

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL APPEAL NO. NET/36/2009**

GREEN PLUS (EAST AFRICA) LTD.....APPELLANT

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA).....RESPONDENT

RULING

1. By Notice of Appeal dated 11th March 2009 that was filed in the Tribunal the same day and supported by an Affidavit of Shailesh Patel, the Appellant's Managing Director sworn on the same day and a further affidavit sworn by the same director, on 1st September 2009, the Appellant sought from the Tribunal: a declaration that the Respondent's refusal to issue it with a licence to import into Kenya a liquid fuel catalyst additive is illegal; an order directing the Respondent to issue the Appellant with a licence to import into Kenya a liquid fuel catalyst; costs of the appeal; and any other order that the Tribunal may issue to serve the ends of justice. The Appellant sought the specified relief on the grounds that:
 - (i) the business of the Appellant is aimed at reduction of air pollution caused by fossil fuel emissions resulting from automobile and immobile combustion engines;
 - (ii) the Appellant applied to the Respondent and paid for a licence to import a liquid fuel catalyst additive pursuant to the Respondent's Legal Notice No. 131 of 2006 issued on 13th October 2006;
 - (iii) the Respondent had failed or refused to issue the licence despite several requests;
 - (iv) the Respondent had not given any reason or excuse for failing to issue the Appellant with the licence sought;
 - (v) the Appellant's Director General had verbally agreed to issue the licence sought but later misled the Appellant by stating that the Respondent was awaiting a "KS" number of the Appellant's fuel catalyst before a licence could be issued;
 - (vi) the Respondent's refusal to grant the licence sought is discriminatory, unjustified, oppressive, illegal, an abuse of authority and in contravention of provisions establishing the Respondent and its mandate.

2. On 31st July 2009, more than four months after the appeal was filed, the Respondent, through the law firm of Mereka & Company Advocates, filed Response to the Appellant's appeal stating that:
 - (i) it had received from the Appellant an application for a licence for a liquid fuel catalyst but the application could not be approved or a licence issued because the Applicant could not provide the Respondent with a Kenyan standard number for the catalyst, referred to as a "KS" number;
 - (ii) without evidence of a KS number from Kenya Bureau of Standards, the Respondent could not grant a licence to the Appellant for production of a fuel catalyst whose effectiveness in cleaning and detoxifying fuel emissions is unknown;
 - (iii) under Regulation 8 (1) of the Environmental Management and Coordination (Fossil Fuel Emission Control) Regulations of 2006, a product such as a fuel catalyst additive is intended to achieve better control of toxic emission and the fossil fuel can only be treated using a fossil fuel catalyst approved by the Authority;
 - (iv) before the Respondent can make an informed decision as to whether to grant or deny the licence sought, Regulation 3 of the Regulations aforesated enjoins it to liaise with lead agencies dealing with internal combustion engine inspection but may delegate the responsibility of undertaking emission inspection to a lead agency;
 - (v) Kenya Bureau of Standards is the one with the technical capacity to guide the Respondent on the Kenyan standard for the Appellant's intended fossil fuel catalyst so that appropriate conditions for grant of a licence may be formulated;
 - (vi) KS number is an important pre-requisite under the aforementioned regulations as the Kenyan standard would be the bench mark against which the effectiveness of the proposed liquid fuel catalyst in cutting down emissions would be measured;
 - (vii) the Respondent's refusal to grant the Appellant a licence was not discriminative, unjustified, oppressive, illegal or an abuse of the Respondent's authority;
 - (viii) the issuance of a licence of the nature sought by the Appellant is not a matter of course;
 - (ix) the Appellant is yet to meet the laid down requirements for the issuance of the licence sought;
 - (x) the Respondent does not have authority to licence the fuel catalyst additives as requested; it can only licence its use; and that
 - (xi) the entire appeal is misconceived, incompetent and devoid of merits.
3. For the reasons stated, the Respondent asked the Tribunal to dismiss the appeal with costs.
4. Before the appeal was scheduled for hearing, the Appellant sought to file in the Tribunal an application for leave to appeal out of time. However, before the application was filed,

Mr. Opondo, then acting for the Respondent and Mr. Walubengo of Magara & Company Advocates agreed to have the appeal filed regarded as having been filed in time. Subsequently, the appeal was heard on two occasions between 24th September 2009 and 16th November 2009. At the hearing, the Appellant was represented by Mr. Walubengo of Magara & Company Advocates and the Respondent by Mr. Mereka of Mereka & Company Advocates. The Appellant called one witness, namely: Shailesh Patel, its Managing Director. The Respondent did not call any witness. When given a chance to call witnesses, Mr. Mereka, Counsel for the Respondent stated that he would not call any witness because there was nothing for the Respondent to defend since no burden had been placed on him to do so. Mr. Mereka chose to state the Respondent's position by way of submissions at the close of the appeal.

5. In his evidence, Mr. Shailesh Patel stated that he was the Managing Director of Green Plus (East Africa) Ltd, a company that specializes in providing mitigation and management solutions, with specialization in air quality programmes, especially in providing mitigating solutions in combustion fuel. He produced, in evidence, copies of the registration certificate of the company, together with its Memorandum of Association.
6. Mr. Patel further stated that on 6th July 2007, the Respondent, as Director General of the National Environment Management Authority (NEMA), issued a notice in the Daily Nation newspaper a request for expression of interest for the supply of a fuel catalyst pursuant to Legal Notice No. 131 for Environmental Management and Coordination (Fossil Fuel Emission Control) Regulations of October 2006 which came into force on 1st February 2007. As stated in the Notice, the objective of the Regulations is to combat air pollution through addition of liquid catalysts to fossil fuels and so as to increase internal combustion efficiency in engines as well as to develop a system of emission inspection and control within NEMA.
7. Mr. Patel stated that in response to NEMA's notice aforesaid, the Appellant, by letter dated 18th December 2006, applied to NEMA for a licence for a liquid fuel catalyst additive to authorize them to import, deal in and supply the catalyst additive and paid a requisite fee of Kshs. 10,000. The Appellant also submitted to NEMA all scientific test results carried out on the product in the United States of America, testimonials, product knowledge and background information on the fuel catalyst additive. Mr. Patel stated that the Appellant's application to NEMA was accompanied by the Appellant's proposal of what it could provide as per the Legal Notice aforesaid and all the scientific proof of the product and that at the time of applying to NEMA, the Appellant also wrote to Kenya Bureau of Standards. However, despite several letters of inquiry by the Appellant, NEMA had not, by the time the appeal was filed, responded to the Appellant's application. There had been no communication from NEMA and it did not provide any explanation for its silence.
8. Mr. Patel stated that the situation as explained in paragraph 7 above prompted the Appellant to appeal to the Tribunal, seeking the Tribunal's order for a licence for the Appellant's fuel liquid catalysts additive, costs of the appeal and any other order that the Tribunal could issue to compel NEMA to carry out its mandate.

9. In cross-examination, Mr. Patel stated that he is an accountant and not a scientist; he came into the industry through the Appellant's principal partner; NEMA's Fossil Fuel Emission Control Regulations (Legal Notice No.131 of 2006) aforementioned require all fuels to be treated before delivery to fuel stations; basically, the appellant's product in question is a fuel treatment technology which has been used in the USA and Mexico, among others; the Appellant had supplied evidence of its use of the product in other countries to NEMA and Kenya Bureau of Standards (KEBS); and that NEMA had required the Appellant to supply it with a Kenyan Standard Number for the catalyst, known as "KS" number for the Appellant's fuel catalyst but that the Appellant did not supply NEMA with the number because KEBS did not give the Appellant the number, despite the Appellant's application to KEBS for the KS number.
10. Mr. Patel further stated that when the Appellant applied to KEBS for a KS number, KEBS responded, by letter dated 3rd July 2007, stating that it did not have a KS number of the catalyst proposed by the Appellant because KEBS does not have certain facilities to conduct testing on the product in order to give it a KS number and that in such circumstances, they could adopt an international number for the product in the country of origin. However, Mr. Patel stated, in the Appellant's application to NEMA and to KEBS for a licence, the Appellant did not include international harmonization code indicating the KS number used in the US and the UK, which is what KEBS would have considered to give the Appellant a KS number.
11. Mr. Patel further stated that he had held several meetings with the Respondent and the NEMA's head of compliance and enforcement department and that each time a meeting was held, NEMA informed him that there were technical issues which NEMA was still trying to formalize the process and that NEMA would give the Appellant the licence sought. He stated that absence of a KS number was just an excuse both NEMA and KEBS used to deny the Appellant a licence because in 2007, NEMA informed the Appellant that it would call for tenders in the newspapers after receiving a KS number from KEBS and in the absence of a KS number from KEBS, NEMA would use an international KS number.
12. In the end, Mr. Patel stated that he was not aware that anybody else had been issued with the kind of licence the Appellant was seeking from NEMA.
13. The gist of Mr. Walubengo's submissions for the Appellant was that the Appellant had tendered evidence which showed that it met all the requirements for the licence sought but NEMA had not communicated to the Appellant the fate of its application. He further stated that NEMA had powers to supervise and coordinate all environmental conservation matters under sections 9 (2) of EMCA and therefore, NEMA should not wait for decisions made by another agency, in this case KEBS, before making a decision. Therefore, by denying the Appellant the licence sought, NEMA had failed to perform an administrative function.

14. On his part, Mr. Mereka of Mereka & Company Advocates who chose not to call any witnesses submitted for the Respondent that under Regulation 9 of Legal Notice No. 131, there was a prescribed format to be followed in presenting an application for a licence of the kind sought, including a requirement that a KS number of the product be stated and that applicants submit, along with their applications, empirical evidence supporting use and effects of the substance on the environment (Regulation 9(e)).
15. Mr. Mereka further submitted that under Regulation 7 of the Environmental Management and Co-ordination (Fossil Fuel Emission Control) Regulations issued as Legal Notice No. 131 of 2006, NEMA could approve a substance to be used as a fuel catalyst if, in its opinion, the substance improves fuel economy, enhances combustion and reduces harmful emissions but that NEMA could not make a decision on these matters if it was not satisfied that the Appellant's product has been standardized and that the only agency that could satisfy NEMA that the product would meet the specified requirements was KEBS. Further, he submitted that when KEBS wrote to NEMA stating that there was no KS number for the product on 3rd July 2007, it laid emphasis on the performance of the product. Subsequently, NEMA wrote to the Appellant on 28th August 2008 stating that the Appellant needed to demonstrate to the industry 'the environmental, economic and advantage for acceptance' of its fuel catalyst additive as a treatment technology and that during the trials and demonstrations, NEMA should be invited to verify so that in future, the Authority could recommend the product to the industry. However, the Appellant never conducted the expected trials.
16. The Tribunal has carefully considered the grounds of appeal, evidence tendered for the Appellants, submissions made by Counsel for the parties and the applicable law, specifically, the Environmental Management and Co-ordination (Fossil Fuel Emission Control) Regulations issued as Legal Notice No. 131 of 2006, made under EMCA. Basically, the Tribunal is being asked by the Appellant to find that NEMA, or more specifically, NEMA's Director General has refused to grant it a licence to import, deal in and supply a fuel catalyst additive in Kenya, to declare that the Respondent's refusal to issue it with a licence to import into Kenya a liquid fuel catalyst additive is illegal and to direct the Respondent to issue the Appellant with the licence sought. To the contrary, the Tribunal has found as follows:
17. The Appellant applied to NEMA for a licence for a liquid fuel catalyst additive that would permit it to import, deal in and supply the substance in Kenya. That application was prompted by NEMA's request for expression of interest for the supply of a fuel catalyst contained on the Daily Nation of 6th July 2007. It was clearly stated in NEMA's request that an eligible firm, such as the applicant in this case, would be required to "*Demonstrate that the product being offered will be able to treat fuels* and ensure that the internal combustion engines that are using fossil fuels meet the emission standard stipulated under the First Schedule of the Fossil Fuel Regulations, 2006" [emphasis added]. In the absence of a Kenyan standard for the product, as confirmed by KEBS in its communication to NEMA by letter dated 3rd July 2007 which was submitted to the Tribunal by the Appellant, emphasis would be laid on the performance of the product after tests. Both of these requirements called for testing of the product to determine its

efficacy. However, it is not denied that the Appellant failed to submit samples of its product for testing as required by both NEMA in its call for expression of interest and by KEBS's letter aforementioned. Therefore, in the Tribunal's considered view, the Appellant came to the Tribunal prematurely before meeting NEMA's requirement for testing.

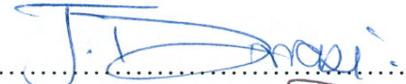
18. Further, it is noted that in its call for expression of interest conveyed through the Daily Nation of 6th July 2007, NEMA clearly indicated that the expression of interest was pursuant to the Environmental Management and Co-ordination (Fossil Fuel Emission Control) Regulations issued as Legal Notice No. 131 of 2006. As an interested party, the Appellant was expected to be familiar with requirements of the Legal Notice, whose copy it did include in its appeal bundle to the Tribunal. Regulation 7 authorizes NEMA to approve a substance to be used as a fuel catalyst if, in its opinion, the substance improves fuel economy, enhances combustion and reduces harmful emissions. NEMA's opinion could be informed by KEBS's issuance of a KS number or its registration or certification of the product for use in the country. NEMA's opinion could also be informed by positive results of efficacy tests of the products. In the absence of both of these, the Tribunal cannot find that NEMA declined or refused to licence the Appellant's product. The Tribunal notes that the oil market is a sensitive one and therefore, it is not likely to accept a fuel catalyst without proven efficacy tests that NEMA requires and in this respect, NEMA cannot be faulted for taking a precautionary approach. While it is NEMA's responsibility to implement Legal Notice No. 131 of 2006, it is prudent for it to consult lead agencies with specialized expertise on the subject.
19. Further, in view of the evidence that there was, in fact, communication between the Appellant and NEMA, NEMA did not decline or refuse to respond to the Appellant's application for a licence. In addition to informal discussions which the Appellant's witness stated to have had with NEMA, there are letters from the Appellant and written responses in the form of letters from NEMA. For example, in response to the Appellants letter of 28th August 2008, NEMA wrote, informing the Appellant that it needed to demonstrate to the industry 'the environmental, economic and advantage' for acceptance of the Appellant's catalyst as a treatment technology. That letter was not followed up with action on the part of the Appellant. Before then NEMA had written to KEBS on 15th December 2006 and on 18th May 2007 asking for Kenya standards on fuel catalysts in order to make a decision on the matter but KEBS wrote on 3rd July 2007 informing NEMA that there was no Kenyan standard to a fuel catalyst additive. While NEMA awaited action on the part of the Appellant and KEBS, KEBS even wrote to the Appellant's parent company asking it to advise on the relevant standards on fuel additives to help make a decision on the Appellant's matter and while there was no response, the Appellant did not indicate it endeavored to follow up the matter with its parent company to facilitate action by NEMA. Therefore, the Tribunal finds that NEMA did not decide not to respond to the Appellant as alleged.
20. The Tribunal also notes that the Appellant did not come to it with clean hands. While KEBS and NEMA were trying to ensure due diligence in the process of approving the

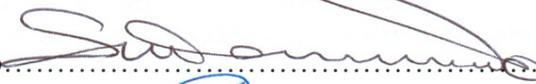
Appellant's product and required the Appellant to provide a Kenyan KS number for the product or a KS number of the product in the parent company, the Appellant did, in its letter dated 3rd July 2007, quote a KS number of fuels to be treated by the proposed catalyst instead of that of the catalyst itself. This, in the Tribunal's view, was an attempt by the Appellant to mislead both KEBS and NEMA and it is legally unacceptable.

21. For the reasons explained, the Tribunal also finds that NEMA had not objected to or rejected the Appellant's application for a licence to import, deal in and supply a fuel catalyst additive. Evidence tendered by the Appellant indicates that the application was still under consideration by NEMA and that at the time the Appellant came to the Tribunal, it had been required by NEMA to, among other things, submit samples for testing of the product to provide basis for its approval. It is therefore open to the Appellant to fulfill the requirements of NEMA in order for NEMA to make a decision on its application.
22. For the reasons explained, the Tribunal hereby, unanimously, dismisses the appeal with no order as to costs.
23. Attention of parties is drawn to section 130 of EMCA.

DATED and DELIVERED at Nairobi this 8th day of December 2009.

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

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

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

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

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