



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. PETITION NO. 44 OF 2017**

**SHILOAH INVESTMENTS LIMITED.....PETITIONER**

**VERSUS**

**NATIONAL ENVIRONMENT TRIBUNAL.....1ST RESPONDENT**

**ATTORNEY GENERAL.....2ND RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY**

**LAKEVIEW RESIDENTS ASSOCIATION.....2ND INTERESTED PARTY**

**SAUNDERS CLOSE RESIDENTS ASSOCIATION.....3RD INTERESTED PARTY**

**KITISURU RESIDENTS ASSOCIATION.....4TH INTERESTED PARTY**

**FARASI LANE RESIDENTS ASSOCIATION.....5TH INTERESTED PARTY**

**MITINI LIMITED.....6TH INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. On 21/7/2016, the petitioner, Shiloah Investments Limited, filed in the High Court a petition dated 15/7/2016 challenging, *inter alia*, the jurisdiction of the National Environment Tribunal (**the Tribunal**) to hear appeals brought under Section 129 of the Environmental Management and Co-ordination Act (the **EMCA**) by persons who were not privy to impugned decisions of the National Environment Management Authority (**NEMA**). Secondly, the petitioner challenged the constitutionality of the automatic stop order which came into force upon filing an appeal under Section 129 (4) of EMCA. (It is to be noted that subsequent to the filing of the petition, Section 129(4) of EMCA was amended to abolish the automatic stay).

2. The petitioner prayed for the following orders :

**a. A declaration that Sections 129(1) and (2) of the Environmental Management and Co-ordination Act, 1999 as amended and as interpreted by the 1st respondent Tribunal in its Ruling contravenes the Constitution and null and void to the extent of the contravention.**

**b. A declaration that Sections 199(4) of the Environmental Management and Co-ordination Act, 1999 as applied by the 1st respondent tribunal to automatically issue a stop order without hearing any party prior to issuing the stop order contravenes the Constitution and is invalid, null and void to the extent of the contravention.**

**c. A declaration that the 1st respondent tribunal is not the court envisaged under Article 70 of the Constitution and any act or omission by the Tribunal in the purported capacity of such court contravenes the said Article 70 and Article 162(2)(b) of the Constitution and is therefore null and void;**

**d. A declaration that the 1st respondent tribunal’s interpretation of Articles 70 and 169 of the Constitution in Tribunal Appeal No. 163/2015 to confer upon itself original jurisdiction over Constitution as read together with Section 13 of the Environment and Land Court Act 2011 (as amended) and is null and void to the extent of the contravention;**

e. An order of prohibition prohibiting the respondent from taking cognizance of, entertaining, hearing, conducting, proceeding with and/or determining the purported Tribunal Appeal No. NET 163/2015; Lakeview Residents Association, Saunders Close Residents Association, Kitisuru Residents Association, Farasi Lane Residents Association and Mitini Estate Limited v National Environmental Management Authority (NEMA) & Shiloah Investments Limited or any other purported appeal in variation, substitution, subtraction, addition, akin to or identical thereto.

f. An order of certiorari removing to this honourable court for purposes of being quashed the proceedings before the National Environmental Tribunal at Nairobi in the purported Tribunal Appeal No. NET 163/2015; Lakeview Residents Association, Saunders Close Residents Association, Kitisuru Residents Association, Farasi Lane Residents Association and Mitini Estate Limited v National Environmental Management Authority (NEMA) & Shiloah Investments Limited together with the ruling delivered therein on the 4th day of July, 2016.

g. Costs of the Petition

h. Any other reliefs the honourable court may deem fit and expedient to grant.

3. On 30/10/2017, Mwita J issued an order transferring the petition to the Environment and Land Court (**the ELC**) at Nairobi. The file was subsequently transferred to the ELC and assigned an ELC Number.

### **Factual Background**

4. The petitioner is a developer of commercial properties in Kenya. At all material times, it procured an environmental impact assessment licence (**EIA licence**) from NEMA to erect a commercial and recreational development on Land Reference Number 2951/434 situated in Kitisuru, Nairobi. Aggrieved by NEMA's grant of the EIA licence to the petitioner, the interested parties lodged an appeal at the Tribunal, seeking revocation of the licence and stoppage of the development. The petitioner herein raised a preliminary objection to the appeal on the ground that the Tribunal had no jurisdiction to entertain and or hear the appeal and would be acting *ultra vires* its statutory mandate if it were to entertain the appeal. In a ruling in Tribunal Appeal Number NET 163/2015, delivered on 4/7/2016, the Tribunal ruled that it had jurisdiction to entertain the appeal. It stated thus:

**“There is no limitation in either Section 129(1) or (2) of EMCA that would preclude an appeal presented by persons against whom NEMA has not made a decision but are, nevertheless, aggrieved by NEMA's decision to issue an EIA Licence permitting a development that in their view, has the potential to negatively affect them and their environment”**

5. The Tribunal proceeded to set down the appeal for hearing. Aggrieved by the ruling, the petitioner brought the present petition.

### **Petitioner's Case**

6. The case of the petitioner was that Article 162 provides for Kenya's system of courts and underpins establishment of courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. The said Article establishes the Environment and Land Court as the court with original jurisdiction over environmental disputes, with jurisdiction to enforce the constitutionally guaranteed environmental rights in Kenya.

7. The petitioner further contended that the Tribunal is a statutory body established as an appellate tribunal over decisions of NEMA, and in order to remain compliant with the Constitution, the Tribunal ought to confine itself to hearing and determining matters which constitute appeals over the decisions of NEMA, lodged by persons against whom the said decisions have been made, not by third parties who claim to be adversely affected by the said decisions. The petitioner further contended that Article 159 of the Constitution makes a clear distinction between “**courts**” and “**tribunals**” and the two terms cannot be used interchangeably to confer the status of a court on the Tribunal.

8. Lastly, the petitioner contended that the Tribunal purported to invoke the provisions of Section 129(4) of EMCA to issue a purported “stop order” against the petitioner's project without hearing the petitioner and in contravention of the petitioner's right to a fair hearing under Articles 47 and 50 of the Constitution and the provisions of the Fair Administrative Actions Act, 2015. Consequently, the petitioner urged the court to grant the prayers sought in the petition.

### **Case of the 1st & 2nd Respondents**

9. The 1st respondent did not file a response to the petition. The 2nd respondent filed a statement of grounds of opposition in which he contended, *inter alia*, that, the petition offended the doctrine of presumption of constitutionality of an Act of Parliament; the petitioner failed to prove how the impugned sections violated the Constitution; the petitioner failed to specifically outline how its rights were violated: the petitioner failed to demonstrate the prejudice it is likely to suffer; Section 129 (1) (a) of EMCA is not unconstitutional and is based on the public interest in environmental governance and accords to international standards geared towards prevention of adverse consequences to the environment; Article 70 of the Constitution provides for redress in the event of threat to the right to a clean and healthy environment; and the petition is an abuse of the process of the Court.

### **Case of the 1st Interested Party**

10. The 1st interested party opposed the petition through a replying affidavit sworn by its director of legal services, Ms Irene Kamunge. She stated that the spirit and letter of Section 129 of EMCA is clear on the jurisdiction of the Tribunal. She argued that Section 129 of EMCA confers jurisdiction upon the Tribunal in relation to actions and omissions of NEMA. She further contended that the right of appeal under Section 129 of EMCA is granted to “anyone” and not just a project proponent because projects affect the general public. She added that as

long as enforcement of a right stems from a decision of NEMA, the Tribunal is the right forum of appeal. The 1st interested party further contended that the appeal before the Tribunal did not relate to a general environmental grievance that would fall under Section 3 of EMCA.

11. Secondly, the 1st interested party contended that the “stop order” was a creature of the statute and does not require a pre-trial or interlocutory hearing and the same was anchored on the pre-cautionary principle. She added that it came into force automatically upon the filing of an appeal at the Tribunal.

### **Case of the 2nd – 6th Interested Parties**

12. The 2nd, 3rd, 4th, 5th and 6th interested parties opposed the petition through a replying affidavit sworn by Mr Andrew Mukite Musangi. He contended that the 2nd, 3rd, 4th and 5th interested parties are registered resident associations whose members are owners and residents of the area that is adjacent to and contiguous to the suit premises, L R 291/44. The 2nd – 6th interested parties contended at paragraphs 25, 26 and 27 that the questions before the Tribunal are within the exclusive jurisdiction of the Tribunal because they challenge the process through which the EIA Licence was procured.

### **Submissions**

13. Mr Agwara, counsel for the petitioner submitted that Articles 23 and 70 of the Constitution and Section 3 of EMCA contemplate existence of a court with original jurisdiction as opposed to an appellate tribunal. He argued that original jurisdiction to hear general environmental grievances is reserved for the ELC. Counsel contended that the Tribunal had opened its doors to all disputes

14. Counsel further argued that the petitioner opted to file a petition as opposed to an appeal because it is questioning the constitutionality of the Tribunal’s jurisdiction to entertain general environmental grievances by parties who were not privy to NEMA decisions. Counsel argued that Section 129 of EMCA only applies to parties to NEMA’s decisions and the redress forum for the general public is the ELC. Lastly, Mr Agwara conceded that the framework on automatic stay has since been repealed.

15. Mr Charles M Mutinda, principal Litigation Counsel, for the 2nd respondent submitted that the ELC has both original and appellate jurisdiction. He argued that Parliament did not intend the ELC to have exclusive jurisdiction because it gave it both original and appellate jurisdiction. He relied on the case of **Edward Mwaniki Gaturu & Another v Attorney General and 3 others (2013) eKLR**.

16. Counsel further submitted that the 2nd to 6th interested parties properly fall within the definition of “person aggrieved” with the issuance of the EIA licence hence the Tribunal is properly seized of the appeal.

17. Lastly, counsel submitted that the framework on automatic stop order properly accorded with international standards on environmental governance and is intended to prevent adverse consequences to the environment.

18. Mr Erastus Gitonga, counsel for the 1st interested party submitted that Section 3 of EMCA relates to constitutional rights to a clean and healthy environment while Section 129 of EMCA relates to challenges against statutory decisions taken by NEMA under EMCA. One such decision is the grant of an EIA licence. Secondly, Mr Gitonga submitted that Section 129 confers the right of appeal to “anyone” and not just a project proponent. He argued that the rationale behind the conferment of the right of appeal to anyone aggrieved by NEMA decisions is that those decisions affect the general public.

19. Counsel further submitted that tribunals are part of Kenya’s court system by dint of the provisions of Article 169(1) (d). He added that Section 13 of the ELC Act recognizes tribunals and gives the ELC appellate jurisdiction over tribunals.

20. Mr Andrew Musangi, counsel for the 2nd to the 6th interested parties submitted that the 2nd to 6th interested parties were persons aggrieved by the EIA licence and were entitled to file the appeal. Counsel further submitted that Article 162(2) of the Constitution gives parliament the mandate to determine the jurisdiction of the ELC and Parliament had given the ELC appellate jurisdiction over disputes relating to decisions taken by NEMA within the framework of EMCA.

### **Determination**

21. I have considered the petition herein, the responses thereto, and the parties’ respective submissions. I have also considered the relevant constitutional and statutory framework and jurisprudence on the key questions in this petition. Three questions fall for determination in this petition. The first question relates to the constitutionality of Section 129 (1) and (2) of EMCA. The second question is whether the National Environment Tribunal has jurisdiction to entertain an appeal under Section 129 of EMCA from an affected person who was not privy to an impugned decision by NEMA. The third question relates to the constitutionality of the automatic stay order which existed under Section 129(4) of EMCA at the time of filing the present petition. I will deal with the three questions in the order in which they are itemized.

22. The petitioner contends that Section 129(1) and (2) of EMCA is unconstitutional because it vests in the National Environment Tribunal jurisdiction to adjudicate environmental disputes. It is the view of the petitioner that the court contemplated under Articles 23 and 70 of the Constitution is the ELC hence conferment of jurisdiction upon the Tribunal is unconstitutional. The Petitioner further contends that the Tribunal is not a court within the meaning contemplated by the Constitution.

23. It would therefore be necessary to briefly outline the constitutional framework relevant to the issue at hand. Article 162(2) (b) of the Constitution obligates Parliament to establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Article (62)(3) empowers Parliament to determine the jurisdiction and functions of that court.

24. Chapter Ten of the Constitution sets out Kenya's system of courts. The superior courts are defined as the Supreme Court, the Court of Appeal, the High Court and the Courts contemplated in Article 162(2) vested with jurisdiction to hear and determine disputes relating to: (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to land.

25. The Subordinate Courts are defined in Articles 169(1) to include: (a) the magistrates courts; (b) the Kadhis' courts; (c) any other court or **local tribunal** as may be established by an Act of Parliament, other than the courts established as required by Article 162(2). Article 169(2) mandates Parliament to enact legislation conferring jurisdiction, functions and power on subordinates as defined under Article 169(1).

26. It is of significance to note that the Constitution has at Article 169(1) defined local tribunals established by Parliament as subordinate courts forming part of Kenya's court system. It is therefore my view that, the petitioner's contention that a tribunal is not a court is incorrect. I say so because Articles 169(1) recognizes local tribunals as established by Parliament as subordinate courts forming part of Kenya's court system. In light of the above language of the Constitution, it is the finding of this Court is that the National Environment Tribunal is a subordinate court within the meaning of Article 169 of the Constitution.

27. Secondly, the question relating to the exclusivity of jurisdiction in environmental and land disputes was a subject of determination by the Court of Appeal in **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (2017)eKLR**. The key question for determination in the said consolidated appeals was whether it is within the power of Parliament to confer, by legislation, jurisdiction on magistrate courts to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to land. The Court of Appeal held thus:

**“ 70. Contrast the expression reserved for the exclusive jurisdiction” with the expression “falling within the jurisdiction”. It is a pointer, in our view, that it was never intended that disputes relating to employment and labour relations and the environment and the use and occupation of, and title to land would be “reserved for the exclusive jurisdiction” of specialized courts under Article 162(2). It is also noteworthy that In Re The Matter of The Interim Independent Electoral Commission (2011) eKLR, the Supreme Court of Kenya in construing Article 165(3) of the Constitution that confers jurisdiction on the High Court to hear any question respecting the interpretation of the Constitution noted that although the High Court was entrusted, under that Article, the mandate to interpret the Constitution, that empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction”**

28. In my view, the jurisdiction granted to the Tribunal under EMCA is to be interpreted within the above pronouncement of the Court of Appeal on the subject of exclusivity of jurisdiction of the Environment and Land Court. It is therefore my finding that there is no unconstitutionality in Parliament's conferment of jurisdiction to the National Environment Tribunal under Section 129 of EMCA to dispose appeals challenging NEMA decisions.

29. I now turn to the second issue which relates to the jurisdiction of NEMA to entertain appeals from the general public. Section 129(1) of EMCA provides as follows:

#### **Appeals to the Tribunal**

##### **1. Any person who is aggrieved by-**

- a. The grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;**
- b. The imposition of any condition, limitation or restriction on the persons licence under this Act or its regulation;**
- c. The revocation, suspension or variation of the person's licence under this Act or its regulations;**
- d. The amount of money required to pay as a fee under this Act or its regulation;**
- e. The imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, May within sixty days after the occurrence of the event against which the Tribunal in such manner as may be prescribed by the Tribunal**

30. Mr Agwara, counsel for the petitioner, contended that under Section 129 of EMCA, the Tribunal is only empowered to hear appeals against decisions of NEMA. He contended that Section 129 of EMCA does not donate to the Tribunal jurisdiction to hear general grievances by the general public. He added that the Tribunal is not the court contemplated under Article 70 of the Constitution.

31. It is to be noted from the framework in EMCA that NEMA is a statutory body vested with the mandate to exercise general supervision and co-ordination over all matters relating to the environment. It is the principal instrument of government in the implementation of all policies relating to the environment. It performs various statutory mandates within the framework of EMCA. Among these function is the issuance of EIA licences upon satisfaction that the applicant has complied with the mandatory requirements of the law.

32. My interpretation of Section 129 of EMCA is that it provides a framework within which any person aggrieved by decisions made by NEMA may ventilate the grievance. The words used by Parliament in Section 129(1) are **“any person aggrieved by”**. In my view, Parliament took cognizance of the fact that injury to the environment affects the general public and provided a forum of redress for any person who may be aggrieved by a decision of NEMA. The contention that only persons who were privy to the impugned decision have a

right of appeal to the Tribunal is in my view not correct.

Consequently, my finding on the second issue is that the Tribunal has jurisdiction to entertain appeals from the general public in relation to decisions by NEMA. Indeed, in the present case, the 2nd – 6th interested parties were aggrieved by the EIA licence granted to the petitioner and they lodged an appeal against that decision within the framework of Section 129(1) of EMCA.

33. The last broad issue relates to the constitutionality of the automatic stay order. Prior to the enactment of Act No. 4 of 2018, Section 129(4) of EMCA offered an automatic stay order against NEMA decision upon the filing of an appeal at the Tribunal. Parliament in its wisdom has, through Act No. 4 of 2018 repealed that statutory framework. Consequently, an aggrieved party has the duty to convince the Tribunal that a stay order is merited whereupon the Tribunal would make a considered decision on whether or not to grant a stay. In light of the amendments, a pronouncement on the constitutionality of a statutory framework which has since been repealed will only serve an academic purpose. The court will therefore not make a determination on that question. It suffice to note that the said framework has since been repealed.

34. Lastly, objection was taken to the filing of the present petition as opposed to the filling of an appeal against the ruling of the Tribunal. That objection, in my view, has merit. The issues raised in the present petition are issues which fall within the appellate jurisdiction of this court under EMCA and under the ELC Act. There is absolutely no convincing reason why the petitioner ignored the forum of appeal as provided under EMCA.

35. The totality of the above findings is that the petition herein is unmerited and the same is dismissed. However, because the petition was filed at a time when litigants were still grappling with unsettled questions relating to the jurisdiction of our various dispute resolution fora, each party shall bear own costs of the petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Agwara Advocate for the petitioner

Mr Nderu Advocate for the 2nd – 6th Interested parties

June Nafula - Court Clerk