



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Judicial Review 54 of 2011

REPUBLIC.....APPLICANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY

EX-PARTE APPLICANT: HAKIKA TRANSPORT SERVICES LIMITED

JUDGMENT

1. The Exparte Applicant runs a Quarry Division which operates a Quarry on Plot No. Kwale/Mazeras/1001, Kwale County. The operation of a quarry is an activity that must be licenced by the Respondent under the provisions of the Environmental Management & Coordination Act, 1999 (EMCA).

2. By a restoration and closure order dated 29th April 2011 the Respondent directed the Exparte Applicant to stop and close its Quarrying Activities. It is that order that has triggered these proceedings in which the Applicant seeks the intervention of this court as follows-

“(a) That an order of certiorari do issue to remove into this Honourable Court for purposes of being quashed the acts, orders, decisions, directives and or demands made by the Respondent against the ex parte Applicant vide it’s letters dated April 29, 2011 directing restoration and closure of the ex parte Applicant’s quarrying activities on Plot No. 1001 Mazeras/Kwale and any other decisions, orders, directives and or demands made further and or precedent and or leading to the aforesaid letter dated April 29, 2011.

(b) That an order of Prohibition do issue to prohibit the Respondent, by itself, it’s servants, agents, representatives and or employees from unilaterally ordering the closure, restoration and or reduction and or in any other manner whatsoever interfering with the ex parte Applicant’s quarrying activities on Plot No. Kwale/Mazeras/1001 and or enforcing the acts, decisions, orders, directives and or demands contained in the Respondent’s letter dated April 29, 2011 and or any other decision, orders, directives and or demands made further and or precedent and or leading to the aforesaid letter dated April 29, 2011 without granting audience and in put from the ex parte Applicant, the already identified stakeholders and or the lead agent in respect of the same.

(c) That an order of prohibition do issue to prohibit the Respondent from unilaterally and without granting any audience to the ex parte Applicant and or the relevant lead agency to respond to any issues arising, canceling, suspending and or in any other manner whatsoever interfering with the ex parte Applicant's Environmental Impact Assessment Licence No. 0003798 and or the subsequent permits, licenses, and or authorizations to emit noise and vibrations in excess of the permissible levels at the ex parte Applicant's quarrying activities on Plot No. Kwale/Mazeras/1001.

(d) That an order of mandamus to issue to compel and or directing the Respondent to renew and or re-issue the Environmental Impact Assessment License and or permits Licenses, and or authorities to emit noise and vibrations in excess of the permissible levels at the ex parte Applicant's quarrying activities on Plot No. Kwale/Mazeras/1001."

3. A synopsis of the dispute is this. The Respondent issued the Applicant an Environmental Impact Assessment Licence dated 13th July 2009 to carry on "**development of Quarrying Activities.**" The licence was subject to certain conditions and valid for a period of 24 months from 13th July 2009. The licence was therefore due to lapse on 13th July 2011 or thereabouts.

4. Complaints about the Quarrying activities were raised by various individuals and public institutions. Acting on this and following an inspection carried out by Respondent, the Respondent served the Applicants a Restoration and cessation Order dated 11th May 2010. The Quarrying activities were to be stopped with immediate effect.

5. That Restoration and Cessation order was lifted by the Respondent through a letter dated 9th August 2010. It is the position of the Applicant that the Respondent made the lifting order after the Respondent was satisfied that corrective and remedial measures had been undertaken.

6. The Applicant contends that it was taken by surprise when it was served with the closure and restoration order of 29th April 2011. But the Respondent thinks that its action was justified in view of the fact, it says, that the Applicant failed to address the environmental issues raised in the restoration and improvement orders brought to the Applicants attention.

The Applicants Case

7. The Applicant submits that the Respondent acted without jurisdiction and in contravention of procedure. It is argued that by virtue of the provisions of Regulation 2 of The Environmental Management and Co-ordination (Noise & Excessive Vibration Pollution) Control Regulations (herein 'The Noise & Excessive Vibration Regulations') the lead agency in respect to quarrying activities is The Mines and Geology Department. That the Respondent acted without exhibiting the written approval of the Director General of the Respondent and without consulting with the lead Agency.

8. The Applicant also argues that the order was issued on the basis of complaints which it had been fully addressed and hence the lifting order of 9th August 2010. That the Respondent, the local community, the lead agency and the Applicant worked together towards reaching a solution prior to the lifting of the order.

9. That having addressed and remedied all the issues raised in early complaints the order of 29th April 2011 was unjustified and exposed the Applicant to double jeopardy.

10. That connected to this, it is submitted, the Respondent is barred by the doctrine of estoppel from revisiting a complaint which had been resolved in the absence of new complaints. For this proposition the Applicant relied on the decisions in **R –Vs- Kenya Revenue Authority Exparte Aberdare Freight Services Ltd & 2 Others [2000]2KLR 530 and R –Vs- AG & exparte Waswa & 2 Others [2005]1KLR 280.**

11. The Exparte Applicant is of the view that the Respondent failed to follow procedure set out in

legislation. That the failure by the Respondent to serve and/or notify the Exparte Applicant with any further and/or any improvement Notice deprived the Exparte Applicant an opportunity of addressing these new concerns. This, to the Applicant, contravenes the provisions of Regulation 26 of The Noise and Excessive Vibration Regulations. The Applicant referred court to the decision of **Hypolito Cassiano De Sunza –Vs- Chairman & Members of The Tanga Town Council (1961) CA 377** for the argument that where statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe the procedure to be followed, that procedure must be observed.

12. The court was also shown Gazette Notice No. 8466 dated July 20th 2011 as proof that the terms of office of the Chairman and members of National Environment Tribunal (the Tribunal) had expired and the tribunal was not properly constituted when the matters raised in respect hereof arose. It is for this reason that the matter is before this court and not the Tribunal.

13. Guided by the provisions of Order 53 Rule 4 of The Civil Procedure Rules (which give effect to Section 9 of The Law Reform Act) the Court will not consider other grounds raised by the Applicant which were not set out in the statutory statement or the further affidavit of 2nd April 2012 of Hassan Ali which were filed with leave of the court.

The Response

14. The Respondent argues that it is the lead agency with the express mandate granted by Section 9 of EMCA to exercise general supervision and coordination over all matters relating to the environment. That it is in carrying out this mandate that it issued the restoration and closure order, which the Respondent submits was issued in conformity with the provisions of EMCA.

15. It is the position of the Respondent that its action was justified as the Applicant had failed to address environmental concerns brought to its attention in various restoration and improvements orders. The Respondent cited the orders dated 11th May 2010, 24th May 2010 and 29th June 2010. The Respondent further cites the Improvement Notice of 31st January 2011.

16. It is the submission of the Respondent that if dissatisfied with the decision, the Applicant ought to have preferred an appeal against the decision to the Tribunal under the provisions of Section 130 of EMCA. The Respondent sought to rely on the decision in **Republic –Vs- Nema Exparte Sound Equipment [2011]eKL** for the proposition that where there is an alternative remedy, and in particular a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

17. It is also the argument of the Respondents that this court must weigh public interest *vis a vis* the rights of the Applicant. That if this court were to grant the orders sought then it would be counter to public interest as the health of the community living around the quarry is compromised by the quarry activities.

18. The Respondent was confident that the order of prohibition sought in prayer 2 of the application could not be granted as the decision of 29th April 2011 sought to be arrested by prohibition has already been made.

19. In respect to prayers 3 & 4 the Respondents firm position is that it has power donated by statute to issue, suspend revoke or re-issue Environmental Impact Assessment Licence and this court cannot direct or curb the manner in which it will exercise its discretion.

Issues for Courts Determination

20. These, in my view, are the issues I am required to determine

(i) ***Did the Respondent act contrary to the provisions of EMCA?***

- (ii) *Was the action of the Respondent in breach of the rules of natural justice and in bad faith?*
- (iii) *Related to (ii) was the Respondent decision a breach of the Applicants legitimate expectations?*
- (iv) *If the answers to any of the above is in the positive is Judicial Review the proper avenue for redress in the circumstances of this case?*

21. The decision under attack is the restoration and closure order dated 29th July 2011 and issued under Section 108 of EMCA. The order is reproduced in part-

*“The Managing Director,
Hakika Quarry,*

P.O. Box 30118,

MAZERAS

RE: RESTORATION AND CLOSURE ORDER OF QUARRYING ACTIVITIES

Your attention is hereby drawn to the following provisions of the Environment Management and Coordination (Noise and Excessive Vibration Pollution (Control) Regulations 2006 and the requirements of Article 69 of the Constitution of Kenya Sub Section 1(g) and 2 ...

The National Environment Management Authority has received numerous complaints from the public regarding the negative impacts associated to your quarrying activities at Mazeras area and this has been brought to your attention on several occasions by Environmental Inspectors as evidenced by restoration order Ref. NEMA/PDE/STOPORDER/Vol.2 dated 11th May 2010, minutes of 24th May 2010, 29th June 2010 and 27th July 2011. However, you have continued to contravene the environmental rights of the residents nearby your facility by causing excessive vibrations during explosives.

Based on the above and in exercise of the powers in Section 108 of the Environmental Management and Coordination Act 1999, and the Constitution of Kenya Article 69(1.g), the Authority hereby orders you to;

- 1. STOP and CLOSE all quarrying activities at the site with IMMEDIATE effect.*
- 2. Restore the environment as near as it may be to the state in which it was before quarrying started.*

Take note that notwithstanding any approval, permit or license granted under this Act or any law in force in Kenya, this order takes precedence and you are required to comply. Failure to comply with this Order will attract litigations against you based on the aforementioned legal provisions.

You have a right of appeal to the National Environmental Tribunal.

B. M. LANGWEN

For: DIRECTOR GENERAL”

22. Section 108(1) of EMCA gives NEMA the Authority to issue and serve an Environmental Restoration Order on any person. Under the provisions of Section 108(4) (a), (b), (c) & (d), the order may require a person on whom it is served to-

- (a) *Take such action as will prevent the commencement of continuation or cause of pollution.*

(b) **Restore land, including the replacement of soil, the replanting of trees and other flora and the restoration as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land or sea as may be specified in the particular order.**

(c) **Take such action to prevent the commencement or continuation or cause of environmental hazard;**

(d) **Cease to take any action which is causing or may contribute to causing pollution or an environmental hazard. (my emphasis)**

23. The contents of an Environmental Restoration order must specify the following (Section 109(1) of EMCA)-

(a) **the activity to which it relates;**

(b) **the person or persons to whom it is addressed;**

(c) **the time at which it comes into effect;**

(d) **the action which must be taken to remedy the harm to the environment and the time, being not more than thirty days or such further period as may be prescribed in the order within which the action must be taken.**

(e) **the powers of the Authority to enter any land and undertake the action specified in paragraph (d);**

(f) **the penalties which may be imposed if the action specified in paragraph (d) is not undertaken;**

(g) **the right of the person served with an environmental restoration order to appeal to the Tribunal against that order, except where the order is issued by a court of competent jurisdiction, in which case the right of appeal shall lie with superior courts.**

24. Although EMCA does not prescribe the procedure for issuing a restoration order, NEMA would be taking an administrative action and must observe the provisions of Article 47 of The Constitution on fair Administrative action. Article 47(1) and 47(2) provides as follows-

(1) **Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

(2) **If a right or fundamental freedom of a Person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

25. Even without the requirements of the Constitution, there is an implied duty of fairness attached to all administrative Acts. If one needs support for this proposition, then it is found in **Misc. Civil Application No. 769 of 2004 Republic –Vs- Attorney General & Another Exparte Waswa & 2 Oths [2005], KLR 280** in which Nyamu & Ibrahim JJ (*as they then were*) said (at page 286)-

“We also associate ourselves with Lord Mustills holding in the case of Doody –Vs- The Home Secretary (HL 1993) that where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair.”

26. It is common ground that NEMA had statutory authority under Section 108 of EMCA to issue the environment Restoration and Cessation order of 29th April 2011. This Court also finds that the Restoration and Cessation order satisfies the content requirement of Section 109 of NEMA as-

(a) **It specifies that the activity targeted is the Quarrying.**

- (b) *The Notice is address to The Managing Director Hakika Quarry, the owner of the quarry.*
- (c) *The Notice stipulates when the notice is to come into effect by requiring the Applicant to stop the activity with immediate effect.*
- (d) *The Applicant is advised of its right of appeal to the Tribunal.*

27. The history of the relationship between the Applicant and the Respondent shows that NEMA had on numerous occasions raised environmental concerns about the quarrying activities. Annexed to the Applicants affidavit are various letters exchanged between the two. Of importance is the stop order dated 11th May 2010 issued by NEMA.

28. So as to deal with the issues raised in that order the Applicant commissioned a Social Management Plan dated 28th May 2010 which acknowledged as follows-

“The following were identified as the main issues that are socially impacting on the local community.

- *Blasting impacts on community houses and institutions (structural compromise).*
- *Dust generated by the quarry.*
- *Noise and excessive vibrations.*
- *Safety threats posed by abandoned quarry sites.*
- *Lack of a clear Corporate Social Responsibility on the part of Hakika Transport Services.”*

This is an acknowledgement that the Applicant had breached the environment.

29. The plan then makes recommendations to address those issues. It was after reviewing this plan that NEMA issued the lifting order of 9th August 2010 but on certain conditions which included that-

“(1) The proponent shall ensure strict adherence to the Social Management Plan (SMP) developed throughout the project cycle ...

(11) The lifting of this restoration order shall not be taken as a statutory defense against any form of violation of any Environmental law or regulation.”

30. In the challenged notice of 29th April 2011 NEMA notes that the Applicant continued to contravene the environmental rights of the residents by causing excessive vibration during explosives. Whether NEMA was justified in taking this view involves probing the merit of the decision which this court will not concern itself with. That would be outside the purview of Judicial Review. The evidence presented by both sides demonstrates a history of considerable interaction between NEMA and the Applicant in which certain environmental breaches by the Applicant were discussed. The evidence is that NEMA had in the past issued improvement notices and Restoration Orders and had held consultative meetings to address the environmental challenges caused by the Quarrying Activity. On the evidence available, NEMA not only gave a hearing to the Exparte Applicant but had given it an opportunity to remedy the situation. It was against this backdrop that the final Order of 29th April 2011 was issued. That decision can hardly be said to be spontaneous and hasty.

31. The Exparte Applicant cannot take refuge in the lifting Order of 9th August 2010 as it would no doubt aware of the provisions of Section 109(4) of EMCA;

“An environmental restoration order shall continue to apply to the activity in respect of which it was served notwithstanding that it has been complied with.”

The Exparte Applicant was under a continuous duty to address the issues raised in the restoration order notwithstanding that it had been lifted.

32. In addition the Exparte Applicant did not take advantage of the review process offered by Section 110(1) EMCA;

“At any time within twenty-one days after the service of an environmental restoration order a person upon whom the order has been served may, by giving reasons in writing, request the Authority to re-consider the order.”

This, in my view, is not an idle provision. It gives the Exparte Applicant an early opportunity to question the procedure used or the decision reached by NEMA. This is intended to enhance the Administrative fairness of the process because NEMA can re-look at its decisions at an early opportunity. The Applicant gave no explanation why it never pursued this.

33. Then there is the complaint raised that the issuance of the order breached Regulations 25 and 26 of Noise & Excessive Vibration Regulations. This is subsidiary regulation made under EMCA which empowers an Environmental Inspector to issue an improvement notice or a closure notice. Under those Regulations The Environmental Inspector can only exercise this power with the Director-General of NEMA and in consultation with the relevant lead agency. The power to issue an improvement notice or closure notice under the regulations is, in my view, quite apart and different from the powers donated to the authority to issue Environmental Restoration orders under Section 108 of EMCA. The order of 29th April 2011 was issued pursuant to Section 108 and was issued under the hand of the Director-General himself. And although NEMA by virtue of Section 109 (3) of EMCA, may seek and take into account any technic, professional and scientific advice which it considers to be desirable for a satisfactory decision to be made on an environmental restoration order, it is not bound to seek such advise and is it certainly not required to consult the lead agency. The prerogative is to be exercised by NEMA alone and not in consultation or conjunction with the lead agency.

34. The decision I reach is that NEMA acted in conformity with procedural requirements of NEMA and the Constitution. It gave the Exparte Applicant a fair hearing and opportunity to take corrective action. When finally it made the decision to issue the Restoration and Cessation order of 29th April 2011, it gave written reasons therefor.

35. It is an alternative position of the Applicant that once the Respondent lifted the Restoration Order vide the letter of 9th August 2010, a legitimate expectation and estoppel arose in its favour. But is this really so? Quite to the contrary the lifting order itself unequivocally disabuses of any such expectation. Condition No. 11 states that-

“(11) The lifting of this Restoration Order shall not be taken as a statutory defense against any form of violation of any Environmental law or regulation.”

36. There was no promise that the lifting order would bar NEMA from questioning any breaches that occurred thereafter. Indeed if NEMA had made this promise then it would be acting *ultra vires* the provisions EMCA. I repeat the provisions of Section 109(4) of EMCA;

“An Environmental Restoration Order shall continue to apply to the activity in respect of which it was served notwithstanding that it has been complied with.”

A proponent served with a Restoration Order is bound to observe the contents of the order notwithstanding that it has been complied with or lifted following compliance. I attempt to illustrate this; if the proponent is ordered to adhere to the provisions regarding Noise and Excessive Vibrations, he cannot simply adhere to it in reaction to the order and then resume the very same breach once the order is lifted.

37. “An expectation whose fulfillment requires that a decision-maker should make an unlawful

decision, cannot be a legitimate expectation.” (**Wade & Forsyth, “Administrative Law” 10th Edition at page 450**). There could not have been a legitimate promise made by NEMA that the lifting order would insulate the Applicant from all future breaches in respect to the matters specified therein or generally.

38. The Exparte Applicants’ plea on double jeopardy and *res judicata* would fail for the same reasons that the Court has given for rejecting the argument on legitimate expectation. The order of 29th April 2011 was in respect to breaches that continued or happened after the lifting order of 5th August 2010. In addition I very much doubt that the plea of *res judicata* applies in these circumstances.

39. For these reasons all the prayers in the Motion would fail. But there are other reasons for declining prayers (b) & (c) which are in respect to prohibition. Prohibitory orders are prospective in nature. They seek to stop the making of a decision (**Nrb Civil Appeal No. 266 of 1996 Kenya National Examinations Council –Vs- Republic**). The decision to close the quarrying activity has already been made and there is nothing left to prohibit.

40. Prayer (d) is a request that this Court issues an order of mandamus to compel and/or direct the Respondent to renew and or re-issue an Environmental Impact Assessment Licence or authority to the Applicant. The law gives NEMA the discretion to issue, revoke, suspend or cancel an Environmental Impact Assessment Licence (Sections 58 and 67 of EMCA). Of course that discretion must be exercised within the dictates of the law. However, the discretion is with NEMA and an order of mandamus cannot be issued to command or compel it to reach a specific decision or carry out the discretion in a specific way.

41. The upshot is that the application fails in it’s entirety. I have reached this decision without having to decide whether or not the Exparte Applicant was entitled to resort to the process of Judicial Review because at the relevant time the Tribunal had not been properly constituted by the Minister. That question is now moot.

42. The application of 26th May 2011 is dismissed with costs.

Dated and delivered at Mombasa this 4th day of July, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Onyango for Exparte Applicant
Wabuoto for Respondent
Court clerk - Moriasi

F. TUIYOTT
JUDGE