



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**E & L C CASE NO. 120 OF 2014**

**BRIDGE GATE HOLDING LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

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

**DOMINIC KIBICHO KARANJA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a plaint dated **2<sup>nd</sup> June, 2014** the plaintiff instituted the suit herein against the defendants seeking to, inter alia, permanently restrain the second defendant from carrying out any quarrying or ballasting activity on **L.R NO. Mweiga/Thung'are/Block 1/Kamiru/197** for as long as his slaughter house and poultry processing plant is operational.
2. Simultaneously with the plaint, the plaintiff filed the notice of motion dated **2<sup>nd</sup> June, 2014** seeking to restrain the 2<sup>nd</sup> defendant from doing the activities sought in the plaint pending the hearing and determination of the application and the suit.
3. During the pendency of the suit and the application, the defendants filed notices of preliminary objections to the suit and the application. The first notice of preliminary objection was filed by the 1<sup>st</sup> defendant. It is dated **20<sup>th</sup> June, 2014**. The second one was filed by the 2<sup>nd</sup> defendant on **5<sup>th</sup> September, 2014** dated **2<sup>nd</sup> September, 2014**.
4. Both objections challenge the jurisdiction of this court to hear and determine this suit. The notice of preliminary objection dated 2<sup>nd</sup> September, 2014 also contends that the Plaintiff has no cause of action against the 2<sup>nd</sup> defendant.
5. On **24<sup>th</sup> November, 2014** directions were taken that the two notices of preliminary objection would be disposed of by way of written submissions. Consequently, advocates for the respective parties filed submissions which I have read and considered.

**Submissions by the 1<sup>st</sup> defendant**

6. In the submissions filed on behalf of the 1<sup>st</sup> defendant, reference is made to **Section 125** of the Environmental Management and Coordination Act (**EMCA**) as read with **Section 129(2)** there under and argued that matters pertaining to the decisions of the Director General or the Authority (**NEMA**) should be heard by the Tribunal (**NET**). It is conceded that this court has appellate jurisdiction over the decision

of those organs or institutions.

7. It is argued that EMCA gives certain rights and liabilities and has a special procedure for enforcing those rights. In this regard, it is submitted that the law (EMCA) does not provide a direct route of approaching the Environment & Land Court. Referring to the case of the **County Government of Nyeri v. National Environment Management Authority; Nyeri H.C ELC No. 243 of 2013** where it was, *inter alia*, held:-

**“Section 13 of Environment and Land Court (E& LC) presupposes that the E & LC does not have exclusive and original jurisdiction as the Tribunals, that were not abolished have jurisdiction to hear and determine disputes in accordance with the Act of Parliament that donates the jurisdiction to them while the E & LC has appellate jurisdiction over them.”**

8. Further reference is made to the case of **Republic v. National Environment Management Authority (2011) e KLR** where the Court of Appeal observed:-

**“Section 125 (c) and (d) of EMCA provides for who can be a member of a Tribunal and they are lawyers with professional qualifications in environmental law and two persons who have demonstrated exemplary academic competence in the field of environmental management. The Tribunal is therefore a specialized body that is acquainted with environmental issues and should have been given first option to consider the matter....”**

9. Further reference is made to the case of **Mohamed Ali Salim & 2 others v. Municipal Council of Mombasa & another Mombasa HCC No. 169 of 2011** where **H.M Okwengu J.** (as she then was) stated:-

**“The plaintiffs ought to have proceeded under 41(6) by appealing to the Liaison Committee set out under section 7 of the Physical Planning Act. Only then can the plaintiffs come to the high Court in dealing with disputes concerning approval of change of user under the Physical Planning Act.....Appellate and not original.”**

### **Submissions by the 2<sup>nd</sup> defendant**

10. In the submissions filed on behalf of the 2<sup>nd</sup> defendant, it is submitted that **Section 125** of EMCA establishes the National Environment Tribunal (NET) as a specialized Tribunal to deal with environment issues.

11. It is pointed out that in this matter, the plaintiff is aggrieved by the 1<sup>st</sup> defendant's decision to award the 2<sup>nd</sup> defendant a licence to operate a quarry in a plot adjacent to premises where he carries his poultry slaughter business. In the light of the foregoing, it is submitted that the plaintiff should have preferred an appeal to the tribunal to address his grievance and not the High Court.

12. Counsel for the 2<sup>nd</sup> defendant argues that the High Court only comes into such disputes where the decision of the tribunal is appealed from. In that regard he refers to **Section 130** of EMCA which provides as follows:-

**“Any person aggrieved by a decision or order of the tribunal may, within thirty days of such decision or order appeal to the High Court.....”**

13. Counsel for the 2<sup>nd</sup> defendant argues that **Section 130** of EMCA provides a guide to the High Court on the kind of orders it can make to wit, confirm, set aside, vary the decision or order in question; remit the proceedings to the tribunal with such instructions...for further consideration report... or evidence as the court may deem fit to give; exercise any powers which would have been exercised by the tribunal in the proceedings in connection with which the appeal is brought or make such other order as it may deem just including any order as to costs of the appeal or earlier proceedings in the matter before the tribunal.

14. Counsel further argues that from the provisions of the said section of the law (Section 130 of EMCA), it is clear that the law has provided for a clear process of appealing the decisions of the Tribunal.

15. It is submitted that the Section makes it clear that the jurisdiction of the High Court is limited to hearing appeals from the tribunal. Counsel makes reference to the clauses “remit the proceedings to the Tribunal, exercise such powers which could have been exercised by the tribunal” to argue that the tribunal is the first point of call.

16. Reiterating the contention that this court has no jurisdiction to entertain the dispute herein as the court of the first instance, counsel argues that since this is not an appeal; the suit and the application herein are bad in law. In support of the foregoing contention he has referred to the cases of **County Government of Nyeri v. National Environment Management Authority; Nyeri H.C ELC No. 243 of 2013 and Nakumatt Holdings Ltd vs. National Environment Management Authority, Nairobi HCCA No.616 of 2005.**

17. On whether the plaintiff has any cause of action against the 2<sup>nd</sup> defendant, it is submitted that the licence to carry out the impugned project was issued to Kuri Investment Ltd, which is the project proponent.

18. Wondering on which basis the plaintiff instituted the current suit against the 2<sup>nd</sup> plaintiff, counsel for 2<sup>nd</sup> defendant argues that as a Limited Liability Company, the project proponent (Kuri Investment Ltd) can sue or be sued on its own name. Referring to among other cases, **Amos Tum Kiptoo and others vs. P.M Wandabwa & others...** where it was held:-

**“The Board Members are agents of the company and its principal is known. To sue Board members in their personal capacities is totally unnecessary and will only vex them and expose them to waste of precious time and legal costs....the net result is that the P.Os are hereby sustained and upheld. I hereby do strike out the 1<sup>st</sup>-10<sup>th</sup> defendants i.e the entire Board Members as defendants and parties in this suit with costs;”**

19. Counsel has submitted that a case filed against an individual director of a company is superfluous and as such cannot be sustained. He submits that the presence of the 2<sup>nd</sup> defendant in this suit is a misjoinder.

20. Maintaining that the suit is bad in law, counsel urges the court to strike it out with costs to the defendants.

### **Submissions by plaintiff**

21. In the submissions filed on behalf of the plaintiff, it is contended that **under Section 129(1)** of EMCA, matters in respect of which an appeal may be preferred to the Tribunal are refusal to grant or transfer a licence; imposition of any condition; limitation on a licence; revocation, suspension or variation of licence; the amount required to be paid as a fee under the Act; imposition of an environmental restoration order. It is submitted that the current suit is not in respect of any of those matters. To that extent the Section is said to be inapplicable to the current suit.

22. **Section 129(2)** is also said to be inapplicable to the matters raised in the current suit. The section provides:-

**“unless otherwise expressly provided in this Act, where this Act empowers the Director General , the Authority to make decision, such decisions of the Authority to make decision, such decisions may be subject to an appeal to the tribunal in accordance with such procedure as may be established by the tribunal for that purpose.”**

23. The Current dispute is said to be not purely between the plaintiff and 1<sup>st</sup> defendant but a dispute arising from the pollution by the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant is said to have been enjoined in the suit

for having licensed the 2<sup>nd</sup> defendant to carry out quarrying activities long after licensing the plaintiff to operate a slaughter house and a poultry processing plant on the adjacent parcel of land.

24. The 1<sup>st</sup> defendant is said to have failed to demonstrate that the issues raised in this suit are subject to an appeal in accordance with the procedure contemplated under **Section 129(2)** of EMCA. The 1<sup>st</sup> defendant is also said to have failed to demonstrate that the procedure contemplated in the said Section of the law exists. Without proof of existence of that procedure, it is submitted that the court cannot speculate that the procedure exists.

25. The authorities cited by the defendants in support of their case are said to be distinguishable. Counsel for plaintiff maintains that **Section 129 of EMCA**, on which the authorities are premised, is not applicable in the circumstances of this case.

26. Counsel argues that under Article **162 sub-article 2(b)** of the Constitution of Kenya 2010 (hereinafter “the Constitution”) as read with **Section 13 (1) and (2)** of the Environment & Land Court Act, 2011 (hereinafter E & LC Act) this court has both original and appellate jurisdiction to hear and determine matters concerning environment and land.

27. Contending that the preliminary objections herein are based on technicalities, counsel refers to **Article 159** of the Constitution and submits that this court is obliged to determine matters brought before it without undue regard to technicalities.

### **Analysis and determination**

28. From the pleadings and the prayers sought in this suit, it is clear that the dispute relates to the 1<sup>st</sup> defendant’s decision to grant a licence to the 2<sup>nd</sup> defendant to carry out its project which the plaintiff objects to on the grounds that it is likely to adversely affect its project.

29. Whereas the licensed developer in respect of the impugned project is a limited liability company, the plaintiff decided to sue the 2<sup>nd</sup> defendant in his individual capacity as opposed to the company, which in law has a separate existence from its owners.

30. In determining whether the plaintiff’s case is maintainable as against the 2<sup>nd</sup> defendant, I adopt the decision in the case of **Amos Tum Kiptoo & others v. P.M Wandabwa & others** (supra) and declare that the 2<sup>nd</sup> defendant is not a proper party in this suit.

31. On whether this court has jurisdiction to hear and determine the dispute herein, having read the provisions of **Section 129(2)**, the cases cited in support of the defendants’ case and being of the view that the plaintiff’s suit is in all fours challenging the decision of the 1<sup>st</sup> defendant to issue licence to the 2<sup>nd</sup> defendant to carry out the impugned decision, I find and hold that the procedure of challenging that decision is that provided under **Section 129(2)**.

32. Concerning the plaintiff’s contention that there is no evidence that the procedure for approaching the tribunal contemplated under the said section exists, being the one wanting the court to rely on that fact to defeat the defendants’ Preliminary Objections, the burden for proving none existence of that procedure lies with him. See Section 107 of the Evidence Act, Cap 80 Laws of Kenya.

33. **Section 129(2)** of EMCA aforementioned provides as follows:-

**“Unless otherwise expressly provided in this Act, where this Act empowers the Director General or the Authority or Committee of the Authority to make decision, such decision may be subject to an appeal to the Tribunal in accordance with such procedure as may be established by the Tribunal for that purpose.”**

34. It is clear from the afore stated provision of the law, that the decision of the 1<sup>st</sup> defendant is subject to the procedure stated therein namely, an appeal to the tribunal. **Section 130** provides an avenue for a second appeal to this court should a party to the appeal to the tribunal not be satisfied with the decision of the Tribunal.

35. From the foregoing statement of the law, there is no doubt that the law does not contemplate a situation where this court would be seized of the dispute herein as a court of first instance.

36. The upshot of the foregoing is that the suit before this court is premature. It is also un maintainable against the 2<sup>nd</sup> defendant on account of misjoinder. Since the suit raises pertinent issues of law and fact, I direct that subject to the procedure contemplated in **Section 129(2)**, the same be transferred to the NET for purposes of being heard and determined on merit.

37. The costs of prosecuting the notices of preliminary objections herein are awarded to the defendants. The 2<sup>nd</sup> defendant is also awarded costs of defending the suit up to this stage.

**Dated, signed and delivered at Nyeri this 27<sup>th</sup> day of February, 2015**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Wahome for the plaintiff

Mr. Wachira holding brief for Mr. Gitonga for the 1st defendant

No appearance for the 2nd defendant

Lydiah – Court Assistant