



**Kay Group Centre v National Environment Management Authority & another (Environment and Land Appeal E023 of 2023) [2023] KEELC 22536 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22536 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E023 OF 2023  
AA OMOLLO, J  
DECEMBER 6, 2023**

**BETWEEN**

**KAY GROUP CENTRE ..... PLAINTIFF**

**AND**

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

**KENYA URBAN ROAD AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

*(Being an Appeal from the Ruling and Order of the National  
Environment Tribunal delivered on 22nd August, 2023)*

**JUDGMENT**

1. The Appellant being dissatisfied with the decision of the National Environment Tribunal (hereafter referred to as the Tribunal) rendered on 22<sup>nd</sup> August 2023 brought this appeal. It raised the following grounds:
  - a. The Tribunal erred in law and in fact in upholding a preliminary objection filed by the 1<sup>st</sup> Respondent in contravention of the laid down principles in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A 696.
  - b. The Tribunal erred in law and in fact in holding that it had no jurisdiction to hear and determine the appeal before it whereas there is no time limit to infringement of constitutionally protected rights, a matter that was raised before the Tribunal.
  - c. The Tribunal erred in law and in fact in holding that it had no jurisdiction to hear and determine the appeal before it when it is the Tribunal charged with



the mandate to hear and determine appeals against decisions of the National Environment Management Authority.

- d. The Tribunal erred in law and in fact in holding that time to file the appeal started running on 3<sup>rd</sup> June, 2023 when a complaint was filed with the National Environment Complaints Committee whereas the committee did not render any decision on the complaint and only took action after the appeal had been filed at the Tribunal.
  - e. The Tribunal's decision to failed to address the appeal before it is in breach of the principle in law that there cannot be a wrong in law without a remedy.
  - f. The Tribunal erred in law and in fact in failing to adhere to the provisions of Articles 25(c), 48 & 50 (1) of the Constitution by holding that the Appellants' appeal was filed out of time.
  - g. That the Tribunal erred in law and in fact in not appreciating sufficiently or at all that the Appellants' appeal was within the ambit of Section 129(2) of EMCA and the limitation period for lodging an appeal thereunder is as stipulated under Rule 4(2) of the National Environmental Tribunal Procedure Rules 2003.
  - h. That the Tribunal erred in law and in fact in dismissing the Appellants' Appeal notwithstanding the evident injustice in allowing the 2<sup>nd</sup> Respondent to continue constructing the bridge in contravention of the constitution and other laws.
  - i. That the Tribunal erred in law and in fact in dismissing the Appellants' appeal notwithstanding the 2<sup>nd</sup> Respondent's non-adherence to procedures for the protection of the environment.
  - j. That the applicant has suffered great miscarriage of justice because the Respondents have jointly and severally refused and or declined to protect its fundamental rights and that of its stakeholders.
2. The Appellant sought to be granted the following reliefs.
- i. That this appeal be allowed
  - ii. This Court vacates the orders of the NET issued on 22<sup>nd</sup> August 2023.
  - iii. The Appeal before the Tribunal be allowed to proceed
  - iv. Costs be awarded to the Appellant
3. Each of the parties filed their respective submissions dated 6<sup>th</sup> November 2023 and 16<sup>th</sup> November 2023 respectively. The Appellant gave a background of their case stating that on 3<sup>rd</sup> June 2022, their advocate wrote to National Environment Complaints Committee raising a complaint on the damage and threat to the environment occasioned by the construction of the footbridge. That the letter itemised the particulars of the damage and included the lack of adequate public participation. The Appellant averred that when they did not receive any response to their letter, their advocate did a reminder letter on 18<sup>th</sup> October 2022 which letter was received on 19<sup>th</sup>, 21<sup>st</sup> and 26<sup>th</sup> October by NECC and NEMA.



4. The Appellant submitted on the role of the NECC and the provisions of section 129(2) of EMCA. They stated that their complaint before the Tribunal included the undertaking of the impugned project without a valid EIA licence and the Tribunal erred in holding that their appeal was pegged only on section 129 (2) of the EMCA.
5. The Appellant cited the case of Moses Wanjala Lukoye vs Benard Alfred Wekesa Sambu where Justice Gikonyo held as follows; The legal delimitations for a preliminary objection were set a long time ago in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 696. The principle (preliminary objection) is not in dispute and I do not think anything novel could be said about it. It has been and continues to be quoted and reinforced by the superior courts including the Court of Appeal, and recently by the Supreme Court. I did not, therefore, understand why Mr Onsando wanted to re-invent the wheel. Nonetheless, I shall restate the principle for purposes of clarity.
6. It is their submission that a preliminary objection can only be properly entertained by a court or Tribunal in the following cases;
  - a. the issue raised is a pure point of law
  - b. The point of law is argued on the assumption that all the facts pleaded by the other side, to wit the appellant is correct.
  - c. It cannot stand where facts have to be ascertained
7. It is the Appellant's argument that the following questions of facts had to be ought to have been settled for the preliminary objection to stand;
  - i. The scope of the Appeal as highlighted in Paragraph 7 was wider than that envisaged by Section 129(1).
  - ii. The Complaint had first been filed with a body authorized by law to investigate and address environmental matters.
  - iii. The Tribunal has a mandate in law to hear appeals from (in)decisions of NEMA and its Committees.
  - iv. The question of existence of an EIA license only came to the fore in the Affidavit of Martha Dawson on behalf of the 1<sup>st</sup> Respondent herein. The Appellant maintains that there is no license over the project outside of Kay Group Centre.
8. The Appellant contends that there is a distinction between matters that fall within section 129(1) of EMCA which are subject to the sixty days' timeline and those other matters that have no specified timelines. That it was erroneous for Tribunal to place any timelines to filing of their appeal and to start computing time from 3<sup>rd</sup> June 2022. They urged this court to set aside the Tribunal's order dismissing the appeal and direct the Tribunal to proceed and hear the appeal.
9. The Respondent also gave brief facts of the appeal presented before the Tribunal as well a summary of their replying affidavit and a preliminary objection filed in response to the appeal. The Preliminary Objection raised before the Tribunal stated as follows;
  - a. The Appellant's suit offends the provisions of section 129 of the Environmental Management & Co-ordination Act.
  - b. The Honourable Tribunal lacks the jurisdiction to hear, determine and grant the prayers sought by the Appellant.



- c. The Appellant's suit as drafted and filed raises no cause of action capable of being heard and determined before the Tribunal.
10. It the Respondent submitted that section 129 of EMCA makes it mandatory for appeals to the Tribunal to be filed within sixty days after the occurrence of the event against which the person is dissatisfied. That in this case, the EIA license complained of was issued on 29<sup>th</sup> March 2011 and further varied on 13<sup>th</sup> January 2021 to facilitate the construction of the foot bridges. Hence the appeal dated 17<sup>th</sup> March 2023 was filed out of time and the Tribunal rightly ruled so.
11. The Respondent referred this court to the decision of Albert Mumma as chairman of Langata District Association vs Director General NEMA and Two Others (2019) eKLR which held that "this Tribunal has on many occasions considered the effect of filing of appeals outside the time permitted by section 129(1) of EMCA and consistently found that the filing of an appeal outside this time limit of 60 days to be invalid and renders any appeal filed to be incompetent."
12. The Respondent in conclusion urged that the present appeal be dismissed with costs.
13. Having considered the grounds pleaded in the memo of appeal and the submissions rendered by the parties, this court frames the issues for determination of the appeal as follows;
- i. Whether or not the preliminary objection was premised on contested facts and therefore ought not to have been allowed.
  - ii. whether or not the appeal lodged at the Tribunal was subject to time limitation.
  - iii. Whether or not the National Environment Tribunal erred in law in dismissing the appeal lodged before it as having been filed out of time.
14. Both the Appellant and the Respondent have given their interpretation of the provisions of section 129 of EMCA which was the relevant section for purposes of determining the preliminary objection as well as this appeal. Section 129 (2) provides that "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."
15. The National Environment Tribunal (NET) summed up the dispute on appeal before them as against, "the decision to construct a footbridge just outside of Kay Group Centre" as stated in paragraph 3 and 4 of the notice of appeal dated 17<sup>th</sup> March 2023. The Tribunal in its finding referred to the EIA license No 0008151 issued on 3<sup>rd</sup> March 2011, varied on 1<sup>st</sup> August 2014 as license no 0001577 and which was further varied on 13<sup>th</sup> January 2021 "to facilitate the construction of the footbridges." They further referred to the Appellant's letters of 3<sup>rd</sup> June 2022 and 18<sup>th</sup> October 2022 which lodged a complaint with the National Environment Complaints Committee (NECC). The Tribunal held that the Appellant became aware of the decision/action it was appealing on 3<sup>rd</sup> June 2022 which in their view was when the sixty (60) day period started running. It was on this basis that they upheld the preliminary objection that the appeal before them was lodged out of time.
16. The Appellant while contesting the preliminary objection before the NET stated that they became aware of the existence of the EIA license after their lodging of the appeal when the Respondent annexed a copy thereof to their replying affidavit. I have considered the arguments presented for and in support of the P.O vis a vi the grounds of appeal that were lodged before the Tribunal. Under paragraph (4), the Appellant stated that the construction of the footbridge was being done contrary to the law.



17. The Appellant is categorical that their appeal fell under section 129(2) of EMCA so that the issue of time when they became aware of the EIA license was a none issue during the determination of the P.O. The question of when time began to run in my view cannot be said to have been a factual matter which required calling of evidence. The Appellant wrote a letter to the NECC in June 2022 registering their displeasure of the construction of the footbridge and so I cannot fault the NET for computing the time from the 3<sup>rd</sup> of June 2022 in so far as it relates to the appeal that was lodged. I agree with the Appellant that the manner in which their appeal was drafted, it fell within the provisions of section 129(2).
18. The second issue is whether complaints brought under section 129(2) of EMCA are subjected to the sixty-day period limitation. This subsection provides thus, “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.” (underline mine for emphasis).
19. M Njoroge J in the case of Gerald Nyaga Marete vs Marete Mbabu M’mbwiria (2017) Eklr held that “A decision was not made by the Embu Provincial Appeals Committee. There is no appeal properly filed in this court. Entertaining such a matter would be putting something on nothing. Something put on nothing will produce nothing” and cited the Supreme Court in Petition No. 5 of 2015 (Between the Republic as Appellant and Karisa Chengo and two others as Respondents) which also quoted Lord Denning in Benjamin Leonard Mcfoy United African Company Limited (UK) [1962] AC 152 in the privy council that;

“If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.
20. The Appellant moved to the NET with a fresh complaint after the inaction of the NECC. There is no doubt they became aware of the issue when they wrote the letter of 3<sup>rd</sup> June 2022 and a subsequent letter of 18<sup>th</sup> October 2022 to follow-up on their complaint. The Appellant had the option of moving the Tribunal in June 2022 although it chose to go before the NECC. Section 129 is silent on time stopping to run if a party lodges a complaint under subsection (2) before another body other than the NET. Consequently. It is my holding that the time for purposes of lodging the appeal before the Tribunal was running as from 3<sup>rd</sup> June 2022.
21. My reading of subsection (2) above spells out that other appeals apart from those falling under subsection (1) are subject to procedures as established by the Tribunal for the purpose of appealing. The NET is governed by its Rules of Procedure and under Rule 4(2) of NET Procedure Rules, 2003 provides that copies of notice of appeal to be delivered within sixty days after the date on which the disputed decision was given or served upon him.
22. The Appellant argues that there is no time limit to infringement of constitutionally protected rights which argument is sound. However, the Tribunal is a creature of Statute and must exercise its powers as given within its source/law, in this case section 129 of EMCA. The Tribunal acted within its mandate to consider whether the appeal before it was filed within the timelines creating it and so I find no fault in their decision. The Appellant also pleaded that there is no wrong without a remedy which is a sound equitable principle. To enjoy equity, equity demands action under the principle of equity aids the vigilant not the indolent.
23. It is my further considered view that since timelines under section 129(2) are provided for under the Tribunal Rules of Procedure, unlike under section 129(1), then it gives the Tribunal leverage to extend



time where a party moves it. I have looked at the submissions rendered by the Appellant before the Tribunal and observed that they did not apply for such extension of time. Consequently, there is no way the Tribunal could have come to their aid.

24. Under paragraph 5 of the appeal to the NET, the Appellant referred to the complaint lodged before the NECC. Section 129(2) presumes that time is computed from when the decision is made by the Director-General, the Authority and the Committees of the Authority, in this case The National Environment Complaints Committee (NECC). The difficult part in this appeal is that there was no decision made by the said Committee pursuant to the complaint lodged on 3<sup>rd</sup> June 2022 and a follow up on 18<sup>th</sup> October 2022. Since the NECC had not rendered a decision as at the time the appeal was lodged, the Tribunal could not render itself on the complaint lodged at the NECC.
25. In conclusion and premised on the analysis given herein above, I find no merit in this appeal and dismiss it. I will not award any costs on account that there is no inconveniences caused to the Respondent as the determination of this appeal was fast-tracked.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2023**

**A. OMOLLO**

**JUDGE**

Sent to advocates on record via email at Nairobi this 6<sup>th</sup> Day of December, 2023.

Deputy Registrar, Elc

Nairobi

