



**Wambua & another v Director General National Environment Management Authority & 2 others (Tribunal Appeal 173 of 2016) [2023] KENET 1252 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KENET 1252 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
TRIBUNAL APPEAL 173 OF 2016**

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

**DECEMBER 8, 2023**

**BETWEEN**

**JOSEPHAT KYOLOLO WAMBUA ..... 1<sup>ST</sup> APPELLANT**

**MIKE MULUNGA MUTUA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**JEFFERSON MWENDWA MUTHAMA ..... 2<sup>ND</sup> RESPONDENT**

**JOYCE MUTINDI MUTHAMA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Background**

1. The chronology of events which triggered these proceedings is not disputed. The Applicants obtained a court decree in their favour against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 3<sup>rd</sup> June 2020 from the Tribunal. Further, the Respondents in response to the Judgment against them, filed an application for leave to file an appeal out of time in the Environment and Land Court in Machakos (Miscellaneous Application no 29 of 2020), which was granted. Copies of the Ruling were attached to their submissions.
2. The Ruling was delivered on the 17<sup>th</sup> of May 2023 where the court held ‘ it is common knowledge that from March 2020, there was disruption of operations of many service providers due to covid-19 pandemic. The explanation given by the Applicants in my view, is a sufficient explanation as to what caused the delay. The applicants’ delay was a 21-day delay. As the pandemic affected the country for a substantial part of the year of 2020, I do not consider a delay of 21 days as being unreasonable in the circumstances of this case, in the premises I am satisfied that there was good and sufficient cause



for the delay and which has been explained to the satisfaction of the court (para. 19).’ Therefore, the Applicants (Respondent) were granted leave to file the appeal.

3. The substantive application filed by the Appellants/Applicants sought to have the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be in contempt of this tribunal for their failure to undertake an Environment Impact Assessment Study report within 30 days of the Judgment delivered on 3<sup>rd</sup> June 2020. It sought to have them committed in civil jail for a period of not more than six months.

### **Respondent’s submissions**

4. The Respondent filed their grounds of opposition to the application and written submissions dated 16<sup>th</sup> October 2023 where several issues were raised, which include: the Appellant/Applicant deliberately withheld material information from the tribunal, more specifically the existence of Machakos ELC Miscellaneous Application no 29 of 2020 which by Section 130(2) of Environmental Management and Co-ordination Act (EMCA) provided an automatic stay against the judgment of the tribunal during its pendency.
5. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s submission that any Application filed during the pendency of Miscellaneous application no 29 of 2020 and before the expiry of the 21 days granted by the Environment and Land Court would be premature as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by operation of the law could not have been in contempt of the directions issued by this tribunal (National Environmental tribunal). The Application was filed on 13<sup>th</sup> March 2022 and was filed while their application was awaiting determination.
6. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ humble submission that the Application before the tribunal was premature and therefore should be dismissed.

### **Applicants Submissions**

7. The Applicant filed their submissions on 7<sup>th</sup> November 2023 where they stated that the appeal was supposed to be filed within 30 days as per section 130(1) of EMCA. The appeal was not filed within those 30 days and in verbatim they stated ‘as a matter of fact Section 130(2) of EMCA does not come to the aid of any party who has filed an appeal out of time. This comes to a party’s aid when the appeal has been filed within the required time frame.’
8. It was further stated that even if time was to start running from the 16<sup>th</sup> of June 2023 it is the 5<sup>th</sup> month and therefore, they are still out of time.
9. The Applicants relied on the case of Simba Corporation Limited v Director General, National Environment Management Authority and another (Tribunal Case no 158 of 2015 [2018-eKLR) which quoted *Canadian Metal Co. Limited v Canadian Broadcasting Corp* (no 2) [1975] where the Court stated:

‘to allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.’
10. It was submitted that the inaction by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was therefore contemptuous of the tribunal’s orders and is inimical to the objects of the Tribunal to protect and safeguard the environment as set out in Article 42 of the Constitution and the Environmental Management and Co-ordination Act



(EMCA). The Applicant therefore holds that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ought to be held in contempt of court and be punished accordingly.

### Issues for determination

11. The main issue for determination is whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are in contempt.
12. Black's Law Dictionary 9th Edition, defines contempt as: The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.
13. In Richard Otieno & 9 others v Michael Otieno Wagude & another [2021] eKLR the court stated It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.
14. North Tetu Farmers Co Limited v Joseph Nderitu Wanjohi [Nyeri HC Civil Case no 13 of 2014] the court highlighted the four elements of civil contempt. These elements are:
  - a. The terms of the order or injunction or undertaking were clear and unambiguous and were binding on the defendant;
  - b. The defendant had knowledge of or proper notice of the terms of the order;
  - c. The defendant acted in breach of the terms of the order; and
  - d. The defendant's conduct was deliberate.
15. The first two elements are not in dispute in the present case. The last two tests however warrant detailed consideration. It is an established principle that a high standard of proof applies whenever a committal to prison for contempt is sought because contempt of court is quasi-criminal. This has also been restated in Githiga & 5 others v Kiru Tea Factory Company Ltd (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment) the court held contempt proceedings being quasi-criminal, required a higher standard of proof than in normal civil cases, and one could only be committed to civil jail or penalized on the basis of evidence that left no doubt as to the contemnor's culpability.
16. The Respondents exercised their right of appeal, and by virtue of section 130 (2) of EMCA, an automatic stay of execution avails itself of all decisions of the tribunal where an appeal has been filed until the appeal is heard and determined. The above position has been upheld in Riunga v Director General, National Environment Management Authority & another (Appeal E057 of 2022) [2022] KEELC 13274 (KLR) (3 October 2022) (Ruling)
17. The Tribunal needs to highlight that the Applicants/Appellants application predated the determination of the Machakos Miscellaneous Application no 29 of 2020. The application was filed on the 13<sup>th</sup> of March 2023 whilst the determination was given on the 17<sup>th</sup> of May 2023.
18. Applying the principles discussed herein above to the facts of the case, the Tribunal does not arrive at a finding of contempt of court.



19. We should pen off here, however we reiterate [\*Sustainable Energy Systems Limited v Kenya Forest Service\*](#) (Tribunal Appeal 215 of 2017) [2022] KENET 720 (KLR) (Civ) (28 September 2022) (Ruling) a judgment of this Tribunal is not a whimsical suggestion whispered in vain by a subordinate court bereft of the mandate and powers to enforce compliance with its judgments and, in default of such compliance, to punish a party that deliberately breaches our judgement and its attendant orders.

**Order**

20. For the reasons stated above the Appellants/applicant Notice of Motion application dated 13<sup>th</sup> March 2023 is dismissed.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER 2023**

**EMMANUEL MUMIA - CHAIRPERSON**

**WINNIE TSUMA - VICE-CHAIRPERSON**

**KARIUKI MUIGUA - MEMBER**

**DUNCAN KURIA - MEMBER**

**RONALD ALLAMANO - MEMBER**

