



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CONSTITUTIONAL PETITION NO. 10 OF 2015

MOI'S BRIDGE QUARRY COMPANY LIMITED.....PETITIONER

VERSUS

NATIONAL ENVIRONMENT TRIBUNAL.....RESPONDENT

AND

CLEOPHAS BARASA SIMIYU.....1ST INTERESTED PARTY

FRANCIS ABUYEKHA.....2ND INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD INTERESTED PARTY

JUDGMENT

(A) INTRODUCTION

(1) Petitioner's claim

Moi's Bridge Quarry Company Limited (*hereinafter referred to as the petitioner*) has brought this petition against National Environment Tribunal (*hereinafter referred to as the respondent*) and Cleophas Barasa Simiyu, Francis Abuyekha and National Environment Management Authority (NEMA) hereinafter referred to as the Interested Parties claiming that 1st and 2nd Interested Parties on 26.2.2015 filed in the respondent Tribunal, Appeal No. NET 138 of 2015, a purported appeal in which they named the 3rd Interested Party herein as 1st respondent and the Petitioner herein as 2nd respondent. The reliefs sought in the appeal were that ***"The Company should stop its operations until the matter is heard in the environmental court and all matters raised in the attached copy be heard and that the community be compensated."*** That of the two appellants (now 1st and 2nd Interested Parties), only the 2nd appellant Francis Abuyekha signed the appeal as required by Rule 4 (3) of the National Environment Tribunal Rules of 2003 (LN No. 177 of 2003) while the 1st appellant Cleophas Barasa Simiyu did not sign the appeal, thereby violating the said Rule and which therefore invalidated his part of the appeal.

On 13.3.2015, the petitioner filed a reply to appeal as well as a preliminary objection against the said appeal stating that the appeal is incompetent for having been filed in clear contravention of section 129 of the Environmental Management and Co-ordination Act (EMCA); for being drawn as a suit for compensation and not an appeal against an identified decision of NEMA and that the same was

misconceived as there is no decision of NEMA being appealed against. The petitioner in the said reply and preliminary objection also challenged the Tribunal's jurisdiction, stating that the Tribunal has no jurisdiction to entertain this matter as by entertaining this matter the Tribunal will be clothing itself with jurisdiction it does not have and usurping the powers of the courts including this honorable court, as well as those of other institutions such as the Public Complaints Committee.

The petitioner in the said reply and preliminary objection also stated that the Tribunal also lacks jurisdiction to grant the reliefs sought in paragraph 6 of the said Appeal namely, awarding compensation or compensatory damages and that the appellants' purported appeal therein being a suit for compensation and not an appeal against an identified decision of NEMA in terms of section 129 of EMCA and Rule 3 of the National Environment Tribunal Rules 2003 is misconceived as there is no decision being appealed against, hence respondent Tribunal lacks jurisdiction to entertain it, as by entertaining it, the Tribunal will be usurping the powers of the courts including this honourable court and clothing itself with jurisdiction it does not have; hence all directions and orders so far made by it therein are null and void ab initio for want of jurisdiction.

The petitioners claim that on the same day, the said petition was filed, the respondent Tribunal through a Mr. J. K. Awuor one of its officer purportedly issued a stop order stopping the operations of the petitioners said Jaribu Kokoto Quarry. The said J. K. Awuor not being the chairman of the Tribunal in issuing the said stop order dated 26.2.2015 stopping the operations of the petitioners said Jaribu Kokoto Quarry acted ultra vires Section 129 of the Environmental Management and Co-ordination Act and also Rule 40 of the National Environment Tribunal Rules, 2003. That the said stop order violated the rules of natural justice as well as the right to a fair administrative action and right to fair hearing guaranteed in Articles 47 and 50 of the Constitution of Kenya 2010, having been made without giving the petitioner a hearing.

According to the petitioner, while all are supposed to be equal before the law and all parties to a dispute are supposed to be treated equal before a court or tribunal, the said stop order discriminated against the petitioner herein by being made Ex-parte without hearing the latter. That in granting issuing a final ex-parte stop order against the petitioner's quarrying activities as stated above, the Tribunal not only misinterpreted and misapplied Section 129(1) of The Environmental Management & Co-ordination Act of 1999 but also violated Articles 47 and 50 of the Constitution of Kenya, 2010. In the alternative, after the promulgation of the Constitution of Kenya, any law or legal provision, legislation or rule that purports to or whose effect is such as to grant automatic orders without a hearing and/or any evidence, such as Section 129(4) of the Environmental Management and Co-ordination Act, are unconstitutional and therefore null and void for being inconsistent with Article 47 and 50 of the Constitution. That on 23.3.2015, the Petitioner (the 2nd respondent therein) and the 1st and 2nd Interested Parties (the Appellants therein) filed in the respondent tribunal, a written consent seeking leave to withdraw the appeal and asking the court to lift the stop order the tribunal had issued therein. The said written consent bore the signatures and thumbprints of the appellants as well as the signature of the Advocates of the 2nd respondent (the petitioner herein) was on 7.4.2015 adopted as an order of the Tribunal and the appeal withdrawn and the stop order issued on 26.2.2015 lifted.

Contrary to the consent and orders made by the Tribunal on 7.4.2015 and without filing a formal application for setting aside or reviewing the said order, Cleophas Barasa Simiyu, the 1st appellant (the 1st Interested Party herein) on 24.4.2015 filed in the Tribunal a document disowning the said consent alleging that his signature and thumbprint were forged and that he has never signed the said consent hence insisted on going on with the appeal; whereupon the Tribunal summoned all the parties in the withdrawn appeal fixed the matter for mention on 22.5.2015. That on 22.5.2015, when the matter came up in the Tribunal, the Tribunal set aside the said consent order despite spirited opposition by the respondents and despite the insistence of Francis Abuyekha (who had signed the appeal and who had been present when the order was adopted) that the withdrawal was proper and that his co-appellant Cleophas Barasa Simiyu had willingly signed the consent in his presence. The Tribunal's setting aside of the said consent order not only contravened its own rules of procedure but was an affront to the law and the Constitution, in that:

a. it ignored the representations of Francis Abuyekha the only appellant who signed the appeal.

b. It violated the legal principles for setting aside consent orders.

c. It was ultra vires the powers given to it by the Environmental Management and Co-ordination Act and the Tribunals Rules, namely the National Environment Tribunal Rules, 2003.

d. It took away the Petitioner's legitimate expectation that the withdrawal having been by consent would stay.

e. The Tribunal failed to note that after the withdrawal of the appeal, it had become functus officio hence could not reconvene to revive the appeal.

f. There was no formal application to set aside the consent order.

g. The action of the Tribunal being an administrative tribunal and not a court of law violated Article 47 of the Constitution as to the Petitioner's right to a fair administrative action as well as Article 159(2)(c) as to promotion of alternative forms dispute resolution including reconciliation, medication, arbitration and traditional dispute resolution mechanisms in the exercise of judicial authority.

h. Failing to note that the said Cleophas Barasa Simiyu, the 1st appellant unlike Francis Abuyekha his co-appellant had not signed the appeal.

i. Failing to consider the submissions of the respondents that the allegations made by Cleophas Barasa Simiyu were very serious touching on criminality and perjury and needed to be referred to the police for investigations and a report thereon presented to the Tribunal for appropriate punitive action or directions.

j. Failing to afford the respondents a chance to cross-examine Mr. Cleophas Barasa who was on oath.

k. Reinstating a withdrawn appeal on mere allegations that were not supported by an affidavit.

The petitioner claims that the respondent Tribunal has through its irresponsible and reckless conduct abdicated its role as an impartial umpire and instead hijacked the proceedings, prosecuted the appeal and shown open bias against the petitioner thereby violating the principles of natural justice but also the tenets of the adversarial system of dispute settlement and that the respondent Tribunal has no jurisdiction to set aside its orders, as rule 20 of its rules of procedure (The National Environment Tribunal rules of 2003 L. N. No. 177 of 2003) only allows it to set aside directions and summons. The Tribunal being an administrative tribunal and not a court of law lacked jurisdiction to set aside a consent. That by entertaining an environmental dispute that was supposed to be filed in the Environment and Land Court, the respondent Tribunal usurped the powers of the Environment and Land Court and also violated Article 162 of the Constitution. The Tribunal having been established prior to 2010, when there were no specialized courts on environment should now realign its operations with the Constitution of Kenya, 2010 as well as the Environment and Land Court Act of 2012 (as amended).

The respondent contends that the Tribunal violated Rule 9(2) of its said rules of procedure namely The National Environment Tribunal Rules of 2003 L. N. No. 177 of 2003 by failing to invite the appellants to submit written observation and submissions on objections. It violated Rule 9(3) of the said Rules by proceeding with proceedings in the said appeal without first determining the 2nd respondent's (the petitioner herein) preliminary objection which was on jurisdiction; and by continuing to entertain the appeal and make orders when it has no jurisdiction in the matters raised by the appeal and when a preliminary objection to that effect had been raised by the petitioner.

That the respondent Tribunal has by its foregoing actions not only exceeded its powers and acted without jurisdiction but also conducted itself in a manner that was against the principles of Public Service stated in Article 232(1) of the Constitution of Kenya 2010, particularly Article 232(1)(a) which requires

high standards of professional ethics and Article 232(1)(c) as to impartially for administrative acts; as well as Article 159(2)(e) which requires courts and tribunals such as the National Environment Tribunal to, in exercising judicial authority, protect and promote the purpose and principles of the Constitution and guided by the principle that the purpose of the Constitution shall be protected and promoted. The fragrant violation by the respondent Tribunal, of the Constitution, Section 129 of the Environmental Management and Co-ordination Act, as well as the National Environment Tribunal Rules of 2003 L. N. No. 177 of 2003 as set out herein above has not only resulted in a grave miscarriage of justice, but has also violated the petitioner's constitutional rights, and requires this honourable court's intervention to uphold the law, protect the law and assert the principles of natural justice.

The petitioner *seeks* a declaration that the manner in which the respondent Tribunal has conducted Appeal No. NET 138 of 2015 has violated section 129 of the Environmental Management and Co-ordination Act as well as the National Environment Tribunal Rules of 2003 L.N. No. 177 of 2003. *Moreover*, a declaration that appeal No. NET 138 of 2015 having been withdrawn the respondent Tribunal had become *functus officio* hence lacked capacity to reinstate it. *Furthermore*, that under its rules of procedure namely The National Environment Tribunal Rules of 2003 L. N. No. 177 of 2003, the respondent Tribunal may only set aside its directions and summons, and has no power to set aside its orders *and that* Section 129(4) of the Environmental Management and Co-ordination Act 1999 is unconstitutional for being inconsistent with Articles 47 and 50 of the constitution of Kenya 2010, hence is and null and void to the extent of that inconsistency *and that* the stop order issued by the respondent Tribunal on 26.2.2015 is unconstitutional for being inconsistent with Articles 47 and 50 of the Constitution of Kenya 2010, hence is and null and void to the extent of that inconsistency. A declaration that the respondent Tribunal has lacked jurisdiction to entertain appeal No. NET 138 of 2015. An order of certiorari bringing into this court and quashing the stop order issued by the respondent Tribunal on 26.2.2015. An order of prohibition, prohibiting the respondent Tribunal from proceeding with the hearing of Appeal No. NET 138 of 2015. Lastly, that the respondent Tribunal be condemned to pay the costs of this Petition.

The petition is supported by the affidavit of Mikul Shah who reiterates the facts in the petition and inter alia states that the petitioner, Moi's Bridge Quarry Company Limited is a limited liability company registered in Kenya under the Companies Act Cap. 486 and carrying on quarrying business and operating Jaribu Kokoto Quarry at Ndabarnach area in Moi's Bridge in Uasin Gishu County and that the 1st and 2nd Interested Parties on 26.2.2015 filed in the respondent Tribunal, Appeal No. NET 138 of 2015, a purported appeal in which they named the 3rd Interested Party herein as 1st respondent and the petitioner herein as 2nd respondent. That of the two appellants (now 1st and 2nd Interested Parties), only the 2nd appellant Francis Abuyekha signed the appeal as required by Rule 4(3) of the National Environment Tribunal Rules of 2003 (LN No. 177 of 2003) while the 1st appellant Cleophas Barasa Simiyu did not sign the appeal, which he is informed by their advocate violated the said Rule and which therefore invalidated his part of the appeal.

(2) Respondent's reply

Despite being served the respondent and third interested parties did not file any reply.

3. 1ST Interested Party's response

Cleophas Barasa Simiyu the 1st interested party filed a replying affidavit stating that the respondent filed and obtained a stop order on 26.2.2015 stopping the operation of the said Jaribu Kokoto Quarry after successfully filing appeal. That the said stop order was signed by one J. K. Awuor who is the Secretary of the Tribunal. That the purported consent signed by him is neither dated and was never signed by him. That the consent had no conditions to be adhered by the Company for the Welfare of the community. That Jaribu Kokoto Company is not in existence. That the company should produce title deed of the property and how it acquired it. That the respondent quarrying activities were generally harmful to the environment. That on the 14th day of March, 2015, people came with motor vehicle registration No. KBT 044J and harassed him. He reported the matter at Moi's Bridge Police Station O.B. No. 16.3.2015. That after the hearing of his appeal, the Tribunal delivered a ruling in his favour.

4. 2nd Interested party response

Francis Abuyekha states that he supports the facts and grounds in the said petition and Notice of Motion as well as all the orders sought and confirms that whereas he added the name of Mr. Cleophas Barasa Simiyu on the appeal, he did not sign the appeal and he is the only one who signed it as the appellant and further confirms that sometimes in March 2015, he signed the consent to withdraw National Environment Tribunal Appeal No. 138 of 2015 with the said Mr. Cleophas Barasa Simiyu and also appended their thumbprints and Identity Card Numbers on it. He confirms that the said Mr. Cleophas Barasa Simiyu signed the said consent and put his thumbprint and in his own handwriting wrote his ID number on the said consent and that he did so in his presence in the office of Sifuna & Sifuna Advocates in Kitale and did so willingly and freely without any threats or coercion. That after signing the said consent, Mr. Cleophas Barasa Simiyu and him travelled to the Tribunal offices in Nairobi on 23.3.2015, where they met Mr. Sifuna Advocate and filed it. That since on the said day, the Tribunal officials had travelled to Mombasa they returned to the Tribunal on 7.4.2015 in his presence and that of Mr. Sifuna Advocate and the NEMA lawyer the Tribunal Chairperson allowed the appeal to be withdrawn on that day he expected Mr. Cleophas Barasa Simiyu to attend but he was surprised when he did not turn up. That he was later surprised to learn that Mr. Cleophas Barasa Simiyu had gone back to the Tribunal insisting to revive the appeal alleging that he never signed the consent and that his signature and thumbprint were forged. That despite his opposition and that of the Advocate for the petitioners and that of the NEMA lawyer the Tribunal arrogantly set aside the withdrawal order and revived the appeal order and insisted on proceeding with it against his wish. That the appeal was his and not Mr. Cleophas Barasa Simiyu as he is the one who signed it and physically travelled to Nairobi and filed it. That Mr. Cleophas Barasa Simiyu is a stranger to this appeal since he never signed the appeal and never travelled to Nairobi to file the appeal. That it is unfair for the Tribunal to hijack his appeal and insist on it after it had granted orders withdrawing it and when him as the complainant he is not interested in pursuing it. That they withdrew the appeal when they realized that the Tribunal had no jurisdiction and that being a case for compensation it was to be filed in a court of law. That Cleophas Barasa has annexed to his Replying Affidavit only part of the Tribunal's Ruling excluding page 3 which contains crucial information regarding his claim that a strange vehicle went to his home at night. In the Tribunal, he stated that the vehicle's Reg. No. is UAE 3482 while in his Replying Affidavit filed in this court he states that the vehicle was Registration No. KBT 044J.

5. SUPPLEMENTARY AFFIDAVIT

Professor Nixon Sifuna filed a supplementary affidavit stating that Cleophas Barasa, the 1st Interested Party never filed or signed the Appeal No. 138 of 2015 as alleged in paragraph 4 of his replying affidavit, hence there was only one appellant Francis Abuyekha, the 2nd Interested Party. That the said 1st Interested Party signed the said consent filed in the Tribunal on 23.3.2015 and he should say he has only changed his mind on it. That he was physically present and witnessed the 1st Interested Party executing the consent filed in the Tribunal on 23.3.2015 and the exercise took place in his chambers in Kitale town. That Jaribu Kokoto Quarry is a quarry owned and operated by the petitioner Moi's Bridge Quarry Ltd. That while he in the Tribunal stated that the strange vehicle driven to his home with strangers was motor vehicle Reg. No. UAE 3482, he has in paragraph 11 of his Replying Affidavit herein stated that the said Motor Vehicle was KBT 044J, which according to the annexed copy of the logbook belongs to him. That he denies that his vehicle has ever been driven to his home as alleged in his affidavit and neither he has ever driven the said vehicle to the said home or at all. That his said allegations are a lie as the deponent has failed to state the OB number yet be heard.

(B) SUBMISSIONS

(1) Petitioner's Submissions

The petitioner submits that contrary to section 129 of E.M.C.A., the respondent's appeal in the Tribunal was not challenging any decision of NEMA. Instead, it was a suit for compensation and injunction for alleged misuse and environmental pollution. The petitioner submits that the respondent Tribunal's said actions in the said appeal NET No. 138 of 2015 have contravened the Constitution of Kenya. The stop

order for instance, violated the rules of natural justice as well as Articles 47, 50 and 159(2)(c) of the Constitution of Kenya. The appellant further argues that the petitioner and the intended parties filed a written consent in the Tribunal seeking leave to withdraw the appeal and asking the court to lift the stop order, the Tribunal had issued in the proceedings of the Tribunal. The appeal was withdrawn and stop order lifted. Contrary to the consent and orders made by the Tribunal on 7.4.2015 and without filing a formal application for setting aside or reviewing the said order to 1st appellant on 24.4.2015 filed in the Tribunal a document disowning the said consent alleging that his signature and thumb-print had been forged and that he has never signed the said consent hence insisted on going on with the appeal.

The petitioner argues that the Tribunal went ahead to set aside the the consent despite the fact that the only appellant who had signed the consent was Francis Abuyekha. Mr. Francis Abuyekha is actually supporting the petition. The 1st Interested Party is the only party opposing the petition. He filed an affidavit in opposition of the petition and states that the ruling was in his favour. The petitioner further submits that the handwriting and fingerprints examination report suggest that the consent was signed by the 1st Interested Party. The 4th Interested Party never filed any pleading or affidavit. On the reliefs sought, the petitioner submits that the respondent has violated the petitioner's rights by failing to observe the principle of natural justice and that the 1st Interested Party signed the consent to withdraw the appeal.

(2) The 1st Interested Party's Submissions

The 1st Interested Party submits that he is individual within the meaning of the constitution and a person within the meaning of Article 20 of the constitution. That he is the chairman of Jaribu Kokoto (Kware village) community, vide by the attached Minutes and the list of officials. That they instituted a petition in the N.E.T. on their own behalf and on behalf of 300 community members and they were acting in the public interest as their right under Article 22 of the constitution. That he contends that on or about the 7th April, 2015, the petitioner and 2nd Interested Party without proper justification and laudable reasons which were suspicious and without involving the members of the general public, himself included withdrew their appeal in the National Environmental Tribunal. That he avers that the community and him continue to be exposed to environmental degradation, pollution and other environmental hazards and thereby suffering in all respect from implementation of the said consent which have threaten the community life, dignity, privacy and health. That the community have a right to clean and healthy environment under the constitution and EMCA and such rights cannot be derived from them unconstitutionally. That he further alleges that the action of the petitioner was purely actuated by extraneous consideration unknown to him or members of the public but which can be attributed to escaping accountability and evading justice. That petitioner and the respondent together in collaboration have abdicated their responsibility and therefore they are the source of suffering in the community and they should be held liable. That the petitioner and NEMA have duty bound to ensure that the community's complaints on the environment are adequately addressed and these duties have not been observed as dictated by both the statutes, principles, the constitution and the law.

That NEMA and the petitioner have failed to undertake or ensure that appropriate environmental and social impact study of the quarry project has been undertaken in accordance with constitution and law. That the public interest and public policy must be clearly defined in the consent. It will be against the rule of natural justice for the Tribunal to have adopted the consent without according the community and himself hearing. That he further states that the wider public interest outweighs the narrow private interest of the petitioner. That he further states that the project affects the entire neighborhood and schools around Moi's Bridge Quarry Limited which amounts to more than 3,000 people of a location and not only one or two individuals. That the petition ought not to succeed in view of the wider public interest and policy which dictates that in any environmental matter, the public have to be involved. That the petitioner has not taken any relevant environmental consideration of all the relevant environmental factors to ensure minimal environmental impacts. That petitioner has not proven any violation of the provision of the constitution. The petition is an abuse of the process of the court and should be dismissed with costs.

(C) DEETERMINATION

The 2nd Interested Party is supporting the petition and therefore, the only party challenging the petition is the 1st Interested Party. In his replying affidavit, which is sketchy and filed and dated on 23.6.2015, the 1st Interested Party denies having signed the consent withdrawing the Appeal No. NET 138 of 2015 between Cleophas Barasa Simiyu, Applicant and Francis Obuyekha also appellant and NEMA and Moi's Bridge Quarry Company Limited in respect of Jaribu Kokoto Quarry appeal which is the genesis of this petition. The decision appealed from was in respect of conducting quarry activities without an E.I.A. licence which activity affected the locals negatively. The grounds of appeal were pollution from the quarry environmental hazard, explosions causing drying of boreholes, construction of sewerage plant in a swamp once encroachment on public land and plantations next to farms. The remedy sought was for the company to stop the operation until the matter was heard in the Environment Court.

The appeal is not signed by Cleophas Barasa Simiyu, however, it is signed by Francis Abuyekha. The 1st respondent was NEMA whilst the 2nd respondent was Moi's Bridge Quarry, the petitioner herein. It is alleged that the appeal was withdrawn by the appellants. The 1st appellant denies the withdrawal whilst the 2nd appellant admits that no appeal was withdrawn. This court finds that the 1st appellant having not signed the appeal was not party to the appeal. Moreover, even if he had been party to the appeal, it was established by the handwriting expert and document examiner that he had signed a consent to withdraw the appeal hence lifting the stop order.

I have considered the petition and the replying affidavits and do find that the respondent and the 3rd Interested Parties against whom the petitioner has directed his complaint have not filed any document in response to the petition and therefore the petition is not challenged. However, I do find that the issues for determination are: -

1-Whether Article 47 of the constitution of Kenya has been violated by the respondent which provides for a fair administrative action.

2-Whether Article 50 of the constitution of Kenya that guarantees the right to fair hearing has been violated by the respondent

3-whether article 159(2) that provides for that the court in exercise of its judicial authority should encourage alternative dispute resolution.

1-WHETHER ARTICLE 47 OF THE CONSTITUTION OF KENYA HAS BEEN VIOLATED BY THE RESPONDENT WHICH PROVIDES FOR A FAIR ADMINISTRATIVE ACTION.

Article 47 of the constitution of Kenya guarantees the right to fair administrative action 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.

(3) Parliament shall enact legislation to give effect to the rights

Article 259(1) of the Constitution has set out the principles that should guide how the Constitution is construed. The Article provides as follows:

(1) This Constitution shall be interpreted in a manner that –

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) *permits the development of the law; and*

(d) *contributes to good governance.*

The Court of Appeal of Tanzania in Ndyanabo v Attorney General [2001] 2 E.A. 485 at 493 the Court of Appeal of Tanzania stated as follows with regard to constitutional interpretation:

“First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr Justice EO Ayoola, a former Chief Justice of The Gambia, in his paper presented at seminar on the Independence of the Judiciary, in Port Louis, Mauritius, in October 1998: A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document.’ Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed...”

In Whiteman vs. AL’s of Trinidad and Tobago [1991] 1 L.R.C (Const.) 536 at pg 551, the Privy Council held on the question of interpretation of the Constitution that:

“the language of the Constitution falls to be construed, not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit and that this is particularly true of those provisions which are concerned with the protection of human rights.”

Even in liberal interpretation, the court has held that a liberal and not an overly legalistic approach should be taken to constitutional interpretation. The Constitution should not be regarded as an empty vessel to be filled with whatever meaning the Court might wish from time to time, but that is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society. (See Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi HCCC NO. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375).

It has also been held that in construing the Constitution, regard must be had to the language and the wording of the Constitution so that where there is clearly no ambiguity the Court has no reason to depart therefrom. This was the holding in Ngare vs. Attorney General and Another [2004] 2 EA 217. (See also Republic vs. El Mann [1969] EA 357; Njoya & Others vs. Attorney General and Others [2004] 1 EA 194 (HCK) and Njogu vs. Republic [2000] LLR 2275 (HCK)).

The other key principle in interpreting the Constitution is the principle of harmonization: that all the provisions bearing upon a particular subject be construed as a whole, without any one provision destroying the other but each sustaining the other, as was held in the case of Olum & Another vs. Attorney General (1) [2002] 2 EA 508 and Tinyefuza v Attorney General, Constitutional Appeal No. 1 of 1997.

In Kigula and Others vs. Attorney-General [2005] 1 EA 132 the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and

entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realize the full benefit of the rights guaranteed. (See also Gideon Mwangangi Wambua v IEBC & 2 Others, Mbsa Election Petition Number 4 of 2013 as per Odunga J.). It is with these principles in mind that the court should consider the issues at hand.

The Petitioner contends that the proceedings by the tribunal violated his right to fair administrative action and fair hearing. S.A De Smith on Judicial Review of Administrative Action, Third Edition (1973) Stevens and Sons Limited, at page 60 opines that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice. As to what constitutes fair administrative action, the Constitutional Court of South Africa in its decision in President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, at paragraphs 135 -136 held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common-law principles developed over decades...”

The South African Constitutional Court further clarified in the said case that the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. Further, that the focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

It is the courts view that the proceedings of the tribunal are classified administrative action because the nature of the proceedings before the tribunal involve a decision-making process that affect the rights of individuals and the principles of natural justice apply. The tribunal breached the principle of fair administrative action when it considered the document filed on 24th April 2015 which is undated and not served upon the 2nd respondent the respondents had a duty to ensure that the document was served. Furthermore, the fact that the petitioners were invited for a mention which was converted to the hearing of the application to set aside the consent to withdraw the appeal amounts to a breach of the petitioners right to a fair administrative action. The respondent had a duty to inform the parties of the nature of document filed by the 1st interested party which in the strict sense was not an application and should have advised the 1st interested party to file an application and set the matter for the hearing of the said application.

This court further finds that the decision appealed from was not disclosed to the respondents and attached to the appeal. Suffice to say that the appellants are appealing from a vague decision of conducting quarrying activities without an E I A license which activities affect the locals negatively. I have not seen any decision by the authority granting or refusing to grant the petitioners a license as envisaged by section 129 (2) and (3) of the EMCA. Failure by the Tribunal to consider all this issues amounted to breach of Article 47 of the constitution that provides for fair administration of justice.

Lastly, on this point, this court finds that the appeal was signed by the 2nd interested party on his behalf

and of the 1st interested party and likewise the withdrawal was signed and filed by the 2nd interested party on his behalf and on behalf of the 1st interested party and therefore the application to set aside could only be filed by the 2nd interested party and not the 1st interested party.

2-WHETHER ARTICLE 50 OF THE CONSTITUTION OF KENYA THAT GUARANTEES THE RIGHT TO FAIR HEARING HAS BEEN VIOLATED BY THE RESPONDENT

Article 50 of the constitution guarantees the right to fair hearing. The **House of Lords** in **Ridge v. Baldwin [1964] AC 40** clarified the law, that the rules of natural justice, in particular right to fair hearing, (*audi alteram partem* rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

1. the right to be heard by an unbiased tribunal.
2. the right to have notice of charges of misconduct
3. the right to be heard in answer to those charges.

On his part, Lord Reid when dealing with class of cases of dismissal from office “*where there must be something against a man to warrant his dismissal*” said at page 66:

“There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”

The right to fair hearing as a rule of natural justice, a part of the common law, has in modern times been variously described as “*fair play in action*”, *justice of the common law*”; “*common fairness*” “*fairness of procedure*” or simply a “*duty to act fairly.*”

As an example, in **Wiseman v Borneman [1969] 3 All ER 275** in determining, *inter alia*, the question whether the principles of natural justice (right to fair hearing) had been followed Lord Morris of Borth-y-Gest denominated the issue as to one of whether the tribunal had “*acted unfairly*”.

So did Lord Denning MR in **Selvarajan v Race Relations Board [1976] 1 All ER 12** when dealing with the procedure of bodies required to make investigation where he said at page 19:

“In all these cases, it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigations and the consequence which it may have on the person affected by it.”

The right to be heard includes the right to be given adequate time to prepare for the hearing. It is not disputed that the petitioner was not given time to file a response to the allegations made by the 1st interested party and therefore I do find that the petitioner’s right to fair hearing was violated.

3-WHETHER ARTICLE 159(2) THAT PROVIDES FOR THE COURT IN EXERCISE OF ITS JUDICIAL AUTHORITY SHOULD ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION.

Article 159(2) (c) provides that the courts and other judicial organs in exercising judicial authority should encourage alternative forms of dispute settlement such as reconciliation, mediation and arbitration. The petitioner argues that by the tribunal setting aside an out of court settlement consent of the parties without there being strong grounds and on mere allegations of forgery without proof violated article 159(2) (c) of the constitution of Kenya. This argument fails on the basis that article 159(2) (c) is meant to encourage genuine reconciliation, mediation and arbitration and that judicial organs cannot entertain consents illegally obtained.

On violation of other provisions of law the respondent argues that net conducted the proceedings in violation of other provisions of the law. He refers to the provisions of section 129 of EMCA AS WELL AS THE NET procedures Rules 2003LN NO 177OF 2003. I have looked at the provisions of section 129(1) of EMCA and do find that the same does not envisage an appeal by the 1st and 2nd interested parties as the only person with the capacity to appeal is one who has been denied a licence or transfer of his licence or against whom conditions limitations or restrictions have been imposed and such like actions as per the EMCA. Clearly the Tribunal has no jurisdiction to entertain the interested parties appeal under this section. Section 129(2) is also not available as the facts do not disclose a decision or action by the director general, the authority, or any committee of the authority.

CONCLUSION

I have found that the proceedings of the tribunal are classified administrative action because the nature of the proceedings before the tribunal involve a decision-making process that affect the rights of individuals and the principles of natural justice apply. The Tribunal breached the principle of fair administrative action when it considered the document filed on 24th April 2015 which is undated and not served upon the 2nd respondent. Furthermore, the fact that the petitioners were invited for a mention which was converted to the hearing of the application to set aside the consent to withdraw the appeal amounts to a breach of the petitioners right to a fair administrative action. The respondent had a duty to inform the parties of the nature of document filed by the 1st interested party was not an application and should have advised the 1st interested party to file an application and set the matter for the hearing of the said application and that the petitioner was not given an opportunity to file a response to the allegations made by the interested party and therefore I do find that the petitioner's rights to fair administrative action and fair hearing were violated. I Have also found that the interested parties should have filed their appeal to the Environment and Land Court and not in NET pursuant to the provisions of section 130 of the EMCA.

On the reliefs sought, I do find that the petitioner is entitled to a declaration that the manner in which the respondent Tribunal has conducted Appeal No. NET 138 of 2015 has violated section 129 of the Environmental Management and Co-ordination Act as well as the National Environment Tribunal Rules of 2003 L.N. No. 177 of 2003 and that the said appeal was filed in the tribunal which lacks jurisdiction to entertain the dispute as the same does not relates to a decision or action envisaged under the Act. *Moreover*, I do issue a declaration that appeal No. NET 138 of 2015 for its worth, having been withdrawn by the 2nd interested party the 1st interested party lacked the capacity to apply to reinstate the same and that the respondent Tribunal had become *functus officio* hence lacked capacity to reinstate it. *Furthermore*, the stop order issued by the respondent Tribunal on 26.2.2015 is unconstitutional for being inconsistent with Articles 47 and 50 of the Constitution of Kenya 2010 for, hence is and null and void to the extent of that inconsistency. Having found that the respondent Tribunal lacked jurisdiction to entertain appeal No. NET 138 of 2015 an order of certiorari is hereby issued bringing into this court and quashing the stop order issued by the respondent Tribunal on 26.2.2015. Further, an order of prohibition, prohibiting the respondent Tribunal from proceeding with the hearing of Appeal No. NET 138 of 2015. Lastly, that the respondent Tribunal is hereby condemned to pay the costs of this Petition.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF FEBRUARY, 2017.

ANTONY OMBWAYO

JUDGE