



**Endesk Properties Limited v Director-General, National Environment  
Management Authority & another (Tribunal Appeal 12 of 2023)  
[2023] KENET 484 (KLR) (Environment and Land) (29 August 2023) (Ruling)**

Neutral citation: [2023] KENET 484 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
ENVIRONMENT AND LAND  
TRIBUNAL APPEAL 12 OF 2023  
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI  
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS  
AUGUST 29, 2023**

**BETWEEN**

**ENDESK PROPERTIES LIMITED ..... APPELLANT**

**AND**

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

**KOPOA DEVELOPERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. Before the Honorable Tribunal is the Appellant's Notice of Motion Application dated 25<sup>th</sup> April 2023 seeking the following orders:
  - a. Spent
  - b. That the 2<sup>nd</sup> Respondent be held in contempt of and in deliberate and contumelious disregard of the Stop Order issued by the Tribunal on 5<sup>th</sup> April 2023 under Section 129(4) of the [Environmental Management and Co-ordination Act](#), 1999;
  - c. That the 2<sup>nd</sup> Respondent to show cause why its senior management should not be jailed for a term not exceeding six(6) months for the deliberate disregard of the Tribunal orders; the 2<sup>nd</sup> Respondent's senior management be committed to civil jail for a term not exceeding six months for willfully disregarding the Tribunal's Stop Order issued on 5<sup>th</sup> April 2023; the 2<sup>nd</sup>



Respondent be barred from taking further part in these proceedings unless and until such time as they purge their contempt and disregard of Stop Order issued on 5<sup>th</sup> April 2023.

- d. That issuance of such further and other orders as will meet the ends of justice to ensure the obedience of the orders and directions issued by the Tribunal in furtherance of the rule of law and, finally costs of this application be borne by the 2<sup>nd</sup> Respondent.
2. The 2<sup>nd</sup> Respondent is opposed to the said application and has to that effect, filed a Notice of Preliminary Objection dated 26<sup>th</sup> April 2023 predicated on the following grounds:
    1. That the 2<sup>nd</sup> Respondent is not in contempt of the Honorable Tribunal's Orders of 5<sup>th</sup> April 2023 and is actually of being in contempt of the said order contrary to the Applicant's allegations in the Application
    2. That the import of Sections 133(2) and 143 of the *Environmental Management and Co-ordination Act* No. 8 of 1999 is not yet applicable and/or enforceable on the part of the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Respondent can neither be alleged to nor be found to be in contempt of this Honorable Tribunal's Order of 5<sup>th</sup> April 2023.
    3. That the provisions of Sections 133(2) and 143 of the Act only come into operation upon the lapse of the timelines as provided/stipulated as well upon failure by the 2<sup>nd</sup> Respondent to comply with the provisions of Section 130 (1) and (2) of the Act.
    4. That pursuant to Section 130(2) of the Act, no decision or order of the Honorable Tribunal shall be enforced until the time for lodging an appeal from the respective decision/order of the Honorable Tribunal has expired.
    5. That pursuant to section 130(1) of the Act, the time for lodging an appeal from the decision/order of the Honorable Tribunal shall run for Thirty (30 days) from the date such decision/order appealed from was made by the Honorable Tribunal.
    6. That in effect therefore, the order of the Honourable Tribunal was issued on 5<sup>th</sup> April 2023 which means that the said order is only enforceable with effect from 5<sup>th</sup> May 2023 at the earliest.
    7. That since the Applicant's Allegations of contempt are alleged to have arisen before 5<sup>th</sup> May 2023 effectively during the Thirty (30) day period provided for in Section 130(1) of the Act, then the said application is wrongly before this Honourable Tribunal since the law does not envisage the possibility of contempt during this period.
    8. That the Applicant's trigger-happy reaction in bringing the application of 25<sup>th</sup> April 2023 is premature, ill-timed and a reckless and pedestrian attempt at hoodwinking the Honorable Tribunal to wrongly find the 2<sup>nd</sup> Respondent to be in contempt and aggravate the subsistent injustice in the matter against the 2<sup>nd</sup> Respondent.
    9. That even after 5<sup>th</sup> May 2023, the date on which the order of 5<sup>th</sup> April 2023 shall first be enforceable, the 2<sup>nd</sup> Respondent cannot be found in contempt by dint of the application of 25<sup>th</sup> April 2023 since the said application raises allegations in respect of the 2<sup>nd</sup> Respondent's alleged activity prior to 5<sup>th</sup> May 2023.
    10. That the application of 25<sup>th</sup> April 2023 therefore has no standing whatsoever before this Honourable Tribunal, it is a waste of this Honorable Tribunal's time, is bad in law, frivolous and vexatious and should be dismissed in its entirety without further consideration.
  2. Further, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn by Liu Jiangang on 10<sup>th</sup> May 2023.



## Issues for Determination

2. Having considered the Appellant's Application together with the supporting affidavit thereto, the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection and Replying Affidavit, the Appellant's submissions and other documents filed by parties, we find that the following issues arise for determination:
  - i. Whether the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 26<sup>th</sup> April 2023 is merited.
  - ii. Whether Appellant's Notice of Motion Application dated 25<sup>th</sup> April 2023 is merited

### **Whether the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 26th April 2023 is merited.**

5. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696, the court held as follows;

‘---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’

6. Thus, a preliminary objection must be based on a pure point(s) of law. In our considered view, the 2<sup>nd</sup> Respondent's preliminary objection raises a pure point of law. Although, the objection is laden with ten(10) grounds, the same can be condensed to only one(1) ground, to wit; the 2<sup>nd</sup> Respondent cannot be found to be in contempt of the Tribunal order during the automatic 30 days' stay window provided by Section 130(1) & (2) of the [\*Environmental Management and Co-ordination Act\*](#).
7. Indeed, we agree with the 2<sup>nd</sup> Respondent that the orders of the Tribunal issued on 5<sup>th</sup> April 2023, only became enforceable after 30 days thereof by dint of Section 130(1) & (2) of the Act. That said, we find that the preliminary objection is not merited since there are allegations by the Appellant, which allegations have not been controverted, that the 2<sup>nd</sup> Respondent continue with the construction on the suit property even after the lapse of the 30 days.

### **Whether Appellant's Notice of Motion Application dated 25<sup>th</sup> April 2023 is merited**

8. We note that the Appellant in its Application, is principally seeking that the 2<sup>nd</sup> Respondent be held in contempt for being in disobedience of tribunal orders issued on 5<sup>th</sup> April 2023. In essence, the Appellant is seeking to enforce the said orders.



9. The 2<sup>nd</sup> Respondent has not denied that it has disobeyed the said orders. However, it argues that it is insulated from these contempt proceedings pursuant to Section 130(2) of the Act. The said provision 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.’

10. The import of the above provision is that it 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. The 2<sup>nd</sup> Respondent has already filed Nairobi- ELCA No. E043 of 2023 being an appeal against the orders of the Tribunal issued on 5<sup>th</sup> April 2023. It therefore follows that the said orders are stayed until such a time the appeal will be determined. That is the import and implication of Section 130(2) as harsh and unfair as it might be.
11. The Environment and Land Court in the case of *Director General National Environment Management Authority (NEMA) v African Network for Animal Welfare suing through its Executive Director, Josephat Ngonyo & 4 others* [2019] eKLR had the occasion of interrogating the import and effect of Section 130(2) of the Act. The Court held as follows:

‘The other order sought by the applicants is leave to execute for the recovery of the costs that were awarded to them by the by the tribunal. As concerns this prayer, I am in agreement with the submissions by the appellant that the execution in respect of which leave is sought is barred by section 130(2) of EMCA. Section 130 (2) of EMCA 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. Execution for the recovery of costs is not exempted. I am not in agreement with the applicants’ novel argument that the automatic stay is limited only to instances where there would be an injury to the environment should execution be undertaken.’

12. The above position is consonance with the holding of Wabwoto J. in the recent case of *Riunga v Director General, National Environment Management Authority & another* (Appeal E057 of 2022) [2022] KEELC 13274 (KLR) (3 October 2022) (Ruling) Neutral citation: [2022] KEELC 13274 (KLR), where the Learned Judge held as follows:

‘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.

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’

13. Deriving from the foregoing, we find that our hands are tied by the provisions of Section 130(2) of the Act. We cannot find the 2<sup>nd</sup> Respondent to be in contempt of orders whose execution is stayed by express provisions of the law. On this ground alone, the Appellant’s Application fails. In the premises, we find that the Appellant’s Notice of Motion Application dated 25<sup>th</sup> April 2023 is devoid of merit, and the same is hereby dismissed.



## **Orders**

- a. The 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 26<sup>th</sup> April 2023 is devoid of merit and is hereby dismissed.
- b. Equally, the Appellant's Notice of Motion Application dated 25<sup>th</sup> April 2023 is unmeritorious and is hereby dismissed.
- c. Each party shall bear its own costs.
- d. To ensure that the substratum of this matter is not lost, the matter be set down for hearing and determined within 21 days from the date of this ruling.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF AUGUST 2023**

**EMMANUEL MUMIA.....CHAIRPERSON**

**WINNIE TSUMA.....VICE-CHAIRPERSON**

**KARIUKI MUIGUA.....MEMBER**

**DUNCAN KURIA.....MEMBER**

**RONALD ALLAMANO .....MEMBER**

