



**Simiyu v Director General, National Environment Management Authority & 2 others
(Tribunal Appeal 32 of 2023) [2024] KENET 632 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KENET 632 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 32 OF 2023**

**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA,
DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**

MAY 7, 2024

**IN THE MATTER OF A DECISION MADE UNDER RULES 10 AND 46 OF THE
ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS,
2003 APPROVING AN ENVIRONMENTAL IMPACT ASSESSMENT PROJECT
REPORT OVER ALL THAT PROPERTY KNOWN AS LAND REFERENCE
NUMBER L.R NO. 17/261 ALONG KITISURU ROAD IN KITISURU**

BETWEEN

DAVID SIMIYU APPELLANT

AND

**THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT**

MAKANJAWA COMPANY LIMITED 2ND RESPONDENT

BLUE RIVET ENGINEERING LIMITED 3RD RESPONDENT

RULING

1. In a Ruling delivered on 19th October 2023, the Tribunal struck out the Notice of Appeal dated 11th October 2023 for being filed outside the statutory timeline of 60 days encapsulated under section 129(1) of the EMCA. Aggrieved by the Ruling, the Applicant, vide a Notice of Motion application dated 29th April 2024, invites this Tribunal to review its orders of 19th October 2023 and, in a manner of speaking, resurrect his appeal. For completeness of record, his application seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to stay execution of its orders made on 19th October 2023 pending the hearing and final determination of the application herein.



- c. That this Honourable Tribunal be pleased to review and/or set aside the orders made on 19th October 2023 and all proceedings antecedent thereto.
 - d. That costs of this application be provided.
2. The application is not unopposed. The 2nd Respondent filed and served a Notice of Preliminary objection dated 2nd May 2024 premised on the following grounds:
- a. The Tribunal has no jurisdiction to entertain the instant Application as it has become functus officio, having fully pronounced itself in this matter.
 - b. The Appellant is guilty of laches.
 - c. Corollary to the foregoing, the pleadings are incurably fatal and defective and ought to be struck out with costs to the Respondents.
3. The parties appeared before the Tribunal for the inter-partes hearing of the application on 6th May 2024. In light of the Notice Preliminary Objection, which raises a jurisdictional challenge, the Tribunal was urged to pronounce itself on the jurisdictional question as a matter of priority.

Issue for determination

4. Having carefully considered the pleadings, we find that the only issue dispositive of the instant application is whether the Applicant's application seeking a review of the Tribunal's Ruling of 19th October 2023 is merited.

Whether the Applicant's application seeking a review of the Tribunal's Ruling of 19th October 2023 is merited

5. Jurisdiction is the lifeblood upon which Courts and Tribunals draw their sustenance, and 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, it is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it.' That jurisdiction is sacrosanct within legal parlance cannot be gainsaid. A decision rendered in the absence of jurisdiction results in a nullity ab initio and is amenable to being set aside ex debito justitiae.
6. The 2nd Respondent has urged the Tribunal to find that upon pronouncing itself on 19th October 2023, the Tribunal became functus officio and, therefore, defrocked of jurisdiction to hear and determine the instant application. Whereas there are no express provisions conferring the Tribunal with the power to review its own decisions, the Tribunal, in the exercise of its inherent powers, can review any of its Judgments, Rulings or orders in order to meet the ends of justice. This was our finding in *Wemali Benson & 3 others v National Environment Management Authority (NEMA) & another* [2020] eKLR.

"The Tribunal in its course of dispensing justice makes numerous orders, some of which are reviewed in the course of the hearing of matters. Whereas the NET Rules do not have a Rule similar to Order 45 of the Civil Procedure Rules, section 129 (3c) provides some leeway to make decisions that may guide the dispensation of justice. It would be a legal absurdity for the Tribunal to find that it cannot review its decisions including errors that may be apparent on the face of the record or any other orders in the course of taking proceedings and instead ask the parties to proceed on appeal.



The purpose of existence of the Tribunal is to save on time, resources, formalities and to make justice more accessible to all and sundry. A finding that the Tribunal cannot review its own decision would be an erosion of the purpose of existence of the Tribunal.”

7. It is trite that the scope of review is limited to the following grounds- (a) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
8. The Applicant locates his application under the limb of discovery of new and important evidence. He has urged the Tribunal to find that the letter dated 6th October 2023, which appears to emanate from the office of the 1st Respondent, is new evidence that was not within his knowledge and could not have been produced by him at the time the Ruling of 19th October was delivered.
9. The Court of Appeal provided an authoritative guide in the consideration of applications of such a nature in *Turbo Highway Eldoret Limited versus Synergy Industrial Credit Limited* [2016]eKLR. The Court held as follows:

“Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”
10. The appeal the Applicant seeks to resuscitate sought to cancel EIA Licence No. NEMA/EIA/PSL/24714 on the grounds listed on the face of the Notice of Appeal dated 11th October 2023. The letter which the Applicant relies on in the instant application emanates from the 1st Respondent’s office and makes available to the Applicant a copy of the impugned license. The same License formed the substratum of the appeal filed by the Appellant before the Tribunal.
11. Can it then be said that the letter of 6th October 2023 satisfies the threshold for the admission of new and important evidence? Hon. Lady Justice Chepkwony in *Anwar Ali & another v Monica Muthoni & another* [2021] eKLR established that for evidence to “qualify to be new evidence so as to fall within the ambit of Order 45 Rule 1 of the Civil Procedure Rules, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence.”
12. We are not satisfied that the letter of 6th October 2023 meets the threshold for the admission of new and important evidence as a ground for review. The import of the letter was simply to forward a copy of the impugned License to the Applicant, which License was subsequently utilised by the Applicant in the filing of the Notice of Appeal dated 11th October 2023. We are at a loss as to what benefit the letter of 6th October 2023 is intended to serve the Applicant. The purported discovery of the letter at



this stage feeds into the caution heralded by the Court of Appeal in *D. J. Lowe & Company Ltd v Bonquo Indosuez*, Nairobi Civil Application No.217 of 1998:

“Where such a review application is based on fact of the discovery of fresh evidence, the court must exercise greatest of care as it is easy for a party who has lost to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

13. We hold the view that allowing the application would unjustifiably reopen the Applicant’s case. As Hon. Justice Mugo Kamau opined in *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] eKLR, ‘litigation must come to an end.’

Orders.

14. In the premises, we make the following orders:

- a. The application dated 29th April 2024 is hereby dismissed in its entirety;
- b. For the avoidance of doubt, the project forming the subject of the instant appeal shall proceed unhindered unless injuncted by a lawful court order; and
- c. Each party shall bear its own costs.

DATED AND DELIVERED ELECTRONICALLY THIS 7TH DAY OF MAY 2024

EMMANUEL MUMIA.....CHAIRMAN

WINNIE TSUMA.....VICE-CHAIR

DUNCAN KURIA.....MEMBER

RONALD ALLAMANO.....MEMBER

