



**Kibe & 1204 others v Director General National Environment Management Authority & 5 others (Tribunal Appeal 7 of 2023) [2023] KENET 482 (KLR) (10 August 2023) (Ruling)**

Neutral citation: [2023] KENET 482 (KLR)

**REPUBLIC OF KENYA**  
**IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI**  
**TRIBUNAL APPEAL 7 OF 2023**  
**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI**  
**MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**  
**AUGUST 10, 2023**

**BETWEEN**

**ZABLONE KIBE ..... 1<sup>ST</sup> APPELLANT**  
**GODFREY KANYI ..... 2<sup>ND</sup> APPELLANT**  
**DENNIS ONDWETE ..... 3<sup>RD</sup> APPELLANT**  
**ALFRED MACHARIA ..... 4<sup>TH</sup> APPELLANT**  
**JAMES MAINA & 1200 OTHERS ..... 5<sup>TH</sup> APPELLANT**

**AND**

**DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT**  
**AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**  
**REGISTRAR OF LANDS ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**  
**SAJA MURAYA ..... 4<sup>TH</sup> RESPONDENT**  
**NAIROBI CITY COUNTY GOVERNMENT ..... 5<sup>TH</sup> RESPONDENT**  
**MAMO B MAMO ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. On the February 21, 2023, the plaintiffs lodged a suit in this Tribunal dated the February 14, 2023. The suit is brought by Zablon kibe, Godfrey Kanyi, Dennis Ondwete, Alfred Macharia, James Maina & 1200 others. This suit as per the averments gleaned from the body of the plaint is brought on behalf of the families occupying land parcel number LR 209/14438.



2. A perusal of the plaint reveals the following prayers –
  - a. A permanent injunction be issued restricting the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> defendants and their agents from evicting, attaching, seizing, selling, auctioning and/or charging the suit property Land Parcel Number 209/14438 or interfering with the peaceful occupation of the suit property LR Number 209/14438 by the plaintiffs and their families;
  - b. A permanent injunction be issued restricting the 4<sup>th</sup> and 6<sup>th</sup> defendants from using the name of his Excellency the President Honourable William Samoei Ruto, to dispose people and sell public land to private individuals using fake title deeds;
  - c. That the area OCS or officer of similar rank do ensure compliance of this orders;
  - d. Any other orders that this Court deems fit to meet the ends of justice.
3. Similarly, the plaintiffs filed an application under urgency on the even date as the Plaint. The Motion is supported by the Affidavit of Zablon Kibe similarly dated the February 14, 2022. The centrifugal force of the Application is that it seeks several interim reliefs against the respondents, the said reliefs are a mirror image of those set out in paragraph 2 hereinabove, save for prayers (v), (vi), (vii) and (viii).
4. In response to the suit, the 1<sup>st</sup> and 6<sup>th</sup> Respondent through Mr. Simon Ngara Learned Counsel, filed a notice of preliminary objection dated the March 3, 2023. The crux of the preliminary objection is that the suit offends section 129 of the Environment Management & Coordination Act, No 8 of 1999 (hereinafter referred to as 'EMCA'), that the honourable tribunal lacks jurisdiction to hear, determine and grant the prayers sought by the appellants and that the appellants suit as drafted and filed raises no cause of action capable of being heard and determined by the honourable tribunal.
5. The 1<sup>st</sup> and 6<sup>th</sup> defendants further filed written submissions dated the April 11, 2023.
6. The appellants did not file any submissions to controvert the preliminary objection.
7. On the July 28, 2023, the matter came up before us for mention for directions where we indicated that the tribunal will render itself on the Preliminary objection dated the March 3, 2023 on the August 9, 2023. On this day the Tribunal adjourned the matter to this day the August 10, 2023.
8. The Tribunal having considered the plaint, notice of motion application both of which are dated the February 14, 2023 and the Preliminary Objection raised by the 1<sup>st</sup> and 6<sup>th</sup> defendant dated the March 3, 2023 has distilled the following as the only issue for determination at this juncture –

**Whether the preliminary objection dated the March 3, 2023 is merited.**

9. From the onset the *locus classicus* case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696, is instructive that;

‘---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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.....;



...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop'

10. Thus, a preliminary objection must be based on a pure point(s) of law. Turning to the instant case, our findings are that the Preliminary objection dated the March 3, 2023 raises pure points of law and thus available for determination at the very earliest as this position emanates from a golden thread of judicial precedent that when the issue of jurisdiction is raised, it is incumbent upon the Tribunal to deal with that question first, particularly as observed by Nyarangi J (as he was then) that jurisdiction is everything and without it a Court of law must down its tools - See *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* (1989) KLR 1.

11. It is therefore incumbent upon us to determine whether the Tribunal has jurisdiction with respect to the Complaint and any consequential filings made therein.

12. The jurisdiction of the Tribunal is to be found in section 129 of EMCA which provides as follows:

Appeals to the Tribunal

(1) Any person who is aggrieved by—

- (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
- (b) the imposition of any condition, limitation or restriction on the person's licence under this Act or its regulations;
- (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
- (d) the amount of money required to be paid as a fee under this Act or its regulations;
- (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(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, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.



(3) Upon any appeal, the Tribunal may—

- (a) confirm, set aside or vary the order or decision in question;
- (b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
- (c) make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;
- (d) if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
- (e) if satisfied upon application by any party, review any orders made under paragraph (a).

13. The import and purport of the above is that the Tribunal's jurisdiction under Section 129 of [EMCA](#) is not unlimited. In Miscellaneous Application Number 391 of 2006, *Republic vs National Environment Tribunal & 3 others ex -Parte Overlook Management Ltd and Silversand Camping Site limited* while considering the jurisdiction of the Tribunal to entertain an appeal against EIA approval, Emukule J, considered the legislative intent of the provisions of [EMCA](#) and held as follows –

“...I have shown in the discussions on the two previous issues that the powers of the Respondent Tribunal are not unrestricted. The Tribunal's powers to entertain appeals are limited to decisions made under the power's given to NEMA (authority) or to NEMA 's Director General or Committee of NEMA ...This is about where the jurisdiction of the Respondent Tribunal ends ...on the other hand, the High Court has both original and appellate jurisdiction commencing from the provisions of section 3(3) of the Act...”

14. Similarly in [Mohamed Ali Baadi and others vs The Hon Attorney General & 7 others](#), the court stated as follows-

“...In our considered opinion, the Tribunal is not a suitable forum for purpose of settling environmental conflicts at community level as disclosed in this petition. in addition, the design of the Tribunal is such that it does not envisage the participation of all interested parties, such as developers , government , the community , non-governmental organizations and environment groups in a joint effort aimed at restoring the environment and agreeing on their sustainable use .Differently put , the multiplicity of parties and the polycentricity of issues in a case such as this one makes it untenable for the Tribunal...”

15. We have endeavored to elucidate on the scope of the Tribunal to ensure we do not stray outside the mandate set out under section 129.

16. In the instant suit, the prayers sought and as captured verbatim in paragraph 2 hereinabove though 4 in number appear to seek the singular intervention of the Tribunal in respect of occupation of land parcel number LR 209/14438. These prayers do not seem to challenge the powers given to NEMA or



NEMA's Director General or a committee of NEMA and thus do not fit within the narrow ambit of section 129 of EMCA. The prayers as sought are incapable of being granted by this Tribunal.

17. In that regard, we are guided by the holding of the Supreme Court in the case Samuel Kamau Macharia v Kenya Commercial Bank & 2 others (2012) eKLR where the Court held that the jurisdiction of the Court flows from either constitution or legislation or both. The Court stated as follows:

‘A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.’

18. That said, and even though the prayers as couched are incapable of being granted by the Tribunal, it can also be discerned from the plaintiffs pleadings that they are equally challenging the restoration order issued to them by the 1<sup>st</sup> respondent on the November 30, 2022.
19. A challenge mounted on the basis of a dispute on the issuance of a restoration order by the 1<sup>st</sup> respondent falls squarely within the jurisdiction of the Tribunal pursuant to section 129 (1)(e) of EMCA. The said provision also requires that an appeal premised on this provision is brought within 60 days from the date of occurrence of the event complained of.
20. The record reveals that the Complaint herein was lodged on the February 21, 2023, yet the restoration order was issued on the November 30, 2022. This means the Appeal was filed 17 days beyond the statutory set timeline of 60 days. This timeline is captured in section 129 (1)(e) of EMCA as follows-

“.... (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.”

21. The implication of the above provision is that even if the prayers in the complaint were to be properly framed so as to capture an appeal against the restoration order, the same and indeed the entire complaint of the appeal would fail for being filed out of the statutory timeline of 60 days. A matter filed outside this timeline leaves the Tribunal without jurisdiction to entertain the same. Indeed, the Tribunal is not clothed with powers to extend this timeline.
22. The upshot of the above rendition is that the preliminary objection dated the March 3, 2023 is hereby upheld and accordingly the suit herein struck out with an order that each party bears their own costs.

**DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF AUGUST 2023**

**EMMANUEL MUMIA**

.....

**CHAIRMAN**

**WINNIE TSUMA**

.....

**VICE-CHAIR**

**KARIUKI MUIGUA**

.....



**MEMBER**

**DUNCAN KURIA**

.....

**MEMBER**

**RONALD ALLAMANO**

.....

**MEMBER**

