



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO. 22 OF 2019**

**PROFESSOR ALBERT MUMMA (In his capacity as Chairman,**

**KAREN LANGATA DISTRICT**

**ASSOCIATION (KLDA).....APPELLANT**

**VERSUS**

**DIRECTOR GENERAL, NATIONAL**

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

**ZABLON A. MABEA.....2<sup>ND</sup> RESPONDENT**

**OKENGO MATIANG'I.....3<sup>RD</sup> RESPONDENT**

**SEVENTH DAY ADVENTIST**

**CHURCH (E.A) LIMITED.....INTERESTED PARTY**

**JUDGEMENT**

1. Being dissatisfied with the decision of the National Environmental Tribunal (NET) delivered on 8/3/2019, the Appellant filed the Amended Memorandum of Appeal against that decision on 17/4/2019. The Appellant averred that NET erred by failing to identify the issues for determination and by failing to give a decision on each issue in its appeal as required by Rule 38 of the NET Procedure Rules of 2003, Secondly, the Appellant faulted NET for determining the objection on jurisdiction and making a finding that the appeal was filed out of time; and by extension, for the manner in which it computed the running of time for purposes of the limitation period. The Appellant also faulted NET for ordering it to pay costs. It sought to have the appeal allowed, the order for costs set aside and a decision made for all issues to be determined on merit.

2. The background to this case is that the Appellant filed an application under Section 129 of the Environmental Management and Coordination Act, 1999 (EMCA) on 6/2/2018 seeking a stop order to suspend construction on land reference number 119/14/72 along Mukoma Road in Karen, Nairobi County ("the Suit Property"). It also sought a declaration that the EIA license dated 20/11/2017 issued by National Environment Management Authority (NEMA) approving the proposed development on the Suit Property was illegal, null and void and should be cancelled. It further sought a permanent court order to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from undertaking any construction or development on the Suit Property without strict compliance with the applicable environmental, physical planning, zoning laws and regulations and the Karen Lang'ata Physical Development Plan.

3. The Appellant averred that on 28/4/2015 it submitted objections to the County Secretary of Nairobi objecting to the change of user of the Suit Property from residential to commercial. It stated that in 2017 it informed the Respondents of its objections to the proposed development and added that the Respondents did not hold public hearings to give stakeholders an opportunity to make representations on the proposed development which was contrary to the environmental laws. Further, the Appellant averred there had been no response on the objections it raised in 2015 on the proposed development.

4. The Appellant stated that on 28/1/2018, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the company of a large number of persons went to the Suit Property to carry out a ground breaking ceremony and that that was when the Appellant and its members who reside in the neighbourhood learnt that NEMA had granted approval for the development of a church and associated facilities for religious purposes on the Suit Property. The Appellant expressed doubt as to whether the proposed development was a church and took issue with the manner in which the approval was granted by NEMA as can be discerned from the facts deposed to in the affidavit of Professor Albert Mumma sworn on 6/2/2018.

5. The appeal came up for hearing on 6/2/2019 before NET and parties agreed to have the appeal heard on the basis of the pleadings and written submissions which they had filed. NET delivered its ruling on 8/3/2019 in which it held that it had no jurisdiction to hear and determine the appeal since it had been filed outside the time limit of 60 days stipulated under Section 129(1) of EMCA. The Appellant filed this appeal on 5/4/2019 urging that the appeal before NET was lodged under Section 129 (2) of EMCA and not Section 129 (1) since the Appellant was not a party to the decision or determination made by NEMA. The Appellant faulted NET for relying on the limitation period stipulated in Section 129 (1) of EMCA in dismissing its appeal without first satisfying itself that the decision NEMA made was given or served upon the Appellant more than 60 days before it filed the appeal.

6. The court considered the submissions which were filed by the parties on this second appeal. The Appellant submitted that Rule 9 (1) of the NET Procedure Rules required objections to the jurisdiction of NET or admissibility of an appeal or any other objections to be made to NET within 30 days of the date the party was notified of the appeal with a copy of that objection being served on the Appellant immediately. It argued that NET acted contrary to Rule 9 (1) of the NET rules when it dismissed the appeal. It maintained that the NET did not give the reasons for its decision as required by Rule 38 of its Procedure Rules. The Appellant gave a litany of issues which it contended NET failed to consider in the appeal.

7. The Appellant relied on the decision in **Simba Corporation Limited v Director General, NEMA and another [2017] eKLR** where the court noted that Section 129 (1) of EMCA related to an appeal by a person who was a party to the decision or determination made by NEMA under EMCA while Section 129 (2) of EMCA was applicable to an appeal brought by a person who was not a party to a decision or determination made by NEMA under EMCA. The Appellant submitted that Mr. Rupert Watson, a member of the Appellant Association, indicated in his witness statement dated 5/11/2018 that he lived about 500 meters from the Suit Property and that genuine neighbours were denied an opportunity to give their views on the proposed development on the Suit Property. He averred that he was never given the questionnaire which the Respondents claim were circulated to the neighbours. He added that the questionnaires were not submitted to the Appellant's office and that he learnt that NEMA had approved the proposed development in January 2018 when the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents went to the Suit Property with the Interested Party accompanied by a huge group of people for the ground breaking ceremony for the development. The Appellant maintained that there was no legitimate public participation as contemplated by Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003. It urged that by directing the proponent to forego the EIA study, NEMA removed the proponent of the project from the legal framework of legitimate public participation.

8. NEMA submitted that the appeal before NET was filed 78 days after it issued the EIA licence. On the issue of its discretion in exempting the project from the EIA study, NEMA submitted that the second schedule of EMCA stipulated the kind of projects to be considered for study report and urged that the Appellant had failed to cite the specific sections of the second study which justified the submission of a report. It relied on regulation 10 (2) on when NEMA could issue a license.

9. NEMA submitted that the appeal filed was by the residents who were involved in the process leading to the issuance of the EIA licence and relied on the Interested Party's submissions before NET in which the Interested Party submitted that in the process of preparing EIA project report, views were sought from the persons who would be affected by the proposed project and who were the persons living where the proposed project was situated along Mukoma Road in Karen. Therefore NEMA submitted that the appeal fell under Section 129(1) of EMCA which provides for a time limit of 60 days for a dissatisfied person to file an appeal. It urged that NET was right in the determination it made that it had no jurisdiction to deal with the appeal.

10. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Appellant was afforded an opportunity to respond to the objection on jurisdiction raised in paragraph 1 of the Reply to the appeal of Dr. Fred Matiang'i Okengo and Zablon N. Mabea. It submitted that on 24/4/2018, NET directed Mr. Koech, counsel for the Appellant to file anything that he wished to file on behalf of the Appellant. And that after numerous court attendances where the Appellant had failed to comply with the directions given, the Appellant indicated on 4/12/2018 that it had filed submissions. Parties agreed to rely on the filed replies, affidavits and written submissions and NET was to give a ruling.

11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also maintained that the appeal was brought under Section 129 (1) of EMCA which gave a time limit of 60 days. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Appellant left it to the NET to determine whether its appeal was under subsection (1) or (2) of Section 129 of EMCA. They also submitted that the Appellant was a party to the decision which NEMA made because it participated at NEMA when the Interested Party was seeking various licenses. They invited the court to hold that a party who filed protestation against the grant of a licence was deemed to have had notice under Section 129 (1).

12. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that their objection on jurisdiction was raised in the replying affidavit which was served upon the Appellant on 2/3/2018. They contended that Rule 9 did not require the objection to take any specific form and that it was only sufficient for it to be raised within 30 days. They argued that the Appellant refused to reply to the issue of jurisdiction which was raised before NET and concluded that NET acted properly when it dismissed the appeal while urging that NET could still have of its own motion determined whether or not it was vested with jurisdiction to hear the appeal.

13. The Interested Party submitted that the appeal was brought under Section 129 (1) of EMCA because it was filed on behalf of residents living along Mukoma Road who were involved in the process leading to the change of user approval and issuing of the EIA license by NEMA. As evidence of this it relied on its submissions before NET and its witness statement. It maintained that NET had no jurisdiction to entertain the appeal which was filed 78 days after the EIA licence had been issued. It also maintained that a preliminary objection on jurisdiction had been raised and brought to the attention of the Appellant.

14. The issue for determination is whether NET erred when it found that it had no jurisdiction to deal with the appeal that was before it. The Appellant did not help matters by simply indicating on the face of its appeal before NET that it was brought under Section 129 of EMCA without indicating the subsection it was relying on. In the court's view NET first needed to make a determination on whether the appeal was brought under Section 129 (1) or if it fell under Section 129 (2) of EMCA. This would be critical because Section 129 (1) relates to decisions made in which the person aggrieved by the issuance of the licence participated in the decision making process and was therefore required to lodge an appeal within 60 days of the date the decision was made. Where the person does not participate in the proceedings leading to that decision, then the appeal would fall under Section 129 (2) of EMCA which requires the appeal to be filed within 60 days of the date the

disputed decision is given or served upon the Appellant pursuant to Rule 4 (1) and (2) of the NET Procedure Rules.

15. NET should have made a determination on whether the Appellant participated in the decision making process that led to the issuance of the EIA license by NEMA. This would have required evidence to be called by the parties. The Appellant submitted that it made objections to the change of user of the Suit Property on 28/4/2015. There is no indication that the Association was served with the questionnaires regarding the issuance of the EIA licence by NEMA. This fact is also supported by the averments of Mr. Rupert Watson who stated that he lived about 500 meters from the Suit Property but was not given an opportunity to give his views on the proposed development on the Suit Property.

16. The court has looked at the public consultation and participation forms relied on by the Interested Party, two of which are indicated to be by neighbours and another two by persons who lived a kilometer from the Suit Property. Another questionnaire was filled by a resident of Banda Lane. Having raised an objection to change of user, one would have expected the Appellant to be served with the questionnaires so that it could participate in the process leading to the issuance of the EIA licence dated 20/11/2017.

17. NET erred when it made a finding that it had no jurisdiction to hear the appeal on the basis that it was filed more than 60 days after NEMA issued the EIA license without first satisfying itself that the Appellant participated in the process leading to the issuance of the EIA license for its appeal to fall under Section 129(1). NET did not satisfy itself that the Appellant had participated in the process that led to the issuance of the EIA licence on 20/11/2017. NET also needed to address the other issues raised by the Appellant.

18. For the reasons given above, the court allows the appeal and remits the proceedings for consideration by the Tribunal. The earlier order made by the Tribunal for payment of costs by the Appellant is set aside. Each party will bear its costs for the appeal and for the earlier proceedings before the Tribunal.

**DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Brian Ondego for the Appellant

Ms. Cynthia Sakami for the 1<sup>st</sup> Respondent

Mr. Clapton Kadimu for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Mr. Clapton Ondiwa for the Interested Party

Mr. V. Owuor- Court Assistant