



**Riunga v National Environment Management Authority & another (Appeal 16 of 2022)  
[2023] KENET 491 (KLR) (Environment and Planning) (27 September 2023) (Ruling)**

Neutral citation: [2023] KENET 491 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
ENVIRONMENT AND PLANNING**

**APPEAL 16 OF 2022**

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

**SEPTEMBER 27, 2023**

**BETWEEN**

**SUSAN WANJIKU RIUNGA ..... APPELLANT**

**AND**

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

**SUTTON HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. Before the Tribunal for determination is the Appellant's Notice of Motion application dated 2<sup>nd</sup> June 2022 filed alongside a Notice of Appeal of even date. The Application seeks the following orders:
  - a. Spent
  - b. Spent
  - c. That this Honourable Tribunal be pleased to extend time for filing an Appeal against the decision made by the 1<sup>st</sup> Respondent on 30<sup>th</sup> July 2021 or such date approving the Environment Impact Assessment Project Report vide application Number NEMA/EIA/PSR/22107 by Sutton Holdings Limited, the 2<sup>nd</sup> Respondent.
  - d. That the Notice of Appeal filed herewith be deemed as having been properly filed.
2. In response to the Appellant's application, the 2<sup>nd</sup> Respondent herein filed a Notice of Preliminary Objection premised on the following grounds:



- a. The Appeal is statute-barred in accordance with section 129 of the *Environmental Management and Coordination Act* No. 8 of 1999 as read together with Regulation 46(1) of the Environmental (Impact Assessment and Audit) Regulations 2003, the Appellant having filed the same outside the mandatory 60 days requirement.
- b. This Honourable Tribunal Lacks Jurisdiction to hear and determine the matter regarding an application for development permission and the issuance of a change of user in view of the unequivocal provision of Section 61(3) as read together with Section 75(2)(d) of the Physical and Land Use Planning Act 2019.
- c. That the instant Appeal is, therefore, frivolous and an abuse of the Court process as this Honourable Tribunal's Jurisdiction has been limited by statute.

### Issues for Determination

3. Parties canvassed the Application and the Preliminary Objection by way of written submissions. We have carefully considered the submissions filed by the parties and pleadings and find that the test laid in the locus classicus case of *Mukisa Biscuits Manufacturing Ltd versus West End Distributors* (1969) EA 696 has been satisfied.
4. The 2<sup>nd</sup> Respondent's Notice of Preliminary Objection raises a pure point of law, one touching on the jurisdiction of the Tribunal. To settle the challenge to our jurisdiction, we shall address two issues; whether the instant appeal is an appeal within the meaning of section 129(1) of [EMCA](#) and whether this Tribunal has jurisdiction to extend the timelines for lodging appeals falling under section 129(1) of [EMCA](#).

### Whether the instant appeal is an appeal within the meaning of section 129(1) of EMCA

5. The Appellant contends that her appeal is to be located within the ambit of section 129 (2) of [EMCA](#). She further contends that her appeal challenges a decision made by the 1<sup>st</sup> Respondent pursuant to his powers under regulation 10 of the [Environmental \(Impact Assessment and Audit Regulations\)](#) 2003 and, therefore, cannot fall under section 129(1) of the [EMCA](#).
6. The 1<sup>st</sup> Respondent rejects the differentiation created by the Appellant. They contend that the Appeal is simply a challenge to the issuance of the EIA license to the 2<sup>nd</sup> Respondent, one that falls under section 129 (2) of [EMCA](#).
7. Picking cue, the 2<sup>nd</sup> Respondent contends that contrary to the averments contained in paragraph 11 of the Appellant's Supporting Affidavit, the Appellant annexed an EIA license and not an EIA project report, further supportive of the claim that the Appellant's grievance lies against the issuance of an EIA license to the 2<sup>nd</sup> Respondent. We have carefully read the supporting affidavit and find the submissions by the 2<sup>nd</sup> Respondent to be rather misleading. Alongside the EIA license is attached an undated EIA project report.
8. Our inquiry in settling the issue of whether the instant appeal is an appeal within the meaning of section 129(1) of [EMCA](#) must commence from the Appellant's Notice of Appeal, wherein he outlines the decision challenged as follows:

The decision appealed against is that said to have been made by the 1<sup>st</sup> Respondent approving an Environmental Impact Assessment Project Report vide application Number NEMA/EA/PSR/22107 by Sutton Holdings Limited, the 2<sup>nd</sup> Respondent, which seeks to enable a large scale and out of character construction of a tier 3 petrol station comprising of 3 pump isles with canopy, four



underground storage tanks, service bay, tyre centre, office, convenient stores, supermarket, a restaurant, a bar and other associated amenities on All That property known as Land Reference Number 1159/323, made known to her on 28<sup>th</sup> May 2022.

9. Having established the nature of the decision the Appellant seeks to challenge in the instant appeal, we now turn to Regulation 10 of the [Environmental \(Impact Assessment and Audit Regulations\)](#) 2003, which provides as follows:

- (1) On determination of the project report, the decision of the Authority, together with the reasons thereof, shall be communicated to the proponent within forty-five days of the submission of the project report.
- (2) Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule to these Regulations.
- (3) If the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with these Regulations.
- (4) A proponent who is dissatisfied with the Authority's decision that an environmental impact assessment study is required may within fourteen days of the Authority's decision appeal against the decision to the Tribunal in accordance with regulation 46.

10. Reconciling Regulation 10 of the Environmental (Impact Assessment and Audit Regulations) 2003 and the decision the Appellant seeks to challenge, it is beyond conjecture that the appeal presently before us firmly locates itself within section 129(1) of the [EMCA](#). To buttress this position, at para 16 of the affidavit filed in support of the Appellant's application, Susan Wanjiku depones as follows:

“That I wish to appeal against the decision by the 1<sup>st</sup> Respondent approving the Environmental impact Assessment Project Report submitted by the 2<sup>nd</sup> Respondent and thus sanctioning the development and land use of the suit property in a manner that not only violates the law but also does not conform with High-Risk Projects requirements.”

11. The 1<sup>st</sup> Respondent's decision to approve an EIA project report is communicated through the issuance of an EIA license. We find that the decision approving a license and the issuance of a license can be likened to Siamese twins and cannot be separated for the limited purpose of differentiating an appeal lodged under section 129(1) and section 129(2) of the [EMCA](#).
12. Put differently, what is the practicality of challenging a decision rendered by the 1<sup>st</sup> Respondent approving an EIA project report without challenging the EIA license itself? Can a decision approving an EIA project report and an EIA license be challenged separately? We roundly disagree, as to find otherwise would be an absurdity.
13. Stripped to the bone, the appeal before us is simply a licensing issue and must be treated as such. This position finds good company in the case of [Simba Corporation Limited v Director General, National Environment Management Authority \(NEMA\) & another](#) [2017] eKLR, where the Hon. Justice Eboso expressed himself in the following manner:

Any appeal that seeks to challenge or touch on matters surrounding, inter alia, the grant or refusal to grant a licence falls within the ambit of section 129(1). Section 129(2) covers



appeals against acts or omissions of the Director General or the committee of the authority or its agents on matters outside the issue of licensing.

14. The not so immediate precursor to the above-cited decision was *Prof. Albert Mumma in his capacity as Chairman, Karen Langata District Association (KLDA) v Director General - National Environmental & 2 others* [2019] where this Tribunal went to great lengths to explain the difference between an appeal lodged under section 129(1) and section 129(2) of the *EMCA*. Importantly, the Tribunal found:

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.

15. It is evident that the Appellant's application is an ingenious effort to seek refuge under section 129(2) of the *EMCA* to cure what is now a recurring problem of a failure by the 1<sup>st</sup> Respondent to communicate a decision to grant a license. We can do no better than amply the call made by Hon Justice Eboso in *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & another* [2017] eKLR:

“Before I make my disposal order, I wish to make some observations concerning communication of NEMA’s statutory decisions to the general public. I have observed in this Judgment that under Section 129 of *EMCA* and Rule 4 (2) of NET Procedure Rules, there is an implied obligation on the part of NEMA to give to or serve upon interested parties notices of statutory decisions made by it within the framework of *EMCA*. More often than not, those decisions have significant bearings on environmental management and investor projects in the country. For this reason, there is need for appellants to promptly lodge all resultant appeals within well-ascertained time-frames. I would advise the Attorney General, the Law Reform Commission, the Cabinet Secretary responsible for environment and the relevant committees of both Houses of Parliament, to consider the appropriateness of a clear prescriptive framework on how NEMA should notify the general public about its statutory decisions which are subject to appeals contemplated under Section 129 of *EMCA*. This will eliminate endless litigations which adversely affect investor projects and the country’s environmental management programmes. In this regard, the Registrar of this court shall cause copies of this Judgment to be supplied to the relevant offices for perusal, should it be deemed necessary.”

16. Having established that the instant appeal falls under section 129(1) of the *EMCA*, the question that now falls for determination is whether this Tribunal can grant the Appellant leave to file his appeal out of time.

**Whether this Tribunal has jurisdiction to extend the timelines for lodging appeals falling under section 129(1) of EMCA.**

17. It is not in dispute that the EIA license forming the substratum of the appeal was granted on 9<sup>th</sup> November 2021. By dint of section 129(1) of the *EMCA*, an appeal against the impugned License ought to have been filed within 60 days from the date of issuance thereof. This appears not to have been the case in the matter before us. The notice of appeal is dated 2<sup>nd</sup> June 2022, well over the statutory timeline of 60 days
18. The Respondents are united in their opposition to the prayer by the Appellant for leave to file the instant appeal out of time. They submit that the 60-day statutory timeline is cast in stone for appeals falling under section 129(1) of the *EMCA*.



19. We are guided by this Tribunal's finding in Tribunal Appeal No. 006 of 2019, *Runda Association versus National Environmental Management Authority (NEMA) & 3 others* in settling the question of whether we have the power to grant leave to the applicant to file his appeal out of time. The Tribunal held:

'It is now trite law following a number of cases determined up to the High Court that where an appeal is brought under section 129(1) a party aggrieved by the grant or rejection of an application for a licence must do so within 60 days from the date of the occurrence of the event ie. The date of the issuance or the rejection of the licence (emphasis added). It is also now well established that the timeline of 60 days in section 129(1) of *EMCA* cannot be extended.'

20. In as much as this Tribunal is reposed with power under rule 7 of the National Environment Tribunal Procedure Rules to extend time, this power does not extend to appeals brought under section 129(1) of *EMCA*.
21. Having established that the instant appeal falls under section 129(1) of the *EMCA* being an appeal seeking cancellation of an EIA license and that the same was filed outside the 60-day statutory timeline, it is our finding that we cannot hear the appeal and neither do we possess the power to extend the time for filing of the Appeal. We, therefore, make the following orders:-
- The 2<sup>nd</sup> Respondent's Notice of Preliminary Objection is merited, and it is therefore upheld.
  - The Appellant's Notice of Motion application dated 2<sup>nd</sup> June 2022 is hereby dismissed.
  - Each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI, THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023**

**EMMANUEL MUMIA.....CHAIRMAN**

**WINNIE TSUMA.....VICE-CHAIR**

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

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

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

