



**Erdermann Property v London Distillers (K) Limited & another (Environment and Land Appeal 2 of 2023) [2025] KEELC 3795 (KLR) (13 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3795 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 2 OF 2023**

**AY KOROSS, J  
MAY 13, 2025**

**BETWEEN**

**ERDERMANN PROPERTY ..... APPELLANT**

**AND**

**LONDON DISTILLERS (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

*(Being an appeal against the Judgment/Order of the Honourable National Environment Tribunal at Nairobi (Honourable Mohammed S. Balala, Chairman; Honourable Christine Kipsang, Vice-Chairperson; Honourable Babati Mwamuye; Honourable Waithaka Ngaruiya; and Honourable Dr. Kariuki Muigua) delivered on 30/09/2020 in National Environment Tribunal Appeal No. 21 of 2019)*

**JUDGMENT**

**Factual background.**

1. This appeal emanates against the decision of the National Environmental Tribunal (NET) whereby the 1<sup>st</sup> respondent lodged a notice of appeal dated 14/08/2019 against the decision of the 2<sup>nd</sup> respondent, which was in the appellant's favour. For clarity, in that appeal, the appellant and the 2<sup>nd</sup> respondent were respondents.
2. The appeal raised several grounds, some of which were ostensibly preliminarily dealt with in a ruling rendered by NET on 6/12/2019.
3. The general effect of this ruling was that a few of the grounds of appeal were subjected to a hearing on merits, while the rest fell by the wayside. Subsequently, the residual grounds were heard, and the respective parties called for expert evidence.



4. The appellant's evidence was led by Kennedy Kijana, an environmental impact assessment expert, the 1<sup>st</sup> respondent by Benjamin Langwen, an environmental management expert and the 2<sup>nd</sup> respondent by Francis Chwanya, who was its compliance and enforcement officer. Lastly, counsel Kisilu Amos was also summoned to give his testimony.
5. Upon conclusion of the hearing, all parties filed written submissions and the matter was subsequently reserved for judgment.
6. In the impugned decision, NET framed the following issues for determination; whether the impugned project required a strategic environmental assessment, whether due process of the law as provided in the *Environmental Management and Co-ordination Act* (EMCA) and the regulations thereof were observed in issuance of the disputed Environmental Impact Assessment (EIA) license and lastly, what orders should NET make.
7. In the impugned decision, the 1<sup>st</sup> issue was found in the negative, the 2<sup>nd</sup> one in the positive and on the last issue, it dismissed the appeal and ordered each party to bear its respective costs.

#### **Appeal to this court.**

8. The appellant faulted a portion of this decision and filed a memorandum of appeal dated 1/10/2020, which raised the following summarised grounds of appeal;
  - a. NET failed in law and fact for failing to hold Benjamin Langwen liable for lying under oath by supposing the 1<sup>st</sup> respondent had not participated in the public consultation exercise, whereas the adduced evidence evinced their unequivocal participation.
  - b. NET erred in law and fact by failing to find and hold the 1<sup>st</sup> respondent had abused the civil legal process by bringing a claim without reasonable and/or probable cause and actuated by malice, misrepresentations and falsehoods.
  - c. NET erred in law and fact by failing to find and hold the 1<sup>st</sup> respondent had acted frivolously, vexatiously and unreasonably in appealing and consequently, an award of costs on a full indemnity basis should have been granted.
9. Accordingly, the appellant implored this court to find Benjamin Langwen guilty of perjury, for him and the 1<sup>st</sup> respondent's directors to show cause why they should not be committed to custodial sentencing or fine, costs of the appeal that was before NET together with interests from the date of filing on full indemnity basis which should be borne by the 1<sup>st</sup> respondent and costs of this appeal.
10. As directed by the court, the appeal was canvassed by way of written submissions, but unfortunately, the 2<sup>nd</sup> respondent did not participate in these proceedings.

#### **Submissions and preliminary issues.**

11. The appellant's submissions dated 5/12/2023 filed by the law firm of M/s. C.M. Advocates LLP collapsed grounds (a) and (b) of the appeal into a singular ground.
12. On arguing these consolidated grounds, the appellant argues that because of the perjury alluded to in ground (a), then it followed that the appeal before the NET was frivolous, vexatious and unreasonable as stated in grounds (b) and (c) and thus entitled to costs as stated in ground (c).
13. Put another way, all the grounds of appeal are interlinked and the outcome of ground (a) of the appeal has a domino effect on the outcomes of the other grounds.



14. Nonetheless, there is a shortcoming on ground (a), and this court agrees with the submissions dated 15/04/2024 by the law firm of Ms. Tiego and Co. Advocates, who are on record for the 1<sup>st</sup> respondent, that the issue of perjury is a new ground that has been introduced on appeal.
15. This court's position is anchored in the Court of Appeal decision of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, where Asike-Makhandia JA stated that the only evidence that can be entertained by an appellate court was only that which formed part of the record.
16. This ground (a) of the appeal was not subjected to determination by NET, and since it was never pleaded, canvassed, raised, or succinctly made an issue before the NET to enable it to exercise its mind upon it, then this court will not consider it.
17. Guidance on this is drawn from the Court of Appeal decision of Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] KECA 692 (KLR), which stated:-

“Due to these fundamental concerns, the Courts has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In *Openda v. Ahn*, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have be properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea.”

18. In that regard, it is surprising that the appellant claims that the NET ought to have, on its own motion, raised the issue of perjury. That cannot be so, as its case before the NET belonged to it, and the appellant had a duty to specifically plead perjury, which it did not.
19. If the appellant considered Benjamin Langwen's evidence was perjured, nothing stopped it from raising the issue before the NET, which had the opportunity to see and hear this witness.
20. Having failed to do so, it cannot raise that issue this late in the day. In the end, this court finds no evidence on record was led on the issue of perjury and concludes this is a new ground introduced on appeal.
21. Consequently, ground (a) of the appeal fails, and since the outcomes of grounds (b) and (c) were all hinged on the outcome of this ground, they equally fail.
22. Ultimately, this court finds and holds that this appeal is devoid of merit. It is hereby dismissed, and this court upholds the judgment of NET that was delivered on 30/09/2020.
23. Accordingly, the appeal fails and is hereby dismissed. It is trite law that costs follow the event, and each party shall bear their respective costs of the appeal.

It is so ordered.

**DELIVERED AND DATED AT MACHAKOS THIS 13<sup>TH</sup> DAY OF MAY, 2025.**



**HON. A. Y. KOROSS**  
**JUDGE**

