



**Valani v National Environment Management Authority (Tribunal Appeal  
30 of 2021) [2023] KENET 225 (KLR) (Civ) (15 April 2023) (Ruling)**

Neutral citation: [2023] KENET 225 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
CIVIL  
TRIBUNAL APPEAL 30 OF 2021  
MOHAMED S BALALA, CHAIR, BAHATI MWAMUYE,  
WAITHAKA NGARUIYA & KARIUKI MUIGUA, MEMBERS  
APRIL 15, 2023**

**BETWEEN**

**ABDUL GAFOOR VALANI ..... APPELLANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .. RESPONDENT**

**RULING**

**Background To The Dispute**

1. The appellant filed the application dated August 30, 2022 seeking the following orders:
  - a. That this honourable tribunal be pleased to review and set aside its orders of August 17, 2022.
  - b. That this honourable tribunal be pleased to reinstate the appeal herein and direct that the same proceeds to hearing on merit.
  - c. That this honourable tribunal fix a hearing date for the appeal herein on a priority basis.
  - d. That the costs of this application be provided.
2. This tribunal, *vide* the ruling dated August 17, 2022, made the following orders:
  - a. The respondent's notice of preliminary objection dated February 28, 2022 is allowed;
  - b. The notice of appeal dated December 3, 2021 is struck out;
  - c. Each party shall bear own costs.



## Submissions

3. The appellant filed his submissions dated February 3, 2023 in support of the application for review.
4. The respondent did not file its written submissions in respect of the appellant's application dated August 30, 2022.

## Issues for Determination

5. Having considered the appellant's application dated August 30, 2022 and all the arguments and evidence presented by the parties, the tribunal has identified the following issues as arising from the application:
  - a. Whether there is sufficient reason for review; and
  - b. What orders should the tribunal make?

## Whether there is sufficient reason for review

6. The appellant's appeal seeks to challenge the decision issued by the respondent *vide* its letter dated October 4, 2021 whereby the respondent declined to grant variation to allow the extension of the validity of the Environment Impact Assessment (EIA) license No NEMA/EIA/PSL/3997 issued to the appellant in November 2016.
7. The respondent raised a preliminary objection, *vide* the notice of preliminary objection (PO) dated February 28, 2022, seeking to strike out the appeal in its entirety on the grounds that the tribunal lacks jurisdiction as the appeal is time barred and thus contravenes section 129 of the [\*Environment Management and Co-ordination Act\*](#), Act No 8 of 1999 (EMCA).
8. The tribunal further held that as it is, the superior courts have found with finality that section 129 is couched in mandatory terms that the tribunal cannot enlarge the time within which a party can file an appeal under section 129 (1) no matter how genuine the reason for seeking the enlargement may be.
9. The appellant submitted that the letter dated October 4, 2021 was sent via post office and was received three weeks after it was purportedly written. He further submitted that this evidence could only be brought before the tribunal by way of a substantive motion and an accompanying affidavit. He relies on ELCA No 100 of 2015 [\*Simba Corporation Limited v Director General NEMA and Anor\*](#) in support of his case.
10. This tribunal, *vide* its ruling dated August 17, 2022, held that the appellant having filed the appeal on December 4, 2021 fell outside the 60 days provided in section 129 (1) of EMCA as the appeal ought to have been filed within the 60 days period which expired on December 3, 2021. This being the case, the tribunal held that it cannot take any further step as it does not have jurisdiction in the matter.
11. It is the appellant's submission that there was no way of knowing when time started running for him but he still filed the appeal at the earliest time possible according to the pleadings on record because the letter reached the appellant three weeks after it was written on October 4, 2021.
12. The [\*Constitution\*](#) of Kenya 2010 provides for access to justice under article 48. In line with article 2 of the [\*Constitution\*](#), the tribunal has the duty to respect, uphold and defend the [\*Constitution\*](#).
13. Further, pursuant to article 159 of the [\*Constitution\*](#), this tribunal in exercising judicial authority shall be guided by the following principles, *inter alia*, justice shall be administered without undue regard



to procedural technicalities and the purpose and principles of this constitution shall be protected and promoted.

14. In the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Limited*, the principles of preliminary objections were set out. The court stated as follows:-

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

15. The fundamental issue in this application is when did the 60-day period start running? Is it on the date when the letter was written, that is October 4, 2021, or the date when the appellant received the letter dated October 4, 2021?
16. The tribunal finds that time should start running when the appellant received the letter dated October 4, 2021 as the appellant cannot be expected to appeal against a decision that he was not aware of.
17. Therefore, the tribunal finds that there is sufficient reason to review and set aside the order made on August 17, 2022.

#### **What orders should the Tribunal make?**

18. For the above reasons, the tribunal makes the following orders:
- The order made on August 17, 2022 be and is hereby set aside;
  - The appellant's appeal is hereby reinstated;
  - The appeal shall proceed to be heard on merit; and
  - Each party to bear their own costs.
19. The parties' attention is drawn to the provisions of section 130 of the EMCA.

**DATED AT NAIROBI THIS 15TH DAY OF APRIL 2023**

**MOHAMMED S BALALA.....CHAIRPERSON**

**BAHATI MWAMUYE.....MEMBER**

**WAIHAKA NGARUIYA.....MEMBER**

**KARIUKI MUIGUA.....MEMBER\*\***

