



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND**

**AT NYERI**

**ELC NO. E002 OF 2021**

**LAIKIPIA NORTH NATURAL RESOURCES**

**SUPPLIERS & BUILDERS LIMITED.....PLAINTIFF**

**-VERSUS-**

**LOATA SAND DEALERS SACCO SOCIETY LIMITED.....1<sup>ST</sup> DEFENDANT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY....2<sup>ND</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. By plaint dated 4<sup>th</sup> February, 2021 the Plaintiff sued the Defendants seeking the following reliefs:

*(a) A declaration that the weighbridge/tool erected by the Defendants, their agents and their activities at Ilpolei and managed by the 1<sup>st</sup> Defendant with the authority of the 2<sup>nd</sup> Defendant is illegal and be removed forthwith.*

*(b) A permanent injunction to restrain the Defendants by themselves, their agents and whosoever is dealing with them from erecting a weighbridge/toll than the one managed by the County Government of Laikipia, levying cess or any other*

*monies on behalf of the Defendants or their agents, issuing stickers or receipts to sand dealers unless they possess a valid license from the relevant authority.*

*(c) Costs of the suit.*

2. The gist of the Plaintiff's claim was that the 2<sup>nd</sup> Defendant had arbitrarily and illegally barred sand harvesting in Laikipia North sub-county but had unlawfully authorized the 1<sup>st</sup> Defendant to supervise sand harvesting and charge levies from sand dealers. The particulars of the alleged illegality were enumerated in paragraph 7 of the plaint as follows:

*(a) Authorizing the 1<sup>st</sup> Defendant to manage sand dealings in Laikipia North Sub-county without a valid current license from the issuing authority.*

*(b) Forcing sand dealers to pay the 1<sup>st</sup> Defendant cess when the same is legally collected by the County Government of Laikipia at Naibor weighbridge.*

*(c) Subjecting members who are not members of the 1<sup>st</sup> Defendant to pay levies at the Ilpolei weighbridge which is managed by the 1<sup>st</sup> Defendant.*

*(d) Failing to pay relevant taxes from the amount of money levied at Ilpolei weighbridge.*

*(e) Requiring non-members of the 1<sup>st</sup> Defendant to pay for sticker and official receipt contrary to the terms of the license.*

*(f) Denying the Plaintiff's legitimate expectation of earning a fair and playing ground by the Defendants.*

(g) *Unjust enrichment by the 1<sup>st</sup> Defendant.*

## **B. THE 1<sup>ST</sup> DEFENDANT'S PRELIMINARY OBJECTION**

3. The record shows that the 1<sup>st</sup> Defendant filed a notice of preliminary objection dated 9<sup>th</sup> March, 2021 objecting to the jurisdiction of the court to entertain the suit on the following grounds:

(a) *That under **Section 129 of the Environmental Management and Co-ordination Act**, a person aggrieved with the grant or a refusal of grant of a license by the National Environment and Management Authority (NEMA) may appeal to the National Environment Tribunal.*

(b) *That if dissatisfied with the decision or order of the Tribunal that one can appeal to the Environment and Land Court as per **Section 130 of the Environmental Management and Coordination Act**.*

(c) *That the matter before court stems from rejection, denial and/or refusal by NEMA to grant the Plaintiff a license.*

(d) *That the Plaintiffs have not exhausted the remedies beforehand and therefore the pleadings by the Plaintiffs should be dismissed in their entirety with costs.*

## **C. DIRECTIONS ON SUBMISSIONS**

4. On 19<sup>th</sup> April, 2021 it was directed that the 1<sup>st</sup> Defendant's preliminary objection shall be canvassed through written submissions. The parties were granted 14 days each to file and exchange their respective submissions. The record shows that the 1<sup>st</sup> Defendant filed its submissions on 10<sup>th</sup> May, 2021 whereas the Plaintiff filed its submissions on 19<sup>th</sup> May, 2021.

## **D. THE ISSUES FOR DETERMINATION**

5. The court has perused the plaint dated 4<sup>th</sup> February, 2021 and the 1<sup>st</sup> Defendant's notice of preliminary objection dated 9<sup>th</sup> March, 2021. The court is of the opinion that the sole issue for determination is whether the 1<sup>st</sup> Defendant's preliminary objection is well founded.

## **E. ANALYSIS AND DETERMINATION**

6. The court has considered the material and submissions on record on the preliminary objection. The gist of the 1<sup>st</sup> Defendant's preliminary objection is that the Plaintiff ought to have sought redress before the National Environment Tribunal (*NET*) and if it was still aggrieved by its decision then approach the court in its appellate jurisdiction. The 1<sup>st</sup> Defendant's contention was that the Plaintiff was essentially aggrieved by denial of a license by the 2<sup>nd</sup> Defendant hence such denial is appealable to *NET* in the first instance under **Section 129 of the Environmental Management and Co-ordination Act 2019 (EMCA)**.

7. The 1<sup>st</sup> Defendant relied upon the following authorities in support of its preliminary objection namely; **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] EA 696**, **Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] KLR 1**; and **Angela Mbugua and 4 Others v KQ Holdings Limited and 2 Others [2020] eKLR**.

8. The Plaintiff, on the other, contended that **Section 129 of EMCA** was inapplicable in the circumstances since there was no evidence on record to demonstrate that it had ever applied for a license from the 2<sup>nd</sup> Defendant and that such application was denied. It was contended that the preliminary objection as framed was speculative and unfounded. It was further submitted that the points raised were not pure points of law since they were predicated upon disputed and unproven factual matters.

9. The Plaintiff relied upon the cases of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (*supra*)**; **Oraro v Ombaja [2005] 1KLR 141**; and **George Kamau Kimani and 4 Others v County Government of Transzoia and Another [2014] eKLR** in opposition to the preliminary objection and urged the court to dismiss it with costs.

10. **Section 129(1) of EMCA** stipulates as follows:

“Any person who is aggrieved by—

(a) a refusal to grant a licence or permit, or the transfer of a licence or permit, 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 the his licence under this Act or regulations made thereunder;

**(d) the amount of money required to be paid 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.**

11. Although a person who is aggrieved by the refusal to grant him a license or permit by NEMA is required to first lodge his appeal with NET, the requisite factual foundation must be established before such party can appeal to NET. The court has perused the entire plaint dated 4<sup>th</sup> April, 2021. There is no averment that the Plaintiff ever applied for a license or permit from the 2<sup>nd</sup> Defendant and that the same was denied. The 1<sup>st</sup> Defendant’s statement of defence dated 8<sup>th</sup> March, 2021 does not allege that the Plaintiff ever sought a license from the 2<sup>nd</sup> Defendant and that it was denied. Similarly, the 1<sup>st</sup> Defendant’s replying affidavit sworn by John Mpopoki Sakayian does not make any such allegation. It only claims that the Plaintiff is unlicensed. Being an unlicensed dealer, even if true, is not the same thing as being denied a license. So, an unlicensed dealer who has never applied for a license cannot lodge an appeal before NET under **Section 129(1) of EMCA**.

12. In the case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributor Limited** (*supra*) a preliminary objection was described as follows:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points of law by way of preliminary objection does nothing but unnecessarily increases costs and on occasion confuses issues.”**

13. The court is thus of the opinion that the objections raised by the 1<sup>st</sup> Defendant cannot properly form the basis of a preliminary objection as known to law. Neither the Plaintiff nor the Defendants pleaded any matters bringing the Plaintiff’s suit within the ambit of **Section 129 (1) of EMCA**. Accordingly, the court finds that the preliminary objection was not well taken. The court is consequently inclined to overrule the same.

**F. CONCLUSION AND DISPOSAL**

14. The upshot of the foregoing is that the court finds no merit in the 1<sup>st</sup> Defendant’s preliminary objection. Accordingly, the 1<sup>st</sup> Defendant’s notice of preliminary objection dated 9<sup>th</sup> March 2021 is hereby overruled. Costs of the preliminary objection shall be in the cause.

It is so ordered.

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 28TH DAY OF JULY 2021.**

In the presence of:

No appearance for the Plaintiff

Mr. Larpei for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

.....

**Y. M. ANGIMA**

**ELC JUDGE**