REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 155 OF 2012

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL ORDERS OF CERTIORARI AND PROHIBITION BY ABDULHAFIDH SHEIKH AHMED ZUBEIDI

IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, ACT NO. 8 OF 1999

VERSUS

REPUBLIC .....APPLICANT

VERSUS

THE NATIONAL ENVIRONMENT TRIBUNAL.....1ST RESPONDENT

MONICA NZILANI MWEU.....2ND RESPONDENT

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY (NEMA).....3RD RESPONDENT

EX PARTE

ABDULHAFIDH SHEIKH AHMED ZUBEIDI

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 17th April 2012 filed on 18th April, 2012, the *ex parte* applicant herein, **Abdulhafidh Sheikh Ahmed Zubeidi,** seeks the following orders:

> **1 An order of Prohibition to prohibit the 1st respondent from hearing, conducting proceeding with and/or determining Tribunal Appeal No. 74 of 2011, Nairobi, Monica Nzilani Mweu Vs. Director General NEMA & Abdulhafidh Sheikh Ahmed Zubeidi or any other purported Appeal in variation, substitution, akin to or identical to the Appeal filed by the 2nd Respondent against the Ex parte Applicant.**

2 An Order of Certiorari to remove to the High Court and quash the decision of the National Environment Tribunal of 27th October 2011 dismissing the Ex parte Applicant's Preliminary objection on the Jurisdiction of the 1st Respondent.

3 An Order of Certiorari to remove to the High Court for purposes of being quashed the proceedings before the National Environmental Tribunal at Nairobi, Tribunal Appeal No. 74 of 2011, Nairobi, Monica Nzilani Mweu Vs. Director General NEMA & Abdulhafidh Sheikh Ahmed Zubeidi.

4 The Costs of the application be paid by the Respondent.

***EX PARTE* APPLICANT'S CASE**

2. The application is based on the following grounds:

1) The National Environment Management Authority issued an Environmental Impact Assessment license to the Ex Parte Applicant dated 8th July 2010 for a Residential Development the building plans having been approved by the Municipal Council of Mombasa on 23rd September 2008.

2) No Appeal was filed under Section 129 of the Act within the stipulated Sixty (60) days after the ex parte Applicant was issued with the Licence nor was any objection raised to the issuance of the EIA License to the Ex Parte Applicant.

3) The 2nd Respondent did not participate in the Environmental Impact Assessment study process for the Applicants development or complain to the 3rd respondent or the Public Complaints Committee on Environment when the licence was issued.

4) The Applicant completed the development project in January 2011 and the Municipal Council of Mombasa issued an Occupation permit on 24th January 2011. The 2nd respondent did not file any objection or Appeal during the construction of the residential flats.

5) The 2nd respondent purportedly being an aggrieved person filed an Appeal to the national Environment Tribunal on 6th April 2011 more than Sixty (60) Days after the issuance of the EIA Licence to the Ex parte Applicant and after the project was completed.

6) The provisions of Section 129 of the Act exclusively govern appeals to the Tribunal and the 1st respondent does not have jurisdiction to entertain any other appeal, as it will be acting ultra vires the Act.

7) Notwithstanding the effluxion of time, the 2nd Respondent did not qualify to be an Appellant within the meaning of Section 129 (10 (a), (b), (c), (d) or (e) of the Act and the 1st Respondent therefore does not have jurisdiction to entertain, preside over, hear or determine the Appeal filed by the 2nd respondent.

8) The Ex Parte Applicant raised a Preliminary Objection to the jurisdiction of the Tribunal on 27th October 2011 when the Appeal came up first for hearing. The 2nd and 3rd Respondents opposed the Preliminary Objection claiming that the 1st respondent had jurisdiction in clear disregard of the law.

9) In a flawed Ruling, the 1st respondent dismissed the Preliminary Objection and unlawfully proceeded with the hearing.

10) The 1st Respondent is acting unlawfully by purporting to confer on itself jurisdiction which it does not have in presiding over the Appeal filed out of time and which does not lie under Section 129 of the Act. The decision to dismiss the Preliminary Objection and to purport to hear the Appeal is patently unlawful.

Frustrating Legislative Purpose

11) The 2nd respondent lacks the locus standi to lodge any Appeal before the national Environment Tribunal and the decision to dismiss the Preliminary object and to proceed to hear the Appeal is intended to frustrate legislative purpose codified in the Constitution of Kenya and the Environmental Management and Co-ordination Act.

Legitimate Expectation

12) The decision of the 1st Respondent of 27th October 2011 to hear the Appeal in clear contravention of the law is a violation of the Ex parte Applicant's legitimate expectation that the 1st Respondent will not act ultra vires.

13) The 1st Respondent's decision is capricious, arbitrary and high handed in declining to stay the proceedings to await determination by the High court on its jurisdiction.

Abuse of Power

14) The 1st Respondent has abused and exceeded its powers and authority by allowing an Appeal to be filed by a person without any locus standi and out of time.

15) The 1st Respondent lacked the humility to accept that it did not have jurisdiction when the fact was brought to its attention.

16) It is the Ex Parte Applicant's contention that the decision by the respondent was made capriciously, maliciously and in bad faith by blatantly disregarding clear provisions of the law.

17) The Court of Appeal has held in the case of republic Vs Commissioner of Co-operatives Ex parte Kirinyaga Tea Growers Co-operative Sacco Ltd [1999] 1EA 245;

> **'It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.'**

18) There is a real danger that unless the Orders sought herein are granted the 1st respondent will proceed to hear and determine the Appeal which is patently unlawful, ultra vires the enabling Act and in excess of its jurisdiction.

3. The application is supported by a verifying affidavit sworn by **Sheikh Ahmed Zubeidi**, the applicant's lawful attorney on 13th April 2012.

4. According to the deponent, the Applicant is the registered owner of the parcel of land registered as Title No. Mombasa Block XI/1061 located off nelson Mandela Road in Tudor Mombasa, which was created after the sub division of the Original Title No. L. R. No. 1061/XVII/MI. In September 2008, the Applicant was granted approval by the Municipal Council of Mombasa to develop residential flats on his property. The approval to develop residential flats by the Municipal Council of Mombasa was subject to approval of the Project environmental Impact Assessment by the 3rd Respondent, the **National Environment Management Authority** (NEMA). The Applicant submitted his Environmental Impact

Assessment (EIA) Project Report for the proposed residential development on 15th June 2009 and the 3rd Respondent, NEMA issued the Conditions for Approval of the EIA Project Report to the Applicant by a letter dated 2nd September 2009. The Applicant complied with the conditions and was granted an Environmental Impact Assessment license dated 8th July 2010 for a Residential Development by the 3rd Respondent. According to the deponent, the 2nd Respondent neither participated in the EIA Study process for the Applicants development nor complained to the 3rd Respondent when the Licence was issued. No Appeal was filed under Section 129 of the Act within the stipulated Sixty (60) days after the ex Parte Applicant was issued with the License nor was any objection raised to the issuance of the EIA Licence to the ex Parte Applicant and the construction of the residential flats was completed in January 2011 and an Occupation Permit issued on 24th January 2011. It is deposed that during the construction phase the 2nd Respondent did not file any Appeal to the 1st Respondent.

5. The deponent avers that the provisions of Section 129 of ***Environmental Management and Co-ordination Act*** (the Act) exclusively govern appeals to the Tribunal and the 2nd Respondent does not have jurisdiction to entertain any other appeal, as it will be acting ultra vires the Act. Yet the 2nd Respondent purportedly being an aggrieved person filed an Appeal to the national Environment tribunal on 6th April 2011 more than sixty (60) days after the issuance of the EIA License to the Ex parte Applicant. Notwithstanding the effluxion of time, the 2nd Respondent did not qualify to be an Appellant within the meaning of Section 129 (1) (a), (b), (c), (d) or (e) of the Act and the 1st Respondent therefore does not have jurisdiction to entertain, preside over, hear or determine the Appeal filed by the 2nd Respondent.

6. As a result, the Ex parte Applicant raised a Preliminary objection to the jurisdiction of the Tribunal on 27th October 2011 when the Appeal came up first for hearing and in a flawed ruling, the 1st Respondent dismissed the Preliminary Objection and unlawfully proceeded with the hearing. According to the deponent, the 1st Respondent blatantly disregarded the decision of this Honourable Court in High Court Judicial Review Cause No. 111 of 2008, **Republic Versus National Environment Tribunal, Ex parte Ol Keku Ronkai Limited & Another**, delivered on 30th September 2010 by the **Honourable Justices Mbogholi Msagha**, **Hannah Okwengu** and **Aggrey Muchelule**.

7. It is the ex Parte Applicant's contention that the decision by the respondent was made capriciously, maliciously and in bad faith by blatantly disregarding clear provisions of the law.

8. The 1st Respondent, it is averred, has now set the appeal down for hearing on 16th and 17th April 2012 and there is a real danger that unless the orders sought herein are granted the 1st Respondent will proceed to hear the Appeal which is contra statute, illegal and against Public Policy.

1ST RESPONDENT'S CASE

9. In opposition to the application the 1st respondent filed the following grounds of opposition:

1 That the Applicant has engaged selective reading of the law and hence arrived at an erroneous conclusion.

2 That the Application is based on a misinterpretation of the law.

3 That the Application is an abuse of the Court process and hence ought to be dismissed.

2ND RESPONDENT'S CASE

10. On behalf of the respondent's a Notice of Motion was filed on 7th June 2012 by a firm calling itself **Azania Legal Consultants**, **Advocates**.

11. In Nairobi High Court (Family Division) Miscellaneous Application No. 3 of 2012, **In the Matter of the Estate of Stephen Kariuki Ndungu**, **G B M Kariuki, J** (as he then was) struck out a suit filed by the said firm on the grounds that the same was filed in breach of Rule 12 of the ***Advocates Practice Rules***. On my part I associate myself with **Hon. Mr. Justice Kariuki's** decision that under the aforesaid rule that no advocate is allowed to practice under any other name than his own name or other of a past or present member or members of the firm. Accordingly the said application is struck out with costs.

APPLICANT'S SUBMISSIONS

12. On behalf of the applicant it was submitted on the authority of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** that the 1st respondent acted unlawfully by purporting to confer on itself jurisdiction which it did not have in presiding over an appeal filed out of time and which does not lie under section 129 of the Act and hence its decision to dismiss the preliminary objection and purport to hear the appeal was ultra vires the Act and in excess of jurisdiction. Citing High Court Judicial Review Cause No. 111 of 2008, **Republic Versus National Environment Tribunal, Ex parte Ol Keku Ronkai Limited & Another** it was submitted that the 1st respondent lacked jurisdiction to hear the **National Environmental Tribunal Appeal No. 74 of 2011** and hence this Court should bring the decision and proceedings before the Tribunal and quash the same.

13. Citing **Republic vs. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers Co-operative Sacco Ltd [1999] 1 EA 245**, is submitted that the 1st respondent's decision was unreasonable and made in bad faith

14. According to the applicant only an aggrieved party has the *locus standi* to appeal before the tribunal and relying on **Republic vs. National Environmental Tribunal ex parte National Housing Corporation [2012] eKLR**, **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** and **In the Matter of an Application by Overlook Management Limited and Silver Sand Camping Site Limited & NEMA Misc. Application No. 391 of 2006**, it is submitted that for a person to have locus standi he ought to have appeared before NEMA, a committee or the Director General and that only parties who have participated in the proceedings before NEMA can approach the tribunal on appeal and further as the appeal was filed long after the statutory period for filing such an appeal had lapsed, the appeal was made in bad faith and the Respondent should not waste its valuable time and public resources hearing an appeal not related to matters touching on the environment. According to the applicant, the 1st respondent exceeded its powers and authority by allowing an appeal to be filed by a person without any *locus standi* and out of time and hence its decision was in clear contravention of the law and is a violation of the Applicant's legitimate expectation that the 1st Respondent will not act ultra vires.

1ST RESPONDENT'S SUBMISSIONS

15. On behalf of the 1st respondent, it was submitted that the applicant's position that the Tribunal had no jurisdiction to entertain the appeal was based on a partial reading of section 129(1) of the Act and in total neglect of the succeeding subsections of the same section. According to the 1st respondent, it is from this partial reading that the section that misguided the applicant's submissions that the jurisdiction of the Tribunal is limited only to the instances laid out in section 129(1), and that the Tribunal therefore lacks the jurisdiction to enter upon a determination of any dispute that is outside the scope of the said section. According to them, the 1st respondent indeed has jurisdiction to hear and determine the dispute before it.

16. It is submitted that it is an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature a statute must be considered as a whole and sections of an Act are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context and the context here means the statute as a whole, the previous state of the law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy. Relying on **Union of India vs. Ephinstone Spinning & Weaving Co. Ltd 2001 (1) JT SC 536** and **Charles Robert Leader vs. George F. Diffey [1888] 13 AC**

294 at 301, it is submitted that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in light of the general purpose of the Act itself hence the words and phrases occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. Citing **Gurmej Singh S vs. Sardar Pratab Singh Kairon AIR 1960 SC 122 at 124** it is contended that this principle is equally applicable to different parts of the same section and that the section must be construed as a whole whether or not one of its parts is a saving clause or a proviso and that the subsection must be read as parts of the integral whole as being interdependent, each portion throwing light if need be on the rest since it is an elementary rule that construction of a section is to be made of all the parts together.

17. It is therefore submitted that section 129(2) extends the jurisdiction of the Tribunal to deal with appeals from decisions of the Director General, the Authority or Committee of the Authority, unless there is an express provision to the contrary in the Act. By virtue of section 129(2) the powers of the Tribunal are extended beyond the instances outline under section 129(1) and therefore the Tribunal can entertain an appeal even where the same is not strictly provided for within the purview of section 129(1), provided there is no provision of the Act stipulating to the contrary. While citing the provisions of section 33 of the Act, it is submitted that a person aggrieved by the decision of the Complaints Committee is thereby entitled to approach the Tribunal and need not be a person enumerated under section 129(1).

18. With respect to the six month limitation period, it is submitted that the same is limited to the persons enumerated under sub-clauses (a) to (e) and does not apply in the case of any other appeal to the Tribunal.

2ND RESPONDENT'S SUBMISSIONS

19. On behalf of the 2nd respondent, submissions were made in support of its application dated 7th June 2012 which application I have already struck out hereinabove.

APPLICANT'S REJOINDER

20. In reply to the submissions made by the 1st respondent, the applicant contends that it is evidence in the plain reading and interpretation of section 129 that the 2nd Respondent is not an aggrieved party and consequently cannot be an appellant as defined under the Act. It is submitted that a right in law must be expressed and not implied hence regulations contemplated under section 129(2) can only be in conformity with section 129(1) of the Act and cannot expand the scope of the appeals as provided for in section 129(1) of the Act. To the applicant, an attempt to do so will be ultra vires the Act within the meaning of section 31(b) of the Interpretation and General Provisions Act hence the orders sought ought to be granted.

DETERMINATION

21. Having considered the foregoing this is the view I form of the matter.

22. In my view the issue for determination in this Cause is whether the Tribunal has the jurisdiction to hear and determine **Tribunal Appeal No. 74 of 2011, Nairobi, Monica Nzilani Mweu Vs. Director General NEMA & Abdulhafidh Sheikh Ahmed Zubeidi.** The objection to the Tribunal hearing the matter is two pronged. Firstly, it is contended that the 2nd respondent who is the appellant before the Tribunal does not fall within the definition of an aggrieved party as contemplated under section 129(1) hence has no *locus standi* to institute the appeal. Secondly it is contended that the said appeal was filed outside the six month limitation period stipulated under the same section.

23. The issue of jurisdiction was as rightly submitted on behalf of the applicant extensively dealt with by the Court of Appeal in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited** (supra) in which **Nyarangi, JA** while citing Words and Phrases Legally defined – Vol. 3: I-N page 13 held:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

24. With due respect the issue cannot have been better put.

25. It is sad and a matter of concern for this court that although learned counsel for the 1st respondent has relied on certain authorities he did not bother to make copies thereof. Counsel ought to furnish copies of authorities they rely to the Court if the Court is expected to take their submissions seriously. It is a dereliction of the duty a Counsel owes to the Court and to his client to simply throw foreign authorities at the Court as it were and expect the Court to research for the same. This careless approach by counsel with due respect ought not to be encouraged.

26. I have agreed with learned counsel that in the interpretation of legislative enactments the same ought to be constructed as a whole and not in parts.

27. Section 129 of the Act provides as follows:

> ***(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.***
>
> ***(3) Upon any appeal, the Tribunal may:—***
>
> > ***(a) confirm, set aside or vary the order or decision in question;***
> >
> > ***(b) exercise any of the powers which could have been exercised by the Authority in the***

proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

28. Although subsection 129(1) of the Act in its opening seems to permit any person to appeal to the Tribunal a reading of the clauses thereunder seems to limit the appeal thereunder only to a person who has applied for a licence. I therefore agree with the decision in **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** (supra) that under section 129(1) of the Act, a person who did not participate in the EIA study process for the development in question, in the NEMA's process of approval of the development or complaint by to the PCC cannot be said to have been an aggrieved by the process which led to the issuance of the licence as no decision could be said to have been made against him hence could not challenge the decision by way of an appeal to the Tribunal and if the Tribunal purports to entertain such an appeal under the aforesaid section, the Tribunal would be acting ultra vires its authority hence its decision would be liable to be quashed.

29. It is however contended that the appeal does not fall under section 129(1) of the Act but falls under subsection(2) thereof hence the definition of an aggrieved party under subsection (1) does not apply to the 2nd respondent. The respondents' position if I understood them correctly is that whereas subsection (1) deals with appeals by a person who applied for a licence, subsection (2) deals with all other persons who are aggrieved by the decision of the Director General, the Authority or a Committee. I agree with the submissions made on behalf of the applicant that any procedures made under subsection (2) cannot supersede the provisions of subsection (1) and therefore in making its procedures the Tribunal cannot for example provide that an appeal covered by section 129(1) may be filed outside the period provided thereunder. However, the Tribunal is clearly empowered under subsection (2) to make procedures for appeal from decisions of the Director-General, the Authority or Committees of the Authority unless otherwise provided. Section 63 of the Act provides:

The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.

30. It is therefore clear that only the Authority that is empowered to issue a licence under section 63 of the Act. Since section 129(1) of the Act deals with the issuance of a licence and the conditions attached thereto, that subsection cannot be said to cover the acts and omissions of the Director General or a Committee of the Authority or even the Authority itself in matters not covered under of the section 129(1).

31. Accordingly, it is my view and I so hold that section 129(2) of the Act deals with appeals other than appeals covered under section 129(1) as long as the same are not otherwise expressly provided.

32. In this case it is clear that the appeal in issue does not fall within section 129(1) since the 2nd respondent was not a participant in the licensing process. I have not been told that he is barred from appealing by any other provision in the Act or Regulations made under the Act. Accordingly I find that the 2nd respondent was clearly entitled under section 129(2) to appeal against the decision of the Authority. To rule otherwise would have the effect of nullifying the avenue for appeals against decisions made by the Director General and a Committee of the Authority as provided under section 129(2) without any justifiable legal reasons. As was held by the Court of Appeal in **Leisure Lodges Ltd. vs. Yashvina Shretta Civil Appeal No. 10 of 1997,** it is an established rule, in construing a statute the intention of the legislature and the meaning of the law is to be ascertained by viewing the whole and every part of the Act and no clause, sentence or word is to be superfluous, void or insignificant and regard is to be had to the policy that dictated the Act as well as the words used. To arrive at a contrary decision would render section 129(2) superfluous, void and insignificant and that would in my view be contrary to the policy

that dictated the Act. One cardinal and essential foundation of the interpretation of legislative enactment is that the words of the enactment are to be used in their natural and ordinary sense. A certain amount of common sense must be applied in construing statutes and the object of the Act has to be considered and where the language of an Act is clear and explicit, it must be given effect whatever may be the consequences, for in that case the words of the statute speak for the intention of the legislature. See **Barnes vs. Jarvis [1953] 1 WLR 649; Warburton vs. Loveland [1832] 5 ER 499.**

33. I have perused the decision in **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** (supra) and it is my view that with due respect the Court did not address its mind to the provisions of section 129(2) of the Act and that had it done so, it might have arrived at a different decision. Although the said section was cited by the Court, there was no decision made as to its scope, relevance and applicability.

34. Having found that the 2nd respondent's appeal to the Tribunal did not fall under section 129(1) of the Act, it follows that the limitation period provided under section 129(1) does not apply to the 2nd respondent since in my view that limitation only applies to a person appealing pursuant to section 129(1).

ORDER

35. In the result the Notice of Motion dated 17th April 2012 filed on 18th April, 2012 fails and is dismissed. I however make no order as to costs taking into account the fact that the 2nd respondent's application which was in effect an opposition to the application was struck out and the 1st respondent's conduct in not furnishing the Court with copies of the decisions relied upon.

Dated at Nairobi this 2nd day of August 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties