



Matus & another v National Environment Management Authority & another (Environment and Land Appeal E103 of 2022) [2023] KEELC 20468 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E103 OF 2022
EK WABWOTO, J
SEPTEMBER 28, 2023**

BETWEEN

JASON EDWARD MATUS 1ST APPELLANT

CATHERINE ROSEMARY BOND 2ND APPELLANT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

INTEX CONSTRUCTION 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the decision of the National Environment Tribunal which upheld the 1st Respondent's Preliminary Objection and struck out the Appellants' Appeal. The decision was rendered on 28th September, 2022.
2. Being aggrieved by the decision of the National Environment Tribunal (NET), the Appellants vide a Memorandum of Appeal dated 25th October, 2022 appealed against the Tribunal's decision on the grounds that:
 - i. The impugned decision of the Honourable Tribunal is a misdirection or misapprehension of the evidence and matters before it particularly failure to consider the Further Affidavit of the Appellants sworn by Oscar Litoro on 4th March 2022 and filed in the Tribunal on 8th March 2022 illustrating that the Notice of Appeal before the Tribunal was virtually filed on the Tribunal's Judiciary e-filing portal on 22/12/2021 where it was referenced NET/E004/2021 and the Tribunal later reassigned reference NET/1/2022 on 18/01/2022 thereby making an erroneous finding in law and fact that the said



appeal was dated on 11/01/2022 and filed on 21/01/2022 after the statutory time to file such appeal had lapsed.

- ii. The Honourable Tribunal impugned ruling and order that the Appellants Notice of Appeal before it was dated 11/01/2021 and filed on 21/01/2022 was without basis law and fact, misdirection or misapprehension of the pleadings, evidence or matters before it, erroneous in law and fact and contrary to the pleadings and evidence on record before the Tribunal illustrating that the Appellants Notice of Appeal before it was dated and filed on 22/12/2021, thereafter amended and filed on 11/01/2022.
- iii. The Honourable Tribunal misdirected and or misapprehended itself on the pleadings and matters before it thereby making an erroneous and wrong conclusion in law that the Appellants appeal against the decision of the 1st Respondent to issue an EIA License dated 22/10.2021 to the 2nd Respondent was filed on 21/01/2022 out of the statutory time.
- iv. The Honourable Tribunal's finding that it lacked jurisdiction to determine the appeal before it is erroneous in law and fact consequent to misdirection of the Tribunal on the pleadings and matters before it.
- v. The Honourable Tribunal's erred in law and fact in failing to consider the Appellants Appeal on record lodged by a Notice of Appeal dated and filed on 22/12/2022 and amended on 11/01/2021 as well as Further Affidavit dated 4/03/2022 filed on 8/03/2022 and gave more weight to the Respondents submissions thereby arriving at a wrong and erroneous decision in law and fact.
- vi. The Honourable Tribunal's was wholly erroneous in law and fact. contrary to the law as well as judicial precedent on the matter and a gross miscarriage of justice.

3. Thus, the Appellant sought for the following orders:

- i. That the Appeal herein be allowed by setting aside the entire ruling and order of the Honourable Tribunal delivered on 28th September, 2022 in Nairobi, Tribunal Appeal No. 1 of 2022 and substituting the said ruling and order with an order dismissing and remitting the Appellants' Appeal lodged on 22nd December, 2022 and amended on 11th January, 2022 in NET/E004/2021 that was later reassigned NET 1/2022 to the Tribunal for determination on merits.
- ii. Costs of this Appeal be in the Cause.

4. Pursuant to the directions issued by this Court, the appeal was canvassed by way of written submissions. The Appellants filed their written submissions dated 7th March, 2023 through Litoro & Omwebu Advocates while the 2nd Respondent filed written submissions dated 10th July, 2023 through Gikera & Vadgama Advocates.

5. The Appellants' Counsel submitted on the following two issues; whether the Tribunal misdirected and misapprehended itself on the pleadings by coming to a conclusion that the Appellants filed their Appeal out of the provided statutory period and whether the National Environment Tribunal had jurisdiction to hear and determine issues raised in the Appeal.



6. It was submitted that the Appellants Further Affidavit dated 4th March, 2022 clearly deponed that the Notice of Appeal before the Tribunal was virtually filed on the Tribunal's Judiciary e-filing portal on 22nd December, 2022 where it was referenced NET/E004/2021 and the Tribunal registry later, re-assigned reference as NET 1/2022 on 21st January, 2022 when hard copies of the Notice of Appeal and amended Appeal documents were physically handed to it.
7. It was also submitted that the ruling by the Tribunal failed to appreciate the Appellants' Further Affidavit thereby making erroneous finding in law and fact that the said Appeal was dated on 11th January, 2022 and filed on 21st January, 2022 after the statutory time to file such an Appeal had lapsed. From the record, the Notice of Appeal and the Amended Notice of Appeal were later delivered to the Tribunal on 21st January, 2022.
8. The Appellants also argued that the Appeal was filed within the statutory timelines of 60 days and hence the Tribunal had jurisdiction to hear the Appeal. The Court was urged to allow the Appeal with costs.
9. The Respondent submitted on the following two issues; whether the Tribunal erred in concluding that the Appellants filed their appeal out of the provided statutory period and whether the Tribunal had jurisdiction to hear and determine issues raised in the appeal.
10. Relying on the cases of Samuel Kamau Macharia vs. KCB & 2 Others, Civil Application No. 2 of 2011, Tribunal Appeal No. 060 of 2019, Runda Association v National Environmental Management Authority (NEMA) & 3 Others, Judith Kamau v Director General, NEMA & 2 others [2021] eKLR among others, it was submitted that the appeal was filed out of the stipulated 60 days period and hence pursuant to the decision of the ELC Case No. 100 of 2015, Simba Corporation Limited v Avic International & Another, the Tribunal didn't have the jurisdiction to hear the appeal.
11. Having considered the grounds of appeal together with the entire record of appeal and written submission filed by the parties, the main issue for determination herein is whether the Tribunal erred in allowing the 1st Respondent's Preliminary Objection.
12. A preliminary objection is canvassed and argued on the basis of the facts posited by the adverse Party (read, the Appellants) 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.
13. 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”

14. 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 v 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”

15. 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 v 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.

16. Having reproduced the foregoing position, it is now appropriate to underscore that what was placed before the Honourable 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.

17. Section 129 (1) of the *Environmental Management and Co-ordination Act* provides that: -

“Appeals to the Tribunal

- (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”.

18. In this case, it was evident that the further affidavit filed by the Appellants clearly demonstrated that the Appeal herein was filed electronically on 22nd December, 2021 which was within the 60 days period after the issuance of the EIA license by the 1st Respondent.
19. In the circumstances, I come to the conclusion that the Tribunal erred in allowing the Preliminary Objection filed by the 1st Respondent.
20. The Appellants herein has established and demonstrated a clear basis to warrant interference with the impugned decision by the Honourable Tribunal. The parameters for interference with the decision of a court of first instance, are well delineated in the case of Mbogo v 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.”

21. For the foregoing reasons, the Appeal herein is merited. On the issue of costs, the error leading to this Appeal having been occasioned by the Tribunal, I will direct that each party to bear own costs of the Appeal.
22. Consequently, the following orders are granted:
 - i. The Appeal is allowed and the ruling delivered on 28th September, 2022 by the Tribunal is hereby set aside.
 - ii. The Tribunal is directed to consider the Appellants’ Appeal lodged on 22nd December, 2021 and amended on 11th January, 2022.
 - iii. Each party to bear own costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023.

E. K. WABWOTO

JUDGE.

In the presence of:

Mr. Olala holding brief for Mr. Litoro for the Appellants.

Ms. Impano for the 2nd Respondent.

No Appearance for the 1st Respondent.

Caroline Nafuna: Court Assistant.

