



**Olago & another (Suing on Behalf of 26 other Persons) v Director
General Nema & another (Environment & Planning Appeal
E008 of 2023) [2025] KEELC 1139 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1139 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & PLANNING APPEAL E008 OF 2023**

AA OMOLLO, J

FEBRUARY 6, 2025

BETWEEN

SAMUEL OTIENO OLAGO 1ST APPELLANT

TAMARA EVGENIEVNA OLAGO 2ND APPELLANT

SUING ON BEHALF OF 26 OTHER PERSONS

AND

DIRECTOR GENERAL NEMA 1ST RESPONDENT

ATC KENYA OPERATIONS LIMITED 2ND RESPONDENT

*(Being an Appeal from the Ruling of the National Environment Tribunal (Nairobi)
delivered on the 8th December 2023 in NET Appeal No.27 of 2023, Nairobi)*

JUDGMENT

1. The Appellants filed a memorandum of appeal dated 19th December 2023 seeking for the following orders
 - a. The appeal be allowed.
 - b. The Ruling in regard to the Respondent's Notice of Preliminary Objection dated 4th October 2023 be set aside and substituted by an order dismissing the Respondent's aforementioned Notice of Preliminary Objection.
 - c. Costs be awarded in favour of the Appellants.
2. The Appeal is based on the grounds that the tribunal erred in law by finding that the tribunal is bereft of jurisdiction to hear and determine the application dated 20th September 2023 by virtue of



the provisions of Section 129 of the Environmental Management and Coordination Act, Laws of Kenya as read together with Regulation 46(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003 thereby occasioning the Appellants grave injustice.

3. That the tribunal erred in law by finding that it is deprived of jurisdiction by virtue of the provisions of Rule 4(2) of the National Environmental Tribunal Procedure Rules, 2003, for reason of limitation of time thus occasioning the Appellants grave injustice. That the tribunal erred in law in holding that the tribunal was devoid of jurisdiction to extend time for filing an appeal out of time by dint of rule 7 of the National Environment Tribunal Procedure Rules occasioning the Appellant injustice.

Submissions:

4. There were no submissions filed by the Appellants.
5. In opposition to the memorandum of appeal, the 1st Respondent and the 2nd Respondent filed submissions dated 6th October 2024 and 16th October 2024 respectively. The 1st Respondent gave a background of the appeal that the Appellants filed an application dated 20th September 2023 at the National Environment Tribunal (NET) praying for the Tribunal to extend time to file their appeal out of time.
6. That the Appellants sought to challenge the E.I.A License issued by the 1st Respondent on 21st July 2022 to the 2nd Respondent although they were aware of the proposed project as early as 29th June 2022 when they filed a suit at the ELC Court being ELC No. E224 of 2022. Upon filing of the application, the 2nd Respondent herein filed a preliminary objection on the basis that the Tribunal did not have jurisdiction to entertain the matter at hand because it was time barred pursuant to Section 129 of EMCA. Further that the Tribunal did not have powers to extend time within which to file an appeal out of time.
7. The Tribunal delivered its ruling on 8th December 2023 upholding the Preliminary Objection by the 2nd Respondent resulting to the current appeal. The 1st Respondent reiterated the submissions dated 9th October 2023 by the 2nd Respondent at the National Environment Tribunal appearing on page 57 – 62 of the record of appeal.
8. They submitted that the jurisdiction of the National Environment Tribunal to entertain matters arising from the decision of the 1st Respondent is conferred by the provisions of Section 129(1) of EMCA which provides that any person who is aggrieved by 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... may within 60 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.
9. That the Appellants relied on Rules 4(2) and 4(7) of the National Environmental Tribunal Rules, 2003 in making their application for filing their appeal and extension of time which essentially provides that notice of appeal should be launched with the Tribunal not later than sixty (60) days but the Tribunal may for good reason shown, on application, extend the time appointed by these rules.
10. The 1st Respondent submitted that the extension is for the time set by the Regulations hereof and not the time limited by the Act thus the Tribunal whereas vested with jurisdiction to extend time provided for by the Rules, it does not have jurisdiction to extend time limited by the Act. The 1st Respondent stated that the nature of the time the Appellants sought to extend is time to file their appeal out of time to challenge the issuance of an E.I.A License to the 2nd Respondent on 21st July 2022 which is limited by the Act.



11. That whereas the limitation is also provided for under the Tribunal Rules, it is limited under the Act and as such cannot be extended by virtue of Regulation 4(7) of EMCA. Thus, the Tribunal had no jurisdiction to extend time to file the appeal considering that 60 days' timeline to file an appeal is limited by the substantive law being EMCA. The 2nd Respondent submitted that Appellate jurisdiction of this court in relation to Appeals is defined under Article 162 (2) (b) of *the Constitution* as read together with Section 13(4) of the *Environment and Land Court Act* and Section 130 of the Environmental Management and Coordination Act.
12. In reliance to the case of Khalid Salim Abdulsheikh Vs Swaleh Omar Said (2019)eKLR which held that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings, the 2nd Respondent submitted that pursuant to Section 129 (1) and (2) of EMCA, the Tribunal lacks jurisdiction to extend the 60 days provided because the mandate to extend time beyond the 60 days is for appeals under the Regulations.
13. In support of their argument, the 2nd Respondent cited the case of Simba Corporation Limited vs Avic International & another (2017) eKLR, where B.M. Eboso J that:

There is no doubt that Section 129 (1) of EMCA provides a limited period of 60 days from the date of occurrence of the impugned event, within which the dissatisfied party is to present an appeal to NET. The framework in Section 129 (1) does not provide for extension of the 60-day period. In the same vein, Rule 7 of the NET Procedure Rules prohibits extension of time in a scenario where the limitation period is expressly limited by EMCA. The legal ramifications of the framework in Rule 7 of NET Procedure Rules is that the extension contemplated therein does not relate to appeals falling under Section 129 (1) because limitation period for appeals falling under Section 129 (1) is limited by the Act. The extension contemplated in Rule 7 of NET Procedure Rules therefore relates only to appeals falling under Section 129(2) because these are the only appeals in respect of which the Act does not set a limitation period.”

Analysis and Determination:

14. This is an appeal against the ruling made by the Tribunal upholding the objection by the 2nd Respondent that the Tribunal lacked jurisdiction to extend time to file an appeal as sought by the Petitioners. The question before me is to determine whether the Appellant's application for leave could be considered under 129(2) as submitted before the NET and therefore the Tribunal erred in finding that it lacked jurisdiction to extend time. The Appellants in their submissions heavily relied in the decision of Simba Corporation case supra
15. It is provided under Section 129 (1) of EMCA that;

“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;

...may any person who is aggrieved 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 law. Equally, the National Environmental Tribunal Rules, 2003 provides for appeals before the Tribunal stating that 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.”

16. Section 129(2) states thus:

“Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority 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.”

17. The first part is specific to the decisions to be appealed which is granting or refusing to grant a permit or license or the transfer of the same. The Appellants referred to among others Rule 7 of the Tribunal’s Procedure Rules which give room for extension of time for good reason shown, and on application to extend the time appointed by these Rules (not being a time limited by the Act) for doing any act or taking any proceedings.

18. In the case of Simba Corporation supra relied upon by the 2nd Respondent, the judge discussed the difference between the two subsection 129(1) and (2) thus;

“In the jurisprudence interpreting the two categories of appeals filed to the NET under Sections 129 (1) and (2) the NET and the superior courts of record have held that the framework in Sections 129 (1) and 129 (2) relate to two different categories of appeals: the framework in Section 129 (1) relates to an appeal by a person who was a party to a decision or determination made by NEMA within the framework of EMCA; and Section 129 (2) provides a framework for an appeal by a person who was not a party to a decision or determination made by NEMA within the framework of EMCA.”

19. According to the good judge in the case law of Simba corporation supra, the NET has power to extend time for appeals filed under section 129(2) of EMCA. He held thus;

“The answer to the question as to whether or not there is a limitation period for Section 129 (2) appeals is to be found in Rule 2, Rule 4 (2) and Rule 7 of the NET Procedure Rules. Rule 2 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”. Rule 4 (2) requires the appellant to send or deliver six copies of the notice of appeal to the tribunal so as to reach the tribunal not later than sixty [60] days after the date on which the disputed decision was given to or served upon the appellant. Rule 7 provides a framework for extension of the 60 days period subject to any applicable limitation set out by EMCA as explained in the preceding paragraphs. My interpretation of Rules 2, 4 (2) and 7 of the NET Procedure Rules is that Rule 4 (2) provides a limitation period of 60 days within which Section 129 (2) appeals are to be lodged. The limitation period is to be reckoned from the time when a Section 129 (2) appellant is given or served with notice of the disputed decision by NEMA.”

20. The foregoing finding which is persuasive on this court takes the view that anyone who was not a party to the decision being challenged falls under subsection (2) where time can be extended for appeals. The Act itself in section 129(1) simply say any party aggrieved by the grant or refusal to grant a permit or a licence can challenge it within 60 days of the occurrence of the event.

21. The NET in their impugned Ruling held that following the amendments to the Act in 2015, the Appellant’s appeal fell under the provisions of section 129(1) where extension of time is not permitted



because it is challenging the grant of a license. The wording of the application for leave to extend time that was placed before the NET read thus;

“The Tribunal may be pleased to extend time for filing an appeal against the decision of the 1st Respondent dated 21st July, 2022 and issued to the 2nd Respondent licensing the development on title no. NBI Block 110/516 situated at Thome Estate area, Nairobi.”

22. It is my view that the wording of the application placed before the NET was direct as it expressed the intention of an appeal to challenge the grant of the licence dated 21st July, 2024 which clearly invokes the provisions of section 129(1)(a). Even if I wanted to find the Appellant is a party falling under 129(2), the wordings of the application before the Tribunal makes it hard for me to fault the Tribunal in their finding that they could not extend the time since it was a matter under 129(1)(a).
23. Again, had the NET proceeded to consider the application under section 129(2) on merit or when time began to run for purposes of lodging an appeal, the Appellants were guilty of laches. I noted by the pleadings made in support of the application for extension of time that there was a delay in bringing it to court. The Appellants pleaded that they learnt of the issuance of the EIA license on 2nd December, 2022 then proceeded to withdraw the existing suit before the Environment and land Court on 19th June of 2023. The application for leave was made three months later on 20th September, 2023 (and filed on 27th September, 2023). There was no explanation provided in the affidavit in support of the application that would have availed them the exercise of discretion in any event.
24. Be that as it may, I observe that there is a lacuna in the two subsections (129 (1) & (2)) of EMCA which this court may not inquire into while dealing with a matter brought by way of appeal.
25. For the reasons stated herein, it is my holding that there is no merit in this appeal hence it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025

A. OMOLLO

JUDGE

