



**Washumbu (Directed Agricultural) Company Limited v National  
Environment Management Authority & another (Tribunal Appeal  
15 of 2022) [2023] KENET 206 (KLR) (Civ) (18 April 2023) (Ruling)**

Neutral citation: [2023] KENET 206 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
CIVIL**

**TRIBUNAL APPEAL 15 OF 2022**

**MOHAMED S BALALA, CHAIR, BAHATI MWAMUYE,  
WAITHAKA NGARUIYA & KARIUKI MUIGUA, MEMBERS**

**APRIL 18, 2023**

**BETWEEN**

**WASHUMBU (DIRECTED AGRICULTURAL) COMPANY  
LIMITED ..... APPELLANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT**

**JOSEPH KAMAU MBIRIRI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of appeal dated May 23, 2022, the appellant sought for an order to restrain the 2<sup>nd</sup> respondent from carrying out mining activities within Washumbu Ranch in Taita Taveta county and for compensation for illegal mining activities and destruction of the environment. The notice of appeal was filed contemporaneously with a notice of motion application dated May 25, 2022 which sought temporary orders restraining the 2<sup>nd</sup> respondent from undertaking any form of mining in Taita Taveta county pending the hearing and determination of the said application.
2. As parties were addressing the tribunal on compliance with directions on the disposal of the notice of motion application and the appeal thereof, it emerged that the appeal before the tribunal may have been filed outside the statutory time frame and that the appeal was *sub judice* as there was a related suit being Mombasa ELC No 423 of 2017 Joseph Kamau Mbiriri v Robert Kiwuwa Kigo & others.
3. The tribunal issued directions that the parties do file brief submissions on the two issues for determination of the tribunal's jurisdiction before issuance of any further orders. The tribunal has



considered the submissions filed by the parties on the twin issues and we shall address the two issues separately.

**a. Does the Tribunal have jurisdiction to hear and determine the Notice of Appeal dated 23rd May 2022?**

4. The appellant's grievance before the tribunal was that there was no stakeholder consultation and participation prior to the issuance of the Environmental Impact Assessment (EIA) Licence to the 2<sup>nd</sup> respondent and that the mining activities were conducted without obtaining an EIA Licence and consent from the appellants for use in the land.
5. In his reply to the appeal, the 2<sup>nd</sup> respondent enclosed an EIA Licence number 0068654 dated November 1, 2021 whose objective is prospecting and mining gemstones at location 1970-1977/1-10 at Bugule Area, Kasigau division, Voi sub county, Taita Taveta county. The appellant has not filed any other EIA Licence nor denounced the licence filed by the 2<sup>nd</sup> respondent.
6. The appellants claim that the 1<sup>st</sup> appellant is the registered owner of the ranch measuring approximately 14591 hectares while the 2<sup>nd</sup> appellant is the chairman of the 1<sup>st</sup> appellant's group ranch and that the 2<sup>nd</sup> respondent invaded the said ranch and commenced mining activities without a mining licence as the said licence had been revoked by the ministry in charge of mining activities. The appellant further stated that if at all there was any EIA Licence then the same did not cover Washumbu Ranch as there was no public consultation on the same thus the 2<sup>nd</sup> respondent should be restrained from carrying out the mining activities.
7. On his part the 2<sup>nd</sup> respondent stated that the appeal is time barred under section 129(4) of the Environmental Management and Co-ordination Act (EMCA) rule 4(2) of the National Environmental Tribunal Rules. The 2<sup>nd</sup> respondent further argues that the appeal is *sub judice* as there was a related suit being Mombasa ELC No 423 of 2017 Joseph Kamau Mbiriri v Robert Kiwuwa Kigo & others.
8. The 1<sup>st</sup> respondent filed written submissions which simply reiterated the contents of the replying affidavit and submissions filed by the 2<sup>nd</sup> respondent.
9. The jurisdiction of this tribunal is set out in section 129 of the Act as follows,

“Section 129. 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 regulations made thereunder.
  - b. the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;
  - c. the revocation, suspension or variation of his licence under this Act or regulations made thereunder;
  - d. the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
  - e. the imposition against him of an environmental restoration order or environmental improvement order by the authority under



this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the tribunal in such manner as may be prescribed by the tribunal.

- (2) 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.”

10. The appeal before the tribunal clearly seeks to restrain the 2<sup>nd</sup> respondent from carrying out mining activities anywhere in Taita Taveta county. The appellant has not furnished the tribunal with evidence of any EIA Licence issued to the 2<sup>nd</sup> respondent for carrying out any mining activities anywhere within the Republic of Kenya. The only EIA Licence that has been furnished in this matter is EIA Licence number 0068654 dated November 1, 2021 and was filed by the 2<sup>nd</sup> respondent.
11. The jurisdiction of the tribunal in an appeal such as this one that challenges an EIA Licence with a specific date and is limited to a specific licence and cannot be a blanket restraining order as prayed for by the appellant. The EIA licence before the tribunal is dated November 1, 2021 and any appeal to the grant of that EIA Licence ought to have been filed within 60 days of the issuance of the same. The appeal herein was filed on May 25, 2022 hence the same is terribly out of time.

#### **b. Is the Appeal sub judice?**

12. The respondent argued that there is a related active suit being, Mombasa ELC No 423 of 2017 Joseph Kamau Mbiriri v Robert Kiwuwa Kigo & others thus the Appeal is *sub judice*.
13. In *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the Learned Justice Mativo (as he then was) stated as follows:

“ 17. With a large number of pending cases, the judiciary is overburdened and faces a stark lack of resources. In a situation like this, when two suits arising out of the same issues between the same parties are brought before the courts, there is bound to be wastage of resources and frivolous litigation. In order to correct this redundancy, there exists the doctrine of sub judice which is captured in section 6 of the *Civil Procedure Act*. [5] In a humble attempt to understand the principle and reasoning behind this doctrine and its application, I will attempt to analyse some salient features of the rule of sub judice.

19. In order to check this very problem, there exists the concept of sub judice which in latin means “under judgement.” It denotes that a matter is being considered by a court or judge. The concept of *sub judice* that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

22. The mere addition of a party or parties does not alter the pith and substance of the suit. *The Black’s Law Dictionary* [7] defines lis pendens, as a Latin expression which simply refers to a “pending suit or action.” *The Oxford Dictionary of Law* [8] defines the expression in similar terms. In the context



of section 6 of the [Civil Procedure Act](#) [9] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.” (emphasis supplied)

14. We have perused the ruling of the Learned Justice L Naikuni filed by the 2<sup>nd</sup> respondent in his reply to the notice of appeal and we find that the issues raised in Mombasa ELC No 423 of 2017 Joseph Kamau Mbiriri v Robert Kiwuwa Kigo & others are similar to the issues raised in the notice of appeal before the tribunal. Taking cue from the holding in In [Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya](#) [2020] eKLR, we find and hold that the instant appeal to is sub judice.

### **Finding**

15. Having analyzed the pleadings, the arguments, the submissions and all documents filed in the instant appeal, the tribunal finds that the appeal was filed outside the statutory timelines and that it is sub judice to Mombasa ELC No 423 of 2017 Joseph Kamau Mbiriri v Robert Kiwuwa Kigo & others.

### **Determination**

16. The appeal dated May 25, 2022 is struck out.
17. Parties are at liberty to approach the tribunal under rule 39 of the [National Environmental Tribunal Rules](#) and address it on the question of costs.

**DATED AND DELIVERED AT NAIROBI, THIS 18<sup>TH</sup> DAY OF APRIL 2023.**

**Mohammed Balala**

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**Chairperson**

**Bahati Mwamuye**

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**Member**

**Waithaka Ngaruiya**

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**Member**

**Kariuki Muigua**

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**Member**

