



**Simiyu & another v National Environment Management Authority & another; Maheri (Purported Intervener) (Environment & Land Case 47 of 2021) [2022] KEELC 2288 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 2288 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 47 OF 2021**

**EO OBAGA, J**

**APRIL 28, 2022**

**BETWEEN**

**CLEOPHAS BARASA SIMIYU ..... 1<sup>ST</sup> APPLICANT**

**CALEB LUVAGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

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

**HUNAN INTERNATIONAL LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SAMWEL MAHERI ..... PURPORTED INTERVENER**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 5<sup>th</sup> January, 2022 in which the Appellants/ Applicants seek the following orders:-
  - a) Spent
  - b) A conservatory order be issued preventing the 2<sup>nd</sup> Respondent Hunan International Ltd from reopening its quarry (known as Hunan Quarry) situated at Ndabarnach Area in Uasin Gishu County until the hearing and determination of this Application.
  - c) An order that the 2<sup>nd</sup> Respondent's Quarry (known as Hunan Quarry) situated at Ndabarnach Area in Uasin Gishu County remain closed and should not resume operations until the hearing and final determination of Eldoret Elc Appeal No. 47 of 2021 that is pending in this honourable court.



- d) An order restraining National Environment Management Authority (NEMA) from licencing or in any way allowing the 2<sup>nd</sup> Respondent's quarry (known as Hunan Quarry) that is situated at Ndabarnach in Uasin Gishu County, until the hearing and determination of Eldoret ELC Appeal No. 47 of 2021 that is pending in this Honourable court.
  - e) A conservatory order that during the pendency of Eldoret ELC Appeal No. 47 of 2021, the National Environment Tribunal should not amend, modify, tamper with, or in any way interfere with the Judgment it delivered on 1/10/2021 in NET Appeal No. 4 of 2020 that is the subject of the said appeal.
  - f) An order of stay for further proceedings in the National Environment Tribunal in NET Appeal No 4 of 2020, until the hearing and final determination of Eldoret ELC Appeal No. 47 of 2021 that is pending in this honourable court.
  - g) Costs of this Application be in this Appeal.
2. The Applicants had filed an appeal at the National Environment Tribunal (NET) being Tribunal Appeal No. 4 of 2020 (Cleopas Barasa Simiyu and another –vs- National Environment Management Authority & 2 others). The appeal was triggered by the quarrying activities being undertaken by the 2<sup>nd</sup> Respondent at Ndabarnach area of Uasin Gishu County.
  3. The Applicants' appeal before NET was dismissed for having been filed out of the statutory period of 60 days provided for under the *Environmental Management and Co-ordination Act* of 1999 (EMCA). The Applicants then moved to this court and filed an appeal against the judgment of NET. The Applicants subsequently filed the present application.
  4. The Applicants contend that when the 2<sup>nd</sup> respondent was served with the present application, its lawyers moved back to NET and filed an application in which they asked NET to amend the judgment. The Applicants argue that if the NET is allowed to amend the judgment it will render their appeal nugatory and an academic exercise as it is the judgment, which is the subject of the appeal.
  5. The Applicants further argue that the 2<sup>nd</sup> Respondent is intent on resuming quarrying activities before the appeal which has been filed is heard and determined. The Applicants argue that while the appeal before NET was going on, quarrying activities had been stopped and that if the quarrying activities were to resume, this will result in Environmental degradation.
  6. The Applicants contend that the 1<sup>st</sup> Respondent may support the re-opening of the quarry as it has done before and that the 1<sup>st</sup> Respondent is not neutral. The Applicants further argue that the Environmental Impact Assessment (EIA) licence which was transferred to the 2<sup>nd</sup> Respondent on 10<sup>th</sup> January, 2020 was in contravention of the EMCA as there was no public participation in the process leading to issuance of the EIA licence and the subsequent transfer to the 2<sup>nd</sup> Respondent.
  7. The Applicants' application was opposed by the 2<sup>nd</sup> Respondent based on a replying affidavit sworn on 17<sup>th</sup> January, 2022. The 2<sup>nd</sup> Respondent contends that the Applicants' application is frivolous, misconceived and devoid of merit. The 2<sup>nd</sup> Respondent states that it moved to the NET to have an omission of the word "not" included in the judgment something which the NET is allowed to do under Rule 42(3) of the National Environment Tribunal Procedure Rules of 2003. The 2<sup>nd</sup> Respondent denies that its application to the NET was as a result of the appeal by the Applicants.
  8. The 2<sup>nd</sup> Respondent argues that resumption of its quarrying activities was automatic following the dismissal of the Appeal by the Applicants which was before the NET and that the Applicants are out to frustrate its activities which is causing huge financial losses.



9. I have carefully considered the Applicants' application as well as the opposition to the same by the 2<sup>nd</sup> Respondent. I have also considered the submissions by the Applicants as well as those of the 2<sup>nd</sup> Respondent. It is apparent that the present application was mainly brought due to the 2<sup>nd</sup> respondent's application before the NET.
10. The main issue for determination in this application is whether the NET should be barred from altering its judgment. A reading of paragraph 30 of the judgment shows that there was an accidental omission of the word "not" in between the word "need" and "go".
11. Rule 42(3) of The National Environmental Tribunal Procedure Rules, 2003 provides as follows:-
- "Clerical mistakes in any document recording a direction or decision of the Chairman or the tribunal, or errors arising in such a document from an accidental slip or omission, may be corrected by the chairman by certificate under his hand or by the Tribunal."
12. There was therefore nothing wrong in the 2<sup>nd</sup> Respondent moving the NET to have the accidental omission rectified. There was no sinister motive in the application and this correction would not prejudice the Applicants in any way or render the Applicant's appeal nugatory. Other than the correction of the accidental omission, and perhaps the issue of costs, there are no other pending proceedings before the NET to call for stay of the same.
13. The other issue for determination is whether the 2<sup>nd</sup> Respondent should be restrained from issuing any licence to the 2<sup>nd</sup> Respondent. It is not disputed that NEMA had issued an EIA licence to Zou Changwei on 14<sup>th</sup> July, 2014. This EIA Licence changed hands by way of transfer until 10<sup>th</sup> January 2020 when the licence landed on the 2<sup>nd</sup> Respondent. There is no any other licence which NEMA is likely to process as to call for an order restraining them from processing it in favour of the 2<sup>nd</sup> Respondent. There is therefore no basis for grant of an order to restrain NEMA from issuing licences to the 2<sup>nd</sup> Respondent.
14. The Applicants are seeking an order barring the 2<sup>nd</sup> Respondent from resuming operations at the quarry site until hearing and determination of the appeal filed herein. There are no provisions for application of stay pending hearing of an appeal under EMCA. The Applicants have already filed an appeal against the decision of the NET. Section 130(2) of EMCA provides as follows: -
- "No decision or order of the Tribunal shall be enforced until the time for lodging of an appeal has expired, or where the appeal has been commenced until the appeal has been determined" (Emphasis added)
15. It is clear from the provisions of section 130(2) of EMCA that it provides an automatic stay where an appeal has been commenced. It will therefore be superfluous to grant stay in the face of those clear provisions. The upshot of this is that I find that the Applicants' application is devoid of merit. The same is hereby dismissed with costs to the 2<sup>nd</sup> Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

**E. OBAGA**

**JUDGE**

**In the virtual presence of;**



Prof. Sifuna for Appellant.

Ms. Mungai for 2<sup>nd</sup> Respondent.

Court Assistant -Albert

**E. OBAGA**

**JUDGE**

**28<sup>TH</sup> APRIL, 2022**

