



Soba (Shimo La Tewa Old Boys Alumni) v Bahari Desalination Company Limited & 2 others (Tribunal Appeal 28 of 2021) [2023] KENET 226 (KLR) (15 April 2023) (Ruling)

Neutral citation: [2023] KENET 226 (KLR)

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 28 OF 2021
MOHAMED S BALALA, CHAIR, BAHATI MWAMUYE,
WAITHAKA NGARUIYA & KARIUKI MUIGUA, MEMBERS
APRIL 15, 2023

BETWEEN

SOBA (SHIMO LA TEWA OLD BOYS ALUMNI) APPELLANT

AND

BAHARI DESALINATION COMPANY LIMITED 1ST RESPONDENT

MOMBASA COUNTY GOVERNMENT 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 3RD RESPONDENT

RULING

Background to the Dispute

1. The Appellant instituted this appeal vide a Notice of Appeal filed on 25th November 2021 under rule 4 (1) of the National Environment Tribunal Procedure Rules.

Respondent's Reply

2. The 3rd Respondent raised a Preliminary Objection, vide the Notice of Preliminary Objection dated 6th June 2022, on points of law seeking to have the Appeal dated 25th November 2021 struck out with costs to the 3rd Respondent on the following grounds:
 - i. That this Honourable Tribunal lacks the jurisdiction to preside over and/or determine the Appeal because it is a property dispute that falls outside the ambit of the causes of action contemplated under Section 129 of the [Environmental Management and Co-ordination Act](#) (EMCA) 1999.



- ii. That further, the suit is fatally and incurably defective as the Appellant lacks the Locus Standi to institute therein.

Submissions

3. None of the parties filed written submissions to the Preliminary Objection raised by the 3rd Respondent.

Issues for Determination

4. Having considered the 3rd Respondent's Preliminary Objection and all the arguments and evidence presented by the parties, the Tribunal has identified the following issues as arising from the Preliminary Objection:
 - a. Whether the appeal falls outside the ambit of the causes of action contemplated under Section 129 of the *Environmental Management and Co-ordination Act* (EMCA) 1999;
 - b. Whether this Tribunal has Jurisdiction; and
 - c. What orders should the Tribunal make?

Whether the appeal falls outside the ambit of the causes of action contemplated under Section 129 of the *Environmental Management and Co-ordination Act* (EMCA) 1999

5. In the celebrated case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Limited, the principles of preliminary objections were set out. The court stated as follows:-

"So far as I'm aware, 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."

6. The 3rd Respondent raised a Preliminary Objection, vide the Notice of Preliminary Objection dated 6th June 2022, on points of law seeking to have the Appeal dated 25th November 2021 struck out with costs to the 3rd Respondent on the following grounds, inter alia:
 - i. That this Honourable Tribunal lacks the jurisdiction to preside over and/or determine the Appeal because it is a property dispute that falls outside the ambit of the causes of action contemplated under Section 129 of the *Environmental Management and Co-ordination Act* (EMCA) 1999.
7. 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.

8. 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.

9. The question on 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 Tribunal Appeal No. 005 of 2018 Prof Albert Mumma vs Director General NEMA & 2 Others, 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’

10. The decision/action appealed, vide the Notice of Appeal filed on 25th November 2021, is ‘objection’. The Appellant further attached a letter dated 11th November 2021 addressed to the Tribunal where it indicated that it would like to file a notice of objection to the proposed project based on, inter alia, the alleged public participation that did not seek comments and inputs from key relevant stakeholders.
11. At paragraph 20 of the Appellant’s witness statement sworn by Dennis Odhiambo Ouna dated 17th May 2022, it states that the Appellant has noted that the alleged study Report No. NEMA/EIA/5/2/1669 SR1670 stated in the Newspaper notice has no reference or evidence of any participation by various crucial stakeholders of the school.
12. From the documents and evidence adduced by the Appellant, it is not clear whether the Appellant is challenging the issuance of an EIA licence and if so which licence to be specific noting that it has not tendered a copy of any such licence as part of its evidence.
13. The Tribunal further notes that the 3rd Respondent did not file any written submissions in support of its Preliminary Objection.
14. A Preliminary Objection should consist of points of law that do not need to be proved by way of evidence. The Tribunal would have to receive evidence from the parties in order to determine whether the Appellant is challenging the issuance of an EIA licence. Therefore, the Tribunal cannot make a finding at this point whether or not the appeal falls outside the ambit of the causes of action contemplated under Section 129 of the *Environmental Management and Co-ordination Act* (EMCA) 1999.



Whether this Tribunal has jurisdiction

15. This Tribunal in Tribunal Appeal Net 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.”

16. Nyarangi JA while citing Words and Phrases Legally defined in *Owners of the Motor Vessel “Lilian S” vs. 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.”

17. Likewise, 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.”

18. We have found that it is not possible to make a determination at this juncture, whether or not the appeal falls outside the ambit of the causes of action contemplated under Section 129 of the *Environmental Management and Co-ordination Act* (EMCA) 1999.

19. Consequently, we find that we have jurisdiction to hear and determine this appeal.

Orders

20. For the above reasons, the Tribunal makes the following orders:

- a. The 3rd Respondent’s Preliminary Objection is hereby dismissed;



- b. The Appeal shall proceed to be heard on merit; and
- c. Each party to bear their own costs.

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

DATED AT NAIROBI THIS 15TH DAY OF APRIL 2023

MOHAMMED S BALALA

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CHAIRPERSON

BAHATI MWAMUYE

.....

MEMBER

WATHAKA NGARUIYA

.....

MEMBER

KARIUKI MUIGUA

.....

MEMBER

