

The National Environmental Tribunal: A Balance between Economic and Environmental Rights

The National Environmental Tribunal is a quasi-judicial tribunal established pursuant to the provisions of the Environmental Management and Co-ordination Act, 1999 (EMCA). Its mandate generally is to hear any disputes regarding the exercise of power by the National Environmental Management Authority (NEMA). More often than not, the nature of such disputes usually revolve around proposed real estate developments.

While the purpose of the Tribunal is noble i.e. to ensure NEMA effectively plays its role in achieving the right balance between economic development (including protection or promotion of employment) and the conservation and preservation of our national heritage, the Tribunal has been saddled by a lot of inefficiencies that stand in its way in delivery of a fair hearing as is enshrined in Article 50 of the Constitution. In recognition of these challenges the Statute Law Amendment Bill No. 3 of 2017 seeks to amend EMCA through amendments that would cure the following: --

- (i) the negative impact of automatic stay orders that are issued immediately a complaint is lodged without considering the merits thereof; and
- (ii) the negative effects the lack of a Chairperson has on the proceedings in the Tribunal that lead to a stay in the proceeding at the Tribunal until the Chairperson is appointed.

To illustrate this we shall look at the Tribunal's operations over the last one (1) year:-

- (i) The Law Society of Kenya's representatives term expired on 31st January, 2017 whilst advertisements have been made by the Law Society of Kenya no appointment is yet to be made twelve (12) months down the line;
- (ii) In the year 2016, the Tribunal only had four (4) members instead of six (6). Out of the four (4) the term of one of the members expired on 30th September, 2016, while the other was on extended leave after which her term lapsed. The other member at that time also served in the Judicial Service Commission which was conducting interviews for the vacant position of a Supreme Court Judge.; the Government only made replacements to fill its three (3) slots on 21st October, 2016;
- (iii) After the three (3) slots were filled the Chairpersons term expired on 18th July, 2017 and the same is yet to be gazetted without a Chairperson the Tribunal has been unable to hear any matters since then.

With a Tribunal that requires a quorum of three (3) members before any hearing can proceed, deals with matters across Kenya and always has a backlog due to the prolonged periods of time where it is unable to sit for lack of quorum matters such as the above, extreme inefficiencies arise. The proposed amendments therefore come as a welcome relief as;

- (i) they do away with the provisions for automatic stay and an application must be made to the Tribunal first so that the merits of the issuance of a Stop Order are considered before the issuance of the same, and,
- (ii) the members are given the right to choose a Chairperson from among themselves instead of waiting for the Judicial Service Commission appointee.

The proposed amendments are currently at the public participation stage where members of the public are invited to offer suggestions as to how the law can be better enhanced after undergoing first reading stage and it is anticipated that the much-awaited proposed changes will help solve some of

the bureaucratic hurdles faces by litigants before the Tribunal. In line with which we submitted the following further amendments (in bold) to the amendments already proposed:

	Proposed Amendment	Reason	Suggested Draft
1	An amendment to the Act recognizing that a decision subject to an appeal to NET be determined in accordance with provisions of the Fair Administrative Action Act 2015	This is in recognition of the fact that NET is a quasi-judicial body charged with the review of administrative action (NEMA's). This would then provide clarity that matters before NET must be heard and determined within a ninety (90) day period as provided by the Fair Administrative Action Act and indeed our Constitution.	Section 129 (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions may be subject to an appeal to the Tribunal in accordance with the provisions of the Fair Administrative Action Act 2015 and with such procedures as may be established by the Tribunal for that purpose
2	Implementation of an effective system of appointment of NET members	To prevent a situation where NET lacks the quorum to commence the hearing of a matter as two thirds of its members' terms have lapsed and therefore take into account the manner in which the appointing authorities operate. Key to note that three(3) members were appointed on the same date i.e. 21.10,2016 and the same situation is likely to recur once their terms lapse; three years from the above date	Section 125 (3) The members of the Tribunal shall be appointed at different times, with intervals of 1-3 months of each other , so that the respective expiry dates of their terms of office shall fall at different times.