



**Riunga v Director General, National Environment Management Authority & another
(Appeal E057 of 2022) [2022] KEELC 15564 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
APPEAL E057 OF 2022
EK WABWOTO, J
DECEMBER 20, 2022
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
MISC. APP. NUMBER 16 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 PROJECT REPORT
ELC APPEAL NO E057 OF 2022
JUDGMENT 1
OVER ALL THAT PROPERTY KNOWN AS LAND REFERENCE
NUMBER 1159/323, KAREN.**

BETWEEN

SUSAN WANJIKU RIUNGA APPELLANT

AND

**DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT**

SUTTON HOLDINGS LIMITED 2ND RESPONDENT

*(Being an Appeal from the decision made on 25th
July 2022 by the National Environment Tribunal)*



JUDGMENT

1. This Appeal arises from the decision of the National Environment Tribunal which upheld the 1st and 2nd Respondent's Preliminary Objections and dismissed the Appellant's Appeal with costs. The Tribunal's decision was rendered on 25th July 2022.
2. Vide an amended Memorandum of Appeal dated 25th July 2022, the Appellant appealed against the Tribunal's decision on the grounds that:-
 1. That the Tribunal erred in law in not determining the issue before it under the application dated 2nd June 2022.
 2. That the tribunal erred in determining a matter not pleaded in the application.
 3. That Honourable Tribunal erred in allowing Preliminary Objections which were not founded.
 4. That the Honourable Tribunal erred in dismissing an appeal that had not been filed and without interrogating the issue of leave to appeal out of time.
 5. That the Tribunal erred in not considering the Appellant's written submissions.
 6. That the Tribunal erred in escalating the proceedings commenced by the Notice of Motion dated 2nd June 2022 as a substantive Appeal.
 7. That the Tribunal erred in dismissing the Appeal without rendering a decision on the substance thereof and
 8. Such other grounds to be adduced at the hearing hereof.
3. Thus the Appellant has sought the following orders: -
 1. That the Appeal herein be allowed;
 2. That the decision made by the National Tribunal on 25th July 2022 be wholly set aside and substituted with an order dismissing the Respondent's Preliminary Objections dated 15th June 2022 and 23rd June 2022 and an order be made allowing the Appellant's Application dated 2nd June 2022; and
 3. That the Appellant be awarded the costs of the Appeal.
4. Pursuant to the directions issued by this court on 21st September 2022, it was directed that the Appeal be canvassed by both written and oral submissions. All the parties save for the 1st Respondent- National Environment Management Authority duly complied. The Appellant filed her case digest and also made oral submissions through her Learned Counsel Mr. Steve Luseno while the 2nd Respondent filed skeleton submissions and list of authorities on 30th September 2022 and also made oral submissions through Learned Counsel Ms. Jillian Ndirangu. During the plenary hearing of the Appeal Ms. Ndirangu also indicated that she was holding brief for Learned Counsel Ms. Sakami for the 1st Respondent.
5. The Appeal was heard on 30th September 2022. Counsel for the Appellant submitted that at the National Environment Tribunal, the Appellant filed Miscellaneous Cause No. 16 of 2022 which was at page 8 of the record of Appeal. In the said Miscellaneous Cause, there was an application at page 11 and 12 of the record of appeal which also indicated the prayers sought.



6. The Appellant's Counsel submitted that the following prayers had been sought vide the said Miscellaneous application dated 2nd June 2022 that had been filed at the Tribunal: -

“2. That pending the hearing and determination of this application, this Honourable Tribunal be pleased to issue a stop order restraining the 2nd Respondent either by itself, its agents and or servants, whosoever from undertaking any construction works on all that property known as Land Reference Number 1159/323 on the basis of a decision made by the 1st Respondent approving the Environmental Impact Assessment Project Report vide application Number NEMA/EIA/PSR/22107 by Sutton Holdings Limited, the 2nd Respondent.

3. That this Honourable Tribunal be pleased to extend time for filing an Appeal against the decision made by the 1st Respondent on 30th July 2021 or such date approving the Environmental Impact Assessment Report vide application Number NEMA/EIA/PSR/22107 by Sutton Holdings Limited, the 2nd Respondent.”

7. It was submitted that the prayer 2 in respect to the stop order was granted by the Tribunal and what was left for determination was prayer 3 in respect to the extension of time to file an appeal against NEMA's decision.

8. Learned Counsel Mr. Luseno argued that the Application at the Tribunal was filed under Section 129 (2) of EMCA, Rules 10 and 46 of the Environmental (Impact Assessment and Audit Regulations) 2003 Rules 3 and 7 of the National Environmental Tribunal Rules 2003 and Articles 49, 50, 69, 70 and Article 159 (2) of *the Constitution*. The Application was seeking leave to challenge the decision by NEMA approving the development as a project report and not as a full study. According to the Appellant, the Tribunal ruled on a draft Notice of Appeal and deemed it as a substantive appeal. It was argued that the Tribunal totally disregarded the Appellant's submissions by creating its own submissions. Counsel also submitted that the Appellant would still wish to rely on her submissions as they were filed at the Tribunal since the Tribunal dismissed the “Appeal” which was yet to be filed. The Tribunal neglected to exercise its jurisdiction and the Application remained undetermined.

9. Counsel also submitted that there were several contested facts hence it was not property for the Tribunal to have allowed the Preliminary Objections filed by the Respondents. The Appellant never attended any public hearing prior to the approval of the project, and neither was her name in the list of attendees as was submitted to NEMA. Counsel further submitted that the email for public participation was sent out on 21st October 2021 then in a record 4 days the Public baraza was held and 6 days later a licence was issued. The licence was dated 9th November 2021. On the face of the licence it is stated that it is issued as a project report and not pursuant to a study report. The project report that was submitted had made reference to repealed statutes which are indicated at page 73, 74 and 75 of the record.

10. Counsel further submitted that pursuant to the decision of *Professor Albert Mumma –vs County Government of Nairobi* (2021) eKLR, the recognition agreement of 3rd March 2021 could not be ignored by the 1st Respondent since the 2nd Respondent's project had also sought to construct a petrol station with several facilities within 0.9 acre of a property which is next to a gated community.

11. Counsel further added that the Court of Appeal sitting at Kisumu had found that limitation of time cannot be cited as a ground to stop a party whose rights have been infringed.



12. Learned Counsel Mr. Luseno also urged the court to express itself on whether the Director General, NEMA is an administrator within the meaning of the provisions of the *Fair Administrative Action Act*. This was specifically in reference to the duty of the Director General in respect to parties affected by decisions that he makes and whether there was any effort to bring to the attention to the affected parties.
13. The 2nd Respondent filed its skeleton submissions through the firm of Igeria & Ngugi Advocates. During the plenary hearing of the appeal Learned Counsel Ms. Jillian Ndirangu made oral submissions on their behalf and also held brief for Learned Counsel Ms. Cynthia Sakami for the 1st Respondent.
14. In her oral submissions, Counsel relied on the 2nd Respondent's skeleton submissions that were on record and proceeded to oppose the Appeal.
15. She submitted that in determining the Preliminary Objections that had been filed at the Tribunal, the Tribunal had to determine whether this was an issue falling under section 129(1) or 129(2) of EMCA. According to Counsel the alleged decision to have been made by NEMA on 31st July 2021 was not annexed to the Appellant's Application because the same was nonexistent. What was in existence was an EIA licence issued to the 2nd Respondent in respect of which the Tribunal had to ask itself whether it had the mandate to extend time.
16. Counsel further added that the Appellant had ventured into a creative attempt to breathe life to an intended appeal that was dead on arrival.
17. In her oral submissions, Counsel also stated that the 2nd Respondent's Replying Affidavit had addressed all the factual issues in dispute. For instance, on the issue of further public participation, Counsel argued that the same does not necessarily entail doing a study report. It only means engaging further on public participation which was undertaken since there was a further engagement in which the Appellant was present as per the minutes of 4th February 2021 that appeared at pages 255 and 256 of the record of Appeal. Counsel further faulted the Appellant for trying to make her own assessment on what amounts to a full study.
18. In respect to the Recognition Agreement of 3rd March 2017 between Karen Langata District Association (KLDA) and County Government of Nairobi that was also affirmed in the case of Professor Albert Mumma –Vs- County Government of Nairobi (2021) eKLR, Counsel argued that KLDA was notified and once that had been done, it was upon them to reach out to their members including the Appellant. It was also stated that KLDA had filed proceedings before the ELC Court vide ELC Misc Application No. E087 of 2022 which was later withdrawn.
19. On the issues raised in respect to the applicable provisions of the *Fair Administrative Action Act*, Learned Counsel Ms. Ndirangu submitted that the same were addressed by the proper process of engaging KLDA.
20. In respect to the issues of constitutional rights, Counsel submitted that the Tribunal is not a Constitutional Court. It doesn't have the mandate of addressing issues of constitutional rights neither does its mandate extend to addressing issues of constitutionality and bill of rights.
21. The 2nd Respondent contended that the Appellant had not demonstrated any special circumstances as to why time should be extended in respect to the decision allegedly made on 30th July 2021 and there are no exceptional circumstances demonstrated to warrant the extension of time.
22. In respect to the issues raised on the repealed statutes that were referred to in the project report, Counsel submitted that it was upon NEMA to address the same.



23. It was further submitted that the decision of 30th July 2021 had not been brought to court. The EIA licence was issued on 9th November 2021 and that the timelines do not in any way work in favour of the Appellant. Counsel argued that the Appellant was trying to run away from the fact that KLDA was engaged and she was aware of the project in March 2021.
24. Counsel concluded her oral submissions by urging this court to uphold the Tribunal's decision in view of the fact that the Tribunal had properly ruled that it lacked jurisdiction to extend time under Section 129(1) of EMCA.
25. In rebuttal submissions, Learned Counsel Mr. Luseno stated that the 2nd Respondent's replying affidavit had not challenged the fact that the Appellant was not aware of the decision for the reasons that she was out of the county. The decision by NEMA had also been made during the Covid Pandemic at a time when it was not business as usual. The Appellant could not access the online platform neither could she have known when the decision had been made. The Director General, NEMA had a duty to ensure that the affected parties were notified by the NEMA's decisions.
26. Counsel also submitted that the Tribunal had not been invited to rule on constitutional rights. What the Tribunal had been invited to do was to find that there was noncompliance that the administrator failed to perform his duties.
27. In respect to the public consultations done with KLDA, Counsel argued that the Appellant had filed the suit in her own personal capacity since she was not a member of KLDA.
28. Counsel, further submitted that the 2nd Respondent had failed to point out anywhere the Tribunal addressed itself to the Appellant's application dated 2nd June 2022. The Tribunal expressed itself on an Appeal that had not been filed and ignored the application on extension of time. Counsel further stated that Regulations 10(4) of EMCA (EIA/EA) Regulations does not limit any other person on when to challenge NEMA's decision and further Section 129(2) of EMCA allows a party to challenge and appeal against the decision of committee's established under EMCA and those decisions made by NEMA.
29. It was further submitted that at the Tribunal, NEMA had not indicated whether or not a decision had been made. There was no affidavit filed by the decision maker in respect to the same and that the EIA licence had been issued on the basis of a project report.
30. I have considered the grounds of the appeal, the oral submissions made by Counsel for the parties, the written submissions filed by the 2nd Respondent and 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 in not determining the issue before it under the Application dated 2nd June 2022.
 - ii. Whether the Tribunal erred in allowing the 1st and 2nd Respondents Preliminary Objections.
 - iii. Whether the Tribunal erred in escalating the proceedings commenced by the Notice of Motion dated 2nd June 2022 as a substantive Appeal.
 - iv. Whether the 1st Respondent violated the Appellant's right to a fair Administrative Action under Article 47 of *the Constitution* and section 4(3) of the Fair Administrative Actions Act.
31. I shall proceed to analyze all the aforementioned issues sequentially.
32. It was the Appellant's position that she commenced the proceedings before the Tribunal by filing a Miscellaneous Application dated 2nd June 2022. The application was brought under the provisions



of Section 129 (2) of EMCA, Rules 10 and 46 of the Environmental (Impact Assessment and Audit Regulations) 2003 Rules 3 and 7 of the National Environmental Tribunal Rules 2003 and Articles 49, 50, 69, 70 and Article 159 (2) of *the Constitution* and it sought the following prayers:-“2. THAT pending the hearing and determination of this application, this Honourable Tribunal be pleased to issue a stop order restraining the 2nd Respondent either by itself, its agents and or servants, whosoever from undertaking any construction works on all that property known as Land Reference Number 1159/323 on the basis of a decision made by the 1st Respondent approving the Environmental Impact Assessment Project Report vide application Number NEMA/EIA/PSR/22107 by Sutton Holdings Limited, the 2nd Respondent.

3. That this Honourable Tribunal be pleased to extend time for filing an Appeal against the decision made by the 1st Respondent on 30th July 2021 or such date approving the Environmental Impact Assessment Report vide application Number NEMA/EIA/PSR/22107 by Sutton Holdings Limited, the 2nd Respondent.”

33. The Appellant also argued that upon filing the said application, the Tribunal considered the same and granted a stop order in respect to the construction of the 2nd Respondent’s project pending the final consideration of the said application.
34. The Respondents upon being served with the said application filed separate Notice of Preliminary Objections dated 23rd June 2022 and 15th June 2022.
35. The 1st Respondent’s Preliminary Objection was raised on the following terms:

“That the Tribunal lacks the requisite jurisdiction pursuant to Section 129 of EMCA.

1. That this application is frivolous, vexatious and an abuse of the court process.
2. Consequently, the application should be dismissed with costs to the 1st Respondent.”

36. The 2nd Respondent’s Preliminary objection was raised on the following terms: -

- “1. The Appeal is statute barred in accordance with section 129 of Environmental Management and Coordination Act No. 8 of 1999 as read together with Regulations 46(1) of the Environmental (Impact Assessment and Audit) Regulations 2003 the Appellant having filed the same outside the mandatory 60 days requirement.
2. The Honourable Tribunal lacks jurisdiction to hear and determine the matter regarding an application for development permission and the issuance of a change of user in view of the un-equivocal provision of section 61(3) as read together with Section 75(2) (d) of the *physical and Land Use Planning Act* 2019.
3. That the instant Appeal is therefore frivolous and an abuse of the court process as this Honourable Tribunal’s jurisdiction has been limited by statute.”

37. The 2nd Respondent also filed a Replying Affidavit sworn by Ronald Kimtai a Lead Environment Impact Assessment Expert. The affidavit was sworn on 24th June 2022.



38. In its ruling delivered on 25th July 2022, the Tribunal at paragraph 13 of the said ruling proceeded to frame the sole issue for determination being whether the Appeal is time barred and subsequently proceeded to uphold the Preliminary Objections and dismissed the Appeal with costs.
39. Before I pronounce myself further on the issue as to whether the Tribunal erred in not determining the issue before it under the Application dated 2nd June 2022, it is important to expound on how proceedings can be commenced at the Tribunal. The procedure governing the Tribunal proceedings is designated as the National Environment Tribunal Procedure Rules, 2003.
40. 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”
41. 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.”
42. 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.”
43. From the record of appeal filed herein, it is evident that the Appellant commenced the proceedings before the Tribunal by filing a Miscellaneous cause and not an Appeal. No Appeal was filed as per the record. The 1st and 2nd Respondents filed Preliminary Objections upon being served with the said application together with the stop order that had been issued by the Tribunal. The 2nd Respondent also filed a Relying Affidavit sworn by Ronald Kimtai on 24th June 2022. Paragraph 2 of the said affidavit stated as follows:
“That I have read and understood the Notice of Motion dated 2nd June 2022 together with the supporting affidavit of Susan Wanjiku Riunga, the Applicant herein and I swear this Affidavit in opposition thereto.” From the record, the Tribunal considered the Preliminary Objections and rendered its ruling on 25th July 2022. The said ruling was pronounced as a ruling in respect to “NET Appeal No. 16 of 2022” which in essence was non - existent. No appeal of such nature had been filed by the Appellant at the Tribunal.
44. Pages 2 - 9 of the supplementary record of Appeal dated 24th September 2022 shows that Appellant’s counsel tried to bring the said error to the attention of the Chairperson and Members of the Tribunal but the same was ignored. In view of the foregoing, it is the finding of this Court that indeed the Tribunal erred in not considering the Miscellaneous Application dated 2nd June 2022 in its ruling rendered on 25th July 2022.
45. While the Tribunal had an obligation to pronounce itself on the Preliminary objections filed by the 2nd Respondent they equally ought to have made a determination on the application dated 2nd June 2022 that had been filed by the Appellant.



46. In respect to the third issue for determination as outlined by the Court, I wish to state that having held that the Tribunal erred in not considering the Miscellaneous Application dated 2nd June 2022 in its ruling rendered on 25th July 2022, it therefore follows that the said Tribunal erred in escalating the proceedings commenced by the Notice of Motion dated 2nd June 2022 as a substantive Appeal when in essence there was no appeal pending before it for determination.
47. On the final issue for determination as to whether or not the 1st Respondent violated the Appellant's right to a fair administrative action under Article 47 of *the Constitution* and Section 4 (3) of the *Fair Administrative Action Act*, I wish to begin by citing the provisions of Article 47 of *the Constitution* which stipulates as follows: -
- Article 47
- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
48. Fair administrative action, as per Article 47 of *the Constitution* of Kenya, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. Article 47 of *the Constitution* codifies every person's right to fair administrative, action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.
49. The Environmental Management and Coordination Act together with the Environmental (Impact Assessment and Audit) Regulations 2003 provide an elaborate procedure for engaging the public and how to address any grievances therein.
50. In the instant Appeal, the Appellant contended that the Director General, NEMA was obligated to comply with the provisions of *Fair Administrative Action Act* and even to communicate to the parties once decisions have been made and inform them on the right to appeal.
51. It is to be noted from the Environmental Management and Coordination Act, NEMA is a statutory body vested with the mandate to exercise general supervision and co-ordination over all matters relating to the environment. It is the principal instrument of government in the implementation of all policies relating to the environment. It performs various statutory mandates within the framework of EMCA. Among these functions is the issuance of EIA licences upon satisfaction that a party has complied with the mandatory requirements of the law.
52. Section 129 of EMCA provides a framework within which any person aggrieved by decisions made by NEMA may ventilate his or her grievance.
53. While the Director General is bound to comply with the provisions of the FAA Act, I wish to state that in the instant case, there was no evidence furnished to this court to confirm that indeed the Appellant engaged the 1st Respondent and her grievance was not addressed as provided for under the FAA Act. In view of the foregoing, the contention by the Appellant that the 1st Respondent violated her right to a fair administrative action as contemplated under Article 47 of *the Constitution* and Section 4(3) of the FAA Act is unfounded and has no basis.



54. For the foregoing reasons, I find that the Appeal herein is merited. On the issue of costs, the error leading to this Appeal having been occasioned by the Tribunal, I will direct each party to bear own costs.
55. Consequently, I grant orders as follows: -
- a. The Appeal is allowed and the ruling delivered on 25th July 2022 is hereby set aside.
 - b. The Tribunal is directed to consider the Application dated 2nd June 2022.
 - c. Each party to bear own costs of the Appeal.
56. Before I conclude, I must sincerely express my gratitude to each Counsel who appeared in these proceedings for their industry, conduct and courtesy and able presentation of their respective client's cases.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DECEMBER 2022.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Muchiri h/b for Mr. Steve Luseno for the Appellant.

Ms. Jullian Ndirangu for the 1st Respondent.

N/A for the 2nd Respondent.

