

REPUBLIC OF KENYA

IN THE NATIONAL ENVIROMENT TRIBUNAL IN NAIROBI

TRIBUNAL APPEAL NO. NET/26/2008 OF 2008

ANIL KUMAR VIRPAR MALDE	1 ST APPLICANT
MOHANLAL DENSHI SHAH	2 ND APPLICANT
NARMADABEN MOHANLAL SHAH	3 RD APPLICANT
JITEN RATILAL GUDKA	4 TH APPLICANT
RATILAL MAKANJI GUDKA	5 TH APPLICANT

VERSUS

DIRECTOR GENERAL NEMA	1 ST RESPONDENT
ZAVIDEN NATHOO MEPA SHAH	2 ND RESPONDENT
AVINASH NATHOO SHAH	3 RD RESPONDENT
SURESHCHANDRA NATHOO MEPA SHAH	4 TH RESPONDENT

RULING ON PRELIMINARY OBJECTIONS

1. By Notice of Motion dated 25th July, 2008 and filed in the Tribunal on the same day, the Applicants who describe themselves as owners of flats erected on land parcel L.R. No. 209/102/2/6 applied to enlarge time within which to file and serve a notice of appeal in the Tribunal. The Motion is filed against the Director General NEMA and three other Respondents, namely: Zaviden Nathoo Mepa Shah, Avinash Nathoo Shah and Sureshchandra Nathoo Mepa Shah.
2. Annexed to the said Motion is a supporting affidavit sworn by Anil Kumar Virpar Malde on his own behalf and on behalf of other Applicants. Anil Kumar Virpar Malde described himself as a resident of Parklands and the owner of flat No.6 within the suit plot, that is L.R. No.209/102/2/6 and has annexed several agreements signed between the Applicants and the 2nd to 4th Respondents, and correspondence exchanged between the Advocates for the Applicants and the 1st Respondent.
3. On the 4th day of August, 2008, the 2nd to 4th Respondents, through the firm of Odera Obar & Company Advocates, filed a Memorandum of Appearance under protest. Two weeks later, the said firm of Advocates filed a Notice of Preliminary Objection pursuant to Section 129(2) of Environment Management and Coordination Act (1999) (hereinafter referred to as EMCA) and Rules 3, 4, 7, 9 and 34(1) of the National Environment Tribunal Procedure Rules (Legal Notice No. 101) of 2003 and all the enabling provisions of the law.
4. Contemporaneous with their Notice of Appointment of Advocates filed on the 11th August, 2008, M/s. K. Mwaura & Co. Advocates also filed a Notice of Preliminary Objection on behalf of the 1st Respondent.

5. The grounds of Preliminary Objection set out in the Notice filed by Odera Obar & Co. Advocates were stated to be: (i) that the application as brought before the Tribunal is incompetent and cannot lie for want of jurisdiction, (ii) that the orders and/or directions made by the Tribunal on the 25th July, 2008 are a nullity *ab initio* for having been made without jurisdiction and (iii) that the subject of appeal contained in the draft Notice of Appeal is inconsistent with the application and the grounds in support thereof.
6. The 1st Respondent's sole ground of Preliminary Objection as contained in the Notice is that this Honourable Tribunal has no jurisdiction to entertain the Notice of Motion dated 20th July, 2008 or to grant the orders sought for enlargement of time for filing and serving the intended Appeal.
7. This matter was first mentioned before the Tribunal on the 12th day of August, 2008, and was fixed for hearing of the Preliminary Objections on the 19th August, 2008. At the hearing of the Preliminary Objections, Mr. Odera Obar for the 2nd to 4th Respondents canvassed the three grounds of Preliminary Objections. He argued that the Stop Order issued by the Tribunal on the 25th July, 2008 against the 2nd to 4th Respondents was given without jurisdiction and in violation of the provisions of Section 129(4) of EMCA. He contended that it is only upon the filing of a proper appeal before the Tribunal that an order of status quo can be made by the Tribunal. Further, that since no appeal has been filed, no proper order could be issued by the Tribunal maintaining the status quo. In his view, an application for leave to lodge an appeal out of time, which the Applicants filed, is not an appeal. He urged the Tribunal to find that the Stop Order issued on the 25th July, 2008 is null and void.
8. In arguing ground 3 of his notice of Preliminary Objection, Mr. Odera submitted that the proposed appeal as contained in the draft notice of appeal is inconsistent with the application and the grounds in support. He contended that while paragraph 3 of the draft notice refers to the issuance of the Environmental Impact Assessment licence (herein after referred to as EIA licence) as the decision to be appealed against, the Notice of Motion filed by the applicants refers to the failure by the Respondent to notify the applicants of the EIA Report to facilitate timely challenge. He urged the Tribunal to find that the intended appeal is inconsistent with the Notice of Motion filed for the extension of time.
9. Finally, Mr. Odera canvassed his first ground of objection. He urged that the Tribunal lacks the jurisdiction to deal with the matter before it. He referred to Rule 3 of the National Environmental Tribunal Procedure Rules, 2003 (hereinafter referred to as NET Procedure Rules) which allows any person to appeal against the decisions of National Environment Management Authority (herein after NEMA) or of its Committees as set out under Section 129 of EMCA. He argued that the decisions that are the subject of the appeal are statutorily underpinned. He submitted that Rule 7 of the NET Procedure Rules empowers the Tribunal to extend time appointed by the Rules and not limited by the Act. He submitted that the time for filing appeals to the Tribunal is limited by the Act under Section 129 (1) and (2) of EMCA. This, he argued, is because Rule 3 makes reference to Section 129 (1) and (2) of EMCA.

10. In so far as Rule 4(2) of NET Procedure Rules is concerned, Mr. Odera submitted that the said Rule provides for the sending or delivery of copies of notices of Appeal to the Tribunal. He asked the Tribunal to distinguish the power under Rule 4(2) and he express provisions of Rule 3 of the NET Procedure Rules. In expounding the powers of Section 129 (1) of EMCA, Mr. Odera submitted that the said provisions limit the power for filing appeals by aggrieved parties to 60 days. This time, he argued, is underpinned by the Act and is sacrosanct and cannot therefore be reopened by the Tribunal. He urged the Tribunal to dismiss the instant application for lack of jurisdiction.
11. Mrs. Waweru for the 1st Respondent associated herself with the arguments of Mr. Odera. She submitted that the time limited by Section 129(1) of EMCA cannot be extended under Rule 4(2) of the NET Procedure Rules. This, she argued, is because a subsidiary legislation cannot override the parent Act. She argued that any conflict between the parent Act and the Rules must be resolved in favour of the Act.
12. In support of her arguments, Mrs. Waweru cited the case of *J.J. Hall v Louuai Ole Maiya, Civil Appeal No.46 of 1981* in which the Court of Appeal held that jurisdiction cannot be conferred. She also referred to the case of *Rent Restriction Tribunal v Mayfair Bakeries Limited, Civil Appeal No.246 of 1981* in which the Rent Restriction Tribunal had granted orders of injunction in excess of its powers. Finally, Mrs. Waweru cited the case of *Republic v the Non Governmental Organizations Coordination Board Ex-Parte the Norwegian Peoples Aid & Another, Civil Case No.1731 of 2004* in which the Court held that a committee of the Board had acted without jurisdiction in imposing certain payments. She urged the Tribunal to dismiss the application as it lacks the jurisdiction to entertain the same.
13. In support of ground 2 of Mr. Odera's ground of objection, Mrs. Waweru submitted that since no substantive appeal had been filed, the orders made by the Tribunal on 25th July, 2008 were made without jurisdiction and in any event not under Section 129(4) of EMCA.
14. In opposing the two notices of Preliminary Objections, Mr. Akoto, Advocate for the Applicants submitted that the order made by the Tribunal on the 25th July, 2008 was indeed made pursuant to Section 129(4) of EMCA since under Rule 4(1) of NET Procedure Rules, an appeal to the Tribunal is deemed to have been filed once the prescribed forms for the lodging of an appeal are presented to the Tribunal. He argued that the Applicants having filed a notice as contemplated by Rule 4(1), then an appeal lies and orders can be made under Section 129(4).
15. In response to the submission by Mr. Odera that there was a conflict between the Notice of Motion filed by the Applicants and the Notice of Appeal annexed to the application, Mr. Akoto explained that the reference to EIA report in the Applicants' Notice of Motion was a typographical error which would be corrected in due course. He affirmed that the Applicants intend to challenge the EIA licence granted by the 1st Respondent to the 2nd to 4th Respondents. In answer to the last ground of preliminary objection, Mr. Akoto submitted that Section 129(1) of EMCA prescribes the time within which appeals must be filed. Indeed, Section 129 (1) (a) - (e) of EMCA limits

the time of appeal to 60 days. He argued that the Applicants herein, are not persons contemplated by Section 129(1) (a)-(e) of EMCA, neither was their Notice of Motion for extension of time to file appeal out of time and the intended appeal to be filed in the Tribunal under Section 129 (1). Mr. Akoto maintained that the Applicants intended appeal falls within the ambit of Section 129 (2) of EMCA and is therefore governed by the Tribunal Rules of Procedure promulgated to guide the Tribunal. He maintained that under Rule 7, the Tribunal may extend time for filing appeals. Finally, Mr. Akoto urged the Tribunal to dismiss the Preliminary Objection and allow the Applicants to argue the motion for extension of time.

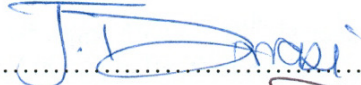
16. In his brief response to Mr. Akoto's submissions, Mr. Odera submitted that Rule 7 of the NET Procedure Rules, only permits the Tribunal to extend the time limited by the Rules and not by the Act. He submitted that since the time referred to in Section 129(2) of EMCA is neither set out in the Act, nor in the Rules, then the Tribunal cannot extend the time. In his view, any conflict between the Rules and the Act must be resolved in favour of the Act and any interpretation that permits the Tribunal to extend time violates the provision of Section 129 of EMCA.
17. The Tribunal notes that the three preliminary grounds of objection raised by Mr. Odera and Mrs. Waweru merit consideration in light of what truly constitutes a preliminary objection. The question is, what constitutes a preliminary objection? This matter was addressed by the Court of Appeal for Eastern Africa in the case of *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors*, (1969) EA 696. At page 700 the Court explained that a preliminary objection "*consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if determined, completely disposes of a matter.*" The Court of Appeal then proceeded to give examples of preliminary objections as objections to the jurisdiction of the Court or a plea of limitation in terms of time frame within which a matter can be brought to court. The grounds of objection presented and argued by the Respondents' Counsel ought to be considered in light of the Court's explanation. The Tribunal notes that of the grounds presented and argued, ground 1 of the Notice of Preliminary Objection filed by the 2nd – 4th Respondents which deals with the question of jurisdiction satisfies the above test and is further considered below.
18. Regarding the ground that there exists a conflict between the Applicants' Notice of Motion and the draft appeal annexed to the Notice, the Tribunal finds that the question whether or not there exists a conflict in the pleadings would only be determined by delving into the contents of the Notice of Motion filed, the supporting affidavits, as well as the annexed draft appeal, which cannot be done at this stage. Therefore, the ground fails as a preliminary objection. Any attempt to delve into the contents of the Notice of Motion filed herein and the annexed draft appeal leads to an application of an objective test and to arguments of the merits of the said application. The arguments by Mr. Odera would, in the Tribunal's view, be advanced at the stage of argument of the main Motion and not as a preliminary objection. For the reasons explained, the ground fails as a preliminary objection.


19. Regarding the question whether or not the Stop Order or directions issued by the Tribunal on the 25th July, 2008 were a nullity *ab initio*, the Tribunal's position is that the said orders are not the subject of the Motion filed for extension of time by the Applicants. Therefore, the matter cannot be raised as a preliminary point of law. If the Respondents feel aggrieved by the orders issued by the Tribunal, nothing would have been easier than for them to apply to vary or set aside the said orders, pending the hearing of the Applicants' Motion. No such application has been brought before the Tribunal. Instead, the Respondents filed notices of preliminary objections to the application for leave to extend time. Therefore, objection on the basis of complaint against the said Stop Order or directions fails the test of a preliminary objection as explained in *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors*, (1969), EA, at 696.
20. Finally, the question of the Tribunal's jurisdiction to entertain the Applicants' Notice of Motion falls for consideration. The Tribunal has considered the submissions by both Counsel for the Respondents that it is barred by want of jurisdiction from considering an application for extension of time to appeal by section 129 of EMCA because, in the Counsel's view, time to file appeals is limited by the provisions to 60 days from the date of NEMA's decisions. The Tribunal also notes the Applicants' Counsel's submission that the application for extension of time to file appeal was brought by way of Notice of Motion under section 129(2) and not 129(1). The Tribunal observes that under section 129(1) (a)-(e) of EMCA, only those who have been parties to EIA licence applications and are aggrieved by NEMA's decisions can appeal. As explained by Counsel for the Applicants, the applicants are not among the persons or parties that were envisaged under that sub-section. Therefore, the Tribunal affirms its position that the Applicants herein can come before it under section 129(2). The Appellants in this case intend to appeal against the decision of the Director General, NEMA in respect of a licence granted to the Respondents. That appeal, in the Tribunal's view, would fall under section 129(2) of EMCA and not section 129(1).
21. Further, the Tribunal notes that while section 129(1) limits the time within which an appeal may be filed to 60 days of the decision, section 129(2) does not impose any time limitation for appeals filed thereunder. Therefore, appeals filed under section 129(2) of EMCA shall be governed by NET Procedure Rules as provided by the proviso to section 129(2). Under Rule 7 of the NET Rules of Procedure, a person aggrieved by decisions of NEMA, the Director General, NEMA or Committees of NEMA may apply for extension of time to file appeal in the Tribunal. The position has been consistently maintained by the Tribunal in a number of cases, including NET/15/2007 (*James Mahinda Gatigi and 13 Others v NEMA and Universal Corporation* and NET/23/2007 (*Hon. Beth Mugo and seven Others v Director General/NEMA and 3 others*)).
22. The Tribunal has considered the argument by Counsels for the Respondents that there exists a conflict between Rule 3 of the NET Procedure Rules and section 129 of EMCA. In the Tribunal's considered view, no such conflict exists.

23. For the reasons explained, the Tribunal, unanimously finds, that the Respondents' arguments lack basis and the Preliminary Objections are hereby dismissed. Therefore, the Notice of Motion dated 25th July, 2008 shall proceed for hearing on the merits.

DATED AND DELIVERED at Nairobi this 22nd Day of August, 2008

Mr. Donald Kaniaru..........Chairman

Dwasi Jane..........Member

Stanley Waudu..........Member

Joseph Njihia..........Member

Tom Ojienda..........Member