Mathu, Shah & Ndegwa (All jointly suing as and on behalf of Kyuna Neighbours Association (KNA)) v National Environment Management Authority (NEMA) & another; Director General, Nairobi Metropolitan Services (Interested Party) (Environment and Land Appeal E032 of 2022) [2022] KEELC 12817 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12817 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E032 OF 2022

OA ANGOTE, J

SEPTEMBER 30, 2022

BETWEEN

KIMANI MATHU, CHAIRMAN ATULA SHAH, VICE CHAIRPERSON AND CHRIS NDEGWA, SECRETARY ..... APPELLANT

ALL JOINTLY SUING AS AND ON BEHALF OF KYUNA NEIGHBOURS ASSOCIATION (KNA)

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 1ST RESPONDENT

MONTESORI LEARNING CENTRE (MLC) ..... 2ND RESPONDENT

AND

DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES INTERESTED PARTY

(Being an Appeal against the whole of the Ruling of the Honourable National Environment Tribunal at Nairobi delivered electronically on 14th April 2022 in National Environment Tribunal Appeal No. 10 of 2022))

RULING

1. In the notice of motion application dated April 20, 2022, the applicant has sought for the following orders:

    a. .....

b. That the Hon court be and is hereby pleased to issue an order of stay against the decision of the Hon National Environment Tribunal, of April 14, 2022, and grant an injunctive restraint against the 2nd respondent or anyone claiming under or through their authority from in any way howsoever undertaking and/or continuing with construction works and/or activity on Plot LR No 7158/62 Kyuna, Nairobi pending hearing and determination of the instant appeal herewith.

c. That the Hon court be and is hereby pleased to issue any further appropriate orders that may give effect to the orders above.

2. The application is based on the grounds on the face of the motion and the supporting affidavit sworn on April 20, 2022 by QS, Kimani Mathu, the Chairman of the Kyuna Neighbours Association. QS Mathu additionally filed a supplementary affidavit dated June 14, 2022.

3. The applicant's chairman deponed that the proposed project by the 2nd respondent seeks to materially alter the user of the land from a single residential use to an educational use, and to establish a primary school for at least 250 students; that the proposed school is out of character with its surrounding and that the scale of the structure is not in keeping with its surrounding.

4. It was deponed that Kyuna Neighbourhood Association filed NET Appeal 10 of 2021 before the National Environment Tribunal (NET) challenging the decision of the National Environment Management Authority's (NEMA's) authorizing construction of a proposed school development on Plot LR No 7158/62 Kyuna, Nairobi.

5. The applicant's chairman deponed that should the court not grant the orders of stay, the applicant and the environment would suffer substantial loss. He stated that on July 5, 2021, NET had issued restraining orders to prevent the 2nd respondent from cutting down decades' old trees and that excavating and commencing construction would waste away the subject matter of litigation by continuing to occasion irreparable harm/ prejudice for which damages cannot be an adequate remedy.

6. He deponed that the determination herein is not a pecuniary or monetary decree, but concerns protection and preservation of the environment; that both the balance of convenience and the lower risk of injustice lies in favour of issuing the orders as sought of stay to allow this court to adjudicate on the propriety of the impugned decision. The applicant relied on the case of *Amir Suleiman vs Amboseli Resorts* (2014) eKLR.

7. The chairman of the applicant finally deponed that unless this court issues the order sought, the 2nd respondent may continue develop Plot LR No 7158/62 Kyuna, Nairobi, which would not only occasion great prejudice to the applicant and the environment, but would render the appeal nugatory and the tribunal's orders otiose.

8. The 2nd respondent's director of the 2nd respondent deponed that the 2nd respondent in proposing the said project, duly complied with all relevant laws and regulations and obtained all necessary approvals, including a change of user and approval of building plans by the Nairobi City County.

9. Additionally, it was deponed, following a full Environmental Impact Assessment (EIA) study by Greendime Consultants Ltd (a NEMA accredited EIA/Audit Firm), the 1st respondent issued the 2nd respondent with license Ref NEMA/EIA/PSL/10439 on March 26, 2021, permitting it to commence the project.

10. The 2nd respondent's director contended that the 2nd respondent is merely constructing a primary school with a capacity of two hundred and twenty (220) primary school children, which construction involves building 4 basic classrooms, a swimming pool and a sports field and that the school is being built by renovating an existing house in the neighbourhood, which, in keeping with the obtained development permit, the 2nd respondent has maintained the residential character of the property.

11. It was deponed that the project is eco-friendly with a reduced building footprint, with 60% of the renovation being done on already existing structure and that 80% of the 3 acres of the subject property is open/ green space.

12. On the assertion that the proposed project will occasion great loss and prejudice to the appellant and the environment, the director of the 2nd respondent deponed that mitigation measures were submitted by the 2nd respondent in its EIA report before obtaining its NEMA license.

13. The 2nd respondent's director deponed that the applicant has grossly violated the 2nd respondent's legitimate expectation under *EMCA* to conclude its construction project without disturbance, having obtained all the relevant approvals, permits and licenses from the requisite authorities.

14. He urged that the current halt and interim injunction has caused a huge blow and occasioned irreparable damage and loss to the 2nd respondent; that due to its legitimate expectation to complete its project, it enrolled fifty (50) students to the school who were to begin their school year in September 2021 and have not done so to date and that the 2nd respondent risks being in breach of the principle of the best interests of the child and breach of their right to education.

15. The students, it was deponed, have had to be housed at the 2nd respondent's kindergarten, which is now suffering due to pressure on its resources and space and that the 2nd respondent has been forced to reduce the intake of kindergarten children. It was deponed that the instant application continue to cause a loss of livelihood for about twenty-six employees who were employed in preparation of the daily running of the school.

16. These events, it was deponed, have caused and continue to cause monetary losses estimated at about Kshs 120,000,000 due to loss of an estimated 60 children due to its closure, loss of expected revenue from the children who were to begin learning in September 2021, construction cost of building new classes at the kindergarten to house the primary school children and enormous increase in its construction costs due to the delay.

17. The 2nd respondent's director urged that if the injunction is granted, the 2nd respondent will suffer irreparable loss and damage; that the 2nd respondent will be unable to complete its development and that the 2nd respondent had complied with all the legal requirements.

18. The 2nd respondent's director deponed that it is a denial of the rights of the children to education under Article 53 to interrupt their expected progression from the lower years to middle years due to this appeal; that it was unfair and unjust for the school which is running as a business and advancing education to have its development interrupted since June 2021 to date, a period of almost one year and that given the above, the balance of convenience does not tilt in favour of the appellants.

19. The 2nd respondent also filed a preliminary objection dated May 12, 2022, in which it stated that the appeal before this court is not contemplated under section 129 (1) and (2) of *EMCA* as it raises issues concerning issuance of development permission and change of user.

20. It was urged by the 2nd respondent that zoning issues lie with the County Physical and Land Use Planning Liaison Committee pursuant to section 61(3) and 4 of the *Physical Planning Act* and not

NET and that the tribunal did not have jurisdiction to entertain the appeal and an appeal from the said subject matter cannot lie to this court.

21. The application was canvassed by way of written submissions. Counsel for the applicant/appellant submitted that that the appeal is likely to succeed; that failure to allow the application will occasion great loss to the applicant and that the subject matter herein concerns a dispute about the environment.

22. It was submitted that this court has jurisdiction to stop the patently deleterious construction project to allow a challenge on whether the tribunal was right in disregarding binding precedents on the differentiated locus standi under section 129(1) and (2) of *EMCA* and the unavailability of determining the dispute by way of a preliminary objection.

23. On the preliminary objection raised by the 2nd respondent, Counsel submitted that the ELC has equal status with the High Court, as observed by the Supreme Court in *Republic vs Karisa Chengo & 2 others* [2017] eKLR and that the ELC exercises unlimited original and appellate jurisdiction over matters falling within its jurisdiction as provided for under section 13 (1) and (4) of the *Environment and Land Court Act*.

24. Counsel for the appellant submitted that in accordance with section 130 of the *EMCA* as read with section 13 of the *Environment and Land Court Act*, the applicant had a legitimate right to appeal to the Tribunal to require a minute scrutiny of the impugned EIA License and the irregular assessment preceding its grant at first instance.

25. The 2nd respondent's appeal was struck out for non-compliance with section 129(1) and for want of jurisdiction on the tribunal's part and that the applicant's grounds upon which this application is founded, fall within the purview of section 61(3) and (4) of the *Physical and Land Use Planning Act* as they are substantially zoning questions, which the tribunal did not jurisdiction to hear under Section 129(1) and (2) of *EMCA*.

26. It was submitted that the applicant's grievances do not fall under section 129(1) of *EMCA* as he is not aggrieved by any condition, limitation or restriction imposed on the 2nd respondent's license, nor is it aggrieved by any revocation, suspension or variation of the said license.

27. It was submitted by counsel that this court lacks jurisdiction under section 130 of the *EMCA* as this court's appellate jurisdiction can only apply to decisions or orders properly issued by the tribunal where the tribunal was clothed with the requisite and lawful jurisdiction to issue the same. As the Tribunal did not have the requisite jurisdiction under section 129(1) and (2) to determine the appeal, it was submitted, this court lacks the jurisdiction to deal with this matter.

28. It was submitted that in any event, there is no evidence of any decision issued under section 129(2) of the *EMCA* capable of being appealed. Counsel relied on Republic vs the National Environmental Tribunal & 2 others [2010] eKLR.

29. Counsel consequently differed with the applicant's contention that the tribunal erred in holding that the appeal fell under section 129(1) rather than (2), on the basis that binding precedent has differentiated locus under section 129(1) which accrues to a person who participated in the process of granting a license while locus under 129(2) includes persons who did not participate in the process leading up to the issuance of a NEMA license.

30. Counsel submitted that the applicant did not file the appeal within the statutory timeframe of 60 days; that as jurisdiction is a fundamental question in any proceedings, it does not require to be pleaded for a court or tribunal to be invited to determine its jurisdiction and that jurisdiction is an issue which

a court or tribunal can determine on its own motion, drawing from its inherent power to meet the ends of justice.

31. It was submitted that the tribunal was correct in holding that it had no authority to extend the 60-days statutory limit as this limit is expressly limited by the Act. Further, a judicial or *quasi*-judicial body has no inherent powers as it is a creature of statute and only has such jurisdiction as specifically conferred upon it by statute. Counsel relied on the High Court's *dicta* in *Republic vs National Environmental Tribunal & 2 others ex-parte Athi Water Services Board* [2015] eKLR.

32. Counsel submitted that with the amendment of section 129 of *EMCA* to include section 129(4), there is now no automatic right of injunction or stay as previously provided for under section 130(2) of *EMCA* and that the applicants have not made a case for grant of an injunction under Order 42 rule 6 or under Order 40 of the *Civil Procedure Rules* as the 2nd respondent continues to suffer great prejudice.

Analysis and Determination

33. This is an appeal against the decision of the National Environment Tribunal in NET Appeal No 10 of 2021 dated April 14, 2022, in which the tribunal struck out the appeal before it for want of jurisdiction and non-compliance with section 129(1) of EMCA. The applicant is seeking that the substantive appeal be remitted back to the tribunal for hearing and determination.

34. The appeal before the tribunal challenged the issuance of license ref No NEMA/ EIA/ PSl10439 to the 2nd respondent, which the applicant believed was issued irregularly and in violation of section 58(2) of the *EMCA*, 1999, Regulation 11, 16, 17 & 20 *Environmental (Impact Assessment and Audit) Regulations* and paragraph 3(1) & (2) *Legal Notices* No 31 and 32 of 2019.

35. The complaint before the tribunal was that whereas the nature of the proposed project required conduct of an Environmental Impact Assessment (EIA)Study and elaborate public participation, this was never done and the appellants were never involved.

36. The motion filed by the applicant herein is seeking for an order of stay against the tribunal's decision striking out the appeal before it and an injunctive order restraining the 2nd respondent from undertaking or continuing construction works on the suit property.

37. The applicant averred that should the court not grant the orders of stay, the applicant and the environment would suffer substantial loss. He stated that the tribunal initially issued restraining orders to prevent the 2nd respondent from cutting down decades old trees. He added that excavating and commencing construction would waste away the subject matter of litigation by continuing to occasion irreparable harm/ prejudice for which damages cannot be an adequate remedy.

38. The applicant argued that both the balance of convenience and the lower risk of injustice lies in favour of issuing the orders of stay to allow this court to adjudicate on the propriety of the impugned decision. This, it was argued, would mitigate the substantial irreparable losses to which the appellants, the environment and the Kyuna community are exposed to.

39. Conversely, the 2nd respondent asserted that the applicant has violated its legitimate expectation under *EMCA* to conclude its construction project without disturbance, having obtained all the relevant approvals, permits and licenses from the requisite authorities. In addition, it was urged, the current halt and interim injunction has occasioned irreparable damage and loss to the 2nd respondent which had enrolled fifty (50) students to the school.

40. According to the 2nd respondent, the instant injunction will also continue to cause a loss of livelihood to about twenty-six employees who were employed in preparation of the daily running of the school,

as well as monetary losses estimated at about Kshs 120,000,000. The 2nd respondent averred that the appeal was filed out of time and has no probability of success and that the balance of convenience does not tilt in favour of the appellants.

41. The 2nd respondent also raised a preliminary objection on the basis that the appeal before this court is not contemplated under section 129 (1) and (2) of the *EMCA* as it raises issues concerning issuance of development permission and change of user; that these are zoning issues that lie to the County Physical and Land Use Planning Liaison Committee pursuant to section 61(3) and 4 of the *Physical Planning Act* and not NET and that the Tribunal did not have jurisdiction to entertain the appeal in the first place.

42. The following issues arise for determination:

    i. Whether this court has jurisdiction to hear and determine this appeal.

    ii. Whether this court should grant an order of stay against the decision of the National Environment Tribunal, of April 14, 2022, and grant an injunctive order against the 2nd respondent preventing them from undertaking and/or continuing with construction works on the suit property pending hearing and determination of this appeal.

43. It is trite law that a preliminary objection must be on a clear point of law. In *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 at page 700 paragraphs D-F, Law JA stated as follows:

> " 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. 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."

44. At page 701 paragraph B-C, Sir Charles Newbold, P added the following:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

45. The 2nd respondent's preliminary objection is that this court lacks jurisdiction. Indeed, jurisdiction is everything. This is well-articulated in the *locus classicus* decision by the Court of Appeal in *Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited* [1989] KLR 1, as follows (Nyarangi, JA at p 14):

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."

46. More recently, the Supreme Court in *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others* [2012] eKLR stated that a court's jurisdiction flows from the *Constitution* or legislation:

> " A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

47. It is not disputed that the matter before this court is an appeal against the decision of the tribunal. The appellate jurisdiction of the Environment and Land Court over decisions by tribunals is set out in section 13(4) of the *Environment and Land Court Act* and section 130(1) of the *Environmental Management and Coordination Act*.

48. Whether the appellant's claim ought to have been filed under section 129(2) of the *EMCA*, as the appellant asserted or under section 129(1) as held by the tribunal has been argued extensively by the parties herein. The 2nd respondent correctly relied on the Court of Appeal's decision in *National Environmental Tribunal vs Overlook Management Limited & 5 others* [2019] eKLR, where it adopted the expanded view of locus standi as follows:

> " In our view and to reconcile the conflicting decisions, where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the Act, such a party may as of right appeal to the appellant. Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd respondent, its Director-General or its committees, then such a party may lodge an appeal pursuant to sub-section 2 of that provision. We take the view that such a party does not have to demonstrate that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed. This is in line with the expanded locus standi in the Act and gives effect to its legislative purpose."

49. In this case, it is not disputed that the applicant was aggrieved by the 1st respondent's decision to issue License No NEMA/EIA/PSL/10439 to the 2nd respondent. Under section 129(1), the Tribunal has jurisdiction to determine grievances over a grant of a license. The 2nd respondent's preliminary objection is thus not meritorious.

50. The remaining issue for determination is whether this court should grant a stay order against the tribunal's decision as well as injunctive orders restraining the 2nd respondent from developing the suit property pending the hearing and determination of the appeal.

51. It is well settled that whether or not a court should grant an order of stay is a matter of discretion. Order 42 rule 6(2) of the *Civil Procedure Rules* 2010 provides that:-

> " (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made,

to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

52. An applicant thus needs to satisfy three conditions to obtain orders of stay: that they will suffer substantial loss unless the orders are granted, that the application has been made without unreasonable delay and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. It is also trite law that a court ought to exercise its discretion on the issue of stay so as not to prevent the appeal from being rendered nugatory *(Butt vs Rent Restriction Tribunal* [1979] eKLR).

53. The applicant's case is that should this court decline to grant orders of stay, the applicant and the environment would suffer substantial loss. The applicant pleaded that on July 5, 2021, the tribunal had issued restraining orders to prevent the 2nd respondent from cutting down decades old trees, which order collapsed when the tribunal struck out the appeal.

54. Indeed, this court is in agreement with the appellant's deposition that in the event an order of stay and injunction are not issued restraining the 2nd respondent from undertaking or commencing any construction works on the suit property, the intended appeal will be rendered nugatory in the event the appeal succeeds.

55. Further, the harm that would result from cutting down decades old trees, excavating the soil and putting up a permanent structure cannot be compensated in damages in the event the appeal succeeds, whereas on the other hand, the harm occasioned to the 2nd respondent can be quantified and remedied by damages.

56. Indeed, the issue of the irreversibility of environmental harm must have been the main consideration for the enactment of section 130 (2) of the *EMCA* which provides for an automatic stay of any contemplated activity by the developer the moment an appeal is filed at the tribunal.

57. Suffice it to say that the issues raised by the 2nd respondent on the jurisdiction of the tribunal vis a vis the Planning Liaison Committee and whether the tribunal was right to have struck out the appeal for having been filed out of time can only be ventilated during the hearing of the appeal, and not at this stage.

58. For these reasons, the notice of preliminary objection dated May 12, 2022 is dismissed and the notice of motion dated April 20, 2022 is allowed as follows:

a. An order of stay be and is hereby issued against the decision of the National Environment Tribunal, of April 14, 2022, and an injunction be and is hereby granted restraining the 2nd respondent or anyone claiming under or through their authority from in any way howsoever

undertaking and/or continuing with construction works and/or activity on LR No 7158/62 Kyuna, Nairobi pending hearing and determination of the instant appeal herewith.

b. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for 1st Respondent

Ms Otieno for Wandabwa for 2nd Respondent

Mr. Githui for Lusi for Appellant

Court Assistant - June