



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO. 6 OF 2019

JESEE MBUGUA MBUTHI

JOHN MARIRA GICHURE

JANE MUMBI KAMAU (Suing as the Chairman, Secretary and Treasurer

of KOINANGE MICRO-FINANCE TRADERS CBO).....APPELLANTS

VERSUS

THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

REGISTERED TRUSTEE OF

THE NYAHURURU JAMIA MOSQUE.....2ND RESPONDENT

JUDGMENT

A. INTRODUCTION

1. This is an appeal against the ruling and order of the National Environment Tribunal (*the Tribunal*) dated 30th April, 2019 in **National Tribunal Tribunal Appeal No. 24 of 2018 – Jese Mbugua Mbuthi and Others v The Director- General, National Environment Management Authority & Another**. By the said ruling, the Tribunal upheld the 2nd Respondent's preliminary objection on the competency of the appeal and held that it was time-barred under **Section 129 (1) of the Environmental Management and Co-ordination Act (EMCA)**.

2. The material on record shows that vide a memorandum of appeal dated 26th November, 2018, the Appellants sought to challenge the issuance of EIA licence Nos. 0029484 and NEMA/LKP/5/2/349 issued by the 1st Respondent to the 2nd Respondent on 21st December, 2015. The Appellants contended that they were not aware of the issuance of the licences until 2018 hence the limitation period of 60 days could not run against them until they discovered the issuance thereof. They further contended that the 1st Respondent had a legal obligation to notify the general public of its decisions made in granting licences under **EMCA** and that time could not run for purposes of an appeal until a proper notification was made.

3. The record further shows that by its ruling dated 30th April 2019 the Tribunal found that the Appellants' appeal fell squarely within matters stipulated under **Section 129 (1) of EMCA** hence the statutory limitation period of 60 days from the date of the decision applied. The Tribunal further held that **rule 4 of the National Environment Tribunal Procedure Rules 2003**, were inapplicable to facilitate extension of time since the rule only governed appeals under **Section 129 (2)** with respect to other decisions of the Director General, the Committees of the **National Environment Management Authority (NEMA)** and its agents other than those specified under **Section 192 (1)**. The appeal was consequently dismissed with costs to the Respondents.

B. THE GROUNDS OF APPEAL

5. Aggrieved by the said decision, the Appellants filed the instant appeal. In their memorandum of appeal dated 16th May, 2019 they listed the following 7 grounds of appeal:

(a) The learned Tribunal erred in law and in fact in failing to appreciate that time for filing an appeal was not affected by the mandatory statutory limit set by Section 129 (1) of EMCA so long as the decision was never given to or served upon the Appellant.

(b) The learned Tribunal erred in law and in fact in failing to appreciate that no evidence of communication of the grant of the licenses under challenge (in the form of a notice in the Kenya Gazette, media publication or otherwise) was ever adduced by the Respondents so as to justify a finding that the Appeal was time-barred.

(c) The learned Tribunal erred in law and in fact in failing to appreciate that even though the EMCA was amended in 2015, the law as stated in the decision of **Simba Corporation Limited v Director General, National Environment Management Authority & 2 Others (Nairobi ELC Civil Appeal No. 100 of 2015)** is still good law and has never been upset subsequently, indeed it was quoted with approval in the decision **Robert Albert Mumma v Director General, National Environment Management Authority & 2 Others (Tribunal Appeal No. NET 005/2018)**. Therefore, to the extent that the latter decision sought to clarify/restate the application of **Section 129 (1) and 129 (2)**, the latter decision is *per incuriam* and *bad law*.

(d) The learned Tribunal erred in law and in fact in failing to appreciate that the appeal was properly before the tribunal and that the Appellants never sought for or attempted to seek for extension of time to file the appeal as the conditions necessary to consider time to file an appeal had not been met and/or demonstrated by the Respondents until October, 2018.

(e) The learned Tribunal erred in law and in fact in failing to appreciate that the 2nd Respondent's preliminary objection was not properly taken and moreover it was seldom an adequate means of disposing the appeal in view of the lack of proof of communication of the grant of the licenses under challenge (in the form of a notice in Kenya Gazette, media publication or otherwise). This was not a matter limited by statute and apparent on the pleadings as going by the decision of **Simba Corporation Limited v Director General, National Environment Management Authority & 2 Others (Nairobi ELC Civil Appeal No. 100 of 2015)**, all statutory decisions had to be communicated hence the 60 days period had to be reckoned from the date of communication.

(f) In the further result, the learned Tribunal erred by disregarding and failing to take into account credible and reliable evidence presented by the Appellant.

(g) All in all, the learned Tribunal so misdirected itself on matters of both law and fact as to occasion a miscarriage of justice against the Appellants.

6. The Appellants consequently sought the following reliefs:

(a) That the ruling and order of the Tribunal be set aside or quashed in its entirety.

(b) That the appeal be reinstated and remitted back to the tribunal for hearing on merit.

(c) That in the alternative, the court do proceed to hear and determine the appeal.

C. DIRECTIONS ON SUBMISSIONS

7. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were also given timelines within which to file and exchange their respective submissions. The material on record shows that the Appellants filed their submissions on 12th October, 2021 whereas the 2nd Respondent filed its submissions on 15th November, 2021.

D. THE ISSUES FOR DETERMINATION

8. Although the Appellants raised 7 grounds in their memorandum of appeal, the court is of the opinion that resolution of the following 3 issues shall be sufficient to dispose of the entire appeal:

(a) Whether the Tribunal erred in law in entertaining the 2nd Respondent's objection by way of a preliminary objection.

(b) Whether the Tribunal erred in law and in upholding the 2nd Respondent's preliminary objection and holding that the appeal was time-barred.

(c) Who shall bear costs of the appeal.

E. ANALYSIS AND DETERMINATION

(a) Whether the Tribunal erred in law in entertaining the 2nd Respondent's preliminary objection

9. The Appellants submitted that it was improper for the Tribunal to entertain a preliminary objection on the limitation period for filing an appeal because factual evidence was required to demonstrate when the impugned licences were issued, and the date of notification of the decisions to the Respondents. They relied upon the decision of **Simba Corporation Limited v Director General, National Environment Management Authority & 2 Others [2017] eKLR** in support of their submission.

10. The 2nd Respondent, on the other hand, submitted that the preliminary objection was properly taken as it raised a pure point of law. It was further submitted that, in any event, it had also filed a detailed replying affidavit whereby all necessary documents had been exhibited.

11. In the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** a preliminary objection was described as follows:

“ So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. The court is of the opinion that an objection to the effect that an appeal is incompetent for having been filed out of time can be taken up as a preliminary objection. A court of law is not obliged to wait until the hearing of the appeal on merit in order to determine whether or not it is incompetent and time-barred especially where there is material on record from which it may be ascertained that it was filed out of time.

13. The material on record shows that the date of issuance of the two impugned licenses was not in dispute. In fact, the date of issuance was clearly specified in the Appellants' memorandum of appearance before the Tribunal. The date of filing the appeal was also not contested. The date of filing is on the face of the memorandum of appeal and the original file of the Tribunal.

14. The only issue which the Appellants could have canvassed was the reason or explanation for filing the appeal 3 years after the issuance of licences. In its ruling, the Tribunal held that since the Appellants' appeal fell within **Section 129 (1) of EMCA** the prescribed limitation period of 60 days applied hence reasons for the delay were immaterial or irrelevant. So, the adjudication of the preliminary objection by the Tribunal did not require any additional material evidence. However, if the Tribunal had found that the appeal fell within **Section 129 (2) of EMCA**, it may have required additional evidence before it. As to whether the Tribunal was wrong in holding that the appeal fell within **Section 129 (1)** and not **Section 129 (2) of EMCA** is the subject of consideration in the next issue.

(b) Whether the Tribunal erred in law in upholding the 2nd Respondent's preliminary objection and holding that the appeal was time-barred

15. The Appellants submitted that the Tribunal erred in law in holding that the appeal fell within the ambit of **Section 129 (1)** rather than **Section 129 (2) of EMCA**. They submitted that they were not parties to the decision by NEMA to grant the 2 licences hence **Section 129 (1)** could not apply to them. They contended that only **Section 129 (2)** applied to them hence the statutory limitation of 60 days from the date of the decision did not apply to them. They relied upon the case of **Simba Corporation Limited (supra)** in support of the submission. The 2nd Respondent, on the other hand, supported the decision of the Tribunal and submitted that the decision to grant the 2 licences was a matter which fell within **Section 129 (1) of EMCA** as amended in 2015. Most of the decisions relied upon by the 2nd Respondent were decisions of the Tribunal itself.

16. **Section 129 (1) of EMCA** stipulates as follows:

Any person aggrieved by -

(a) 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 regulations made there under;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made there under;

(c) the revocation, suspension or variation of his licence under this Act or regulations made there under;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made there under;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made there under, 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 the Tribunal.

17. On the other hand, **Section 129 (2)** states that:

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

18. The court is of the opinion that the granting of the impugned licences was a matter which clearly fell within **Section 129 (1) of EMCA** and not within the general rubric of **Section 129 (2) of the Act**. The court finds no justification for the Appellants' attempt to bring licensing decisions not within the general provisions of **Section 129 (2)** whereas the Act has specifically provided for such matters in **Section 129(1) (a)**. Accordingly, the court is satisfied that the Tribunal did not err in law in holding that the appeal was filed outside the prescribed limitation period of 60 days from the date of issuance of the impugned licences.

19. It is apparent from the material on record that prior to the amendments to **EMCA** in 2015 the granting of a licence was not among the

appellable decisions under **Section 129 (1) of the Act** but with the amendment of 2015 the intention of the legislature was made plain. Accordingly, the court finds no fault in the Tribunals' decision to hold that the appeal before it was time-barred under **Section 129 (1) of EMCA**.

C. Who shall bear costs of the appeal

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful Respondent should not be awarded costs of appeal. Accordingly, costs shall be awarded to the 2nd Respondent only since the 1st Respondent did not participate in the appeal.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 3RD DAY OF FEBRUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM

In the presence of:

No appearance for the Appellants

No appearance for the 1st Respondent

Ms. Mary Wanjiku for the 2nd Respondent

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Y. M. ANGIMA

JUDGE