



Movement & 4 others v National Environment Management Authority (NEMA) & another; Kenya National Highways Authority (Interested Party) (Environment and Land Appeal E011 of 2022) [2023] KEELC 21741 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E011 OF 2022
MD MWANGI, J
NOVEMBER 22, 2023**

BETWEEN

**GREENBELT MOVEMENT 1ST APPELLANT
WANGARI MAATHAI FOUNDATION 2ND APPELLANT
DANDORA COMMUNITY JUSTICE CENTRE 3RD APPELLANT
NATURAL JUSTICE 4TH APPELLANT
KATIBA INSTITUTE 5TH APPELLANT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 1ST
RESPONDENT
CHINA ROAD AND BRIDGE CORPORATION (K) 2ND RESPONDENT**

AND

KENYA NATIONAL HIGHWAYS AUTHORITY INTERESTED PARTY

*(In respect of the Preliminary Objection dated 9th December, 2022
and the Notice of Motion application dated 8th May, 2023 seeking
the striking out of the Appeal by the Appellants filed out of time)*



RULING

Background

1. What is before the Court for determination is the 2nd Defendant's Preliminary Objection dated 9th December, 2022 as well as the Notice of Motion dated 30th March, 2023. Both the Preliminary Objection and the Application raise the same issue; that the appeal herein was filed out of time.
2. A Preliminary Objection was described in the *Mukhisa Biscuits Manufacturing Co. Ltd...v... West End Distributors Ltd* (1969) EA 696 to mean: -

“So far as I am 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.”
3. The court in the Mukhisa case went further to give examples of issues that may be raised by way of a preliminary objection as follows;

“Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.
4. The preliminary objection herein is on a point of law and qualifies to be raised as such. In any event, the Applicants additionally filed the application dated 30th March, 2023.
5. Appeals to this Court under the provisions of Section 16A of the *Environment and Land Court Act*, Section 130 of the *Environmental Management and Coordination Act* (EMCA) and under Section 79G of the *Civil Procedure Act*, from the Subordinate Courts and Local Tribunals are to be filed within 30 days from the date of the decision or order appealed from.
6. The Section 130 of *EMCA* is particular that:
 - i. “Any person aggrieved by a decision or order of the Tribunal may within 30 days of such decision or order appeal against such decision or order.”
7. Order 42 rule 1 of the *Civil Procedure Rules* on the other hand specifies that an appeal shall be by way of a Memorandum of Appeal signed in the same manner of a pleading setting out the grounds concisely and in distinct form.
8. As this Court observed in the case of *Kenya Harlequin Football Club v Quaco Two Hundred and Thirty-Two Ltd & another* (2022) eKLR, in the High Court (and courts of equal status), unlike in the Court of Appeal, a Notice of Appeal is not required prior to the filing of an appeal. All that a party who intends to file an appeal is required to do is to file a Memorandum of Appeal within 30 days from the date of the decree or order appealed from.
9. For purposes of an appeal, Section 2 of the *Civil Procedure Act* is explicit that a decree includes judgment. A judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.
10. A further reading of Rule 2 of Order 42 of the *Civil Procedure Rules* reveals that a Memorandum of Appeal does not have to be accompanied by a Certified Copy of the Decree or Order appealed against



at the time of filing. The Appellant has the leeway to file such certified copy later on, “as soon as possible and in any event within such time as the Court may order.’

11. In determining whether an appeal has been filed out of time therefore all that the Court will consider is the date of filing of the Memorandum of appeal viz a viz, the date of the judgment/decision or ruling appealed from. Any other document, as in this case, the notice of appeal is inconsequential.
12. In this case, as the Applicant rightly points out, the appeal was filed nine (9) months after the date of the judgment of the National Environment Tribunal. That is the date when the memorandum of appeal was filed.
13. The Appellants did not bother to seek that their appeal be admitted out of time under the provisions of Section 79G of the *Civil Procedure Act* or under Section 16A of the *ELC Act*. Upto the time of this ruling, no such application has been filed. The nature of the case and the reasons for the delay would have off course been pertinent considerations in such an application. Without an application made, the court cannot act suo moto to extend time.
14. This Court therefore finds that the appeal herein was filed out of time. At this juncture, I must point out that compliance with rules of procedure, as the Court of Appeal noted in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC and 6 others* [2013] eKLR, serves to make the process of Judicial determination and adjudication fair, just, certain and even-handed.

“It is in the even-handed and dispassionate application of rules that Courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

15. Having made a finding that the appeal herein was filed out of time, I have no option but to strike it out.

What orders should the court make as regards the costs of the appeal?

16. The next issue that I must address then is the issue of costs. The Appellants implored the court, in case it arrived at a decision to strike out their appeal to spare them the costs on the basis that theirs was a public interest case. They averred that they are not advancing any private interest or personal gain.
17. Public Interest litigation is meant to serve the purpose of protecting rights of the public through vigilant action by public spirited persons. As Kariuki Muigua observes in Volume 1 in, ‘Attaining Environmental Justice for Posterity’, Public Interest litigation is a highly effective weapon in the armory of the Law for reaching social justice to the common man. It is a unique phenomenon in constitutional jurisprudence that has no parallel in the world and acquired a big significance in the modern legal concerns.
18. Public Interest Litigation is a tool that can be realistically used especially towards promotion and protection of environmental rights, as well as realization of sustainable development agenda in general.
19. One of the ways that courts can encourage public interest litigation is being slow to award costs against unsuccessful public interest litigators in order to diminish ‘the chilling effect’ that adverse costs orders would have on such public-spirited litigants.



20. The rationale for refusing to award costs against unsuccessful litigants in public interest/constitutional litigation was discussed by the South African Constitutional Court in *Affordable Medicines Trust v Minister of Health* (2005) ZAAC 3, which stated that,
- “An award of costs may have the chilling effect on the litigants who might wish to vindicate their constitutional rights.”
21. The South African Court appreciated that in such kind of cases, a court may be justified to deviate from the conventional principle that costs follow the event. Ngcobo J asserted that,
- “The ultimate goal is to do that which is just having regard to the facts and circumstances of the case.”
22. In the Kenyan case of *Amoni Thomas Amfry and Another v. The Minister for Lands and Another*, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held (para. 180) that:
- “In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”
23. The Supreme Court of Kenya in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR upheld the above reasoning and stated that:
- “It is clear that there is no prescribed definition of any set of “good reasons” that justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the- event. In the classic common law style, the Courts have proceeded on a case-by-case basis to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs.
- It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in settling the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”
24. Having considered the replying affidavits and submissions filed on behalf the Appellants and having had a glimpse at the decision of the National Environment Tribunal appealed from, I am convinced that the Appellants were genuinely advancing Public Interest. However, as is the nature of litigation, a decision had to be made, one way or the other based on the facts presented before the court or tribunal.



25. I will exercise my discretion and spare the Appellants the costs of this appeal. I note that NET too did not condemn them to pay the costs of the case before it. The Appellants will live to fight another day.
26. Consequently, the final orders are that, the Appeal herein is struck out but with no orders as to costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF NOVEMBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Agwara for the 2nd and 3rd Defendants/Applicants

N/A for the Appellants and 1st Respondent

M. D. MWANGI

JUDGE

