGUA

.....

MEMBER

DUNCAN KURIA

.....

MEMBER

RONALD ALLAMANO

.....

MEMBER

