



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL CASE NO. 53 OF 2016**

**RUNDA WATER LIMITED.....APPELLANT**

**VERSUS**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY....1ST RESPONDENT**

**DR MOSES KINUTHIA.....2ND RESPONDENT**

**JUDGMENT**

1. On 30/6/2015, the National Environment Management Authority (**NEMA**) granted Dr Moses Kinuthia (**the 2nd respondent**) a licence to drill a borehole on Land Reference No 7785/112, situated in Runda, Nairobi. Aggrieved by that decision, the appellant, Runda Water Limited, filed an appeal in the National Environment Tribunal (**the Tribunal**) seeking a revocation of the said licence. On 14/3/2016, **NEMA** filed a notice of preliminary objection to the said appeal, dated 11/3/2016, contending that the appeal was time-barred. The preliminary objection was canvassed before the Tribunal and in a ruling dated 28/4/2016, the Tribunal upheld the preliminary objection, holding that the appeal was filed under **Section 129(2)** of the **Environmental Management and Co-ordination Act [the EMCA]** and that the appeal was filed out of time and without an order extending time. Consequently, the Tribunal struck out the appeal.

2. Aggrieved by the decision of the Tribunal, the appellant brought this appeal under **Section 130** of the **EMCA** and urged the court to set aside the decision of the Tribunal on the following grounds:

*1) The Learned Chairperson and Members of the Tribunal erred in law and in fact in failing to appreciate that the time vis-a-vis the lodging of appeals arising from S. 129(2) of the Environmental Management & Co-ordination Act (EMCA) was as stipulated under Rule 4(2) of the National Environmental Tribunal Procedure Rules, 2003.*

*2) The Learned Chairperson and the Members of the Tribunal erred in law and in fact in failing to uphold [sic] that the 1st Respondent's Preliminary Objection resultant into the ruling was urged on the basis that the contention by the appellant that it was notified for the first time of the 1st Respondent's grant of EIA Licence dated 30th June, 2015 to the 2nd Respondent as pleaded under paragraph 6 of the Notice of Appeal dated 29th November, 2015 and filed at the National Environment Tribunal on the same date was correct.*

*3) Consequently, the Learned Chairperson and Members of the Tribunal erred in law and in fact in failing to find and hold that time limited for the filing of an appeal under Rule 4(2) of the National Environmental Tribunal Rules, 2003 for the case of the Appellant began to run the time the Appellant was served with the decision of the Director General granting the aforementioned licence to the 2nd Respondent.*

*4) The Learned Chairperson and Members of the Tribunal misinterpreted the words "to reach it not later than sixty (60) days after the date on which the disputed decision was given to or served upon him" as used in Rule 4(2) of the National Environmental Tribunal Rules, 2003 as applying to the 2nd Respondent rather than the Appellant in the aforesaid appeal.*

*5) The Learned Chairperson and Members of the Tribunal erred in law and in fact in finding that the Appellant's appeal filed out of time on 1st December, 2015.*

*6) The Learned Chairperson and Members of the Tribunal erred in law and in fact in holding that the Appellant needed to first apply for the extension of time under Rule 7 of the National Environmental Tribunal Rules, 2003.*

**7) Consequently, the Learned Chairperson and Members of the Tribunal lacked any sound legal and/or factual basis upon which they allowed the 1st Respondent's Preliminary Objection dated 11th March, 2016 and the attendant dismissal of the Appellant's Notice of Appeal dated 29th November, 2015 and filed on 1st December, 2015.**

3. The appeal was canvassed through brief written submissions dated 6/6/2020, filed by the firm of *Ochieng, Onyango, Kibet & Ohaga Advocates*. Counsel for the appellant condensed the above seven grounds of appeal into one issue: Whether the Tribunal erred in law to uphold the objection and strike out the appeal. Counsel submitted that the appellant was not a party to the determination by NEMA and their appeal to the Tribunal was filed under **Section 129(2)** of the EMCA. Counsel contended that the applicable limitation period for the appeal was 60 days from the date when they were given or served with the determination by the EMCA, as prescribed under **Rule 4(2)** of the National Environment Tribunal Procedure Rules (the **NET Rules**). Counsel submitted that the Tribunal's reliance on the letter dated 29/10/2015 as conclusive evidence for inferring that the appellant had been furnished with copies of relevant approvals and permits and therefore the appeal before it was time-barred was wrong because the said letter did not disclose the date when the documents were furnished to the appellant for the purpose of reckoning time. Counsel cited this court's decision in **Simba Corporation Limited v Director, National Environment Authority (NEMA) & Another [2017] eKLR** and urged the court to allow the appeal.

4. The 1st respondent opposed the appeal through written submissions dated 2/2/2021, filed by *Ms Emma Lisanza Advocate*. Counsel for the 1st respondent identified the following as the three issues falling for determination in this appeal: (i) Whether the Tribunal's decision delivered on 28/4/2016 should be set aside; (ii) Whether the reliefs sought is nugatory; and (iii) Whether this appeal should be struck out with costs.

5. On the first identified issue, counsel submitted that **rule 4 (2)** of the NET Procedure Rules required the appellant to deliver an appeal to the Tribunal within 60 days from the date when NEMA's decision was issued or served upon them. Counsel contended that the date when the appellant got to learn about the decision was not the event prescribed by the rules. Counsel contended that the contention that the appellant learnt about NEMA licence three months after its issuance should not be a basis for bringing the present appeal.

6. On the 2nd issue, counsel submitted that because the borehole had been drilled, allowing this appeal and adjudication of the dispute at the Tribunal would be an academic exercise. Lastly, counsel urged the court to "strike out" the appeal with costs.

7. The second respondent opposed the appeal through written submissions dated 19/1/2021, filed through the firm of *Oundo, Muriuki & Company Advocates*. Counsel for the 2nd respondent submitted that the sole issue falling for determination in the appeal was whether the appeal had been overtaken by events. Counsel contended that the appeal had been overtaken by events because the 2nd respondent had already sunk the borehole which was the subject of the impugned licence. Counsel urged the court to dismiss the appeal on that ground.

8. I have considered the grounds of appeal and the entire record of appeal; the parties' respective submissions; the legal framework on the key issue in this appeal; and the prevailing jurisprudence on the key issue in the appeal. The key issue in this appeal is whether there was a proper legal basis upon which the Tribunal upheld the 1st respondent's preliminary objection and struck out the appellant's appeal for being time-barred

9. Our courts have oftentimes stated that striking out a case is a draconian recourse that should only be resorted to where the case is clear. It is draconian because it has the effect of shutting the door to the seat of justice on the litigant.

10. Secondly, our courts have been categorical that preliminary objections are canvassed and disposed on the basis of pleadings before court. Where an issue requires further ascertainment through evidence, that issue cannot be disposed on the platform of a notice of preliminary objection. [see **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited [1909] EA 696**]

11. In the appeal before me, the parties and the Tribunal were all in agreement that the appeal before the Tribunal fell under Section 129(2) of the EMCA. They were also in agreement that the limitation period of the impugned decision was stipulated under **rule 4(2)**. **Rule 4** provides thus:

***"4(1) An appeal to the Tribunal shall be made by written notice, and where the Tribunal has approved a form of notice for the purpose, in the form so approved.***

***(2) The appellant shall send or deliver six copies of the notice of appeal to 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"***

12. I have underlined the words "was given to or served upon him" because the first question which the Tribunal ought to have determined was whether the Objector [NEMA] had demonstrated that they gave or served upon the appellant the impugned decision and that a period of 60 days had lapsed without them lodging an appeal. Regrettably, the Tribunal did not consider it pertinent to determine this important question. As at the time of striking out the appeal on the ground that it was statute-barred, the objector had not demonstrated to the Tribunal that they gave or served upon the appellant the impugned decision on a particular date.

13. Secondly, whenever objection to a case is raised on the basis of limitation, the adjudicating body has a duty to establish the relevant limitation period and thereafter make a clear pronouncement on when time started running and when the limitation period lapsed. In the present appeal, the Tribunal elected to strike out the appeal before it without ascertaining when the 60 days limitation period started running and when it lapsed.

14. Thirdly, the appeal at the Tribunal was lodged on 1/12/2012. While striking out the appeal on the ground of limitation, the Tribunal relied on letters dated 29/10/2015 and 6/11/2015 from the 2nd respondent's advocates to the appellant. Neither of the two letters forwarded a copy of the impugned NEMA License to the appellant. Neither of them was specific on when a copy of the impugned NEMA licence was given to or served upon the appellant. There was therefore nothing in the said letters to suggest that the appellant had been given or served

with a copy of the impugned licence on a particular day. The two letters, therefore, cannot be said to constitute a proper basis upon which to make a conclusive finding to the effect that the **Section 129(2)** appeal was filed outside the prescribed time of 60 days.

**15.** I would have commented on the impropriety of the Tribunal admitting an affidavit while considering a preliminary objection but I restrain from commenting on the issue because it was not canvassed before me.

**16.** The respondents urged the court to dismiss the appeal on the ground that it has been overtaken by events because the contemplated borehole had been sunk. Firstly, whether or not the borehole has been sunk is not one of the questions I was invited to establish. Secondly, what is before court is a dispute relating to the environment. One of the guiding principles in the adjudication of environmental disputes is that it is never too late to undo or mitigate damage to the environment.

**17.** The totality of the foregoing is that this appeal has merit and should be allowed. Because the errors giving rise to the appeal were committed by the Tribunal, I will not make any award in relation to costs of this appeal.

**18.** Ultimately, my finding on the single issue in this appeal is that the Tribunal did not have sufficient conclusive evidence or proper basis to enable it come to the conclusion that the appeal before it was time-barred. The order striking out the appeal was made without proper legal basis. Consequently, the present appeal is disposed in the following terms:

*a) The ruling of the National Environment Tribunal rendered on 28/4/2016 upholding NEMA's objection and striking out the appellant's appeal is set aside.*

*b) Tribunal Appeal No NET/162/2015 is remitted for further consideration by the Tribunal*

*c) There shall be no award relating to costs of this appeal*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF JULY 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Mwangi holding brief for Ms Lisanza for the 1st Respondent

Mr Muthee for the Appellant

Court Assistant: June Nafula