**Kopoa Developers Limited v Endesk Properties Limited & another (Environment and Planning Appeal E010 of 2024) [2025] KEELC 4398 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4398 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND PLANNING APPEAL E010 OF 2024**

**AA OMOLLO, J**

**JUNE 5, 2025**

**BETWEEN**

**KOPOA DEVELOPERS LIMITED ..... APPELLANT**

**AND**

**ENDESK PROPERTIES LIMITED ..... 1ST RESPONDENT**

**DIRECTOR GENERAL NEMA ..... 2ND RESPONDENT**

***(Being an appeal from the ruling of the National Environment, Tribunal at Nairobi delivered on 8th April 2024 in National Tribunal Appeal No. 12 of 2023)***

**JUDGMENT**

## Background

1. On April 8 2024, the National Environment Tribunal (hereafter referred to as the Tribunal) delivered a ruling in *National Environment Tribunal Appeal case no. 12 of 2023* where it was ordered that;

    a. The 2nd Respondent's corporate veil is hereby lifted, and its director Jiangang Liu is found to be in contempt of the Tribunal for disobeying the Tribunal's orders issued on 14th December 2023.

    b. Jiangang Liu is hereby fined Kshs. 2 million to be paid within the next 30 days.

    c. In default of compliance with order (b) above, a Notice to Show Cause will issue against the 2nd Respondent's director, Jiangang Liu to appear in person before the Tribunal to show cause why he should not be committed to civil jail.

2. The Appellant aggrieved by the said ruling filed a memorandum of appeal dated 29th April, 2024 seeking for the following reliefs;

i. This appeal be allowed;

ii. The decision lifting the corporate veil of the appellant and holding its director in contempt of the Tribunal be set aside;

iii. The decision ordering the appellant to pay a fine of Ksh. 2 million to the National Environment Tribunal within 30 days be set aside; and

iv. The appellant be awarded the costs of the appeal.

3. The five grounds listed for lodging the appeal are that;

1. The Tribunal erred by finding the appellant's director guilty of contempt without giving him the opportunity to be heard.

2. The Tribunal erred in finding of the appellant's director liable for contempt and ordering him to make to make payment of the of the sum of Kshs.2 million.

3. The Tribunal erred in holding that the appellant's director was in contempt after finding at paragraph *10*, that no construction was ongoing during the site visit. There was no basis for the finding that the appellant's director was willfully disobeying the Tribunal's orders.

4. There was no evidence tendered before the Tribunal to support a decision to lift the corporate veil.

5. The Tribunal's decision of sentencing the appellant and ordering the appellant's director to pay a fine were contrary to the appellant's right to fair administrative action, procedurally unfair and contrary to the principles of natural justice.

4. The appeal was canvassed through filing of written submissions with the appellants filing submissions dated 1st August, 2024 and the 1st Respondent filed submissions dated 16th February, 2025.

**The Appellant's Submissions:**

5. The Appellant submitted that the ruling was delivered without according the appellant a fair hearing, or any hearing at all and that the same was contrary to justice and the principles of fairness. It submits that his right to a fair hearing was violated in the contempt proceedings, as the Tribunal failed to provide the necessary opportunity for him to be heard before delivering its ruling.

6. In support of these arguments, it cited the case of *Githiga & 5 Others v Kiru Tea Factory Company Ltd* [2023], where the Supreme Court emphasized that contempt proceedings, being quasi-criminal in nature, require strict adherence to fair procedures, including giving the alleged contemnor a reasonable opportunity to defend themselves. That the Tribunal in this case bypassed the scheduled mention date of 26th April, 2024 and delivered a ruling on April 8, 2024 without hearing the parties involved. The appellant submitted that by then it had only filed a replying affidavit and had not been given a chance to file submissions or attend a hearing to contest the contempt allegations.

7. It submits that the failure to provide an opportunity for a proper hearing amounts to a miscarriage of justice, particularly as the ruling directly impacted the appellant's director's liberty, which is a serious matter requiring thorough procedural fairness. Further, the Appellant submits that the Tribunal's decision to lift its corporate veil and find its director in contempt was flawed due to insufficient evidence.

8. The decision is also faulted because the contempt application was primarily based on photographs that lacked proper authentication or clear evidence of when or where they were taken. In support, reference was made to the case of *MNN v JMM* [2022] eKLR among others, to submit that contempt proceedings require a higher standard of proof, and the photographs presented did not meet this standard.

9. Additionally, the Appellant argues that the Tribunal lacked the jurisdiction to make rulings on zoning and development issues, as the underlying dispute concerned matters beyond its scope. It cited Angote J in his judgement dated 16th May, 2024 regarding the dispute between the parties, which ruled that the Tribunal did not have jurisdiction over the case's core issues. As such, the Appellant avers that the Tribunal's actions were legally flawed and should be set aside, as affirmed by the Court of Appeal in *Public Service Commission v Cheruiyot & 20 Others* (2017) eKLR.

**The 1st Respondent's Submissions:**

10. The 1st Respondent submitted that the Appellant was indeed given a fair hearing and the Tribunal followed due process, issuing an order on 23rd January, 2024 to serve the Appellant, who complied by filing a response. However, the Appellant failed to file its written submissions within the prescribed time, which is essential to the Tribunal's decision-making process.

11. This Respondent argues that the Appellant's failure to act within the 52-day period, despite being aware of the Tribunal's order, amounted to a lack of vigilance, which the court of Appeal in *Benjoh Amalgamated Ltd &another v Kenya Commercial Bank Ltd* (2014) eKLR emphasized when it discussed "laches," where delay or inactivity forfeits equitable relief. Therefore, the Appellant's own inaction cannot now be used to claim a miscarriage of justice, as equity aids the vigilant, not the indolent.

12. On the issue of whether there was sufficient evidence of contempt of the Tribunal's orders, the 1st Respondent maintains that the Appellant did not refute the court's order of 14th January, 2024, which directed a site visit to the construction site. With regard to Appellant's argument about the lack of a report after the site visit, the Respondent explains that the Tribunal's site observation was simply to inform its understanding of the dispute.

13. Additionally, the 1st Respondent submitted photographs as evidence of the ongoing construction, arguing that the photographs were authentic and not manipulated. The date was automatically generated by the capturing device and that the Appellant did not challenge the authenticity of the photographs at the Tribunal level.

14. In support, the Respondent cited the case of *Peter Ngethe Ngari t/a PNN Funeral Services v Standard Group Limited PLC* (2020) eKLR to underscore the admissibility of electronic evidence under Section 106B (1) of the *Evidence Act*, highlighting the legitimacy of the photographs as evidence of contempt. Thus, there was sufficient evidence to prove contempt, supported by the Tribunal's power under Sections 127(2)(e) and 133(2) of the *Environmental Management and Coordination Act* (EMCA) to punish contempt of its orders.

**Analysis and Determination:**

15. This being a first appeal, this Court is granted powers to review the evidence adduced before the tribunal and satisfy itself that the decision was well-founded. The existence of this principle/powers

was enunciated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court of Appeal held as follows:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

16. I have gone through the record of appeal dated 29th April 2024 and the supplementary record dated 5th May, 2025. Vide the application dated 15th January 2024, the 1st Respondent sought orders that the Tribunal does lift the cooperate veil of the Appellant herein and hold its director Jiangang Liu in contempt for disobeying its ruling and orders made on 14th December 2023. The 1st Respondent argued that the said ruling had been delivered in the presence of the Appellant's Advocates, thus they were fully aware of it.

17. The Appellant challenges the finding inter alia that it was not given the necessary opportunity to be heard before the ruling was delivered on 8th April, 2024. That the Tribunal bypassed the scheduled mention date of 26th April, 2024, by delivering the impugned ruling on April 8, 2024, without hearing the parties involved.

18. The issues for determination in this appeal can be summed as follows;

    a. Jurisdiction of the Tribunal

    b. Whether the Appellant's right to be heard was violated

    c. Whether there was sufficient evidence proving the contempt.

19. On the argument that the Tribunal lacked the jurisdiction to make rulings on zoning and development issues, the subject matter of this appeal is limited to the finding of contempt. There is no dispute that before the contempt application was made, the Tribunal had issued an order on 14th December, 2023. The 1st Respondent had formally moved the court vide an application dated 9th November, 2023 seeking orders for site visit and stoppage of construction pending determination of that appeal.

20. I perused the judgement by J, Angote on *ELC EPA E002 of 2024* which the Appellant has relied on in stating that the Tribunal lacked jurisdiction to deliver rulings on zoning and developments as follows;

> "79. With respect to whether the development breached zoning regulations, as correctly argued by the Appellant, it was not within the jurisdiction of the Tribunal to make such a determination, moreso considering that the same was not a term of the impugned EIA License. The issue of zoning and development permissions fall within the province of the County Government, and by extension the County Physical and Land Use Liaison Committee.

21. However, what was before the Tribunal as at that time was an interlocutory application and not the merit of the appeal. In allowing the application vide the ruling dated 14th December 2023, and which constitutes orders that the Appellant was found guilty of disobeying, the Tribunal ordered that;

    a. The tribunal to conduct a site visit of the ongoing construction by the 2nd Respondent on 11th January 2024

b. In the meantime, in order to preserve the subject matter of the suit, any further construction on the suit property be stopped pending the delivery of the judgement

c. Each party to bear their own costs.

22. The Appellant was bound in law to obey the orders issued by the Tribunal despite disagreeing in its jurisdiction to issue the same. In the case of *Central Bank of Kenya & Another v Ratilal Automobiles Limited & Others* Civil Application No. Nai. 247 of 2006, the Court of Appeal held that judicial power in Kenya vests in the Courts and other Tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect. See also *Commercial Bank of Africa Ltd. v Isaac Kamau Ndirangu* Civil Appeal No. 157 of 1995 [1990-1994] EA 69

23. Lenaola, J, (as he then was) in *Kariuki & 2 Others v Minister for Gender, Sports, Culture & Social Services & 2 Others* [2004] 1 KLR 588 expressed that;

> "...Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which Courts are set up."

24. On the question of jurisdiction whether the Tribunal could make the orders it did, site visit is as much a judicial process as a hearing in open court. The purpose for the site visit was explained which under Rule 22 (6) of the *NET Procedure Rules* 2003 clothes the Tribunal with fact finding powers and not acting as a mere observer. That the ground inspection was to help the Tribunal better understand the dispute before making its final orders. Proceedings of a site visit should be part of the record in all its aspects, in terms of the date when it is scheduled, the parties present and what took place.

25. Parties should be made aware of the date when it is scheduled and be given the opportunity to be present during the visit and to offer evidence in response to any notes taken by the Court during the visit. (See the Court of Appeal decisions of *Cyrus Nyaga Kabute v Kirinyaga County Council* (1987) eKLR *Beatrice Ngonyo Ndungu & another v Samwuel K. Kanyoro & 2 others* (2017) eKLR and Ayoyih – Muhamnji (ELC Appeal No 11 of 2022) eKLR 2023.)

26. Thus, in line with the provisions of section 126 (2) of *EMCA* and rule 22(6) of the *NET Procedure Rules*, 2003 I hold that making an order for a site visit was within the jurisdiction of the Tribunal together with making the order to preserve the subject matter of the case by stopping any further construction on the suit property pending the delivery of the judgement is also within its mandate.

27. The date of the site visit was clearly stated in the ruling of 14.12.2023 and so parties had the opportunity to be present during the stated date. If the Appellant was unhappy with the part of the order stopping construction pending determination of the appeal before the Tribunal issued on 14th December 2023, nothing stopped them from lodging an appeal against the said decision.

28. With regard to the question of whether the Appellant's right to be heard was violated, it pleaded that the director was found guilty of contempt without giving him opportunity to be heard. On the other hand, the 1st Respondent contended that a chance was given to file its submissions to be heard within given timelines. The appellant confirmed that it did file a replying affidavit sworn on 25th January, 2025 in opposition to the application for contempt but failed to file the submissions within the timeline set.

29. As was held in *Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji* Civil Application No. Nai. 179 of 1998 and cited by Odunga J. (as he then was) in *Republic v Commission on Administrative Justice & 2 others Ex parte Michael Kamau Mubea* (2017) eKLR:

> 'Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it." (underline mine for emphasis).

30. The burden was on the Appellant to demonstrate the violation of its right to be heard since it had filed the replying affidavit dated 25th January, 2024 which was deemed as a response to the allegations by the 1st Respondent. The affidavit afforded an opportunity to counter any allegations thereof and adduce any evidence in support of its defence. The replying affidavit was also considered by the Tribunal as stated in paragraphs 2 and 3 of the impugned ruling.

31. In the impugned ruling, the Tribunal at paragraph 2 mentions the replying affidavit filed in opposition to the application and which the NET stated it considered. To confirm that the contents of the replying affidavit was considered, the Tribunal says thus at paragraph 8;

> " The 2nd Respondent also argues that the application has already been overtaken by events since judgement has already been delivered..."

32. The replying affidavit was also sworn by Liu Jiangang who was sought to be committed for contempt on behalf of the Appellant. He was thus aware of the orders sought against him and the grounds offered in support of the application. Therefore, having been given an opportunity to respond, the Appellant or its director cannot claim they were not given an opportunity to be heard merely because they did not file written submissions. There is no explanation by the Appellant why they did not file the submissions within the timelines set.

33. Was the Tribunal in error to find the Appellant liable in contempt? The Appellant stated that there was no sufficient evidence produced by the Applicant to prove that it was in contempt of the orders. That the ruling was based on photographic evidence which lacked authenticity and the dates when they were taken was questionable. In its finding, the Tribunal cited the provisions of section 126(1) of *EMCA* which provides thus;

> " The Tribunal shall not be bound by the rules of evidence as set out in *Evidence Act* (Cap. 80)"

34. The said provision expressly excludes the application of Section 106B of the *Evidence Act*, Chapter 80 relied upon by the Appellant in challenging the authenticity and validity of the photographic evidence. Since the Tribunal is a creation of *EMCA*, it is bound by the provisions of the Act and I find no basis to fault them in reaching the said conclusion.

35. The Tribunal relied on photographs presented and their observations during the site visit. Besides challenging the probative value of the photographs, the Appellant in its relying affidavit did not present contradicting evidence on the status of the developments prior and post the order. Thus, even in

exercising the powers conferred to this court to review the evidence presented to the trial court, I have nothing to review that would make me reach a contrary finding.

36. Additionally, the Tribunal while lifting the corporate veil, the Tribunal made reference to the cases of *Shimmers Plaza Limited v National Bank of Kenya* (2015)eKLR and *Wanjeru v Family Bank Ltd & 5 Others* (2021)eKLR. In the *Shimmers Plaza case*, the part of the holding referred to was on knowledge of the order and it stated thus;

> " Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case."

37. The appellant argued that there was no evidence to support the Tribunal's decision to lift the veil. In the case of *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Ano* [2014] eKLR, the Court held as follows;

> " It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of Salomon & Co Ltd v Salomon [1897] AC. 22 HL that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities"

38. The only question would be the need to determine which director should be picked to bear the burden of the Appellant. The present director convicted was mentioned in the application and nowhere in the replying affidavit does he contest that in the event the company is found guilty of contempt, there are other directors to be picked other than him. Hence, I cannot fault the Tribunal for lifting the veil to punish the specific director on behalf of the Appellant for being in contempt of the orders of 14th December, 2023.

39. In the upshot, the appeal is dismissed for lack of merit with costs to the 1st Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE, 2025**

**A. OMOLLO**

**JUDGE**