



Sikalieh (Suing as the Chairman of the KLDA) v Director General, National Environment Management Authority (NEMA) & 2 others (Environment and Land Appeal E078 of 2022) [2022] KEELC 13803 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13803 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E078 OF 2022
EK WABWOTO, J
OCTOBER 21, 2022
IN THE NATIONAL ENVIRONMENTAL TRIBUNAL AT NAIROBI
TRIBUNAL CAUSE NO. 23 OF 2022
IN THE MATTER OF A DECISION MADE UNDER RULES 10
AND 46 OF THE ENVIRONMENTAL (IMPACT ASSESSMENT
AND AUDIT) REGULATIONS, 2003 APPROVING AN
ENVIRONMENTAL IMPACT ASSESSMENT LICENSE NO.
NEMA/EIA/PSL/12294 OVER ALL THAT PROPERTY KNOWN
AS LAND REFERENCE NUMBER L.R. NO. 11892/8, KAREN
-BETWEEN-
ELC APPEAL NO E078 OF 2022 JUDGMENT 1
SAMORA SIKALIEH (SUING AS THE CHAIRMAN OF THE
KLDA..... APPELLANT
VERSUS
THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY(NEMA).....1ST
RESPONDENT
AMS PROPERTIES & MY SPACE PROPERTIES.....2ND
RESPONDENT
NAIROBI METROPOLITAN SERVICES.....3RD
RESPONDENT
(BEING AN APPLICATION TO EXTEND TIME WITHIN WHICH TO



APPEAL AGAINST THE DECISION OF THE DIRECTOR GENERAL TO APPROVE AN ENVIRONMENTAL IMPACT ASSESSMENT (PROJECT) REPORT AND LICENSE RECEIVED FROM AMS PROPERTIES & MY SPACE PROPERTIES FOR A PROPOSED COMMERCIAL AND PETROL STATION DEVELOPMENT ON ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER NUMBER LR. NO 1189/8, KAREN AREA WHICH WAS MADE KNOWN TO THE APPELLANT ON 4TH JULY 2022)

-IN RESPECT OF-

INTENDED CONSTRUCTION OF A PETROL STATION AND ASSOCIATED AMENITIES ALL THAT PROPERTY KNOWN AS LAND REFERENCE NUMBER LR NO. 11892/8, KAREN WHICH AREA IS LARGELY ZONED FOR RESIDENTIAL PURPOSES

BETWEEN

**SAMORA SIKALIEH APPELLANT
SUING AS THE CHAIRMAN OF THE KLDA**

AND

**DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 1ST RESPONDENT
AMS PROPERTIES & MY SPACE PROPERTIES 2ND RESPONDENT
NAIROBI METROPOLITAN SERVICES 3RD RESPONDENT**

(Being an Appeal from the decision delivered on 11th August 2022 by the National Environment Tribunal)

JUDGMENT

1. On July 6, 2021, the 1st respondent, National Environment Management Authority issued an Environmental Impact Assessment License to AMS Holdings Limited in respect to the construction of two (2) level commercial shopping mall and the two (2) petrol service station comprising of four (4) No pump isles, two (2) No. underground storage tanks and other associated amenities/facilities.
2. The appellant being aggrieved by the said decision by the National Environment Management Authority, challenged the same at the National Environment Tribunal by filing an appeal which was commenced *vide* a notice of appeal dated June 24, 2022. Contemporaneous to the filing of the said notice, the appellant's herein also filed a notice of motion and a document marked as "plaint" both dated June 24, 2022. The gist of which it sought orders to the effect of restraining the respondents herein from undertaking any construction in relation to the project that was approved herein.



3. The 2nd respondents upon being served with the appeal filed by appellants at the tribunal objected to the same by filing a notice of preliminary objection dated July 4, 2022 and a replying affidavit sworn by J. Murugesan a director of AMS properties on July 5, 2022. The gist of the preliminary objection and replying affidavit, was to the effect of challenging the appeal for having been filed outside the stipulated mandatory 60 days period as provided for under section 129(1) of *EMCA, 1999* as read together with regulation 46(1) of the Environmental Impact Assessment and Audit Regulations 2003.
4. The honourable tribunal, upon considering the 2nd respondent's preliminary objection and submissions of the parties delivered its ruling on August 11, 2022 wherein they upheld the preliminary objection and struck out the notice of appeal dated June 24, 2022 for non-compliance with section 129(1) of *EMCA* and want of jurisdiction. The appellant equally being aggrieved with the said decision subsequently filed the memorandum of appeal dated September 9, 2022.
5. Through its memorandum of appeal dated September 9, 2022, the appellant has raised 7 grounds of appeal: -
 - i. That the tribunal erred in law in not determining the issue before it under the application dated June 24, 2022.
 - ii. That the tribunal erred in determining a matter not pleaded in the application.
 - iii. That the honourable tribunal erred in allowing a preliminary objection which were not properly founded.
 - iv. That the honourable tribunal erred in dismissing an appeal that had been filed and without interrogating the issue of leave to appeal out of time.
 - v. That the tribunal erred in not considering the appellant's written submissions.
 - vi. That the tribunal erred in escalating the proceedings commenced by the notice of motion dated June 2, 2022 as a substantive appeal.
 - vii. That the tribunal erred in dismissing the appeal without rendering a decision on the substance thereon.
6. It is proposed to request this honourable court for orders that: -
 1. That the appeal be allowed.
 2. That the decision made by the National Environment Tribunal on August 11, 2022 be wholly set aside and substituted with an order dismissing the respondent's preliminary objections dated July 4, 2022 and an order be made allowing the appellant's application dated June 24, 2022.
 3. That the appellant be awarded the costs of the appeal.
7. Pursuant to the directions issued by this court on September 26, 2022, it was directed that the appeal be canvassed by way of written submissions. The appellant and 2nd respondent duly complied. The appellant filed its written submissions dated September 27, 2022 through M/S Washika Wachira & Co Advocates while the 2nd respondent filed their written submissions dated October 4, 2022 through M/ S Brian Otieno & Co Advocates.
8. In its written submissions, counsel for the appellant identified two issues for determination by this court: -



- i. Whether the 2nd respondent's fraudulent behavior occasioned the mistake that has been realized in this honourable court.
 - ii. Whether this honourable court has jurisdiction to hear this appeal.
9. On the first issue, counsel submitted that the 2nd respondent fraudulently hid the EIA licence and change of user from the appellant by not disclosing of its existence. They only brought and made the appellant aware of the EIA license and change of user documents after this suit had been instituted in the tribunal and service upon them was effected. Counsel submitted that this was a tactic meant to lock out the appellant from filing the appeal within the 60 days period.
 10. Counsel also submitted that section 31 of the *Limitation of Actions Act* cap 22 provides that where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be constructed as if part III of this Act were incorporated in it. Counsel also argued that section 26 of the *Limitation of Actions Act* would be applicable herein to the extent that the appellant was in the dark as regards the 2nd respondent's project.
 11. On the issue of jurisdiction, counsel submitted that pursuant to section 125 of *EMCA*, the court has appellate jurisdiction to determine the appeal herein and it ought to allow the extension of time and the notice of motion dated June 24, 2022. Counsel for the appellant did not submit on the other grounds delineated in the appellants memorandum of appeal dated September 9, 2022.
 12. In their written submissions dated October 4, 2022, counsel proposed to argue and submit on the following grounds of appeal: -
 1. Whether the learned tribunal erred in law in not determining the issue before it under the application dated June 24, 2022.
 2. Whether the honourable tribunal erred in dismissing an appeal that had been filed and without interrogating the issues of leave out of time.
 3. Whether the honourable tribunal erred in escalating the proceedings commenced by the notice to motion dated June 24, 2022 as a substantive appeal?
 13. Counsel argued that rule 9 of the National Tribunal Procedure Rules, 2003 sets out the procedure to be undertaken by the tribunal when faced with a preliminary objection. It was submitted that the tribunal upon the filing of a preliminary objection has no option but to suspend proceedings on merits and proceed to direct parties to file their respective submissions on the objection and proceeds to render its ruling on the objection. Counsel cited the following tribunal cases where the tribunal allowed preliminary objections raised on where an appeal had been filed outside the stipulated 60 days period. Tribunal appeal NET No 005 of 2018 *Albert Mumma (in his capacity as Chairman, Karen Langata District Association (KLDA) v Director General – NEMA & 2 others* (2019) eKLR, tribunal appeal No 20 of 2022. *Tom Kipng'etich (suing on behalf of South C Mugoya Phase 4) v National Environment Management Authority & Another* (2020) eKLR, tribunal appeal No 028 of 2019 *Judith Kamau v Director General NEMA & 2 others* (2021) eKLR, tribunal appeal No 001 of 2021 *Joseph Muchiri & 2 others v Sigma Seeds Limited* (2021) eKLR and tribunal appeal No 004 of 2020 *Cleophas Barasa Simiyu & another v NEMA & another, Samuel Mabei (interested party)* (2021) eKLR.
 14. Counsel further reiterated that the tribunal did not err by determining the preliminary objection first instead of delivering into the merits of the appeal for reasons that the preliminary objection brought out the paramount issue of jurisdiction which ought to have been dealt with in the first instance.



15. On whether the tribunal erred in dismissing an appeal that had been filed and without interrogating the issue of leave to appeal out of time, counsel argued that the appeal filed at the NET Tribunal sought *inter alia* cancellation of the EIA licence and hence it was an appeal limited to section 129(1) of EMCA and regulation 46(1) of Environmental (Impact Assessment and Audit) Regulations, 2003. It was contended that in view of the foregoing, the tribunal had no jurisdiction to extend time since the same was statute barred. Counsel cited the following cases in support of this position, [Runda Association v NEMA & 3 others](#) (2020) eKLR, [Jesse Mbugua Mbuti & 12 others v Director General, NEMA & another](#) (2020) eKLR and [Simba Corporation Limited v Director General, NEMA & another](#) (2017) eKLR.
16. Counsel further reiterated that the appeal at the tribunal was filed on June 24, 2022 which was 354 days after the issuance of the licence on July 6, 2021.
17. On whether or not there was no disclosure by the 2nd respondent, counsel argued that section 129(1) of EMCA does not impose an obligation on a successful applicant or NEMA to serve its decision on the licence to those who are likely to be affected by it and who may wish to challenge the same. Counsel cited the case of [Runda Association v NEMA & 3 others](#) (2020) eKLR, where the court held: -

“.....17. section 129(1) does not impose an obligation on a successful applicant or NEMA to serve its decision to grant, revoke or refuse to grant a licence or permit on those who are likely to be affected by it and who may wish to challenge that decision. That observation was made by Eboso J. in *Simba Corporation Limited v Director General, NEMA* (2017) eKLR regarding the persistent issue of the need for NEMA to notify persons who are likely to be affected by the issuance of a permit or license under section 129(1) so that they can appeal against those decisions within the statutory period.

18. The court notes that even though the rules provide that an appellant under section 129(2) of EMCA should be served with NEMA’s decision, there is no framework on how that service is to be effected. There certainly is need for a clear prescriptive framework on how NEMA should notify members of the public about its statutory decisions which are amenable to appeal pursuant to section 129 of EMCA to enable persons aggrieved to exercise their right of appeal.”

18. On whether the tribunal erred in escalating the proceedings commenced by the notice of motion dated June 2, 2022 as a substantive appeal, counsel submitted that from the record, it is clear that the appellant’s filed the following: -
 - a. Summons to enter appearance dated June 24, 2022.
 - b. Notice of appeal dated June 24, 2022.
 - c. Notice of motion application dated June 24, 2022.
 - d. Complaint dated June 24, 2022

And as such by filing the notice of appeal dated June 24, 2022, they had submitted to the jurisdiction of the tribunal and the tribunal did not err in striking out the appeal for contravening section 129(1) of EMCA. Counsel urged the court to dismiss the appeal with costs to the 2nd respondent.

Analysis and Determination

19. I have considered the grounds of appeal, the written submissions filed on behalf of the parties and the issues for determination are as follows:-



- i. Whether the National Environment Tribunal erred in law and in fact by holding that the appellant's notice of appeal was filed in contravention of section 129(1) of the Environmental Management and Coordination Act.
 - ii. Whether the tribunal erred in dismissing an appeal that had been filed and without interrogating the issue of leave to appeal out of time.
 - iii. Whether the tribunal erred in escalating proceedings commenced by the notice of motion dated June 2, 2022 as a substantive appeal.
 - iv. Whether the tribunal erred in determining a matter not pleaded in the application dated June 24, 2022.
20. I shall proceed to analyze all the aforementioned issues sequentially.
21. The National Environment Tribunal upon considering the 2nd respondent's preliminary objection dated July 4, 2022 made the following findings: -

“9. Having considered the pleadings filed by the parties, it is incumbent on this tribunal to state, unequivocally, that the superior courts above as have held time and again that this tribunal has no power to extend time for an appeal falling under section 129(1) of EMCA. This tribunal cannot look into the reasons why an appeal was not filed within the 60 days period. Ours is only to ascertain when the appeal was filed vis a vis the date of the impugned licence so that we may establish whether or not we have jurisdiction. For that reason, it is not necessary for us to interrogate the three pronged defence advanced by the appellant.

10. In the present case, this appeal was filed 354 days after the date of the impugned licence and it is thus 294 days out of time we have no power to admit such an appeal.

11. The appellant filed an appeal before a subordinate court that had no jurisdiction to hear and determine the appeal, necessitating the 2nd respondent to enter appearance and thereafter file and argue the present preliminary objection. The 2nd respondent thus is desiring of an award of costs.

Orders

12. The notice of appeal dated June 24, 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.

Costs' of the appeal are awarded to the 2nd respondent as against the appellant.”

22. Section 129(1) of the *Environment Management and Coordination Act* provides that: -

“ Any person 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 variations of the persons licence under this Act or its regulations;



- d. The amount of money required to be 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 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”
23. Under section 129(1) of the *Environmental Management and Coordination Act*, the appellant ought to have filed the appeal to the tribunal within 60 days from the July 6, 2021 when the EIA licence was issued. By filing the appeal on June 4, 2022, the appellants were time barred and to that extend the tribunal did not err when it upheld the 2nd respondent’s preliminary objection and struck out the appeal for having been filed contrary to section 129(1) of EMCA.
24. This relates to ground 4 of appeal. In responding to this issue. Counsel for the 2nd respondent submitted that the appeal before the National Tribunal was premised under section 129(1) of EMCA which was found to be time barred having been filed after the 60 days statutory period. Counsel also submitted that the tribunal duly considered the notice of appeal vis a vis the objection raised and held that they once it was established that the appeal was filed out of time, they did not have jurisdiction to entertain the same since jurisdiction cannot be conferred through some form of innovation.
25. I have taken the time to peruse the ruling delivered by the tribunal on August 11, 2022 and I note that at paragraph 9 of the said ruling the tribunal held as follows: -
- “Having considered the pleadings filed by the parties, it is incumbent on this tribunal to state, unequivocally, that the superior courts above as have held time and again that this tribunal has no power to extend time for an appeal falling under section 129(1) of EMCA. This tribunal cannot look into the reasons why an appeal was not filed within the 60 days period. Ours is only to ascertain when the appeal was filed vis a vis the date of the impugned license so that we may establish whether or not we have jurisdiction. For that reason, it is not necessary for us to interrogate the three pronged defence advanced by the appellant.”
26. In reference to the foregoing, it is evident that the tribunal considered the pleadings on record and arrived at the position that the said appeal was filed out of the stipulated period which they had no powers to extend the same. In the circumstances this ground of appeal as pleaded by the appellant fails.
27. While this was pleaded as ground no 6 of the appeal, the appellant did not specifically submit on the same. Counsel for the 2nd respondent submitted that proceedings at the tribunal were commenced *inter alia* by filing a notice of appeal dated June 24, 2022 which clearly subjected the appellant to the jurisdiction of the tribunal upon which the 2nd respondents filed a notice of preliminary objection on the basis that the said appeal was filed out of the 60 days period contrary to section 129(1) of EMCA
28. Section 129(1) of EMCA provides that any person who is aggrieved by any of the decision listed under the provisions of section 129(1) of EMCA may within sixty days after the occurrence of the event file an appeal to the tribunal in the manner prescribed by the tribunal.
29. The procedure governing the tribunal proceedings is designated as the National Environment Tribunal Procedure Rules, 2003.



30. Rule 2 of the said rules defines an “appellant” as: -
“a person who makes an appeal to the tribunal under section 129 of the Act and includes a duly authorized agent or legal representative of that person”
31. Rule 3 which deals with appeals stipulates: -
“Any person who is aggrieved by any determination or decision of the authority or any of its committees or officers as specified in subsection (1) and (2) of section 129 of the Act may appeal to the Tribunal in accordance with these rules.”
31. Rule 4 on the notice of appeal stipulates as follows
“(1) An appeal to the tribunal shall be made by written notice, and where 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.”
32. From the record of appeal filed herein, it is evident that the 2nd respondent upon being served with the notice of appeal and other pleadings filed by the appellant, filed a notice of preliminary objection and replying affidavit dated and sworn on July 4, 2022 respectively.
33. A further reference of the record of appeal shows that the tribunal on July 4, 2022 directed that the notice of preliminary objection filed by the 2nd respondent before it be canvassed first and by way of written submission upon which all the parties were given an opportunity to file and exchange their written submissions.
34. Having analyzed the tribunal proceedings, it is evident that the notice of preliminary objection having raised the issue of jurisdiction was considered as a response to the notice of appeal. I do not see any fault by the tribunal in considering the preliminary objection as a response to the appeal. Equally this ground of appeal has no basis and fails on that aspect.
35. This was also raised as ground No 2 of the appellants memorandum of appeal. I have perused the appellant’s submissions dated September 29, 2022 and it is clear that the appellant did not address the court on the same. The 2nd respondent while submitting on this ground, stated that since the notice of motion was filed on June 24, 2022 together with a notice of appeal dated on the same day, the 2nd respondent filed a preliminary objection upon which the tribunal had no option but to suspend proceedings on merit and consider the same. Counsel for the 2nd respondent further added that the tribunal considered the preliminary objection and rendered its ruling on August 11, 2022.
36. In addressing this issue, I have taken time to examine how the proceedings were commenced at the tribunal. From the record, the appellant filed an appeal at the National Environment Tribunal on June 24, 2022. On the said date, the appellant also filed an application dated June 24, 2022 seeking for an injunction against the respondents in respect to the 2nd respondent’s project. The record shows that the appellant also filed a document known as “a plaint” dated June 24, 2022. Paragraph 13 of the said document stated as follows;

“The plaintiff avers that this court has the jurisdiction to hear and determine the suit.”
37. In reference to the aforementioned, the 2nd respondent filed a notice of preliminary objection challenging the jurisdiction of the tribunal to hear the appeal as having been filed out of time. In the circumstances and as I have consistently stated in analyzing the other issues, the tribunal had to hear



the preliminary objection first and be satisfied that it had the requisite jurisdiction to proceed with the appeal. Equally therefore the grounds of appeal that the tribunal erred in determining a matter not pleaded in the application fails.

38. Before I conclude, I wish to address myself on the need for NEMA to find a way of notifying the 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 v NEMA & 3 others* [2020] eKLR. Regrettable, NEMA being the 1st respondent herein, did not participate in these proceedings despite being notified and duly served.
39. In the end, while I sympathies with the predicament of the appellants, I find that the appeal is not merited and the same is dismissed in its entirety with costs to the 2nd respondent. For avoidance of doubt, the ruling of the National Environment Tribunal dated August 11, 2022 is upheld.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF OCTOBER 2022

E.K. WABWOTO

JUDGE

In the presence of:

Ms. Wachira for the Appellant.

N/A for the 1st Respondent

Ms. Owino and Mr. Otieno for the 2nd Respondent.

E.K. WABWOTO

JUDGE

