



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**LAND AND ENVIRONMENTAL LAW DIVISION**  
**CIVIL SUIT (ELC) NO.529 OF 2010**

**CECILIA WANJIKU NJOROGE.....PLAINTIFF**  
**VERSUS**  
**NATIONAL ENVIRONMENTAL**  
**MANAGEMENT AUTHORITY (NEMA).....1<sup>ST</sup> DEFENDANT**  
**PETER GATHECA NGANGA**  
**T/A JUPITER ANIMAL FEEDS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Cecilia Wanjiku Njoroge is the plaintiff in this suit. National Environmental Management Authority (NEMA) is the 1<sup>st</sup> defendant whilst Peter Gatheca Nganga is the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant is the registered owner of two parcels of land known as LR No. Sigona/1056 and Sigona/1057. The two parcels of land neighbor LR No. Sigona/1052, which is owned by the plaintiff, and where the plaintiff has set up her home.
2. The plaintiff is aggrieved that the 2<sup>nd</sup> defendant has set up an animal feeds factory within his aforementioned land without any environmental impact assessment being licensed by the 1<sup>st</sup> defendant. As a result of the animal feeds processing activities, the plaintiff and her family are exposed to an offensive pungent smell, high volumes of dust, noise made by the processing machinery, and high traffic of factory workers hovering around.
3. The plaintiff's demands and a notice of intention to sue has been ignored and she has therefore come to this court seeking an order of permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendant; a declaration that the 2<sup>nd</sup> defendant's land parcels are only fit for residential and or agricultural purposes; general damages for nuisance; and costs of the suit.
4. Filed contemporaneously with the plaint, is a chamber summons dated 4<sup>th</sup> November, 2010, in which the plaintiff seeks an interim order of injunction restraining the 2<sup>nd</sup> defendant from constructing a factory or processing animal feeds, and or continuing any activities of a processing or industrial nature, on his aforementioned land; and an interim injunction restraining the 1<sup>st</sup> defendant from issuing a licence or allowing the activities by the 2<sup>nd</sup> defendant on the aforementioned land.
5. The 2<sup>nd</sup> defendant has filed a replying affidavit in which he maintains that this court lacks jurisdiction to try the suit, as there is a specialized tribunal, empowered under the Environmental Management and Coordination Act No.8 of 1999 (EMCA), to deal with matters raised by the

plaintiff. Secondly, the 2<sup>nd</sup> defendant maintains that the application before the court is defective, and thirdly, that the construction works were completed before these proceedings were filed. The 2<sup>nd</sup> defendant maintains that he has obtained all necessary approvals from the Kikuyu Town Council and has further obtained an environmental impact assessment report which is pending before NEMA for consideration for the issuance of an environmental impact assessment licence. The 2<sup>nd</sup> defendant further maintains that the plaintiff's suit is actuated by bad faith as there are 6 other industries within the neighbourhood manufacturing diverse products including animal feeds.

6. The 2<sup>nd</sup> defendant has raised a preliminary objection to the hearing of plaintiff's chamber summons on the following grounds:

(i) That the High Court lacks jurisdiction to entertain the suit in view of the provisions of Section 129 of the Environmental Management & Co-ordination Act No.8 of 1999 as it creates a specialized Tribunal to deal with cases such as the one before the honourable court.

(ii) That the suit is not maintainable in so far as it seeks to curb the powers of NEMA in considering, reviewing and approval of EIA applications, a power expressly donated by statute and which the court cannot take away through restraining orders.

(iii) That the suit is otherwise premature in so far as an EIA license is yet to be issued by NEMA.

7. Pursuant to an agreement by the parties, written submissions were duly filed upon which this court is invited to rule on the preliminary objection.

8. For the 2<sup>nd</sup> defendant, it was submitted that the plaintiff's claim consists of environmental grievances that the plaintiff has with the 2<sup>nd</sup> defendant's project. These complaints have already been forwarded to NEMA through its District Environmental Officer, Kiambu. The environmental impact assessment process is still going on. It is therefore argued that this court cannot in exercise of its jurisdiction injunct NEMA from carrying out powers donated to it by Statute. It is further argued that Section 129 of the EMCA creates a specialized Tribunal to deal with environmental issues. Although Section 129 of EMCA does not oust the jurisdiction of the High Court, that Section read with Section 130 of EMCA, provides for the Tribunal as a court of first instance, and the High Court as the appellate court, to which appeals against decisions of the Tribunal can go. Referring to Section 11 of the Civil Procedure Act, it was argued that the Tribunal being the court of first instance, it was the best forum to handle the dispute.

9. For the plaintiff, it was argued that Section 129 (1) and (2) of EMCA was clear on disputes which should be entertained by the Tribunal. It was submitted that the grievance of the plaintiff did not fall under the category stipulated under Section 129(1) of EMCA. It was maintained that the High Court has statutory powers under the Civil Procedure Act and Rules, to halt or order a cessation of illegal activities which have the potential of harming or exposing a party to continuous harm. It was pointed out that Section 129 of EMCA does not provide the Tribunal with jurisdiction to issue an injunction. It was submitted that the acts and omissions complained of by the plaintiff were not captured under Section 129(1) of EMCA. It was submitted that the plaintiff has sought the intervention of the 1<sup>st</sup> defendant without success and in seeking the High Court's intervention, the plaintiff was merely re-awakening the 1<sup>st</sup> defendant to its role which it had failed to do.

10. Further, it was pointed out that the court cannot deem the entire suit as not maintainable, as the plaintiff has a legitimate claim against the 2<sup>nd</sup> defendant. It was argued that the defendants cannot claim that the suit is premature because the 2<sup>nd</sup> defendant had already commenced operation of the factory without relevant licences. The plaintiff further pointed out that the approval of change of user for the 2<sup>nd</sup> defendant's property was irregular. He noted that although no environmental impact assessment had been approved, the buildings plans were approved and building commenced even before the EIA licence was granted. The court was urged to find that it had jurisdiction to hear the matter and overrule the

preliminary objection.

11. I have considered the preliminary objection and the written submissions. The main issue is whether in view of Section 129 of EMCA this court lacks jurisdiction to deal with this dispute. Section 129(1) of EMCA states as follows:

**“129(1) Any person who is aggrieved by: -**

- (a) a refusal to grant a licence or to the transfer of his licence 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.**

12. It is evident from the above that Section 129(1) gives powers to the Tribunal to hear disputes in which an applicant for a licence under the EMCA is aggrieved by a decision either rejecting his application for a licence, imposing conditions, revoking the licence or imposing an environmental restoration order against him. In the present case, the plaintiff is not an applicant for a licence under EMCA. He cannot therefore appeal to the National Environment Tribunal under Section 129(1). The plaintiff's claim as is evident from the plaint includes a claim for general damages for nuisance. While it is true that the National Environment Management Authority has powers under the Act to approve an environmental impact assessment application, the plaintiff contends and this has been conceded to by the 2<sup>nd</sup> defendant that no license has been issued as yet. Therefore, the plaintiff cannot move to the High Court under Section 130 of EMCA as there is no decision of NEMA to challenge. Does that mean that the plaintiff has no remedy for his grievances?

13. In my view, the High Court is a court with original jurisdiction. It can therefore at this stage deal with the issue of the nuisance which is allegedly being created. Other issues will be dependent on the facts established and cannot therefore be subject of a preliminary objection. For the above reasons, I do overrule the preliminary objection and order that the hearing of the application shall proceed, with liberty to the defendants to raise any appropriate issues in response to the application.

**Dated and delivered this 22<sup>nd</sup> day of June, 2011**

**H. M. OKWENGU**  
**JUDGE**

In the presence of: -  
Maina for the plaintiff  
Advocate for the defendants absent  
B. Kosgei - Court clerk