



Mombasa Gas Terminal Ltd v National Environment and Management Authority & 4 others (Environment and Land Appeal E040 of 2022) [2024] KEELC 4061 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4061 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E040 OF 2022**

SM KIBUNJA, J

MAY 8, 2024

BETWEEN

MOMBASA GAS TERMINAL LTD APPELLANT

AND

NATIONAL ENVIRONMENT AND MANAGEMENT AUTHORITY 1ST RESPONDENT

WEMALI BENSON 2ND RESPONDENT

ESTATE OF ALI MWAKUNYAPA (DECEASED) 3RD RESPONDENT

RASHID KARUNGU 4TH RESPONDENT

HAMISI MWANGA 5TH RESPONDENT

JUDGMENT

1. The appellant, being dissatisfied with the ruling and orders of 24th May 2024 by the National Environment Tribunal, hereafter referred to as the tribunal, in Net Appeal No. 9 of 2019, Wemali Benson & 3 Others versus National Environment Management Authority & Mombasa Gas Terminal Ltd, filed this appeal through the memorandum of appeal dated 30th May 2022 setting out 22 grounds. The appellant seeks for the following prayers:
 - a. This appeal be allowed with costs.
 - b. The ruling of the tribunal delivered and/or issued on 24th May 2022 be set aside and the same be replaced with an order allowing the application dated 25th May 2021 and dismiss the application dated 23rd June 2021 in Net Appeal No. 09 of 2019;
 - c. The status quo as at 5th December, 2019 be reinstated; and



- d. That the appellant be awarded costs of this appeal and costs of the application in the Tribunal. I have summarized the grounds of the appellant as follows:
- i. That the Honourable tribunal admitted the affidavit of Seth Ojienda Advocate dated 7/10/2021 without leave being sought first.
 - ii. That the Honourable tribunal relied on the said affidavit in giving its ruling and orders of 24/5/2022 bearing in mind that the parties had already closed proceedings.
 - iii. That the affidavit supporting the said application for reinstatement was allowed despite the 2nd respondent denying swearing the said affidavit. The appellant implies that the signature is a forgery despite other documents showing the true signature of the 2nd respondent.
 - iv. The appellant avers that the Honourable tribunal ought to have dismissed the afore mentioned application for reinstatement.
 - v. The Honourable tribunal irregularly allowed the firm of Hashim & Leisagor Associates Advocates to represent the 2nd to 5th respondents despite protest from all the parties. The appellant avers that it was summoned to court and gave evidence on 31/3/2021 that it never instructed the firm.
 - vi. That the afore mentioned affidavit by Seth Ojienda advocate was supporting the allegation that the firm of Hashim & Leisagor Associates Advocates was representing the appellant and that the ruling of 8/12/2020 faulted the appellant for not making an application for cross examination of the said Seth Ojienda.
 - vii. The appellant avers that the tribunal erred in law and fact by not following the procedure rules and issuing order that are in ultra vires of its jurisdiction and contrary to section 130 (2) of the Environmental Management and Coordination Act 1999 (EMCA). The appellant gave examples such as;
 - a. The tribunal did not allow enough time for compliance of the pre-trial conference as it scheduled the pre-trial conference 6 days after giving directions for the pre-trial conference.
 - b. The tribunal disregarded the 30 days stay period provided under section 130 (2) of EMCA. The appellant is apprehensive that the tribunal was biased in arriving at its decision of 24/5/2022.
 - viii. That the Honourable tribunal erred in law and fact by not considering the merits of the appellant's application dated 25/5/2021.
2. The learned counsel for the appellant and the 3rd respondent filed their submissions dated the 20th April 2023 and 25th November 2023 respectively, which the court has considered.
3. The issues for the court's determinations are as follows:
- a. Whether the application dated the 25th May 2021 ought to be allowed.
 - b. Whether the court erred in law in allowing the affidavit by the 2nd respondent supporting the 2nd to 5th respondents' application dated 13th March 2020.
 - c. Whether the tribunal conducted proceedings irregularly and thereby occasioned a substantive failure of justice.



- d. Whether or not the application dated 23th June 2021 should be dismissed.
 - e. Who pays the costs?
4. The court has considered the grounds on the memorandum of appeal, the entire records of appeal, submissions by the two learned counsel, superior courts decisions cited thereon and come to the following determinations:

- a. This being a first appeal, the court reminds itself of the principles enunciated in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, thus:

“...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...”

See also the cases of *Ephantus Mwangi & Another versus Duncan Mwangi* [1982-1988] 1KAR 278 and *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 cited in *Opiyo & Another versus Olunje (Civil Appeal No. 148 of 2018)* [2023] KECA 1539 (KLR) 2023.

- b. Mohamed Said, Ali Kaingu, Salim Juma, Hussein Mijuma Kibwana, Yusuf Mwidani, Salim Masudi, Fatma Juma and Mfaki Yusuf Mwidani, participated in this appeal representing the Estate of the 3rd Respondent. The appellant has challenged their participation in the tribunal proceedings, and consequently, their locus in this appeal is also in question. They have through their submissions maintained that there is no complaint against them in this appeal, and that they should be allowed to proceed with the proceedings before the tribunal. Their Counsel reminded the court that the tribunal is not bound by strict rules of evidence as per section 126 (1) and 126(5) of EMCA. The counsel cited the case of *Demutila Namanya Pururmu vs Salim Mohamed Salim Eldoret CACA No. 138 of 2018* and submitted that forgery must be proved beyond reasonable doubt. The counsel pointed out that it is a fact that the said Seth Ojienda commissioned the supporting affidavit of the 2nd respondent after meeting both the 2nd respondent and Mr. Lesaigor advocate.
- c. The record confirms that the appellant had through its notice of preliminary objection dated 27/5/2019 moved the tribunal to strike out the appeal for being filed out of time. The preliminary objection was upheld and the appeal struck out through the order of 5th December 2019. Consequently, the 2nd to 5th respondents filed the application dated the 13th March 2020, seeking for inter alia reviewing/setting aside of the order of 13th December 2019. The 2nd to 5th respondents among others, relied on the ground that the 1st respondent had through its letter dated 4/3/2019 accepted an error it had made with regards to the plot number and therefore, the period for filing an appeal had been extended by 14 days under section 129 (3) (a) and (c) of EMCA. The record of appeal on page 551 on the proceedings of 29/7/2020 show that the tribunal directed that the appellant and 1st respondent to file and serve their replies to the application within 7 days and for all parties to file and serve written submissions in 14 days after service. The next proceedings was on 22/3/2021 and it appears the tribunal was to deal with the issue of representation but due to connectivity challenges, the matter was adjourned to 29th March 2021. On 29th March 2021, 1st April 2021 and 6th April 2021, the tribunal dealt with matter of derogatory remarks by Mr. Okaalo advocate. The same issue was among



those addressed on the 5th May 2021, when the tribunal was informed of an application under certificate of urgency, which according to Mr. Eredi's submissions at page 564 of the record of appeal, was seeking to strike out the 2nd respondent's application and orders reinstating the appeal. The record at pages 355 to 368 has the application by the 2nd respondent dated 10th December 2020, inter alia seeking to reopen the hearing of the application dated the 13th March 2020, and stay the delivery of the ruling. It would appear the application was filed late as the ruling on the application dated the 13th March 2020 had been delivered on the 8/12/2020, which is two days before the application dated 10th December 2020 that was filed on 15th December 2020 was drawn. At page 593 of the record of appeal on the proceedings of 7th July 2021, Mr. Eredi, counsel for the 2nd respondent, submitted on that application as follows:

“I believe the application has been overtaken by events. Unless now I do another application to set aside the ruling as per the grounds that I can see from the application, it's been overtaken by events. Therefore, that application is compromised.”

- d. The issue of forgery in respect of the affidavit to the review application dated the 13th March 2020 did not arise during the hearing of that application, and was not addressed in the ruling delivered on 8th December 2020. The challenge to that affidavit was first raised through the notice of motion dated the 25th May 2021 that was determined through the tribunal's ruling of 24th May 2022. In the said ruling, the tribunal restated the applicants' deposition at paragraphs 9 and 10 inter alia that they “... had not instructed the firm of Lesaigor to file the application dated 13th March 2020 and the signature of the 1st appellant that appears on the affidavit in support of the contested application was a forgery.... The three appellants argued that they never met or interacted with any person from the firm of Lesaigor advocates and are unaware of the application dated 13th March 2020 to reinstate the appeal...” After considering the evidence and submissions by the parties' learned counsel, the tribunal inter alia found that “... the appellants had knowledge of the existence of the application dated 13th March 2020... There was no examination of the signatures by a handwriting expert or any forensic investigations into the contested signature to verify whether the signature was made by the 1st appellant. A party who alleges must prove. The appellants alleged that the 1st appellant's signature appearing on the affidavit of 13th March 2020 was a forgery thus any orders made in reliance to the said affidavit and the application supported by it should be set aside. The tribunal finds that the allegations of forgery and fraud have not been proved and there is no reason whatsoever to cause the tribunal to hold in favour of 1st, 3rd and 4th appellants.” The tribunal then proceeded to dismiss “the application dated the 26th May 2021” with no orders as to costs. I have perused the record and seen the application, which is at pages 375 to 455 of the record of appeal, is dated the 25th May 2021, and not 26th May 2021, which is the date of its filing.
- e. The ruling of 8th December 2020 at paragraphs 14 to 16 confirms that the appellant had participated in the application dated 13th March 2020 for review by filing their grounds of opposition that were considered. I have perused the said grounds of opposition dated the 24th May 2020, that is at pages 342 to 343 of the record of appeal and it does not raise any challenge to the supporting affidavit to the application dated the 13th March 2020. In any case, grounds of opposition are useful in only addressing the issues of law and not fact. The appellant had not filed an affidavit in respect to the application dated the 13th March 2020 through which a challenge to the facts on the supporting affidavit could have been challenged. The following two superior courts decisions are relevant on that position:



In the case of Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR the court stated that;

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”

Further, in the case of Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR the court held as follows: -

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.

- f. Fair hearing in all forums must conform to the prescriptions of Article 50 of *the Constitution*. The article sets out the rights that must be accorded to an accused person/defendant. The provision of section 126 (5) of EMCA and the National Environmental Tribunal Procedure Rules 2003 gives the tribunal wide scope in the conduct of proceedings before it. The appellant has claimed that the tribunal proceedings were irregularly conducted, and was not given sufficient time to comply with pre-trial. The court has perused the proceedings of 7th July 2021 that start from page 587 of the record of appeal and at page 598 the tribunal directed as follows;

“...the advocates for the 1st and 4th appellants have filed an application for expunging of documents and proceedings arising from the order of review. The intendende appellants who have also filed and applicatiob to join the proceedings through advocate Muchiri.Mr. Lesaigor is therefore given five days from the date hereof to file his reply to the application filed by Mr. Okalo for the appellant dated 26th May 2021. Thereafter, Mr. Okaalo learned counsel for the appellant shall file submissions in support of his application within 14 days from the date hereof. The 2nd respondent Mr. Lesaigor shall file the submissions and reply seven days after service of submissions filed by Mr. Okaalo. The intended or proposed appellants’ application filed by Mr. Muchiri dated the 23rd June 2021 shall be served today by email on the advocates present in this matter. The parties shall have seven days from the date of service to file the responses to that application if so wish. The applicants to the application of 23rd June 2021 shall also file their submissions and serve the same with 14 days from today’s date. The respondents to that application will have seven days from the date of service to submissions to reply. Both applications will be fixed for hearing for 3rd August 2021....”

Further directions extending the timelines were given on the 3rd August 2021 2nd September 2021 and 1st October 2021 as confirmed at pages 617 to 619, 624 to 625 and 631 respectively of the record of appeal. The application by the appellant herein, who was the 2nd respondent in the tribunal matter, for leave to cross examine parties and commissioner of oaths was rejected as seen at page 619 of the record of appeal. During the proceedings of the 31st May 2022, that is at pages 633 to 635 of the record of appeal,



the tribunal was informed of orders of this court dated the 17th January 2022 staying the proceedings. The record of appeal confirms the 31st May 2022 is the last day of the tribunal proceedings.

- g. The appellant's claim under grounds 15 to 17 of the memorandum of appeal on the timelines for filing and exchanging replies and submissions on the two applications under considerations appear to be without basis. The proceedings of 7th July 2021, 3rd August 2021, 2nd September 2021 and 1st October 2021 clearly shows the tribunal accommodated all the parties who sought for time to file and serve their replies and or submissions. On the issue of 30 days' notice, Section 130 (2) EMCA provides as follows:

“No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.”

In this matter, the proceedings have already been stayed and there is no decision to be enforced. I do not therefore find any basis to fault the procedure, proceedings and orders by the tribunal so far in this matter.

- h. The application dated the 23rd June 2021 was filed by Mohamed Said Ali Karungu, Salimu Juma, Hussein Mijuma Kibwana, Yusuf Mwidani, Salim Masudi, Fatma Juma, and Mfaki Yusuf Mwidani, seeking to be added as appellants in Net Appeal No. 9 Of 2019. The application was not to substitute the 2nd appellant who had reportedly died. The appellant herein, who is the 2nd respondent in the tribunal matter, opposed the application through the replying affidavit of Engineer Julius Riungu, sworn on 2nd August 2021. The tribunal considered the facts presented and the law and allowed it observing inter alia that “the application is based on grounds that the appeal is based on public interest with regard to a gas plant that is contemplated by the 2nd respondent within the proposed appellants' locality which affect about 10,000 people, and the main leader of the community was Mwakunyapa who has since died.” The tribunal ruling of 24th May 2021 at page 641 to 642 of the record of appeal contains the following orders on the determinations of the applications dated the 25th May 2021 and 23th June 2021;
- a. “The tribunal finds the application dated 26th May 2021 has no merit and is dismissed with no orders to costs.
 - b. The notice of motion application dated 23rd June 2021 is allowed with no orders as to costs.
 - c. Mohamed Said Ali Karugu, Slimu Juma, Hussein Mijuma Kibwana, Yusuf Mwidani, Salim Masudi, Fatma Juma and Mfaki Yusuf Mwidani be and are hereby enjoined in the appeal as the 7th – 11th appellants respectively.
 - d. All parties to file their documents and witness statements within the next 14 days.
 - e. The matter be mentioned for pre-trial conference on 31st May 2022 for a hearing date to be fixed on priority basis.”

The seven persons mentioned under order (c) were joined in the appeal as the 7th to 11th appellants respectively, and not as substitutes for the deceased appellant. The court having considered the above finds that the appellant herein has failed to show in what way the tribunal erred in its finding on factual and legal aspects of the proceedings before it in respect of the applications dated the 25th May 2021 and



23rd June 2021 that were decided through tribunal ruling of 24th May 2022. The appeal is therefore without merit.

- i. It is important to observe that the parties herein should put their efforts in having the appeal pending before the tribunal heard and determined without any further delay. Thereafter, any party that may be dissatisfied will have recourse on appeal to this court.
- j. That though the appellant has failed in the appeal, I am of the considered view that justice will be better served by an order that the costs herein abide the outcome of the tribunal appeal.
 1. In the upshot of the foregoing, the court finds and orders as follows:
 - a. The appellant's appeal is without merit and is hereby dismissed.
 - b. That tribunal finding and orders of 24th May 2022 in respect of the applications dated the 25th May 2021 and 23rd June 2021 are upheld.
 - c. The costs in this appeal to abide the outcome of NET Appeal No. 9 of 2019.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 8TH DAY OF MAY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellant : Mr. Iredi

Respondents : Mr. Okara for 1st, 3rd and 4th Respondents.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

