



**Bernard Nderitu Kingori t/a Kenwood Products & Kenwood Plywood Co. Ltd v Kenya Forest Service (Tribunal Appeal E033 of 2023) [2024] KENET 517 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KENET 517 (KLR)

**REPUBLIC OF KENYA**  
**IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI**  
**TRIBUNAL APPEAL E033 OF 2023**  
**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR,**  
**DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**  
**APRIL 19, 2024**

**BETWEEN**

**BERNARD NDERITU KINGORI T/A KENWOOD PRODUCTS & KENWOOD  
PLYWOOD CO. LTD ..... APPELLANT**

**AND**

**KENYA FOREST SERVICE ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Appellant moved this Tribunal by way of a Notice of Appeal dated 4<sup>th</sup> October 2023. The face of the Notice of Appeal contains six (6) grounds of appeal, which appear to be more or less a summary of facts upon which the appeal is premised. We shall reproduce them nonetheless verbatim:
  - a. The Appellant has had a tumultuous relationship with the service ever since he ventured into harvesting forest produce and processing it into timber. This sour relationship began in 2015 when he applied for a license after having expended millions of shillings in building and equipping a plywood manufacturing factory, which was amongst the requirements of getting a license. His license, as well as an appeal, were both rejected, forcing him to shut down operations.
  - b. After a second attempt, he was granted a notification letter on 12 June 2017, prequalifying him as a sawmiller. On 28<sup>th</sup> June 2017, he requested the allocation of forest produce from the Respondent's pine tree plantation for subsequent processing into plywood. On 1<sup>st</sup> August 2017, he was allocated a cypress tree plantation, which was not suitable for plywood production.



- c. On or about October 2017, he was asked to pay Kshs. 150,000 being the plywood license fees as well as Kshs. 563,988 for the cypress tree allocation. Subsequent to payment of this amount, he did not receive his license but was nevertheless allocated a plantation but the same was not accessible as there was no bridge to allow access to the property. The bridge would only be later constructed in December 2017, after which the Appellant commenced harvesting in January 2018 for a few weeks before the government issued a moratorium on harvesting forest produce.
  - d. From the date he paid for his license and plantation fees until the date of commencement of the moratorium, the Respondent frustrated his efforts to harvest the produce by not setting up structures in place to enable him access the plantation.
  - e. The Respondent on or about 2021, commenced in earnest a verification process which would ultimately see him get a refund of the amounts he spent as above but never got to enjoy. He was rightfully verified as a fully paid-up and prequalified miller and was advised that the auditor general would audit the claims to enable the Respondent to process the refunds.
  - f. Regrettably, despite numerous letters to the Respondent, he has never received a single dime.
2. Upon being served with the Notice of Appeal and the accompanying documents, namely, the list and bundle of documents and the statement of Bernard Nderitu Kingori, the Respondent entered appearance and filed a Replying Affidavit sworn by Fredrick B. O. Ojuang on 18<sup>th</sup> March 2024. The Replying Affidavit was filed in opposition to the appeal.
  3. The appeal proceeded by way of viva voce evidence on 2<sup>nd</sup> April 2024 and 4<sup>th</sup> April 2024, whereafter parties were directed to file and exchange submissions. The Appellant filed submissions dated 8<sup>th</sup> April 2024, while the Respondent filed submissions dated 15<sup>th</sup> April 2024.

## **Background**

4. The uncontested facts leading to the appeal are as follows: The Appellant, vide a notification letter dated 12<sup>th</sup> June 2017, was prequalified by the Respondent as a sawmiller to undertake harvesting of exotic timber. Subsequent to the pre-qualification, the Appellant paid a license fee of Kshs. 150,000 and further Kshs. 563,988 for the allocation of a cypress tree plantation in Uhururu, Nyeri County. The amount of Kshs. 150,000 was paid on 17<sup>th</sup> October 2017 whereas the amount of Kshs. 563,988 was paid on 13<sup>th</sup> October 2017.
5. In February 2018, the national government imposed a ninety (90) day moratorium on timber harvesting in all public and community forests to allow for the re-assessment and rationalisation of the entire forest sector in the country.

## **Issues for determination**

6. Having carefully considered all the pleadings, oral evidence, and submissions filed by the parties, we find three issues that merit determination:
  - a. Whether this Tribunal has jurisdiction to hear and determine the instant appeal
  - b. Whether the Respondent should refund the plantation fees with/without interest; and
  - c. Whether the Respondent should refund the license fees paid.



### **Whether this Tribunal has jurisdiction to hear and determine the instant appeal**

7. At paragraph 8 of the Respondent's Replying Affidavit sworn by Fredrick B. O Ojuang, the Respondent challenges the jurisdiction of this Tribunal to hear and determine the instant appeal. The paragraph reads as follows:

“That this Tribunal lacks jurisdiction to deal with this appeal as there is no decision that was made by the Respondent that can form the subject of the appeal before this Tribunal.”

8. The Respondent's witness Mr. Ojuang again repeated the challenge to the Tribunal's jurisdiction during the appeal hearing on 4<sup>th</sup> April 2024. According to Mr. Ojuang, the instant appeal should have been filed before the Environment and Land Court.
9. The Tribunal will be remiss not to address the jurisdictional challenge. As the Court of Appeal correctly observed in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, ‘jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it?’ Jurisdiction is so sacrosanct within legal parlance that a decision rendered in the absence of jurisdiction results in a nullity ab initio, and amenable to being set aside ex debito justitiae.
10. This Tribunal's jurisdiction in appeals of the nature before us derives from the [\*Forest Conservation and Management Act\*](#). Section 70 thereof provides

#### Disputes

- (1) Any dispute that may arise in respect of forest conservation, management, utilisation or conservation shall, in the first instance, be referred to the lowest possible structure under the devolved system of government as set out in the [\*County Governments Act\*](#) (Cap. 265).
- (2) any matter that may remain un-resolved in the manner prescribed above shall be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie in the Environment and Land Court as established under the [\*Environment and Land Court Act\*](#) (Cap. 8D).
11. The questions posed before the Tribunal centre on forest utilisation, thereby placing the appeal squarely within the ambit of section 70(1) of the [\*Forest Conservation and Management Act\*](#). Concomitant to the jurisdictional challenge posed by the Respondent is the question of whether the Appellant had exhausted the alternative dispute resolution mechanism created under section 70(1) of the [\*Forest Conservation and Management Act\*](#). By dictate of the section, the first port of call in any dispute arising from forest conservation, management or utilisation shall be the lowest possible structure under the devolved system of government.
12. Alive to the provisions of section 70(1) of the [\*Forest Conservation and Management Act\*](#), the Appellant wrote a letter to the County Executive Committee Member, Environment, Water and Climate Change, Nyeri County, on 7<sup>th</sup> September 2023 inquiring whether a mechanism for resolving the dispute at hand was available. For completeness of record, we shall reproduce the contents of the letter hereunder:

Our client intends to lodge a claim against the Kenya Forest Service, a claim which arose within your jurisdiction. Pursuant to Section 70 of the [\*Forest Conservation and Management Act\*](#) 2016, the relevant County Government has original jurisdiction over such a claim. The section is replicated hereunder for ease of reference.



## Section 70

“Any dispute that may arise in respect of forest Conservation, Management and Utilization or Conservation shall in the first instance be referred to the lowest possible structure under the devolved government as set out in the County Government Act, 2012....”

To this end, kindly inform us if your ministry has any structures in place for resolution of such disputes.

Thanking you in advance.

13. Despite receiving the letter on 8<sup>th</sup> September 2023, the office of the County Executive Committee Member failed to respond to the same, prompting the Appellant to move this Tribunal vide the Notice of Appeal dated 4<sup>th</sup> October 2023.
14. The operative word in section 70(2) of the *Forest Conservation and Management Act* is ‘unresolved’. Can it be said that the dispute was resolved by the Appellant’s letter of 7<sup>th</sup> September 2023? To the contrary, it remains unresolved. The absence of intention on the part of the County Executive Committee member of Water, Environment, Natural Resources and Sanitation to have the dispute resolved is evidenced by the failure to have the letter responded to date. Article 47 of *the Constitution* envisages administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.’ Can the omissions and/or commissions of the office be said to meet the constitutional imperative aforestated? We answer in the negative.
15. The question we must grapple with is whether the appeal before us ought to be referred back to the office of the County Executive Committee member of Water, Environment, Natural Resources and Sanitation, Nyeri County, for resolution. In answering this question, we turn to William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR where a 5 Judge bench laid down exceptions to the doctrine of exhaustion. One of the exceptions which we rely on in finding we have jurisdiction was expressed by the eminent bench as follows:

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting the Court’s jurisdiction must be construed restrictively.
16. The High Court is not alone in the position that the doctrine of exhaustion can indeed be limited. The Court of Appeal in *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR amplified this position in the following manner:

Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions, ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection.
17. Referring the appeal back to the office of the County Executive Committee member of Water, Environment, Natural Resources and Sanitation, Nyeri County will, in our view, serve as a desecration of article 48 of *the Constitution* to which, as a Tribunal, we are called upon to safeguard jealously. Having established that we have jurisdiction, we now turn to the two other issues.



**Whether the Respondent should refund the plantation fees with/without interests:**

18. At the commencement of the Appellant's case, Mr. Ndichu, counsel for the Appellant, prayed for Judgment on admission to be entered against the Respondent for the sum of Kshs. 563,988 on account of the admission contained in para 4 of the Respondent's Replying Affidavit sworn by Fredrick B. O Ojuang. The paragraph reads as follows:

“The Respondent is ready and willing to refund the sum of Kshs. 563,988 to the Appellant herein as full and final settlement.”

19. The admission was reiterated by the Respondent's witness, Mr. Ojuang, during the hearing of the Respondent's case. In the witnesses' own words during cross-examination by the Appellant's counsel, 'We have no problem refunding the Kshs. 563,988 paid.'
20. Order 13 of the Civil Procedure Rules is the centrifugal force upon which a Judgment on admission operates. The test we must now apply was established by the High Court in *Guardian Bank Limited vs Jambo Biscuits Kenya Limited* [2014] eKLR as follows:

“The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern.

21. Looking at the language deployed in paragraph 7 of the Replying Affidavit and the testimony of the Respondent's witness, Mr. Ojuang, we are satisfied that the admission was clear and unequivocal; Judgment is therefore entered in favour of the Appellant for the admitted sum of Kshs. 563,988 on account of the Respondent's admission.
22. Tied to this issue is the question of interest. The appellant claims interest from the date of payment, 13<sup>th</sup> October 2017. The Respondent opposes this prayer. To answer this question, we turn our minds to the erudite exposition of Hon. Justice Prof. Joel Ngugi (as he then was) of section 26 of the *Civil Procedure Act* in *Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others* [2018] eKLR:

30. Third, when it comes to the period before the filing of the suit, Section 26 of the *Civil Procedure Act* has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where, under an agreement, there is a stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties. See *Gulamhussein v French Somaliland Shipping Company Limited* [1959] EA 25; *Highway Furniture Mart Limited – v- The Permanent Secretary & Another* EALR (2006) 2 EA 94; Mulla – *The Code of Civil Procedure* (16<sup>th</sup> Ed.) Vol. 1 at p. 505.

23. It follows that the Appellant's prayer that interest be computed from the date he paid the sum of Kshs 563,988 must fail. Being a liquidated sum, courts have time without number held that interest accrues at court rates from the time of filing the suit, in this case, 4<sup>th</sup> October 2023, until payment in full. The sum of Kshs. 563,988 shall, therefore, attract interest at court rates from 4<sup>th</sup> October 2023 until payment in full.



### **Whether the Respondent should refund the license fees paid**

24. The Appellant has urged the Tribunal to find that he is entitled to a refund of the sum of Kshs. 150,000 paid to the Respondent as license fee on 17<sup>th</sup> October 2017. He testified that despite holding the license, he was unable to access the assigned plantation until the month of January 2018 as there was no access bridge. It was his testimony that the only period he utilised the license was the month of January 2018 as soon thereafter, in the month of February 2018, the national government issued a nationwide moratorium on forest produce.
25. On cross-examination, the Respondent's witness, Mr. Ojuang, heavily disputed the Appellant's testimony that his assigned plantation lacked an access bridge. According to Mr. Ojuang, had that been the case, the Appellant should have raised a complaint in the first instance. The Appellant's counsel, Mr Ndichu, while cross-examining Mr Ojuang, pointed the witness to a letter dated 14<sup>th</sup> December 2022, where the claim of the lack of an access bridge was raised. With tremendous respect to counsel, the contents of the letter touching on the absence of a bridge ought to have been communicated to the Respondent as soon as the Appellant was allowed access to the plantation in October 2017 and not December 2022.
26. We are therefore inclined to agree with the submissions and testimony of the Respondent that, indeed, there was an access bridge as no evidence has been presented before the Tribunal to suggest otherwise besides the belated letter of 14<sup>th</sup> December 2022. It bears repeating the evidentiary truism that he who alleges must prove.
27. In further support of his claim for a refund of the license fees, the Appellant testified that he was allocated a cypress tree plantation as opposed to a pine tree allocation. In support of this position, he referred the Tribunal to two (2) letters dated 28<sup>th</sup> June 2017 and 4<sup>th</sup> July 2017. Both letters request the Respondent to allocate him a pine tree plantation. Be that as it may, we turn to the sequence with which the Appellant made the payments, forming the subject of the appeal before the Tribunal. On 13<sup>th</sup> October 2017, the Appellant paid the sum of Kshs. 563,988 for what was clearly indicated as a cypress tree plantation allocation. Soon thereafter, on 17 October 2017, the appellant paid the license fees of Kshs. 150,000. The Appellant can, therefore, not be allowed to approbate and reprobate at the same time. It is clear that the Appellant knew what he was getting himself into as he made the respective payments. Indeed, in the Appellant's letter dated 7<sup>th</sup> September 2023 to the Respondent, he admits to paying the sum of Kshs. 563,988 for the allocation of cypress tree plantation.
28. The question we must now answer is whether the Appellant is entitled to a refund of the license fees. The Respondent's witness, Mr. Ojuang, testified that in as much as the license fee is paid annually, it entitled the Appellant to a limited access period of 90 days. He further testified that the 90 days were to run between December 2017 and February 2018. On the other hand, the Appellant urged the Tribunal to prorate the license fee and direct the Respondent to process a refund for the 11 months the license was unutilised. It was his case that he was only able to utilise the license for the month of January 2018 on account of the absence of an access bridge and the subsequent moratorium.
29. Neither party provided the Tribunal with a copy of the license; we are, therefore, unable to verify the Respondent's position. What is common ground is that the fee was paid annually.
30. As rightly conceded by the Appellant in his submissions dated 8<sup>th</sup> April 2023, no legal framework exists supporting the prayer for the refund of license fees. As a Tribunal, we respectfully decline to take up the invitation by the Appellant to join him as he explores what we consider to be uncharted seas out of an abundance of caution and the need to uphold stable jurisprudence and judicial practice.



31. The moratorium issued by the national government in February 2018 was unenforceable, and the Appellant conceded this fact during cross-examination. Additionally, it was the testimony of the Respondent's witness, Mr. Ojuang, that the line ministry did not consult the Respondent as the decision to enforce the moratorium was taken. To find that the Respondent must be held accountable for each and every unutilised license will be to place such an onerous burden on the Respondent's shoulder in the absence of an existing legal framework or concession from the Respondent. We therefore reject the prayer for a refund of license fees as urged by the Appellant.

#### **Orders**

32. In the premises, the Tribunal proceeds to make the following orders:
- a. Judgement is entered in favour of the Appellant for the admitted sum of Kshs. 563,988, which shall attract interest at court rates from the filing date until payment in full.
  - b. The Respondent shall bear the costs of the appeal.

**DATED AND DELIVERED AT NAIROBI, THIS 19<sup>TH</sup> APRIL 2024.**

**EMMANUEL MUMIA - CHAIRMAN**

**WINNIE TSUMA - VICE-CHAIR**

**DUNCAN KURIA - MEMBER**

**RONALD ALLAMANO - MEMBER**

