



**Mungai & 6 others v National Environment Management Authority & 2 others  
(Tribunal Appeal 5 of 2024) [2024] KENET 630 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KENET 630 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
TRIBUNAL APPEAL 5 OF 2024  
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA,  
DUNCAN KURIA & RONALD ALLAMANO, MEMBERS  
APRIL 29, 2024**

**BETWEEN**

**LILIAN NJERI MUNGAI ..... 1<sup>ST</sup> APPELLANT  
AMIT RAMRAKHA ..... 2<sup>ND</sup> APPELLANT  
GARVIT ASHOK SHAH ..... 3<sup>RD</sup> APPELLANT  
MAMTA MAHAJAN ..... 4<sup>TH</sup> APPELLANT  
SUSHMA MAHAJAN ..... 5<sup>TH</sup> APPELLANT  
NILESH PATEL ..... 6<sup>TH</sup> APPELLANT  
SUREKHABEN ASHOK SHAH ..... 7<sup>TH</sup> APPELLANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT  
THERMAX (EAST AFRICA) LIMITED ..... 2<sup>ND</sup> RESPONDENT  
SKYHIGH VERONA LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 23<sup>rd</sup> October 2023, the 2<sup>nd</sup> Respondent obtained EIA Licence No. NEMA/EIA/PSL/28868 from the 1<sup>st</sup> Respondent for the construction of a project described as “3 No. Blocks of 15 Storey each (2 No. basements, ground floor, podium plus 15 No. floors) residential comprising of a total of 225 No. Units (30 No. studio units, 90 No. one-bedroom units, 75 No. two- bedroom units and 30 No. three-bedroom units), 238 No. parking slots, meeting room, an eatery, games room, social hall, swimming



pool, yoga and gym, massage room, steam bath associated facilities and amenities and amenities located at Plot L.R. No 209/7480 along Muthangari drive within Westlands sub- county, Nairobi County.”

2. Aggrieved by the 1<sup>st</sup> Respondent’s decision to license the project, the Appellant moved this Tribunal by way of a Notice of Appeal dated 29<sup>th</sup> February 2024 wherein they principally invite the Tribunal to vacate the 1<sup>st</sup> Respondent’s decision and grant a restorative order in respect of the suit property described in their appeal as ‘Plot L.R. No 209/7480 Westlands Nairobi.’
3. Upon being served with the Notice of Appeal and incidental documents, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Notice of Preliminary Objection dated 25<sup>th</sup> March 2024 wherein they raise the following grounds for our consideration:
  - a. The Appellant’s grievances are time-barred; thus statute barred pursuant to section 129(1) of the Environmental Management & Coordination Act, 1999 (‘the EMCA’).
  - b. Being an appeal arising out of the decision of NEMA to grant a License (i.e. ‘a Section 129 (1) EMCA appeal;’ as opposed to ‘a Section 129 (2) EMCA Appeal’), the limitation of action period of 60 days from the date of issuance of the License is cast in stone and cannot be varied or extended.
  - c. The impugned license having been issued on 23<sup>rd</sup> October 2023; the filing of the present Appeal on 25<sup>th</sup> February 2024 was way out of the statutorily-provided period, thus making the Appeal incurably incompetent and for striking out.
  - d. This Tribunal lacks jurisdiction to entertain matters of planning, or to seat on appeal over decisions of planning authorities.
  - e. The Appellants’ Appeal offends section 129 (1) of the EMCA, and purports to countermand the ratios of this Honourable Tribunal and the Environment & Land Court on the interpretation to be had of the provision.
4. When parties appeared before the Tribunal for directions on the appeal, we directed that the Notice of Preliminary Objection be heard on a priority basis. Parties were directed to file and exchange written submissions on the same. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their submissions in support thereof on 2<sup>nd</sup> April 2024, while the Appellants filed their submissions in opposition thereto on 16<sup>th</sup> April 2024.

#### **Issue for determination**

5. Having carefully considered the pleadings and written submissions filed by parties, we find that the only issue dispositive of the instant Notice of Preliminary Objection is whether the appeal lodged by the Appellants is founded on section 129(1) of the Environmental Management and Coordination Act or section 129(2) thereof.

#### **Whether the appeal lodged by the Appellants is founded on section 129(1) of EMCA or section 129(2) thereof**

6. From the outset, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are unequivocal in their submission that the instant appeal is a section 129(1) EMCA appeal as opposed to a section 129(2) EMCA appeal. They submit that any appeal against the issuance of a licence under section 129(1) of the EMCA ought to be filed within 60 days of the issuance of the licence. They have urged us to find that since the impugned license was issued on 23<sup>rd</sup> October 2023, any appeal after 22<sup>nd</sup> December 2023 is statutorily time-barred. It is their position that the 60-day period is cast in stone and cannot be enlarged by the Tribunal. They have, in this regard, cited the Tribunal’s decisions in NET (Nrb) Appeal No. 028 of 2019 – Judith



Kamau v Director General National Environment Management Authority & 2 others [2011] eKLR and NET (Nrb) Petition No. 23 of 2023 - Yusuf & another v Director-General, National Environment Management Authority & another [2023] KENET 493 (KLR).

7. On the other hand, the Appellants have submitted that their appeal falls under section 129(2) of the EMCA. They further submit that section 129 of the EMCA creates two separate and distinct streams of appeals against decisions arrived at by the 1<sup>st</sup> Respondent. They cite Vincent Kioko Suing in his Capacity as Chairman for and on Behalf of Runda Gardens Residents Association v National Environment Management Authority & another 2023 eKLR, Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & another [2017] eKLR and Professor Albert Mumma (In His Capacity As Chairman, Karen Langata District Association (KLDA) V Director General, National Environment Management Authority & 2 Others; Seventh Day Church (E.A) Limited 2021 eKLR in support of this position.
8. Placing reliance on the authorities cited in the preceding paragraph; they urge us to find that their appeal falls under section 129(2) of EMCA, being an appeal by an aggrieved party who was neither involved nor participated in the process/exercise leading to the issuance of the impugned licence. It is their submission that section 129(2) of EMCA, as read with Rule 4(2) of the National Environment Tribunal procedure rules, provides for a 60-day period within which a section 129(2) appeal is to be filed. They urge us to find that in such appeals, time begins to run from the date the Appellant is notified of the impugned decision to licence. For coherence, they further urge us to find that having learnt of the 1<sup>st</sup> Respondent's decision to license the impugned project vide a letter dated 31<sup>st</sup> January 2024, their appeal dated 29<sup>th</sup> February 2024 is well within time.
9. Having set out the rival positions of the parties, we now set out to resolve the question presently before us. Section 129 of the EMCA, which forms the nub of the arguments before us, provides as follows:

129.

- (1) Any person who is aggrieved by:-
  - a. a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
  - b. the imposition of any condition, limitation or restriction on his licence under this act or regulations made thereunder;
  - c. the revocation, suspension or variation of his licence under this Act or regulations made thereunder;
  - d. the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
  - e. the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder;

may within sixty days after the occurrence of the event against which he 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 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

10. The Environment and Land Court has innumerable pronounced itself on the letter and import of section 129 of the EMCA. The Court has interpreted section 129 of the EMCA as creating two streams of appeal. Going by the Court's interpretation, Section 129(1) of the EMCA is to be invoked by aggrieved parties who were a part and parcel of the licencing process; on the other hand, section 129(2) of the EMCA is to be invoked by parties who were not involved in the licensing process.
11. The two streams were explained by Hon. Justice Oguttu Mboya in *Vincent Kioko Suing in his Capacity as Chairman for and on Behalf of Runda Gardens Residents Association v National Environment Management Authority & another* [2023] eKLR in the following manner:

“60. For good measure, an appeal which is anchored on the provisions of Section 129(1) of the EMCA, 1999 and which can only be mounted by an aggrieved person, who was party to the proceedings and/ or process before the National Environment Management Authority, must be lodged within 60 days of delivery/issuance of the impugned decision.

61. On the contrary, the appeal provided for by dint of Section 129(2) of EMCA relates to and or concerns appeal by such other persons who are aggrieved and or affected by the Decisions of National Environment Management Authority (NEMA) and her officers; but who were not Parties to the proceedings/ processes leading to the impugned decision.”

12. In similar breadth, Hon. Justice Eboso made a similar finding in *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & another* [2017] eKLR

“In the jurisprudence interpreting the two categories of appeals filed to the NET under Sections 129 (1) and (2) the NET and the superior courts of record have held that the framework in Sections 129 (1) and 129 (2) relate to two different categories of appeals: the framework in Section 129 (1) relates to an appeal by a person who was a party to a decision or determination made by NEMA within the framework of EMCA; and Section 129 (2) provides a framework for an appeal by a person who was not a party to a decision or determination made by NEMA within the framework of EMCA.”

13. That the Tribunal must correctly identify the stream under which a section 129 EMCA appeal lies cannot be gainsaid. In *Professor Albert Mumma (In His Capacity As Chairman, Karen Langata District Association (KLDA) V Director General, National Environment Management Authority & 2 Others; Seventh Day Church (E.A) Limited* [2021] eKLR, Hon Lady Justice Bor found as follows:

“In the court's view NET first needed to make a determination on whether the appeal was brought under Section 129 (1) or if it fell under Section 129 (2) of EMCA. This would be critical because Section 129 (1) relates to decisions made in which the person aggrieved by the issuance of the licence participated in the decision-making process and was therefore required to lodge an appeal within 60 days of the date the decision was made. Where the person does not participate in the proceedings leading to that decision, then the appeal would fall under Section 129 (2) of EMCA which requires the appeal to be filed within 60 days of the date the disputed decision is given or served upon the Appellant pursuant to Rule 4 (1) and (2) of the NET Procedure Rules.”



14. What we now have to resolve is which stream the instant appeal falls under, lest we fall into the error pointed out by Hon. Lady Justice Bor in the above-cited Judgement

“NET erred when it made a finding that it had no jurisdiction to hear the appeal on the basis that it was filed more than 60 days after NEMA issued the EIA license without first satisfying itself that the Appellant participated in the process leading to the issuance of the EIA license for its appeal to fall under Section 129(1). NET did not satisfy itself that the Appellant had participated in the process that led to the issuance of the EIA licence on 20/11/2017. NET also needed to address the other issues raised by the Appellant.”

15. Do we have the tools to determine which of the two streams the instant appeal falls under at this preliminary stage? We note that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents elected to file a Notice of Preliminary Objection. In this respect, it is important to rehash the findings of Sir Charles Newbold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969]EA 696

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion.

16. The factual contestations before the Tribunal regarding notification of the decision and the Appellants’ involvement in the licencing process call for further interrogation. It is trite law that a Preliminary Objection cannot be anchored on disputed facts. In *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & another* (supra), Hon. Justice Eboso observed that the question of whether an appeal falls under section 129(2) of the EMCA cannot be resolved by a Notice of Preliminary objection but through a substantive motion as it calls for an interrogation of evidence:

26. Secondly, I have observed that the appellant moved the court by way of a notice of preliminary objection as opposed to a substantive motion. A perusal of the framework in Rule 4 (2) of the NET Procedure Rules suggests that to determine whether or not an appeal is time barred, the Tribunal would have to look at the evidence confirming the date when the disputed decision was given to or served upon the appellant. In my view, in the absence of a clear concession by way of relevant pleadings, this is an issue that calls for adducement of evidence confirming the exact date when the disputed decision was given to or served upon the appellant. To this extent, the efficacy of a bare notice of preliminary objection as a mechanism for disposing an appeal on the ground of limitation under Rule 4 (2) of the NET Procedure Rules is doubtful. A substantive motion supported with an affidavit together with relevant evidence would be more efficacious and would afford the opposing party the opportunity to respond to the motion.

17. Hon. Justice Eboso is not alone in taking this position, in *Vincent Kioko Suing in his Capacity as Chairman for and on Behalf of Runda Gardens Residents Association v National Environment Management Authority & another* (supra), Hon. Justice Oguttu Mboya shared a similar position expressed in the following manner:

“In my humble view, the 2<sup>nd</sup> Respondent could only canvass and ventilate the preliminary objection, if and only if, same was conceding, inter-alia, that the facts as pleaded at the foot of the Notice of Appeal and the Appellant’s statement in support of the appeal, were admitted and correct. However, the moment the 2<sup>nd</sup> Respondent disputed whether or not the appeal



was mounted pursuant to Section 129(2) of the EMCA, 1999; and that the Appellant only discovered of the supposed approval when the 2<sup>nd</sup> Respondent commenced the impugned works; then the fulcrum upon which the preliminary objection was anchored dissipated into thin air. In a nutshell, it is my finding and holding that the determination of the impugned notice of preliminary objection required interrogation and investigation of certain factual/evidential issues, which negated and militated against the ventilation of the Preliminary objection. ”

## **Orders**

18. In light of the authorities cited in our Ruling, it is evident that the questions the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent invite the Tribunal to resolve at this preliminary stage can only be settled by evidence at the hearing of the main appeal.
19. In the premises, we make the following orders:
  - a. 2<sup>nd</sup> and 3<sup>rd</sup> Respondent’s Notice of Preliminary Objection dated 25<sup>th</sup> March 2024. is hereby dismissed
  - b. Costs shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI, THIS 29<sup>TH</sup> APRIL 2024.**

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

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

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

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

