



Mathu, Chairman & 2 others (All jointly suing as and on behalf of Kyuna Neighbours Association) v National Environment Management & 2 others; Director General Nairobi Metropolitan Services (Interested Party) (Tribunal Appeal 26 of 2021) [2023] KENET 487 (KLR) (1 September 2023) (Ruling)

Neutral citation: [2023] KENET 487 (KLR)

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 26 OF 2021
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
SEPTEMBER 1, 2023

BETWEEN

KIMANI MATHU, CHAIRMAN 1ST APPELLANT
ATULA SHAH, VICE CHAIRPERSON 2ND APPELLANT
CHRIS NDEGWA , SECRETARY 3RD APPELLANT
ALL JOINTLY SUING AS AND ON BEHALF OF KYUNA NEIGHBOURS
ASSOCIATION

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT
SHANZU RETREAT LIMITED 2ND RESPONDENT
SHAHNAWAZ MOHAMEDALI WISSANJI MURJI 3RD RESPONDENT

AND

DIRECTOR GENERAL NAIROBI METROPOLITAN SERVICES . INTERESTED
PARTY

RULING

1. In a Judgment delivered on April 13, 2023, we directed parties to approach the Tribunal under Rule 39 of the National Environmental Tribunal Rules, 2003, and make representations on the costs of the Appeal.



2. When parties appeared before us August 4, 2023, we directed them to canvass the issue of costs by way of written submissions. Pursuant to our directions, the Appellants filed their submissions dated August 25, 2023. The 2nd and 3rd Respondents equally filed their submissions dated August 17, 2023.
3. In their submissions, the Appellants contend that they have instituted an appeal against our Judgement before the Environment and Land Court at Milimani being ELC Civil Appeal E076 of 2023. They contend that section 130(2) of the Environment Management and Coordination Act therefore serves as a bar to the proceedings presently before us. The section provides as follows:

“No decision or order of the tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has commenced until the appeal has been determined”.

4. The Appellants further contend that a representation on costs as directed by the Tribunal constitutes part of the ‘decision or order of the Tribunal’ and therefore offends section 130(2) of [EMCA](#). The Respondent’s submissions do not address us on this particular argument advanced by the Appellant’s submissions.
5. Having considered the rival submissions filed by the parties, we find that the only issue that presents itself for determination is whether the filing of ELC Civil Appeal E076 of 2023 stayed the proceedings before this Tribunal.

Whether the filing of ELC Civil Appeal E076 of 2023 stayed the proceedings before this Tribunal

6. *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011, the Supreme Court cautioned against an arrogation of ‘jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.’ A reading of Section 130(2) of EMCA in a manner that confers on us jurisdiction to dispose of the question of costs in the face of the appeal lodged by the Appellants would amount to an error of interpretation.
7. The verb enforce is defined in the Black’s Law dictionary (9th edition) as ‘to give force or effect to; to compel obedience to.’ The proceedings before us seek to enforce an order made by the Tribunal in its Judgment of April 13, 2023
8. In [Riunga v Director General, National Environment Management Authority & another](#) (Appeal E057 of 2022) [2022] KEELC 13274 (KLR) (3 October 2022), Hon Justice Wabwoto rendered himself on the subject in the following manner:

The appellant also referred to the provisions of section 130(2) of EMCA which provides as follows: -“No decision or order of the tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced, until the appeal has been determined.”

19. Counsel cited the cases of Nairobi ELCA Number 16 of 2015 (Director General NEMA v Africa Network for Animal Welfare & others ELC and Nairobi Appeal Number 50 of 2016 (Isaac Ngotho & others v Director General NEMA & another where the court while making reference to section 130(2) of EMCA separately held that the said provision provides for an automatic stay of execution of all decisions of the tribunal where an appeal has been filed until the appeal is heard and determined.



20. Being guided by the above authorities and the provisions of section 130(2) of EMCA, I am inclined to allow prayer 3 of the appellant's/applicant's motion dated September 15, 2022 with an order that costs of the application shall abide the outcome of the main appeal.
9. We note that the appeal lodged by the Appellant is against the entirety of our Judgment and consequential orders, proceeding with the matter before us runs the risk of exposing us to ridicule should the appellate court set aside our Judgment. Indeed, we are guided in this regard by Hon. Justice Ojwang (as he then was) in *B. V. Attorney General* [2004] 1 KLR 431 where he counselled:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise, the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

Orders

10. We hereby direct that the proceedings before us be stayed pending the hearing and determination of ELC Civil Appeal E076 of 2023.
11. The matter shall be mentioned after 60 days for the purpose of appraising the Tribunal on the outcome of ELC Civil Appeal E076 of 2023.

Dated at Nairobi this 1st day of September 2023

EMMANUEL MUMIA.....CHAIRMAN

WINNIE TSUMA.....VICE-CHAIR

KARIUKI MUIGUA.....MEMBER

DUNCAN KURIA.....MEMBER

RONALD ALLAMANO.....MEMBER

