



Vincent Kioko Suing in his Capacity as Chairman for and on Behalf of Runda Gardens Residents Association v National Environment Management Authority & another (Environment and Land Appeal E086 of 2022) [2023] KEELC 19248 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEELC 19248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E086 OF 2022
JO MBOYA, J
AUGUST 10, 2023**

BETWEEN

**VINCENT KIOKO SUING IN HIS CAPACITY AS CHAIRMAN FOR AND ON
BEHALF OF RUNDA GARDENS RESIDENTS ASSOCIATION APPELLANT**

AND

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

REGISTERED TRUSTEES OF FOUNTAIN GATE CHURCH 2ND RESPONDENT

(Being an Appeal against the whole of the Ruling of the Honourable National Environment Tribunal at Nairobi (Hon. Mohammed S. , Chairman; Hon. Christine Kipsang, Vice Chairperson; Hon. Babati Mwamuye; Hon. Waitbaka Ngaruiya; and Dr. Kariuki Muigua) dated 28th September 2022; in NETT Appeal No. 018 of 202)

JUDGMENT

Introduction And Background

1. The 2nd Respondent herein sought for and procured an Environment Impact Assessment License which was issued on the 30th January 2018; and in respect of which the 2nd Respondent was mandated and/or otherwise authorized to commence the construction of a Church Hall with three parking levels for religious purposes, on L.R No. 27397, situate along Kigwaru Gardens Drive, within Runda Area, Westland Sub-County, in the City of Nairobi.
2. Pursuant to and arising from the issuance of the Environment Impact Assessment license, (details in terms of the preceding paragraph), the 2nd Respondent commenced to and indeed started the impugned Project, on the suit property.



3. Nevertheless, upon the commencement of the impugned project, the Appellant herein who had hitherto not participated in the process leading to the issuance of the impugned EIA License, filed and or mounted an Appeal before the National Environment Tribunal and in respect of which the Appellant sought to challenge the propriety, legality and validity of the EIA License. For good measure, the Appellant lodged the Appeal vide Tribunal Appeal No. 18 of 2021.
4. First forward, upon being served with the Appeal by and on behalf of the Appellant, the 2nd Respondent herein filed and or lodged a Notice of Preliminary Objection dated the 19th August 2021; and wherein same contended that the impugned Appeal filed by and on behalf of the Appellant was incompetent and contrary to the provisions of Section 129 of EMCA, 1999; and in particular that the impugned appeal had been filed outside of the statutory duration provided under the law.
5. Following the lodgment of the Notice of Preliminary Objection, the Honorable tribunal issued directions pertaining to and concerning the hearing and disposal of the Preliminary Objection. Instructively, the tribunal directed that the Preliminary Objection be canvassed by way of written submissions.
6. For the sake of completeness, both the 2nd Respondent (who was the originator of the preliminary objection) and the Appellant herein, thereafter proceeded to and filed their respective written submissions. For good measure, the respective submissions which were filed by and on behalf of the Appellant and the 2nd Respondent form part of the Record of Appeal.
7. Subsequently, the Honorable Tribunal rendered a Ruling on the 28th September 2022; and in respect of which the Honorable Tribunal found and held that the impugned Appeal filed by and on behalf of the Appellant was time barred and in this respect, the appeal was struck out, albeit with no orders as to costs.
8. It is the Ruling rendered on the 28th September 2022, which has provoked the instant Appeal by and on behalf of the Appellant; who contends that the impugned Ruling by the Honorable Tribunal constitutes a misapprehension of the import and tenor of Section 129(2) of EMCA.
9. Instructively, the Memorandum of Appeal dated the 30th September 2022; has itemized and enumerated various Grounds of Appeal.
10. For ease of reference, the Grounds of Appeal are as hereunder;
 - i. The Honorable tribunal erred in law and fact by finding that it had no jurisdiction to hear the appeal, (on the basis that the Appeal was filed more than 14 days after NEMA issued the EIA License); whereas the Hon Tribunal had not, first satisfied itself whether the Appellants participated in the process leading to the issuance of the EIA License for its Appeal to fall under Section 129(1), Environment Management and Coordination Act, (EMCA) 1999.
 - ii. The Hon Tribunal erred in law and in fact by disregarding BINDING precedents from the Environment and Land Court in Prof Albert Mumma (in his capacity as Chairman Karen Langata District Association – KLDA) v Director, NEMA & 2 Others and the SDA Church, EA LTD (2021)eKLR; Simba Corporation LTD v Director General, NEMA & Another (2017)eKLR and John Kabukuru Kibicho & Another v County Government of Nakuru & 2 Others (2016)eKLR as well as the Court of Appeal decision in National Environment Tribunal v Overlook Management Ltd & 5 Others, (2019)eKLR on the judicially determined applicability and indeed differentiated locus



standi accruing under Section 129(1), EMCA as distinguished from that accruing under Section 129(2), EMCA.

- iii. The Hon Tribunal erred in law and in fact in violating the doctrine of stare decisis, contrary to the court of appeal holding in Abu Chiaba Mohamed vs Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003 (cited and followed by Odunga, J in Republic v Chairman, Political Parties Dispute Tribunal & 2 Others Ex-parte Susan Kihika Wakarura (2017)eKLR.
- iv. The Hon Tribunal erred in law and fact in disregarding that the Appellants had in fact unequivocally pleaded that their Appeal was premised on Section 129(2) of the Environment Management and Coordination Act, which premised a factual enquiry and inexplicably disregarded by the Hon Tribunal.
- v. The Hon Tribunal erred in law and fact by failing to find and hold that Section 129(1) of EMCA related only to appeals in respect of decisions made, in which the person aggrieved by the issuance of the license participated in the decision-making process and would therefore be required to lodge an appeal within 60 days of the date the decision is made.
- vi. The Hon Tribunal erred in law and in fact by failing to find and hold that where a person does not participate in the proceedings leading to the issuance of the license, then the appeal would fall under Section 129(2) of EMCA; which requires that such an appeal be filed within 60 days of the date of the disputed decision is given or served upon the Appellant pursuant Rule 4(1) and (2) of The NET Procedure Rules.
- vii. The Learned Tribunal erred in law and fact by admitting for determination a fatally defective preliminary objection which centers of factual disputation, which required adduction of evidence.
- viii. By failing to dismiss the notice of Preliminary Objection dated the 19th August 2021; and award costs on a full Indemnity basis; the impugned ruling of the Honourable tribunal is erroneous in law and fact and contrary to Equity and is for setting aside on Appeal.

Submissions By The Parties

a. Appellant's Submissions

11. The Appellant filed written submissions dated the 11th April 2023; and in respect of which the Appellant has raised, highlighted and canvassed three (3) salient issues for consideration by the Honourable court.
12. First and foremost, Learned counsel for the Appellant has submitted that the Honorable Tribunal failed to appreciate and or comprehend that the provisions of Section 129 of EMCA, 1999; creates and establishes two streams of appeal; namely, an appeal to be filed by an aggrieved Person, who was Party to the proceedings leading to the impugned decision.
13. For good measure, Learned counsel for the Appellant contended that such an appeal is governed and or regulated by dint of the provisions of Section 129(1) of EMCA and same ought to be filed within 60 days from the date of issuance/delivery of the decision sought to be challenged and/or impugned.



14. The second aspect of Appeal relates to an appeal governed by the provisions of Section 129(2) of the EMCA and in this respect, Learned counsel for the Appellant has submitted that such an appeal relates to persons who were not parties to the proceedings/process leading to the issuance of the impugned decision.
15. Furthermore, Learned counsel has submitted that the honorable tribunal failed to distinguish the status of the appeal that was filed on behalf of the Appellant and thus same arrived at an erroneous conclusion, which vitiates and negates the entire Ruling that was rendered by the Honorable Tribunal.
16. In support of the foregoing submissions, Learned counsel has cited and relied on, inter-alia, the decision in the case of John Kabukuru Kibicho & Another versus The County Government of Nakuru & 2 Others (2016)eKLR; Simba Corporation Ltd versus Director General, National Environment and Prof. Albert Muma (in his capacity as the chairmen Karen Langa'ata District Association) versus Director General NEMA & 2 Others; the SDA Church EA Ltd (2021), respectively.
17. Secondly, Learned counsel for the Appellant has submitted that the Honorable tribunal erred in law in entertaining and allowing the Preliminary objection; even though same did not constitute and/or raise pure points of law, capable of being ventilated without invocation of factual and evidentiary Issues; which evidence was inadmissible and in any event, required due investigations and or interrogation, before a decision could be arrived at.
18. For coherence, Learned counsel for the Appellant has submitted that the impugned Notice of Preliminary objection was anchored and premised on disputed evidence and hence same could not have been entertained and dealt with in the manner that the Honorable Tribunal did.
19. In support of the submissions that the Notice of Preliminary objection was anchored on disputed evidence, which would have required due investigations beforehand and thus did not meet the threshold of what constitutes Preliminary objection, Learned counsel for the Appellant has cited, inter-alia, the decision the case of Mukisa Biscuit manufacturing Company Ltd versus West End Distributors Ltd (1969)EA 696; Hamed Nurani and Another versus Rajendra Ratilal Sanghangi (2020)eKLR and Owners of Motor Vessel Lilian S versus Caltex Oil Kenya Ltd (1989)eKLR.
20. Thirdly, Learned counsel for the Appellant has submitted that in allowing the impugned Notice of Preliminary objection; and thereby striking out the Appeal by the 2nd Respondent, the Tribunal disregarded and or ignored binding decisions of the Superior Court, which were cited to and within the knowledge of the Honorable tribunal.
21. Further and in addition, Learned counsel has contended that by disregarding the Doctrine of stare decisis which is trite and established, the Honorable tribunal has therefore brought to disrepute the Rule of Law; which the tribunal ought to uphold, comply with and adhere to at all times.
22. In support of the submissions touching on and concerning the import and tenor of the Doctrine of stare decisis, Learned counsel for the Appellant has cited, inter-alia, the case of Dodhia versus National and Grindlays Bank Ltd & Another (1970)EA; Republic versus Chairman, Political parties Dispute tribunal ex-parte Susan Kihika Wakarura (2017)eKLR, Geoffrey Makana Asanyo versus Attorney General & 3 Others (2020)eKLR; and Jasbir Singh Rai & 3 Others versus Talochand Singh Rai & 4 Others (2013)eKLR, respectively.
23. Premised on the foregoing submissions, Learned counsel for the Appellant has therefore contended that the Appeal by and on behalf of the Appellant, is meritorious and thus same ought to be allowed.



24. Further and in addition, Learned counsel for the Appellant has submitted that the Honorable Court ought to restore, reconstitute and/or reinstate the Appellant's appeal before the National Environment tribunal; for purposes of hearing and determination on merits.

b.2nd Respondent's Submissions:

25. The 2nd Respondent filed written submissions dated the 5th May 2023; and in respect of which same has similarly raised, highlighted and canvassed three (3) issues for due consideration by the Honourable court.

26. Firstly, Learned counsel for the 2nd Respondent has submitted that the Honorable tribunal was right and correct in finding and holding that the impugned appeal filed by the Appellant was filed outside the statutory duration stipulated vide Section 129(1) of The EMCA, 1999.

27. Further and in addition, Learned counsel for the 2nd Respondent has submitted that insofar as the Appeal was filed outside the statutory timelines; the impugned appeal was incompetent and otherwise invalid and hence same was rendered void on account of lapse of time.

28. In any event, Learned counsel for the 2nd Respondent has also submitted that even if the appeal by the Appellant before the honorable tribunal was pursuant to Section 129(2) of the EMCA, 1999 (which is disputed); Learned counsel for the 2nd Respondent further submits that the impugned appeal was still lodged outside the statutory timeline prescribed by Rule 4 of The NET Procedure Rules.

29. Based on the foregoing, Learned counsel for the 2nd Respondent has thus contended that the Honorable Tribunal was right in finding and holding that the impugned appeal before the tribunal was incompetent for having been filed outside the statutory timeline, albeit, without Leave having been sought for and/ or obtained.

30. Secondly, Learned counsel for the 2nd Respondent has submitted that the preliminary objection which filed and mounted by the 2nd Respondent raised and canvassed pure points of law, which were argued on the basis of the totality of the evidence placed before the tribunal by and on behalf of the Appellant.

31. Consequently and in this respect, Learned counsel for the 2nd Respondent has therefore contended that the submissions by the Appellant that the Notice of Preliminary objection before the Honorable tribunal was irregular and defective, are therefore mistaken, misleading and erroneous.

32. Furthermore, Learned counsel for the 2nd Respondent has submitted that the EIA License, which has been challenged by the Appellant showed that same was issued on the 30th January 2018; yet the appeal to the tribunal was only lodged on the 11th August 2021. In this regard, Learned counsel has pointed out that it is evident that the impugned Appeal before the tribunal was mounted after a duration of 1289 days.

33. From the foregoing, Learned counsel for the 2nd Respondent has therefore submitted that the computation of time would certainly take the Appeal outside the statutory duration stipulated at the foot of Section 129(1) of the EMCA, 1999.

34. Additionally, Learned counsel has submitted that where an appeal is filed outside the statutory duration, such an appeal is rendered invalid and hence same ought to be struck out.

35. In any event, Learned counsel has further submitted that Limitation of time governing the filing of appeal is a critical issue, which goes to the root of the Jurisdiction and thus determinable by way of a summary process, in the manner in which the tribunal did.



36. As pertains to the question of Jurisdiction and the fact that Jurisdiction can be determined by way of a Preliminary objection, Learned counsel for the 2nd Respondent has cited and relied on, inter-alia, the case of Owners of Motor Vessel Lilian S versus Caltex Oil (K) Ltd (1989)eKLR, Jesse Mbugua Mbuthia & 2 Others vs Director General National Environment Management Authority & Another (2022)eKLR and Republic versus National Environment Tribunal Ex-parte National Housing Corporation (2012)eKLR.
37. Thirdly, Learned counsel has submitted that the Appellant herein was aware of and/or privy to the issuance of the impugned EIA License as early as the year 2020, when the Appellant herein attempted to bar the 2nd Respondent from entering onto and taking possession of the suit property for purposes of commencement of disputed project.
38. Additionally, Learned counsel for the 2nd Respondent has submitted that arising from the actions and or activities by the Appellant, the 2nd Respondent herein was constrained to and indeed filed Civil Proceedings vide ELC Case No. 68 of 2020; and wherein the 2nd Respondent sought for and procured, inter-alia, an order of temporary injunction which was issued on the 17th June 2021.
39. Owing to the foregoing, Learned counsel for the 2nd Respondent has thus contended that the Appellant herein was indeed aware of the existence of the EIA License from as early as 2020; and therefore same ought to have filed the impugned appeal timeously and not otherwise.
40. Other than the foregoing, Learned counsel for the 2nd Respondent has thereafter undertaken substantial arithmetical calculations, whose details are exhibited in terms of paragraphs 51 to 54 of the written submissions filed on behalf of the Second Respondent.
41. Lastly, Learned counsel for the 2nd Respondent has submitted that the Honorable tribunal did not breach and or violate the Doctrine of stare decisis either as alleged or at all. Further and in addition, Learned counsel has submitted that the Honorable tribunal appraised and appreciated the facts at the foot of the appeal which was mounted by the Appellant; and thereafter applied the relevant provisions of the law, in arriving at the decision that is now appealed against.
42. Additionally, Learned counsel for the 2nd Respondent has submitted that different sets of cases raise and come forth with contradictory factual situations, which ought to be taken into account prior to and or before the application of any particular case law.
43. In support of the foregoing position, Learned counsel for the 2nd Respondent has cited and relied on, inter-alia, the decision in the case of SGS (K) Ltd versus Energy Regulatory Commission & 2 Others (2020)eKLR and George Mike Wanjohi versus Stephen Kariuki & Another SCK Petition No. 2A of 2014 (2014)eKLR, respectively.
44. In view of the foregoing submissions, Learned counsel for the 2nd Respondent has thus implored the Honourable court to find and hold that the Honorable tribunal reached and arrived at the correct decision in finding and holding that the impugned appeal was filed outside the statutory timeline prescribed vide Section 129(1) of The EMCA, 1999.
45. Consequently and in the premises, Learned counsel for the 2nd Respondent has invited the Honourable court to dismiss the Appeal by and on behalf of the Appellant; and to award costs to the 2nd Respondent.



c.Submissions By The 1st Respondent:

46. Though served with the Appeal herein, the 1st Respondent herein neither participated nor filed any written submissions or at all.
47. In the premises, the appeal herein shall be determined on the basis of the Record of Appeal and the submissions filed by and on behalf of the Appellant and the 2nd Respondent, respectively.

Issues For Determination:

48. Having reviewed the Memorandum of Appeal, (whose details were enumerated elsewhere herein before); the Record of Appeal and the submissions filed by and on behalf of the respective Parties; this Appeal raises and is determinable on the basis of Two (2) salient issues; namely
 - i. Whether the Notice of Preliminary Objection which was raised and canvassed by the 2nd Respondent met/satisfied the requisite threshold for canvassing a Preliminary Objection.
 - ii. Whether the Honorable Tribunal erred in law in allowing the impugned Preliminary Objection; and thereby striking out the Appellant's appeal.

Analysis And Determination

Issue Number 1: Whether the notice of Preliminary Objection which was raised and canvassed by the 2nd Respondent met/satisfied the requisite threshold for canvassing a Preliminary Objection.

49. It is common ground that the 2nd Respondent herein procured and obtained an EIA License from the 1st Respondent, with a view to commencing and undertaking the designated project on L.R No. 27397, along Kigwaru Garden Drive; Runda. Instructively, the impugned License was issued on the 30th January 2018.
50. Subsequently, the 2nd Respondent herein commenced and began the impugned project, (sic) in accordance with the License which had hitherto been granted to and in her favor by the First Respondent herein.
51. Be that as it may, upon the commencement of the designated project, the Appellant herein felt dissatisfied with the nature and magnitude of the project that had been commenced by and on behalf of the 2nd Respondent and thereafter same moved to the National Environment Tribunal vide NET Appeal No. 18 of 2021 and wherein same sought to challenge and invalidate the license which had hitherto been granted in favor of the 2nd Respondent.
52. For good measure, upon being served with the Notice of Appeal and the incidental documents by the Appellant; the 2nd Respondent herein generated and mounted a Notice of Preliminary objection dated the 19th August 2021; and in respect of which same sought to strike out the Appellant's appeal.
53. Notably, the 2nd Respondent contended that the impugned appeal by and on behalf of the Appellant had been filed and/or mounted outside the 60 days duration stipulated vide the provisions of Section 129(1) of the EMCA, 1999.
54. Subsequently, the impugned Notice of Preliminary Objection was canvassed before the Honorable tribunal and thereafter same was disposed of vide Ruling rendered on the 28th September 2022; and



in respect of which, the Honorable tribunal found in favor of the 2nd Respondent. Invariably, the Appellant's appeal was ordered struck out.

55. From the Notice of Preliminary Objection, it is evident that same was anchored on the provisions of Section 129 of the EMCA, 1999, albeit without pointing out whether it related to subsection (1) or (2) of the said section.
56. It is important to state and underscore from the onset that the provisions of Section 129(1) and 129(2) of the EMCA, 1999; create and establish two separate and distinct avenues for mounting an appeal against the decision of National Environment Management Authority (NEMA) and/or her Director General or Officers.
57. Consequently and in this respect, it is therefore incumbent and peremptory upon any intending Appellant to identify or isolate the requisite provision of Section 129 of the EMCA, 1999, which is sought to be invoked and/or relied upon.
58. Similarly, it is also incumbent upon any Party, the 2nd Respondent herein, not excepted, to isolate and identify under which limb of Section 129 of the EMCA, 1999; that is being relied upon for purposes of canvassing and ventilating the Preliminary objection, so as to avert litigating by surprise and/or ambush.
59. Notwithstanding the foregoing, it is not lost on this Honourable court that the 2nd Respondent herein, who was the originator of the Preliminary objection, however did not find it appropriate to articulate which limb of Section 129 of the EMCA, 1999; which was being espoused, in canvassing the position that the Appellant's appeal was lodged and or mounted outside the statutory duration.
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.
62. Notably and in this regard, the appeal in terms of Section 129(2) of the EMCA, 1999(2015); is required to be filed in accordance with the provisions of Rule 4(2) of NET Procedure Rules.
63. For good measure, it is imperative to reproduce the provisions of Rule 4 of the NET Procedure Rules.
64. In this regard, same are reproduced as hereunder;
Rule 4 (1) and (2) of the NET Procedure Rules provides as follows:

“ 4.

- (1) An appeal to the Tribunal shall be made by written notice, and where the Tribunal has approved a form of notice for the purpose, in the form so approved.
- (2) The appellant shall send or deliver six copies of the notice of appeal to the Tribunal so as to reach it not later than sixty (60)



days after the date on which the disputed decision was given to or served upon him.”

65. From the import and tenor of Rule 4(2) (supra), it is important to underscore that an Appellant who is keen to file an appeal in pursuance of Section 129(2) of the EMCA, 1999 is called upon to do so not later than 60 days after the date on which the disputed decision was given or served upon him.
66. Instructively, prior to and or before determining whether or not an appeal filed pursuant to Section 129(2) of the EMCA, 1999; has been filed outside the statutory duration; it behooves the authority, in this case the 1st Respondent, to demonstrate the date when the impugned decision was either given to or served upon the intending Appellant, in this case the Appellant herein.
67. Moreover, it is important to highlight that in determining the date when the disputed decision was given or served upon the intending Appellant, the tribunal would be called upon to interrogate certain factual or evidential issues, including, but not limited to, any Kenya gazette or Newspapers advertisement, if any.
68. The foregoing being the position, the question that this court must now resolve is whether the tribunal could be able to ascertain the date when the disputed decision was given and/or served on the Appellant, albeit on the basis of a Preliminary Objection, in the manner contended by the Second Respondent herein.
69. To my mind, a preliminary objection is canvassed and argued on the basis of the facts posited by the adverse Party (read, the Appellant) and the assumption that those facts are correct and admitted. Clearly, a preliminary objection cannot be canvassed and agitated when certain fundamental/ underlying facts have to be investigated and or interrogated by the Court and/or tribunal; or where what is sought is exercise of Discretion.
70. In this respect, it is important to restate and reiterate the dictum in the case of Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“So far as I’m aware, 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.”

This was followed up by the judgment of Sir Charles Newbold in the same case:

“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”



71. Furthermore, the circumstances under which a Preliminary objection can be raised, canvassed and ventilated was also elaborated, nay, illuminated upon in the case of Oraro versus Mbaja (2004)eKLR, where the court (per Justice Ojwang, Judge, as he then was); stated and observed as hereunder;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message”

72. Most recently, the Supreme Court of Kenya had occasioned to add its voice to the circumstances where a preliminary objection can be raised and be canvassed in the case of Independent Electoral & Boundaries Commission versus Jane Cheperenger & 2 others [2015] eKLR, where the court held thus;

(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.

73. Having reproduced the foregoing position, it is now appropriate to underscore that what was placed before the Honorable Tribunal in terms of a notice of Preliminary Objection, could not have been properly adjudicated upon and/or disposed of by way of a Preliminary objection or otherwise.

74. Quite clearly, before determining whether or not the Appellant’s appeal was filed outside the statutory timeline prescribed by Section 129(2) of the EMCA, 1999; as read together with Rule 4(2) of the NET Procedure Rules; it behoved the tribunal to undertake investigations pertaining to when the impugned decision was given to or served upon the Appellant.

75. Instructively, such investigation could not be undertaken whilst entertaining or dealing with a preliminary objection, which is by law canvassed on the basis of pure law and only, when underlying facts are not in dispute.

76. Further and in addition, the impugned preliminary objection was also misconceived, insofar as the 2nd Respondent was attempting to agitate and canvass same, without first acknowledging the facts as allude to and pleaded by the adverse Party, namely, the Appellant.

77. In this respect, it is imperative to point out that the Appellant had deponed that her appeal was anchored and/or premised on Section 129(2) of the EMCA, 1999. For good measure, it is important to reproduce clause 3.3 of the Notice of Appeal which states as hereunder;

Clause 3.3 The Appellant herein invokes the authority of the tribunal under Section 129(2) of the EMCA, 1999.

78. Additionally, the Appellant had also lodged a Statement in support of the Appeal and at paragraph 13 of the said statement, the Appellant averred as follows;



Paragraph 13: The Appellant only learnt of the supposed approval, authorization and license after the notice inversion of their estate by heavy machinery and commencement of works against supposed approval from the 1st Respondent

79. In my humble view, the 2nd 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.
80. However, the moment the 2nd 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 2nd Respondent commenced the impugned works; then the fulcrum upon which the preliminary objection was anchored dissipated into thin air.
81. 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.

Issue Number 2 :Whether the Honorable Tribunal erred in law in allowing the impugned Preliminary objection; and thereby striking out the Appellant's appeal.

82. The Honorable tribunal in their short albeit terse ruling stated at paragraph 4 as hereunder;
- Paragraph 4: The 2nd Respondent submitted that the tribunal has no jurisdiction because the appeal has been file outside the mandatory 60 days period prescribed by Section 129 of the EMCA, 2015
83. After making the foregoing observation, the Tribunal thereafter proceeds to and states as follows in terms of paragraphs 9 and 11 of the impugned Ruling.
- Paragraph 9: The EIA License No. NEMA/NRB/PR/5/1/10624 was issued by the 1st Respondent to the 2nd Respondent and is dated the 30th January 2018 whilst the appeal challenging this license is filed on the 11th August 2021.
- Paragraph 11: The stipulated 60-day period under the statute has no extension and the appeal is clearly filed out of time and thus the tribunal agrees with the 2nd Respondent that the appeal is filed out of time.
84. From the excerpts quoted, two things do arise and merit mention and a short discussion. Firstly, it is evident that the 2nd Respondent was agitating the preliminary objection on the basis of Section 129(1) of EMCA, 1999, which should not have been the case, insofar as the appeal under reference was not anchored on the said Section.
85. Secondly, the Honorable Tribunal misconstrued and misapprehended the foundation upon which her Jurisdiction had been invoked by the Appellant in terms of the Notice of Appeal dated the 11th August 2021; and more particularly, Clause 3.3 of the said Notice of Appeal.
86. To my mind, had the Honorable Tribunal appraised the Notice of Appeal and the Statement in support of the Notice of Appeal; no doubt, the Honorable tribunal would not have come to the conclusion that the impugned appeal was filed outside the 60-days statutory period; in any event, without first authenticating when the impugned decision was given to or served on the Appellant.
87. Consequently and in the premises, I come to the conclusion that the Honorable tribunal misapprehended the facts underpinning the appeal before her, as well as the statutory provision(s)



anchoring the appeal. In this case, the decision by the Honorable tribunal was therefore wrought and replete with error; which thus requires correction by this Honorable court.

88. In short, I find and hold that the Appellant herein has established and demonstrated a clear basis to warrant interference with the impugned decision by the Honorable tribunal. For good measure, the parameters for interference with the Decision of a court/a tribunal of first instance, are well delineated in the case of Mbogo – Vs – Shah & Another (1968) EA 93, where the court stated as follows:-

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

89. In view of the foregoing, my answer to issue number two (2) is to the effect that the Honorable tribunal indeed erred in law in finding and holding that the impugned appeal was statute barred, whereas no legal foundation had been established to warrant such a finding.

Final Disposition

90. Before making the final and dispositive order, it is pertinent to mention and state that Learned counsel for the 2nd Respondent has submitted that the Appellant herein was privy to and or knowledgeable of the issuance of the approvals and in particular the EIA License from as early as the year 2020.
91. Furthermore, Learned counsel for the 2nd Respondent has contended that on or about May 2020; the Appellant herein attempted to interfere with the operations of the 2nd Respondent, whilst the 2nd Respondent was ongoing with construction on the suit property.
92. Instructively, Learned counsel has contended that the attempted interference took place after more than 1 ½ years from the date when the impugned construction had commenced.
93. Additionally, Learned counsel has also submitted that arising that from the Appellant’s interference with the designated project, the 2nd Respondent proceeded to and filed ELC No. 68 of 2020, wherein temporary orders of injunction were ultimately granted.
94. The foregoing submissions and factual disposition could very well be true. However, whilst ventilating a preliminary objection, such issues, (which in any event; were never raised before the tribunal), could not have been ventilated.
95. Perhaps, had a formal application been filed before the tribunal, then the tribunal would have had an occasion to interrogate the factual and evidential basis, prior to and or arriving at a given outcome.
96. Be that as it may, I have found that the decision by the Honorable tribunal was replete and/or wrought with errors of law, both in the comprehension and interpretation of the statutory provision(s) upon which the impugned appeal was mounted and the import thereof.
97. Consequently and in the premises, the appeal is meritorious and same be and is hereby allowed. In this respect, the Ruling of the Tribunal be and is hereby set aside and/or quashed.
98. Further and in addition, the appeal vide NET Appeal No. 18 of 2021 be and is hereby returned to the tribunal to be heard and determined on merits; albeit taking into account the totality of the evidence, including when if at all the Appellant encountered and became aware of the impugned decision/ approval.



99. Finally, the Appellant be and is hereby awarded costs of the appeal and same shall be borne by the 2nd Respondent herein; and same shall be agreed upon and in default, to be taxed by the Deputy Registrar of the Environment and Land Court in the usual manner.
100. However, costs of the Preliminary Objection before the National Environment Tribunal, shall abide the outcome the Appeal, which has since been remitted back to the tribunal.
101. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF AUGUST 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Lusi for the Appellant.

Ms. Khizi for the 2nd Respondent.

N/A for the 1st Respondent.

