



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL APPEAL NO.21 OF 2019

PAKWOOD INVESTMENTS LIMITED.....1ST APPELLANT

DERBY HOLDINGS LIMITED.....2ND APPELLANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT

MAJESTIC LIMITED.....2ND RESPONDENT

FINESSE HEALTH & BEAUTY CLINIC.....3RD RESPONDENT

EASTWOOD ESTATES LIMITED.....4TH RESPONDENT

KAUSHIK L SHAH.....5TH RESPONDENT

KEVAL SHSH.....6TH RESPONDENT

HARAT LAKHANI.....7TH RESPONDENT

JOSEPH TANK.....8TH RESPONDENT

(Being an appeal from the ruling and orders of the National Environment Tribunal

dated 8th March 2019.

JUDGEMENT

1. This is a memorandum of appeal dated 4th April 2019, arising from the ruling and orders of the National Environment Tribunal dated 8th March 2019 in **Tribunal Case No.002 of 2019**.
2. The Appellants herein filed an appeal in which they had challenged the 1st Respondent's grant of license No. NEMA/EIA/PSL/6998 to the 2nd Respondent.
3. The 2nd Respondent filed a preliminary objection on jurisdiction of the Honourable Tribunal to hear and determine the matter arguing that the Appeal before the Tribunal was filed outside the sixty (60) days

period provided under Section 129(1) of the Environment Management and Coordination Act.

4. The 2nd Respondent's Preliminary Objection dated 14th February 2019 sought orders:-

"1. That the Appeal filed by the Appellants be dismissed with costs for being time barred by virtue of Section 129 of the Environmental Management and Co-ordination Act and Rule 4(2) of the Environmental Management and Co-ordination Tribunal Procedure Rules, 2003.

The same is premised on the grounds that:-

"1) The Appellants filed the Appeal out of time without leave of court in blatant violation of Section 129 of the Environmental Management and Co-ordination Act and Rule 4(2) of the Environmental Management and Co-ordination Tribunal Procedure Rules.

2. That the Act provides for mandatory statutory timelines for lodging of appeals being 60 days from the time the licence was issued to the 2nd Respondent.

3. That the Appeal is therefore time barred and the Tribunal cannot rightly hear and determine the matter.

4. That it is in the interest of justice that the prayers sought herein are granted."

5. The National Environment Tribunal upon considering the said preliminary objection made the following findings:-

"It is therefore the Tribunal's finding that the appeal filed by the 1st and 2nd Appellants is one under section 129(1) of the Environmental Management and Co-ordination Act. The time limit of 60 days runs from the date of issuance of the licence and in the instant case was filed outside the statutory period. Relying on the Court of Appeal decision in Civil Appel No 209 of 2015; Maersk Kenya Limited vs Murabu Chaka Tsuma. The statutory time count is not suspended or affected by the period from 21st December to 6th January ("the excluded period") in the absence of any legal provision permitting the tribunal to incorporate the same.

ORDER

42. For the reasons stated the 2nd Respondent's Preliminary Objection is hereby allowed and the appeal dismissed for lack of jurisdiction on the part of the Tribunal with costs to the 2nd Respondent".

6. The Appellants aggrieved by the said ruling, have appealed to this court vide the Memorandum of Appeal dated 4th April 2019. The grounds are:-

(i) The Tribunal erred in law and fact in not appreciating sufficiently or at all that there was no adequate public participation in compliance with the provisions of Article 69(1) (d) of the Constitution and Section 58 and 59 of the Environmental Management and Co-ordination Act prior to the issuance of Licence No NEMA/EIA/PLS/6998 dated 20th November 2018 and hence the Appellants could not have had knowledge of the issuance of the aforesaid licence on 20th November 2018.

(ii) The Tribunal erred in law and in fact in not appreciating sufficiently or at all that the Appellants became aware of the 1st Respondent's issuance of Licence No. NEMA/EIA/PLS/6998 dated 20th November 2018 to the 2nd Respondent in mid January 2019 when the 2nd Respondent started felling trees at the suit premises so as to commence construction and timeously lodge an appeal at the Tribunal on 23rd January 2019.

(iii) The Tribunal erred in law and in fact in holding that at the time of filing the appeal by the Appellants it was possible to determine precisely when the licence was issued notwithstanding the Appellant's averments that the 1st and 2nd Respondents did not comply with the provisions of Section 58 and 59 of the EMCA prior to the issuance of Licence No. NEMA/EIA/PLS/6998 and that the aforestated Licence was issued in a clandestine manner.

(iv) The Tribunal erred in law and in fact in holding that the Appellants' Appeal fell within the ambit of Section 129 (1) of the EMCA notwithstanding the Tribunal's finding "that the appellant bringing an appeal under section 129(1) of EMCA must have participated in the process leading to issuance of a licence in order to have locus standi".

(v) The Tribunal erred in law and in fact in not appreciating sufficiently or at all that the Appellants' appeal was within the ambit of Section 129 (2) of EMCA and the limitation period for lodging an appeal thereunder is as stipulated under Rule 4 (2) of the National Environmental Tribunal Procedure Rules 2003.

(vi) The Tribunal erred in law and in fact in failing to adhere to the provisions of Articles 25(c), 48 & 50 (1) of the Constitution by holding that the Appellants' appeal was filed out of time.

(vii) The Tribunal erred in law and in fact in dismissing the Appellants' appeal notwithstanding the evident injustice in allowing the 2nd Respondent to obtain an advantage by the clandestine issuance of Licence No. NEMA/EIA/PLS/6998.

(viii) The Tribunal erred in law and in fact in dismissing the Appellants' appeal notwithstanding the 2nd Respondent's non adherence to procedures for the protection of the environment including failure to conduct adequate public participation prior to commencing construction on LR NO 1870/III/150, Matundu Lane, Nairobi in violation of Articles 42, 69 and 70 of the Constitution.

7. IT IS PROPOSED to request this honourable court for orders that:-

(a) This appeal be allowed with costs to the Appellants.

(b) The Ruling and orders in Tribunal Appeal No. NET/002/2019 issued on 8th March 2019 be set aside and substituted with an order dismissing the 2nd Respondent's preliminary objection dated 14th February 2019 with costs.

(c) Pending the hearing and determination of the Appellants' Appeal dated 23rd January 2019, interim orders be issued directing the 2nd Respondent to stop all construction activities on LR NO 1870/III/150, Matundu Lane, Nairobi so as to protect the environment from irreparable damage.

(d) This honourable court do proceed to hear and make a determination on the Appellants' Appeal dated 23rd January 2019 lodged at the Tribunal challenging the 1st Respondent's issuance of the Licence No NEMA/EIA/PSL/6998 dated 20th November 2018 to the 2nd Respondent.

(e) Such further or other order as this honourable court will consider just and expedient in the circumstances.

8. On the 26th February 2020 the Court with the consent of the parties directed that the Appeal be canvassed by way of written submissions.

The Appellants' submissions

9. They are dated 1st March 2021.

10. The Appellants identified the following issues for determination:-

a) Whether the tribunal erred in law & fact in holding that that the Appellant's appeal fell within the ambit of Section 129(1) of Environmental Management and Coordination Act.

b) Whether the tribunal violated the provisions of Article 25(1), 48 & 50(1) of the Constitution by holding that the Appellant's appeal was filed out of time.

11. On the issue whether the appeal fell within the ambit of Section 129(1) of Environmental Management and Coordination Act, the Appellants submitted that their appeal was brought under Section 129(2) of Environmental Management and Coordination Act and it was lodged timeously on 23rd January 2013 immediately they became aware of the issuance of the license.

12. They also submitted that the tribunal correctly stated on the issue of locus that, "on the question of locus, it is now also accepted that the Appellant bringing an appeal under Section 129(1) of Environmental Management and Coordination Act must have participated in the process leading up to the issuance of a license in order to have *locus standi*." They however faulted the tribunal for failing to interrogate the facts in order to make a determination on whether the Appellants participated in the process leading up to the issuance of the license.

13. They submitted that had the tribunal interrogated the facts, it would have found that their appeal was proper because they did not participate in the process leading up to the issuance of the license and they demonstrated those facts vide a further supplementary affidavit dated 1st March 2019 and the 5th Respondent's affidavit dated 5th March 2019.

14. They added that the question of whether they participated was a central issue for determination thus the tribunal abdicated its constitutional duties in terms of Articles 25(c), 50(1) & 159(2)(e) of the Constitution by failing to determine the said issue. They relied on the case of **Royal Media Services Limited & 2 Others v Attorney General & 8 Others [2014] e KLR**.

15. They also submitted that as the determination of the 2nd Respondent's preliminary objection called for investigation of facts, it was not a true preliminary objection and it ought to have been dismissed. They relied on the case of **Mukisa Biscuit Manufacturing Co.Ltd v West End Distributors Ltd [1969] E.A** as cited in **Oraro vs Mbaja [2005]e KLR**.

16. On the issue of violation of Article 25(1), 48 & 50(1) of the Constitution, they submitted that their grievances are perfectly suitable for adjudication thus to deny them an opportunity to be heard is contrary to the rights envisaged in the aforementioned articles of the constitution. They relied on the cases of **Francis Karioko Muruatetu & Another [2017] e KLR** and **Kenya Bus Service Ltd & Another v Minister For Transport & 2 Others[2012]e KLR**.

The 2nd Respondent's submissions.

17. They are dated 21st May 2021. The Respondent identified the following issues for determination.

a) Was the appeal falling within Section 129(1) of the Environment Management & Coordination Act?

b) Did the Appellants participate in the EIA process culminating with the issuance of the license?

c) *Is a preliminary objection on limitation of time a proper preliminary objection?*

d) *Was the Appellant's right of fair hearing violated by the Tribunal?*

18. On the issue whether the Appeal fell under Section 129 (1) of Environmental Management and Coordination Act. It submitted that it opposed the Appellants contention that their appeal at the Tribunal was filed within the confines of Section 129(2) of Environmental Management and Coordination Act and therefore the same could not be subject to the time limitation under Section 129(1) of the Act.

19. It further submitted that Section 129(1) & (2) are distinct in that subsection 1 deals with the issuance, rejection or imposition of condition of a license by any person aggrieved by the decision of the authority relating to licenses while Subsection 2 relates to the other administrative decisions of the Authority apart from those covered under subsection 1.

20. It added that the Appellants appeal at the Tribunal fell squarely under subsection 1 because the substratum of the Appellants case before the Tribunal was the issuance of the license under section 129(1).

21. It also submitted that to invite the Tribunal to extend the timelines limited by statute would be contrary to statute and the intention of parliament since limitation of time is meant to ensure that grievances are raised timeously to prevent a miscarriage of justice against the Respondents.

22. It submitted that the Record of Appeal has the Appellants' filled questionnaires, letters by Westlands Residents Association on behalf of residents including the Appellants and the Appellants' letter dated 10th December 2018 which prove that the Appellant participated in the process leading to issuance of a license to the 2nd Respondent thus having lodged a complaint solely against the issuance of the licence, the Appellant's complaint fell under Section 129(1).

23. It submitted that limitation as to time is an instance when a preliminary objection may be raised. It relied on the Supreme Court's decision in **Kalpana H.Rawal & 2 Others [2016] e KLR** where the court considered a plea of limitation as a ground for a preliminary objection.

24. On the issue whether the Appellant's right to a fair hearing was violated, the Respondent submitted that there was no violation of the Constitution as the right to hearing is applicable both ways thus any delay by the Appellants to exercise this right should not be meted out against the 2nd Respondent. It further submitted that enactment of the Environmental Management & Coordination Act was done in accordance with Article 47 of the Constitution in order to ensure efficient determination of suits and access to justice and that jurisdiction of a court flows from either the Constitution or legislation or both.

25. I have considered the Grounds of Appeal, the written submissions filed on behalf of the parties, the oral highlights and the authorities cited. The issues for determination are:-

(i) *Whether the National Environment Tribunal erred in law and in fact by holding that the Appellants' Appeal fell within the ambit of Section 129(1) of Environmental Management & Coordination Act.*

(ii) *Whether the National Environment Tribunal breached the Appellants' right to a fair hearing.*

(iii) *Is the Appeal merited?*

(iv) *Who should bear costs of this Appeal?*

26. It is the Appellant's submissions that the Tribunal ought to have ascertained that the Appellants participated on the process leading to the issuance of the Environmental Impact Assessment Licence. It ought to have called evidence and not dismiss the Appeal on a preliminary objection.

27. According to **Black's Law Dictionary, 10th Edition** a preliminary objection is defined as:-

“In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. An objection to the courts’ jurisdiction is an example of a preliminary objection.”

In the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** the court stated thus as per Sir Charles Newbold P;

“.....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought, is an exercise of judicial discretion”.

Law JA stated;

“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 out of pleadings, and which if argued as a preliminary objection 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”.

28. **Section 129 (1)** of the Environmental Management & Coordination Act provides that:-

Any person who is aggrieved by—

Any person who is 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 its regulations;

(b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

(c) the revocation, suspension or variation of the person's licence under this Act or its regulations;

(d) the amount of money required to paid as a fee under this Act or its regulations;

(e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

29. In conformity with the Physical Planning Act requirements the 2nd Respondent put up a notice of change of use in the Standard Newspaper of 13th July 2018. It proposed to change use of LR NO 1870/III/150 Matundu Lane Westlands from single dwelling unit to multi dwelling (Apartments).

30. The 2nd Respondent as per the Environmental Management and Coordination Act Regulations distributed questionnaires to be filled by the people to be affected by the project. From the Record of Appeal, there are questionnaires filled by the Appellants and other residents of the area. Most of them objected to the project. It is therefore correct to state that the 2nd Respondent held consultation and public participation forums with the area residents and other persons who were likely to be affected by the project.

31. By a letter dated 15th August 2018 to the County Secretary Nairobi City County, by Westlands Association Limited;

“15th August 2018

The County Secretary

Nairobi City County

P. O. Box 30075 – 00100

NAIROBI

Dear Sir

RE: OBJECTION TO THE PROPOSED RESIDENTIAL DEVELOPMENT ON LR NO 1870/III/150

We refer to the above mentioned subject matter and the public notice in the Standard Newspaper on the 13th of July 2018 inviting objections and comments to the proposed development.

The Westlands Association and the majority of the aggrieved residents of the Brookside area in Westlands object to the proposed residential development on LR NO 1870/III/150 consisting of fourteen (14) floors on the following grounds:-

- At the time of the publication of the public notice in the Standard Newspaper dated 13th July 2018, the developers of the proposed development had failed and/or ignored to fulfil some of the mandatory requirements under the Physical Planning Regulations such as; failure to erect a board notifying the general public of the change of use from single dwelling to multi dwelling as well as the specifications of the intended development. The developers erected a board on the premises on the 9th of August 2018, whereas by regulation boards have to be erected at all roads leading to this property for proper public awareness.**
- The existence of the narrow road, being Matundu Lane on which this property is, cannot withstand the traffic that will be caused due to the proposed development and will adversely affect the convenience of road users including pedestrians. No traffic study has been provided.**
- Currently there are no high rise buildings on Matundu Lane. The reason for this is but the obvious being the overall infrastructure cannot support this kind of development at all on a narrow lane which is so narrow that two cars in opposite directions cannot pass with ease. To add to this there are no footpaths on the lane for pedestrians. We request the report on infrastructure development.**
- Matundu lane, has currently become the only exit for all traffic in Waiyaki Way. Any further increase in traffic in Matundu lane will certainly create continuous grid-lock traffic.**
- Assuming each dwelling unit has two cars each this will result in approximately 200 vehicles, thereby, drastically increasing not only traffic congestion but increased fuel emission which will have a negative impact on the air quality too.**
- The proposed development will result in increased strain on accessibility to water, storm water and on the sewage system too.**
- At the moment there is no consistent electricity supply and the added immense proposed development will increase the inconsistency of supply. The proposed development would necessitate a large transformer for the area.**
- A 14 floor development will have an adverse effect on the residential amenity of the resident**

by reason of among other factors dramatic increase in noise pollution, disturbance, overlooking, loss of privacy, deprivation of sunlight and the loss of existing views.

· The proposed development will be over-bearing, out of scale and character in term of its appearance development will be overbearing, out of scale and character in terms of its appearance compared with existing developments in the vicinity which consists of single dwelling residential units.

· There will be numerous security challenges commonly associated with large construction projects of this nature.

Kindly avail the following:-

- 1. Traffic study*
- 2. Infrastructure study i.e electric, water etc.*
- 3. Any other plans*

Please do advise as to when we may have a meeting to discuss the proposed development.

Attached to this letter is the signed objections of the concerned residents.

Yours sincerely,

Petronilla Nafula

Chairperson

Encls. As above.”

32. There is another letter to the Director General, National Environment Management Authority dated 10th December 2018 in which the area residents including the Appellants herein raised their concerns to the said project. Following the complaints the Director General wrote to the Director of the 2nd Respondent about the concerns of the residents and directed it to stop any activities on the suit property.

33. It appears the 2nd Respondent engaged the residents on the concerns raised because there is a letter dated 16th October 2018 from Westlands Residents Association;

“Our Ref: WAL/081/2018

Date: 16th October 2018

To Officer in charge of EIA

Dear Sir/Mada

RE: OBJECTION TO DEVELOPMENT ALONG MATUNDU LATE PLOT NO. OR 1870/III/150

Greetings from Westlands Association

Following the meeting that was held on 15th August 2018 at Golden Tulip hotel along Muthithi road, members of Westlands Association deliberated on the issue above and agreed as per the report attached. The following were consulted and information shared:-1. EIA – Planner Mr.

Murithi

2. Developer Mr. Medhanie

3. Residents meeting

We believe all the concerns we had raised have been answered as we have consulted widely. We therefore withdraw our objection.

Petronilla Nafula -CEO

Westlands Association Limited

Tel: 0723437278”

The same was received by National Environment Management Authority on 18th October 2018. Later on an Environmental Impact Assessment License was issued on 20th November 2018.

34. It is not in dispute that prior to the issuance of the Environment Impact Assessment Licence to the 2nd Respondent as can be seen from the correspondences in the Record of Appeal, the Appellants participated. It was therefore rightly held by the Tribunal that the Appellants had the *locus standi* to file the Appeal dated 23rd January 2019.

35. The Appellants were challenging the issuance of the Environmental Impact Assessment Licence to the 2nd Respondent. The same was issued on the 20th November 2018.

36. Under Section 129 (1) of the Environmental Management and Coordination Act the Appellants had to file the appeal to the court within sixty (60) days from 20th November 2018. By filing the same on 23rd January they were time barred. This is an issue which goes to the root of the Appeal and whether the tribunal would have jurisdiction to entertain the said Appeal. In my view this was a pure point of law which had to be determined by the Tribunal. I find that the preliminary objection raised by the 2nd Respondent was a pure point of law.

37. I disagree with the Appellants submissions that the Tribunal ought to have interrogated facts as to whether they had participated on the process prior to the issuance of the Environmental Impact Assessment Licence. I find that they had participated from the questionnaires they filled and the letters from the Westlands Association to the relevant agencies.

38. I disagree with the Appellants' argument that, had the Tribunal interrogated the facts it would have found that the Appellants did not participate in the process leading to the issuance of the Environmental Impact Assessment Licence hence come to the finding that the Appeal was brought under Section 129(2) of the Environmental Management and Coordination Act.

39. This cannot be the correct position because the Appellants were invited to consultation forums to address the projected positive and negative impact of the project and present recommendations. The Appellants were aware of the proposed public consultation forums and they cannot feign ignorance.

40. There were letters inviting residents for consultation forums. They were received by Kiran Kaur on 16th August 2018 on behalf of Westlands Residents Association. The Appellants were invited to the said meetings.

41. The Environmental Impact Assessment Licence was issued on 20th November 2018 hence the appeal to the National Environment Tribunal ought to have been filed by 18th January 2019. In the case of **Shilouh Investments Limited vs NET & 7 Others [2018] eKLR** it was held thus:-

“My interpretation of Section 129 of Environmental Management and Coordination Act is that it provides a framework within which any person aggrieved by the decision made by National Environment Management Authority may ventilate the grievance. The words used by Parliament in section 129(1) are “any person aggrieved by....” In my view Parliament took cognizance of the fact that injury to the environment affects the general public and provides a forum for redress for any person who may be aggrieved by a decision of NEMA. The contention that only persons who were privy to the impugned decision have a right to Appeal to the Tribunal is in my view not correct”.

I find that the Tribunal was not bound to interrogate whether the Appellants were privy to the process leading upto the issuance of the licence. It only had to consider that the appeal had been brought challenging a licence and whether it had been brought within the stipulated timelines.

42. The substance of the Appellants’ appeal was the decision of National Environment Management Authority to grant licence No NEMA/EIA/PSL/6998 to the 2nd Respondent. This falls within the ambit of Section 129(1)(a) of Environmental Management and Coordination Act which allows Appeals against the grant of licences to be made within sixty days of the decision being made. The Appellants’ appeal did not fall within Section 129(2) of Environmental Management and Coordination Act as subsection (2) covers appeals against acts or omission of the Director General or the committee of the authority or its agents on matters outside the issuance of a licence.

43. As stated earlier there is overwhelming evidence that the Appellants participated in the process leading to the issuance of the licence to the 2nd Respondent. In the case of **NET vs Overlook Management Ltd & 5 Others [2019] eKLR** the Court of Appeal held thus:-

“In our view and to reconcile the conflicting decisions, where a party considers itself aggrieved by the events stipulated on Section 129(1) (a-e) of the Act, such a party may as of right appeal to the appellant. Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd Respondent, its Director General or its committee, then such a party may lodge an appeal pursuant to subsection 2 of that provision.....”

I find that the Appellants appeal falls within Section 129(1) of Environmental Management and Coordination Act.

44. The Tribunal held correctly that a substantive statute like Environmental Management and Coordination Act could not be overridden by subsidiary legislation like order 50 of the Civil Procedure Rules as the statute mandated the tribunal to prescribe its regulations for the conduct of proceedings before it. The statute did not contemplate a situation where the tribunal could be permitted to expand time by providing for excluded days in terms similar to those under order 50 rule 4 of the Civil Procedure Rules.

In the case of **Gathoni vs KCC Ltd, Civil Application No 122 of 1981** cited in **E. Torgbur vs Ladislaus Odongo Ojuok (2015) eKLR** Potter J observed in obita that:-

“The law on limitation is intended to protect defendants against unreasonable delay in bringing suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

45. I agree with the Respondents that time can be considered as a ground of preliminary objection as was held in **Kalpna H. Rawal & 2 Others vs Judicial Service Commission & 3 Others [2016] eKLR**.

46. I find that the National Environment Tribunal did not breach the Appellants right to a fair hearing as this right applies to both Appellants and the Respondents. In conclusion I find no merit in this appeal and the same is dismissed with costs to the 2nd Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 9TH DAY OF DECEMBER 2021.

.....

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:-

MS NYAGAH FOR THE APPELLANTS

MS NGANGA FOR MR. MOSOTA FOR THE 2ND RESPONDENT

NO APPEARANCE FOR THE 1ST, 3RD – 8TH RESPONDENTS

STEVE – COURT ASSISTANT