



**Sein & 3 others v National Environment Management Authority
(NEMA) & another (Environment and Land Appeal 11 of 2017)
[2022] KEELC 12802 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 11 OF 2017
SO OKONG'O, J
SEPTEMBER 26, 2022**

BETWEEN

**SARAH PITORIA OLE SEIN 1ST APPELLANT
RIMPA ESTATES LIMITED 2ND APPELLANT
ALBANUS RUMOI LESEYA 3RD APPELLANT
BERNARD NAUMU LESEYA 4TH APPELLANT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 1ST
RESPONDENT
ATHI WATER SERVICES BOARD (AWSB) 2ND RESPONDENT**

*(An Appeal from the Ruling of the National Environment
Tribunal made at Nairobi on 21st February 2017)*

JUDGMENT

Background:

1. The 2nd respondent applied to the 1st respondent for an environmental impact assessment license (hereinafter referred to only as “EIA license”) to construct the Kiserian sewerage system and sewerage treatment works (hereinafter referred to only as “Kiserian sewerage works). The 2nd respondent submitted to the 1st respondent environmental impact assessment study report (hereinafter referred to only as “the EIA report”) that was challenged by the appellants. The appellants contended that the 2nd respondent failed to give them notice of the project neither were they consulted on the project that was going to have impact on their parcels of land. The appellants submitted their objection to the 2nd



- respondent's EIA report in writing to the 1st respondent on June 12, 2015 in which they also adopted an earlier objection to the same project that they had lodged with the 1st respondent on February 20, 2015. The EIA report was published in the Daily Nation Newspaper on May 15, 2015.
2. Prior to their objections to the said EIA report, the appellants had filed a suit before this court in 2014 namely, ELC No 1312 of 2014 (hereinafter referred to only as "the ELC suit") complaining about what they termed as impunitive, unlawful and unprocedural takeover of their properties by the 2nd respondent.
 3. The 1st respondent after considering the said EIA report and holding a public hearing on August 5, 2015 issued the 2nd respondent with EIA license on November 25, 2015. On June 24, 2016, the appellants filed an appeal with the National Environment Tribunal at Nairobi (hereinafter referred to as "NET") against the 1st respondent's decision to issue the 2nd respondent with the said EIA license. Since the appeal was filed out of time, the appellants filed together with the appeal, a notice of motion application dated June 23, 2016 seeking extension of time within which to file the appeal and for the appeal that was filed out of time to be deemed filed and served upon the respondents within the prescribed time. The application was brought on the grounds set out on the face thereof and on the affidavit sworn by one, Constance Kone Ole Sein, an attorney of the 1st appellant sworn on June 23, 2016. In their grounds on the face of the application, the appellants contended that they did not file appeal within time because "the 1st and 2nd respondent appear to have conspired to avoid and exclude the applicants and interested people from the applicant's said community from participating in public decisions which affect the applicants' environment" and that "applicants discovered license had been issued long after expiry of 60 days." In her affidavit in support of the application, Constance Kone Ole Sein did not state the reason why the appellants did not file their appeal within time. She instead concentrated on the reasons why in the appellants' view, the EIA license was wrongfully issued by the 1st respondent. The affidavit sounded like submissions on appeal against the issuance of the said license. No wonder in paragraph 22 of the affidavit, Constance Kone Ole Sein stated that "I swear this application in support of the applicants application to cancel the license issued to AWSB by NEMA on the November 25, 2015, authorizing the latter to commence the construction of the Kiserian sewerage project."
 4. The 1st respondent filed grounds of opposition dated July 25, 2016 to the application. The 1st respondent contended that the appellants were guilty of inordinate delay having filed the application more than 7 months after the issuance of the license. The 1st respondent contended further that the appeal was time barred having been filed contrary to the provisions of section 129(2) of the *Environmental Management and Co-ordination Act* 1999(EMCA) and rules 4 and 7 of the *National Environment Tribunal Procedure Rules 2003*. The 1st respondent contended that the appeal was *sub judice* in view of the suits that were pending before this court on the same issue.
 5. The 2nd respondent opposed the application through a notice of preliminary objection dated July 4, 2016 and grounds of opposition dated July 27, 2016. In its preliminary objection, the 2nd respondent contended that the court lacked jurisdiction to entertain the appellants' appeal the same having been filed contrary to the provisions of sections 125 and 129 of *EMCA*. The 2nd respondent contended further that the appellants lacked *locus standi* to file the appeal. The 2nd respondent contended further that the appeal was *sub judice* in view of the existence of ELC No 1312 of 2014 (the ELC suit) between the same parties over the same issue. The 2nd respondent contended further that the appeal was time barred having been filed contrary to the provisions of section 129(1) of *EMCA* and rules 4 and 7 of the *National Environment Tribunal Procedure Rules 2003*. The 2nd respondent urged the court to strike



out the appeal. In its grounds of opposition, the 2nd respondent contended that NET lacked the power to extend time limited by section 129 of *EMCA*.

6. NET heard the appellants' application for extension of time and the 2nd respondent's preliminary objection together. In a ruling delivered on February 21, 2017, NET upheld the respondents' preliminary objection and dismissed the appellants' application for extension of time. In the ruling, NET found that the appellants' appeal fell under section 129(2) of EMCA and as such the same should have been filed within 60 days of the issuance of the license. NET found further that it had power under rule 7 of the National Environment Tribunal Procedure Rules 2003 (the rules) to extend the said period of 60 days for good reason. NET considered whether the appellants had offered good reason to warrant extension of time and found in the negative. NET observed that the affidavit in support of the application was sworn by Constance Kone Ole Sein on behalf of the 1st appellant only and that nothing was said about the reasons why 2nd, 3rd and 4th appellants wanted extension of time. NET observed further that Constance Kone Ole Sein did not state in her affidavit how and when she learnt of the decision of the 1st respondent to issue a license to the 2nd respondent. NET concluded that the affidavit as framed was not intended to show good reasons on the basis of which NET could exercise its discretion to extend time but was meant to address the merit of the intended appeal. NET noted that although the appellants' advocate mentioned some reasons for the delay in his submissions, the same were given from the bar with no basis in the affidavit in support of the application.
7. NET held that its discretion to extend time to file appeal was to be exercised judicially and only for good reason. NET found that no reasons, grounds or explanations had been given in support of the application for extension of time. The application was dismissed on that account. Since the application for extension of time failed, the objection to the appeal on the ground that it was filed out of time was upheld.

The Appeal Before This Court:

8. The appellants were dissatisfied with the said ruling by NET and filed this appeal on March 21, 2017 through a memorandum of appeal of the same date. The appellants amended their memorandum of appeal on April 21, 2021. In their memorandum of appeal, the appellants challenged the ruling by NET on the following grounds;
 1. The tribunal erred in failing to find that the appellants had no way of knowing that the 1st respondent had issued to the 2nd respondent licence No NEMA/EIA/PSL/2551 dated November 25, 2015.
 2. The tribunal erred in failing to recognize that the application before the tribunal was for leave to extend time within which the applicants could file a notice of appeal after 60 days had expired.
 3. The tribunal therefore erred in finding that there was a record of appeal before the tribunal to justify the respondents raising, filing and arguing a preliminary objection when the applicants' application dated June 23, 2016 and scheduled for hearing on the October 26, 2016 was seeking leave to extend time to file a notice of appeal.
 4. The tribunal erred in dismissing the applicants' application for extension of time by upholding an illegal and/or a pre-mature and speculative preliminary objection.
 5. The tribunal erred and abdicated its judicial responsibility when it failed to keep an accurate record of the proceedings thus denying the applicants the right to respond to the so called preliminary objection and thus providing/facilitating an opportunity to the respondents to ambush the applicants with the so called preliminary objection.



6. The tribunal erred and abdicated its judicial responsibility by displaying extreme bias on the face of its record in order to justify its pre-planned decision.
7. The tribunal erred in handling the applicants' application for leave to extend time as though it was a substantive appeal knowing the same not to be the case with a view to deny the applicants the right to file an appeal against the 1st respondent's decision in respect of which the respondents were guilty of not only violating the Constitution, statute law and regulations but also of fraud, fraudulent practice and abuse of power and/or office.
8. The tribunal erred in failing to find that the applicants had provided sufficient grounds and explanations as to why they were not aware of the issuance of the licence to the 2nd respondent until they visited the 1st respondent's office to find out what was going on in view of posters that the 2nd respondent was erecting in places far away from the scene.
9. The tribunal erred in resorting to excessive technicalities which were not argued or raised before it to justify its desired ruling and/ or decision.
10. The tribunal erred in claiming that its ruling and order were unanimous despite the fact that there were panelists who never heard the appellants' application. The appellants contended that there was a fraud on the face of the record of the tribunals ruling and a cover up of the fact that one of the panelists who heard the application for leave was not a signatory to the ruling.
11. The tribunal erred in both law and fact when it failed to keep an accurate record of all the panelists who heard the appellants'/applicants' application for extension of time within which to file a notice of appeal dated the June 23, 2016 on December 13, 2016.
12. The tribunal erred in both law and fact when it made a single inaccurate, incomplete and sketchy record of its proceedings by the honourable chairperson, J.W Dwasi on the said December 13, 2016 and relied on the same to make its ruling /order dated the February 21, 2017.
13. The tribunal erred when it relied on the record of the proceedings made by the honourable chairperson, J Dwasi only to the exclusion of the recording, verbal directions and comments given and/or made by the other two members of the tribunal's panel who heard the said appellants'/applicants' application dated June 23, 2016 on the December 13, 2016.
14. The tribunal erred both in law and fact when it failed and or omitted to record panelist Prof Tom Ojienda's direction to the litigants in response to the applicants' request for directions on how to proceed in view of the preliminary objection filed by one of the respondents, to the effect that the matter before the tribunal that morning was an application for the extension of time. The appellants contended that there was no substantive application or appeal on a defined and contested subject matter before the tribunal to justify arguing a preliminary point of law at that time.
15. The tribunal's failure to record the applicants' request for directions and the directions or response given by Prof Tom Ojienda accurately and comprehensively was an error of fact and law which rendered the tribunal's record by honourable Jane Dwasi (chairperson) incomplete, inaccurate, unreliable and a cause of a miscarriage of justice.
16. The tribunal erred in law and fact when it deliberately and persistently attempted to sabotage the appellants'/applicants' application dated June 23, 2016 by misrecording and/or misrepresenting the applicants' advocate's verbal presentation, arguments, submissions and or



reply to the 1st and 2nd respondents' advocates' and submissions on the said December 13, 2016; as an appeal. The appellants contended that where the advocate for the applicants spoke of an "application", the tribunal recorded an "appeal" and where he spoke of "applicants", the tribunal recorded "appellants". The appellants contended that this was done when there was no substantive record of appeal before the tribunal and when the scheduled hearing was for an application for extension of time within which to file a "notice of appeal".

17. The tribunal erred in law and fact when in instead of writing its ruling on the applicants' application dated June 23, 2016, it veered into taking into account and ruling on a matter that was not before the tribunal on the December 13, 2017; to wit; a non-existent appeal.
 18. The tribunal erred and displayed overt bias against the appellants/applicants herein when instead of ruling on the application for extension of time before it on December 13, 2016 only, it wrote a ruling on a non-existent appeal and used the said ruling to dismiss the applicants' application for extension of time for filing a notice of appeal.
 19. The tribunal made irretrievable errors of law and facts when it undertook to simultaneously write a single ruling for both the application dated June 23, 2016 and its invention, a non-existent appeal/intended appeal.
 20. The tribunal erred both in law and fact when it claimed that its decision/ruling/order dated February 21, 2017 dismissing the appellants' application dated June 23, 2016 was unanimous.
 21. The tribunal erred in law and fact when it purported to authenticate its claim to a 'unanimous' decision/ruling by three signatures of:- Jane Dwasi (chairperson); Mohammed Balala and Christine Kipsang (members) knowing that some of the said three signatories were not part of the tribunal's panelists who heard the applicants' application on December 13, 2016.
 22. The tribunal erred in law and fact and acted in a manner amounting to a fraud and forgery on the face of the record when it failed to disclose, show, reveal and/or display/declare the names, recording, directions, comments and/or participation of all the panelists who heard the applicants' application on the December 13, 2016.
 23. The tribunal's simultaneous consideration of the said applicants' application and the appeal it (the tribunal) invented, is/was an error of fact and law which was designed and/or intended to deny the applicants/appellants herein their right to natural justice.
 24. The method adopted by the tribunal in writing its ruling/decision dated February 21, 2017 was duplicitous hence an irretrievable error of law and fact intended to confuse, mislead and cause the applicants suffer a miscarriage of justice.
 25. The tribunal erred both in law and fact when it carried out its proceedings and wrote its ruling in respect to the applicants' application for extension of time in a manner intended to ambush and deny the applicants' the right to natural justice.
 26. The tribunal erred in law and fact when it upheld a defective and premature preliminary objection by the respondents herein.
9. The appellants sought the following reliefs in their memorandum of appeal;
- a. That the ruling and order of the tribunal dated February 21, 2017 be quashed and set aside.
 - b. The appellants' application for extension of time dated June 23, 2016 be allowed



- c. There be a stay of execution against the implementation of the licence No NEMA/EIA/PSL/2551 dated November 25, 2015 and issued by the 1st respondent to the 2nd respondent pending the hearing and determination of this appeal on merits.
 - d. A declaration to issue declaring that the preliminary objection against an appeal existing and or non-existing cannot be raised in an application for leave to extend time within which to file a notice of appeal and that the tribunal erred in entertaining the preliminary objection at that stage of the proceedings and in the absence of a substantive appeal before it.
10. Some of the parties filed affidavits and grounds of opposition purporting to support and oppose the appeal the legal basis of which I was unable to appreciate.

The Submissions By The Parties:

11. The appeal was argued by way of written submissions. the appellants filed their submissions dated February 16, 2022 in which they reiterated their grounds of appeal. The 2nd respondent filed its submissions dated January 28, 2022. The 2nd respondent argued that NET did not err in law and in fact in upholding its preliminary objection and dismissing the appellants' application for extension of time. The 2nd respondent submitted that NET rightfully found that the appellants failed to show sufficient reasons for their delay in filing the appeal. I have not seen the submissions by the 1st respondent on record.

Analysis And Determination Of The Issues Arising:

12. Section 129 of EMCA provides as follows:

129. Appeals to the tribunal

- (1) Any person who is aggrieved by—
 - (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;
 - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
 - (d) the amount of money required to paid as a fee under this Act or its regulations;
 - (e) the imposition against the person of an environmental restoration order or environmental improvement order by the authority under this act or its regulations, may within sixty days after the occurrence of the event against which the person 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 or its agents 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.”

13. Rules 3, 4 and 7 of the [*National Environmental Tribunal Procedure Rules 2003*](#)(the rules) provide as follows:

3. Any person who is aggrieved by any determination or decision of the authority or any of its committees or officers as specified in subsections (1) and (2) of section 129 of the Act may appeal to the tribunal in accordance with these rules.
 - 4.(1) An appeal to the tribunal shall be made by written notice, and where the tribunal has approved a form of notice for the purpose, in the form so approved.
 - (2) The appellant shall send or deliver six copies of the notice of appeal the tribunal so as to reach it not later than sixty (60) days after the date on which the disputed decision was given to or served upon him.
 7. The tribunal may for good reason shown, on application, extend the time appointed by these rules (not being a time limited by the Act) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appear to it just and expedient”.

14. Under the provisions of section 129 of EMCA and rule 4(2) of the rules, the appellants were supposed to file an appeal against the decision of the 1st respondent within 60 days from November 25, 2015 when the decision was made. According to rule 4(1) of the rules, the appeal is to be filed by way of a notice of appeal. It is not disputed that the appellants filed a notice of appeal (appeal) on June 24, 2016 pursuant to section 4(1) of the rules. It is also not disputed that the said appeal was filed out of time. That explains why the appellants filed the notice of motion application dated June 23, 2016 under rule 7 of the rules for extension of time. What was before NET was the appellants’ said application for extension of time. Since the appeal that was filed by the appellant was filed out of time as aforesaid, the 2nd respondent filed a preliminary objection to the same contending that the same was time barred and should be struck out.

15. The tribunal considered the appellants’ application on merit and found that the grounds for extending time were not established and dismissed the application. After the dismissal of the application, what remained in NET’s record was the appellants’ appeal that was filed out of time. With the dismissal of the application for extension of time, the pending appeal was incompetent and NET rightfully upheld the 2nd respondent’s preliminary objection and dismissed the appeal. There is no dispute that the power to extend time under rule 7 of the rules is discretionary.

16. The only issue arising for determination in this appeal is whether NET exercised its discretion properly in dismissing the appellants’ application dated June 23, 2016 for extension of time to file appeal and in upholding the 2nd respondent’s preliminary objection. I have carefully perused the record of appeal which contains the pleadings and the proceedings of NET. I have also considered the ruling the subject of the appeal and the grounds of appeal put forward by the appellants. Finally, I have considered the submissions of counsel together with the authorities cited in support thereof. It is settled that discretionary powers should be exercised judiciously and not capriciously. The rationale behind the



judicious exercise of discretionary powers was explained by the Court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu*, Nairobi CA No 20 of 2016, [2018] eKLR as follows:

It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

17. In *Mbogo v Shah* (1968) EA 93 the court stated as follows at page 94:

I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its 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 consideration and in doing so arrived at a wrong conclusion."

18. I am not persuaded that NET exercised its discretion wrongly. NET was asked by the appellants to extend time within which they were to file an appeal and for their appeal that was filed outside the prescribed time to be deemed properly filed and served. The application as mentioned earlier was brought under rule 7 of the rules. Under that rule, an order for extension of time can only be made for good reason which must be established. NET was alive to its duty to act judiciously. NET considered whether any good reason had been put forward in support of the appellants' application and found none. For the reasons that were given by NET that I have highlighted earlier, I am in agreement with it that the appellants did not put before NET the reasons why they did not file their appeal within time. No such reason was given in the body of the application or in the affidavit in support of the application. In the absence of good reason to extend time, the appellants' application was for dismissal and it was so dismissed. Upon considering the record as a whole, it is my finding that NET exercised its discretion properly. In the circumstances, I find no reason to interfere with its exercise of discretion. In its grounds of appeal, the appellants claimed that the record of NET did not correctly capture what transpired during the hearing of their application. The appellants have also claimed that some of the members who signed the ruling did not hear the application. I find no merit in these claims. First, I am unable to ascertain the claims from the record. Secondly, the court takes judicial notice that members of NET serve for a specific term. Nothing in my view stops new members of NET from delivering a pending ruling or judgment in a matter that was heard by person(s) who has/have ceased to be member(s) of NET.

Conclusion:

19. In the final analysis and for the foregoing reasons, I find no merit in the appellants' appeal. The appeal filed herein on March 21, 2017 is dismissed with costs to the respondents.

DELIVERED AND DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2022.

S. OKONG'O

JUDGE

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nabutete for the Appellants



N/A for the 1st Respondent

Mr. Kamande for the 2nd Respondent

Ms. C.Nyokabi-Court Assistant

