



**Pearl of Riverside Garden Ltd & another v National Environment Management Authority & another (Environment and Land Appeal E071 of 2022) [2022] KEELC 13802 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13802 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E071 OF 2022**

**EK WABWOTO, J  
OCTOBER 21, 2022**

**BETWEEN**

**PEARL OF RIVERSIDE GARDEN LTD ..... 1<sup>ST</sup> APPELLANT**

**BHAVESH HARILAL GOHI ..... 2<sup>ND</sup> APPELLANT**

**AND**

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

**WINCHESTER VENTURES (K) LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the whole of the ruling and orders of the National Environment Tribunal at Nairobi in Net Appeal No. 19 of 2022 between Pearl of Riverside Garden Limited, Bhavesh Harilal Gohl-Vs- National Environment Management Authority, Winchester Ventures (K) Ltd)*

**JUDGMENT**

1. Pearl of Riverside Garden Limited and Bhavesh Harilal Gohi the appellants herein being aggrieved by the decision of the National Environment Tribunal made on July 20, 2022 filed an appeal before this court vide a memorandum of appeal dated August 15, 2022.
2. The memorandum of appeal enumerated the following grounds: -
  1. The learned tribunal erred in law and in fact by failing to consider the appellants' submissions;
  2. The learned tribunal erred in law and in fact by upholding a preliminary objection on matters not purely on law but which required a formal application supported by affidavit to establish;
  3. The learned tribunal erred in law and in fact by failing to follow the law as established with regard to computation of time;



4. The learned tribunal erred in law and in fact by failing to appreciate that the respondents did not advertise or show any form of notice of the issuance of the impugned EIA licence and the appellants came to know about it by chance;
  5. The learned tribunal erred in law and in fact by failing to appreciate that failing to show any form of notice to members of the public not parties to the issuance of the EIA license by the respondent's was fatal to any objection raised on timelines for filing the appeal;
  6. The learned tribunal erred in law and in fact by failing to sign the said ruling.
3. The appellants have sought for the following prayers: -
- a. The appeal be allowed and this honourable court sets aside the ruling of the tribunal dated July 20, 2022 in its entirety and that the matter be reinstated and be heard on its merits by the tribunal.
  - b. The appellants be awarded costs of this appeal.
4. The national environment tribunal upon considering the 2<sup>nd</sup> respondent's preliminary objection dated June 22, 2022 made the following finds: -

“ 22. The date that this appeal was filed is not in dispute. The parties agree that this appeal was filed on Monday 13<sup>th</sup> June 2022. Accordingly, the appeal herein was filed sixty (63) days from the date of the EIA licence. In view of the applicable dates and the fact that this appeal falls under section 129(1) of EMCA, the tribunal finds that the instant appeal dated June 13, 2022 and filed on June 14, 2022 against a licence issued on April 12, 2022 and was filed outside the statutory period. This tribunal does not have the statutory power to extend or enlarge time for such appeals.

23. The appellants filed an appeal before a subordinate court that had no jurisdiction to hear and determine the appeal, necessitating the 2<sup>nd</sup> respondent to enter appearance and thereafter file and argue the present preliminary objection. The 2<sup>nd</sup> respondent is deserving of an award of costs.

#### Orders

24. The appeal dated June 13, 2022 and filed on June 14, 2022 is struck out for non-compliance with section 129(1) of EMCA and the consequent want of jurisdiction on the part of the tribunal.

25. Costs of the appeal are awarded to the 2<sup>nd</sup> respondent as against the 1<sup>st</sup> and 2<sup>nd</sup> appellants.”

5. On September 26, 2022, this court directed that the appeal herein be canvassed by way of written submissions. Parties were granted time to file and exchange their written submissions upon which the court would render its judgment. Save for the 1<sup>st</sup> respondent, all the parties complied. The appellants filed their submissions dated September 30, 2022 through Prime Lawyers LLP while the 2<sup>nd</sup> respondent filed their written submissions dated October 4, 2022 through Brian Otieno & Company Advocates.
6. Counsel for the appellants submitted that the appeal before the tribunal was filed within time. It was submitted that in computation of time, the first day when the event happened is excluded but the last



- day is included. Reference was made to section 57(a-c) of the *Interpretation and General Provisions Act*, cap 2 of the Laws of Kenya.
7. In reference to the said provision, counsel argued that in this case the appeal was filed on June 13, 2022, since it was the next working day after the June 11, 2022 which was deemed as the 60<sup>th</sup> day. Counsel also argued that section 129(1) of the *EMCA* is clear to the effect that the 60 days period begins running after the event and not before. Counsel cited the cases of High Court sitting at Nyeri in Civil Appeal Number 53 of 2006 *Mbuni Dry Cleaners Ltd- vs- George Mugo Kagenda and Simba Corporation Limited v DG, NEMA & Anc Int'Real Estate (EA) Limited* in support of their submissions.
  8. Save for the foregoing, counsel for the appellants did not submit on the other grounds raised in the appellants memorandum of appeal.
  9. The 2<sup>nd</sup> respondent identified the following issues for determination: -
    - a. Whether the learned tribunal erred in law and in fact by upholding a preliminary objection matters not purely on law but which required a formal application supported by affidavits to establish.
    - b. Whether the learned tribunal erred in law and in fact by failing to follow the law as established with regard to computation of time.
    - c. Whether tribunal erred in law and in fact by failing to appreciate that failing to show any form of notice to members of the public was fatal to any objection raised on timelines for filing the appeal.
    - d. Whether the instant appeal is merited.
  10. On the first issue, counsel submitted that the tribunal in dismissing the appellant's appeal considered the preliminary objection as having raised the issue of the tribunal's jurisdiction. Counsel also stated that rule 9 of the *National Environment Tribunal Rules, 2003* sets out the procedure to be undertaken by the tribunal when faced with a preliminary objection. It states as follows: -

“9. Preliminary objections

1. Any objection to the jurisdiction of the tribunal or to the admissibility of an appeal or other objection, the tribunal's decision upon which is requested before proceeding to consider the merits of the appeal, shall be made to the tribunal in writing within thirty days from the date when the party was notified of the appeal and a copy of the preliminary objection shall be served on the appellant immediately.
2. On receipt of any preliminary objection, the tribunal shall suspend the proceedings on merits and shall require the appellant to submit written observations and submissions on the objection within seven days from the date of service on him of notice of the objection.
- (3) The tribunal shall suspend the proceedings on merits pending its ruling on the objection.

Counsel reiterated that in view of the foregoing, the tribunal had no option but to consider the preliminary objection as the same was properly brought before the tribunal.



11. On whether the learned tribunal erred in law and in fact by failing to follow the law as established with regard to computation of time, counsel referred to section 129(1) of *EMCA* as regard with regulation 46(1) of the *Environmental (Impact Assessment and Audit) Regulations 2003*. Counsel stated that the appeal was filed on June 13, 2022 challenging an EIA licence which had been issued on April 12, 2022. Counsel stated that the appeal was filed after 62 days from the date of issuance of the Environmental Impact Assessment License. Counsel referred to various decisions of the Tribunal which the court has considered that outlined how the Tribunal had addressed itself on the issue of computation of time in respect to appeals filed under section 129(1) of *EMCA*.
12. On whether the tribunal erred in law and in fact by failing to appreciate that failing to show any form of notice to members of the public was fatal to any objection raised on timelines for filing the appeal, counsel submitted that section 129(1) of *EMCA* does not impose an obligation on a successful applicant or NEMA to serve its decision to grant, revoke or refuse to grant a license or permit to those who are likely to be affected by it and who may wish to challenge that decision. Counsel also submitted that there is no established framework under the law, which prescribes a how the NEMA's decision should be disseminated to the public. Counsel cited the cases of *Runda Association -vs- National Environment Management Authority & 3 others* (2020) eKLR and *Simba Corporation Limited -vs- DG NEMA, & another* (2017) eKLR wherein the ELC court had made pronouncements on the said issue.
13. On the appellants' assertion that the learned tribunal erred in law and in fact by failing to sign the said ruling, counsel submitted that the ruling was delivered virtually in line with the extended practice directions for the protection of judicial officers and other court users and the general public from risks associated with the global corona virus pandemic.
14. On the final issue on whether the appeal is merited, counsel submitted that the appellants have failed to prove any grounds of their appeal and as such this court ought to dismiss the same with costs to the 2<sup>nd</sup> respondent.

#### **Analysis and determination.**

15. I have considered the ground of the appeal, the written submissions by the parties, I have also considered the authorities cited by the parties. The issues in my opinion which arise for determination can be summarized as follows; -
  - i. Whether the tribunal erred in law and fact by upholding a preliminary objection on matters not purely on law but which required a final application supported by affidavits to establish.
  - ii. Whether the tribunal erred in law and in fact by failing to follow the law as established with regard to computation of time.
  - iii. Whether the appeal is merited.
16. I shall proceed to analyze all the aforementioned issues sequentially.
17. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties*



Ltd v Singh Kalsi & another [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A preliminary objection raises a pure point of law, which is argued 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...”

18. This statement of the law has been echoed time and again by the courts: see for example, Oraro –v- Mbaja [2007] KLR 141.

In Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:-

“ .... 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”. [emphasis added]

19. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection –against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis added]

20. In Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

“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...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.



21. The Supreme Court in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others*, Civil Appl No 2 of 2011, observed that:

“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 the 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... Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

22. Section 129 (1) of the *Environmental Management and Co-ordination Act* provides that: -

Appeals to the tribunal

- (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.

23. In the instant appeal, i have perused the record of appeal filed herein and at page 94 of the said record, the tribunal in its ruling stated that the ruling was delivered pursuant to the notice of preliminary objection filed by the 2<sup>nd</sup> respondent to the effect that the appeal had been filed out of time. In the case before the tribunal, it was not disputed that the appeal was filed on June 13, 2022 seeking to challenge a licence issued on April 12, 2022 which according to the 2<sup>nd</sup> respondent showed that the appeal had been filed out of time.

24. Having considered the said position, it is the finding of this court that the tribunal did not err by rightly considering the preliminary objection which was before it. since the said preliminary objection as was framed sought to challenge the appeal as having been filed out of time. That was an issue that went to the jurisdiction of the tribunal in considering the appeal before it and the same did not require filing of a formal application supported by affidavits.

25. This is the gravamen of the appellants appeal. This issue raised by the appellants is not new to the tribunal and neither is it new to this court. The tribunal has held in the several cases that the computation of time in respect to filing of an appeal before it, is computed from the date of the licence and not from the next day for the purposes of section 129(1) of *EMCA*. In the ruling of the tribunal



delivered on July 20, 2022, the tribunal cited the case of Nairobi ELC Appeal No 60 of 2019 *Runda Association –v- National Environment Management Authority & 3 others* (2020) eKLR which was also an appeal from the Tribunal that had sought to challenge the tribunal’s computation of time in respect to appeals filed by parties under section 129 (1) of *EMCA*. The ELC court upon considering the said appeal held that time starts to run from the date when the licence was issued and that the said timeline cannot be extended by the tribunal since its stipulated by statute.

26. In the circumstances and being guided by the said decision, I am unable to concede to the appellants submissions on their mode for computation of time since the appeal was filed out of the stipulated sixty days statutory period which are incapable of being extended by the tribunal and this court.
27. Having carefully reviewed the grounds of appeal raised by the appellants and having similarly considered the submissions by the parties, the court concludes that the appeal herein is devoid of merits.
28. Before I conclude, I wish to address myself on the need for NEMA to find a way of notifying aggrieved parties of its decisions in respect to the approval or otherwise of projects listed under the second schedule of *EMCA*. Many parties often complain that they were not aware when the said decision was made and hence could not have filed the appeal within the stipulated time. I am aware that NEMA is currently spearheading a comprehensive review of the Environmental Management and Coordinating Act No 8 of 1999 and this would be an opportune moment to consider the appropriateness of a clear prescriptive framework on how NEMA should notify the general public about its statutory decisions which are subject to appeals contemplated under section 129 of *EMCA*. This will eliminate endless litigations which adversely affect investor projects and the country’s environmental management programmes. I reiterate and emphasis on this issue since the same has been previously raised by my brother Justice B. Eboso in the case of *Simba Corporation Limited v Director General, NEMA* [2017] eKLR and my sister Justice K Bor in the case of *Runda Association vs NEMA & 3 others* [2020] eKLR. Regrettable, NEMA being the 1<sup>st</sup> Respondent herein, did not participate in these proceedings despite being notified and duly served.
29. In conclusion, it is the finding of this court that this appeal lacks merit and the same is dismissed with costs to the 2<sup>nd</sup> respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 21<sup>ST</sup> DAY OF OCTOBER 2022**

**E.K. WABWOTO**

**JUDGE**

**In the presence of:**

Mr. Muchiri for the Appellants.

N/A for the 1<sup>st</sup> Respondent.

Ms. Owino and Mr. Otieno for the 2<sup>nd</sup> Respondent.

**Court Assistant Caroline Nafuna**

**E.K. WABWOTO**

**JUDGE**

