



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 504 OF 2011

NIXON AZARIA OOKO.....APPELLANT

-VERSUS-

DIRECTOR GENERAL-NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY (NEMA).....1ST RESPONDENT

NICHOLAS KARUME WEKE.....2ND RESPONDENT

(Being an appeal from the ruling delivered by the National Environment Tribunal on 6th September, 2011 in Tribunal Appeal No. 76 of 2011)

JUDGMENT

1. The appellant previously lodged an appeal before the National Environment Tribunal (*the Tribunal*) on 24th May, 2011 seeking to challenge the issuance of a license by the 1st respondent to the 2nd respondent, approving his operation of a nursing home on land title L.R. No. KAMAGAMBO/KABUORO/1561.
2. The aforesaid appeal was primarily premised on the argument that in granting the license, the 1st respondent had failed to take into account the environmental concerns raised by the appellant and other residents, and that the 1st respondent also failed to evaluate the nature of the proposed project.
3. For the above reasons, the appellant sought to have the license reviewed, recalled and/or revoked amongst other related orders.
4. However, in response thereto, the 1st and 2nd respondents filed separate Notices of Preliminary Objections indicating inter alia that the appeal is statute barred and that the matter is *res judicata* and/or *sub judice* by virtue of the fact that a similar case involving the same parties was pending before the High Court that is Kisii Civil Case No. 270 of 2010.
5. The Tribunal heard the preliminary objections and in its ruling, the Tribunal found that the appeal had been filed out of time contrary to the provisions of Section 129 (1) and (2) of the Environment Management and Co-ordination Act (*EMCA*) and that the matter before it is substantially the same as that before the High Court at Kisii. Consequently, the appeal was dismissed with no order on costs.
6. The ruling provoked the filing of the appeal in which the appellant put forward the following grounds of appeal in his memorandum dated 3rd October, 2011:

I. THAT the Tribunal misdirected itself and erred in law by dismissing the appeal yet the same had not been heard on its merits.

II. THAT the Tribunal erred in holding that the appeal before it was substantially the same as the one before the High Court at Kisii.

III. THAT the Tribunal further erred in dismissing the appeal on account of the pendency of the case before the High Court at Kisii when the latter sought an injunction against the 2nd respondent whereas the former sought to challenge the issuance of a license by the 1st respondent to the 2nd respondent.

IV. THAT the Tribunal further erred in dismissing the appeal yet the suit before the High Court at Kisii was still pending and the EMCA permits the filing of proceedings before the Tribunal and complementary proceedings in the High Court.

V. THAT in any event, the only order open to the Tribunal was to stay the appeal pending the hearing and disposal of the suit before the High Court at Kisii.

7. This court directed the appeal to be disposed of by written submissions. The appellant and 2nd respondent were the only parties who filed their submissions.

8. The brief background of this matter is that the appellant was at all material times the registered owner of a parcel of land known as L.R. No. KAMAGAMBO/KAGUORO/4405 in Koderia Bara Village in Migori County and which parcel of land is adjacent to that belonging to the 2nd respondent, namely L.R. No. KAMAGAMBO/KABUORO/1561.

9. A dispute arose between the parties with regard to an intended construction by the 2nd respondent, prompting the filing of Kisii H.C.C.C. No. 270 of 2010 wherein the appellant sought for declaratory and injunctive orders against the 2nd respondent.

10. The appellant further indicated that he filed an application before the said High Court, seeking for temporary injunctive orders, but the application was dismissed on 30th November, 2010.

11. The appellant added that he filed a second application seeking a review of the said order and which application it would appear is yet to be determined.

12. On learning of the issuance of the license by the 1st respondent to the 2nd respondent, the appellant soon thereafter filed the appeal before the Tribunal.

13. Having set out the background, I now turn my attention to this appeal. Ground (i) concerns the question as to whether the appeal before the Tribunal was filed out of time and whether it was proper for the Tribunal to dismiss the same instead of striking it out.

14. The appellant in his submissions contended that in issuing licenses, the 1st respondent has not demonstrated the mechanisms applied in notifying members of the public.

15. The appellant also submitted that the 60-day limitation period within which a party wishing to challenge the issuance of a license should file an appeal starts to run from the date on which the decision was either given to or served upon the intended appellant.

16. On his part, the 2nd respondent strongly argued that pursuant to the provision of section 129 of the EMCA; rule 46 (f) of the Environment and Impact Assessment (Impact Assessment and Audit) Regulations 2003 and Rule 4 of the National Environment Tribunal Procedure Rules 2003, appeals to the Tribunal ought to be lodged within 60 days of the date of the disputed decision.

17. The 2nd respondent further submitted that the appeal was lodged after the lapse of 160 days from the date of issuance of the license.

18. The tribunal in its ruling found that the appellant had filed his appeal after the lapse of the stipulated 60 days following the issuance of the license by the 1st respondent to the 2nd respondent, and without leave of the Tribunal.

19. As rightly put by the parties, *Section 129 (1)* of the *EMCA* expresses the following:

“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;

...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.”

20. Furthermore, *Section 129 (2)* is clear 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.”

21. From the foregoing, it is safe to state that *Section 129 (2)* is most applicable in this instance since it relates to an appellant who was not a party to the issuance of the license.

22. That being the case, *Rule 3* of the *National Environment Tribunal (NET) Procedure Rules, 2003* grants any party aggrieved with the decision of NEMA or its committees/officers the right of appeal to the Tribunal under the abovementioned Section 129 (1) and (2).
23. *Rule 7* of the said Rules on the other hand provides for an extension of time by the Tribunal upon application by a party.
24. Drawing from the foregoing, it is not in dispute that a timeline of 60 days for lodging an appeal lies in place. Nonetheless and as concerns a situation such as the one currently before this court, it has been interpreted that time begins to run from the date on which notice of the decision; in this case the license; was given or served upon the appellant.
25. In the opinion of this court, and from my reading of the relevant statutory provisions the 1st respondent would be expected to notify the public of its decisions, particularly those touching on Section 129 of the EMCA.
26. From the facts presented to this court, there is nothing to confirm when or how the appellant came to be aware of the issuance of the license. Furthermore, no documentary or other evidence was presented to the Tribunal by the 1st respondent to show any form of service or giving of such a notice to the appellant.
27. In the circumstances, there is no clear indication as to whether the appellant filed his appeal before the Tribunal out of time, considering the fact that there was no evidence of service of the notice/decision by the 1st respondent to issue a license to the 2nd respondent.
28. It would appear time would begin to run as and when such notice/service was effected. The learned trial tribunal, in my view, therefore has given no basis for arriving at the finding that the appeal was filed out of time in the absence of the specific timelines surrounding service/notice of the license.
29. The appellant also challenged the Tribunal's decision to dismiss as opposed to striking out the appeal on the basis that the same had not been heard on merits.
30. The 2nd respondent's response is that the Tribunal's decision to dismiss the appeal was proper in every respect and in line with Rule 34 (1) and (2) of the NET Procedure Rules, 2003.
31. I have looked at the said *Rule 34 (1) and (2)* which confirm that the Tribunal has the discretion to make such orders as it deems necessary upon hearing parties on an issue raised at the preliminary stage.
32. From the foregoing, I am satisfied that it was not necessary for the matter to be heard on merit for a dismissal order to apply. The objections raised touched on the foundation of the appeal. Consequently, on this argument I have no reason to find that the Tribunal was wrong in dismissing as opposed to striking out the same.
33. This leaves me with the grounds (ii), (iii), (iv) and (v) which all concern the appeal before the Tribunal vis-à-vis the suit pending before the High Court at Kisii.
34. It is the appellant's submission on the one hand that to begin with, the 1st respondent is not a party to the separate suit before the High Court and that secondly, the issues arising and prayers sought differ in both instances.
35. On the other hand, the respondent submits that the matters in both instances are substantially the same, hence the Tribunal was correct in its finding.
36. I have examined the impugned ruling by the Tribunal. In its finding on the issue, the said Tribunal reasoned that the appellant did not disclose the existence of the Kisii High Court case. Nonetheless, the Tribunal concluded that the matter before it was substantially the same as that before the High Court.
37. Upon perusing the pleadings before the High Court at Kisii, it is apparent that the same relate to an anticipated construction of an alleged funeral home, though the 2nd respondent has disputed this by asserting that it is in fact a nursing home which he intends to construct.
38. The appellant is seeking declaratory and injunctive orders against the 2nd respondent with respect to the said construction in that particular case.
39. I have as well observed that in the appeal before the Tribunal was premised on the license issued by the 1st respondent. In addition, the orders sought were largely the revocation, recalling or review of the license.
40. It is clear that the two (2) cases, though connected, do not raise parallel issues of fact and/or law. Likewise, the prayers/orders sought are isolated and distinct in nature. In the premises, I find no applicability of the *sub judice* or *res judicata* rules here.

41. The upshot is that the appeal succeeds in part with regards to ground (i) to the extent that the tribunal erred in finding that the appeal with the Tribunal had been filed out of time in the absence of specific timelines evidencing the same. The appeal also succeeds on grounds **(ii)**, **(iii)** and **(iv)** of appeal, having found that the subject matter on appeal before the Tribunal was not substantially the same as that pending before the High Court at Kisii under Civil Case No. 270 of 2010.

42. Consequently, the orders made by the Tribunal on 6th September, 2011 are hereby set aside and Tribunal Appeal No. 76 of 2011 is hereby reinstated. The appeal to be heard on its merits. Costs awarded to the appellant.

Dated, Signed and Delivered at Nairobi this 2nd day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent