



Olago & another (Suing on their Behalf and on Behalf of 26 other Persons) v Director-General, National Environment Management Authority & another (Tribunal Appeal 27 of 2023) [2023] KENET 1249 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KENET 1249 (KLR)

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 27 OF 2023
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
NOVEMBER 30, 2023

BETWEEN

SAMUEL OTIENO OLAGO 1ST APPLICANT
TAMARA EVGENIEVNA OLAGO 2ND APPLICANT
SUING ON THEIR BEHALF AND ON BEHALF OF 26 OTHER PERSONS

AND

THE DIRECTOR-GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT
ATC KENYA OPERATIONS LIMITED 2ND RESPONDENT

RULING

1. By way of a Notice of Motion of Application dated 20th September 2023, the Applicants moved the Honourable Tribunal seeking an extension of time for filing an appeal against the decision of the 1st Respondent dated 21st July 2022 to issue an EIA license to the 2nd Respondent. The Application is supported by the affidavit of Samuel Otieno Olago sworn on 20th September 2023.
2. The Application did not go unopposed, and in that regard, the 2nd Respondent filed Grounds of Opposition dated 4th October 2023 and Notice of Preliminary Objection of even date. The Preliminary Objection principally challenges the jurisdiction of the Tribunal to hear and determine the Applicants' Application.
3. Parties agreed to canvass the Preliminary Objection by way of written submissions, and in that regard, the 2nd Respondent filed its submissions dated 9th October 2023, the 1st Respondent filed its



submissions dated 25th October 2023, and the Applicants filed their submissions dated 31st October 2023.

4. Having considered the Applicants' Application and the supporting affidavit thereto, the 2nd Respondent's Notice of Preliminary Objection and the parties' respective submissions, the Tribunal has isolated the following as the sole issue arising for determination-

Whether the Tribunal has jurisdiction to extend time for the Applicants to file an appeal against the decision of the 1st Respondent dated 21st July 2022 issuing an EIA license to the 2nd Respondent

5. The principal jurisdiction of the Tribunal is to be found in Section 129 of [EMCA](#). The relevant part of the said provision 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 persons 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 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

6. From the orders sought by the Applicants, the Tribunal notes that the intended appeal is against the issuance of the EIA license issued to the 2nd Respondent by the 1st Respondent. From the above provision, it is clear that any appeal mounted on a challenge of issuance of an EIA license must be filed within 60 days from the date when the license was issued. Being aware that they are out of time, the Applicants have moved this Tribunal seeking an extension of time.
7. It is urged by the Applicants that their intended appeal falls within the ambit of Section 129(2) of [EMCA](#). We respectfully disagree and note that was the position before the 2015 amendments to the [Act](#). The Applicants are aggrieved by the grant of the EIA license to the 2nd Respondent, and therefore, their intended appeal falls squarely within the provisions of Section 129(1)(a) of the [Act](#). The



Tribunal is guided by its decision in Tribunal Appeal No. 005/2018 [*Albert Mumma in his capacity as Chairman, Karen Langata District Association \(KLDA\) v Director General - National Environmental & 2 others*](#), where it held as follows:

‘The 2015 amendments clarified the position by introducing the following words to section 129(1)(a):-

- (a). the grant of a licence or a permit or a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder Essentially, with the 2015 amendment all appeals either challenging the grant or refusal of a licence now fell under section 129(1). Section 129(2) was left to decisions made by the Director General, the committees of the Authority or its agents under the [*Act*](#).

From a plain reading of EMCA, it is clear that decisions under section 129(2) entailed appeals on matters, other than licensing issues, made by the Director General under powers conferred by the [*Act*](#).

8. Similarly, the Court in Misc Civil application 155 of 2012: [*Republic v NET ex parte Abdulhafidh Sheikh Zubedi*](#), while differentiating between appeals made under Section 129(1) and 129(2) of the [*Act*](#) held as follows:

‘It is therefore clear that only the Authority is empowered to issue a licence under section 63 of the [*Act*](#). Since section 129(1) of the [*Act*](#) deals with the issuance of a licence and the conditions attached thereto, that subsection cannot be said to cover the acts and omissions of the Director General or a Committee of the Authority or even the Authority itself in matters not covered under of the section 129(1).

Accordingly, it is my view and I so hold that section 129(2) of the [*Act*](#) deals with appeals other than appeals covered under section 129(1) as long as the same are not otherwise expressly provided.’

9. It is thus our finding that the Applicants’ intended appeal falls under Section 129(1) as opposed to Section 129(2) of the [*Act*](#). Having found as such, the question that arises is whether the Tribunal has jurisdiction to extend the time for filing appeals under Section 129(1) as sought by the Applicants. The answer to this question is an emphatic NO.

10. The Applicants have sought refuge in Rule 7 of the [*National Environment Tribunal Procedure Rules*](#) which provides as follows:

‘The Tribunal may for good reason shown, on application, extend the time appointed by these Rules (not being a time limited by the [*Act*](#)) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appear to it just and expedient’

11. Rule 7 permits an extension of time for those appeals whose time limits have not been fixed by the Act. The class of appeals falling under Section 129(1) of [*EMCA*](#) have their time fixed by statute and cannot be extended. As already held hereinabove, the intended appeal is an appeal challenging the issuance of an EIA, thereby falling within Section 129(1) of the [*Act*](#). It does not fall under the categories of appeal capable of having time extended by Rule 7 of the Rules. The Tribunal has times without number held that the timeline under Section 129(1) of the [*Act*](#) is ironclad, and it neither has the jurisdiction nor the discretion to extend the same.



12. Deriving from the foregoing, it is our finding that the 2nd Respondent's Notice of Preliminary Objection dated 4th October 2023 is merited. Consequently, the instant Appeal is hereby struck out with no orders as to costs.
13. It is so ordered.

DATED AND DELIVERED AT NAIROBI, THIS 30TH DAY OF NOVEMBER 2023

EMMANUEL MUMIA - CHAIRMAN

WINNIE TSUMA - VICE-CHAIR

KARIUKI MUIGUA - MEMBER

DUNCAN KURIA - MEMBER

RONALD ALLAMANO - MEMBER

