

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E085 OF 2022

KIMANI MATHU, CHAIRMAN
ATUL SHAH, VICE CHAIRPERSON
CHRIS NDEGWA, SECRETARY
[all jointly suing as and on behalf of
KYUNA NEIGHBOURS ASSOCIATION] - APPELLANTS

VS

NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY - 1ST RESPONDENT
ARVIND MANI - 2ND RESPONDENT
MALIKA SOOD - 3RD RESPONDENT
DIRECTOR GENERAL NAIROBI
METROPOLITAN SERVICES - INTERESTED
PARTY

JUDGMENT

1. This appeal arises from the Ruling of the National Environment Tribunal [NETT] at Nairobi delivered on 23/9/2022 in NETT Appeal No 13 of 2021.
2. By way of background, the appellants moved the NETT under Section 129 (2) of Environment Management Coordination Act [EMCA] by way of an appeal, NETT No 13 of 2021, against National Environment Management Authority [NEMA's] decision, Ref No NEMA NRB/PR/5/1/41.169, on the grounds that the 2nd and 3rd Respondents' proposed maisonette house development on LR No 7158/447, Kyuna Estate, Nairobi [suit land], was in contravention of the law; and that NEMA had irregularly issued a purported approval, Ref No NEMA NRB/PR/5/1/41.169, retrospectively.

3. That, as a result of NEMA's willful failure to exercise its lawful mandate under the law, coupled with the unlawful development by the 2nd and 3rd Respondents, the appellants' right to quiet enjoyment of their properties and their legitimate expectation of lawful protection under the law have been violated.
4. Consequently, the appellants sought relief thereunder, namely;
 - a. An order directed to NEMA to set aside, vacate and/or otherwise quash its decision, referenced NEMA/NRB/PR/5/1/14/169, which irregularly and retrospectively approved the development on the suit land.
 - b. An order directed to the 2nd and 3rd Respondents, requiring them to immediately cease and desist from any further construction processes in respect of the impugned project on the suit land and further cease interfering with or destroying the environment.
 - c. An order directed to the 2nd and 3rd Respondents to immediately restore the suit land to its original condition and state before the commencement of the impugned construction.
 - d. An order declaring that the respondents have violated the appellants' rights to property, a clean and healthy environment, and fair administrative action.
 - e. An order for costs on a full indemnity basis
5. On 26/8/2021, the appellants filed a notice of motion seeking interlocutory injunctive orders restraining the 2nd respondent from continuing with the impugned construction works on the suit land.
6. In opposing the appeal, the 1st Respondent filed a Preliminary Objection dated 9/9/2021, contending that the appeal was time-barred because it was filed outside the 60-day period provided for under section 129 (1) of EMCA.
7. In its decision of 23/9/22, the NETT upheld the preliminary objection and struck out the appeal for non-compliance with Section 129(1) of EMCA, thereby ousting the NETT's jurisdiction.

8. It is the above decision of the NETT that has triggered the appeal before this court on 8 grounds, namely;
- a) The Hon. Tribunal erred in law and fact by finding that it had no jurisdiction to hear the appeal, (on the basis that the Appeal was filed more than 14 days after NEMA issued the EIA License): whereas the Hon. Tribunal had not, first satisfied itself whether the Appellants participated in the process leading the issuance of the EIA license for its Appeal to fall under Section 129(1), Environment Management and Coordination Act, [EMCA] 1999.
 - b) The Hon. Tribunal erred in law and fact by disregarding BINDING precedents from the Environment and Land Court in **Prof Albert Mumma (in his capacity as Chairman Karen Langata District Association-KLDA) v Director General, NEMA & 2 Others and the SDA Church, E. A Ltd [2021]eKLR; Simba Corporation Ltd v Director General, NEMA & Another (2017) eKLR; AND, John Kabukuru Kibicho & Another V County Government of Nakuru & 2 Others[2016]eKLR** as well as the Court of Appeal decision in **National Environment Tribunal v Overlook Management Ltd & 5 Others, [2019]EKLR** on the judicially determined applicability and indeed differentiated locus standi accruing under Section 129(1), EMCA as distinguished from the accruing under Section 129(2), EMCA.
 - c) The Hon. Tribunal erred in law and fact in violating the doctrine of stare decisis, contrary to the Court of **Appeal holding in Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003 (cited and followed by Odunga, J in Republic V Chairman, Political Parties Disputes Tribunal & 2 Others Ex Parte Susan Kihika Wakarura [2017]eKLR.**
 - d) The Hon. Tribunal erred in law and fact in disregarding that the Appellants had in fact unequivocally pleaded that their Appeal was

- premised on Section 129(2), EMCA which premised a factual enquiry, and inexplicably disregarded by the Hon. Tribunal.
- e) The Hon. Tribunal erred in law and fact by failing to find and hold that Section 129(1) EMCA relates only to Appeals in respect of decisions made, in which the person aggrieved by the issuance of the license participated in the decision making process, and would therefore be required to lodge an appeal within 60 days of the date the decision was made.
 - f) the Hon. Tribunal erred in law and fact by failing to find and hold that where the person does not participate in the proceedings leading to issuance of the license, then the appeal would fall under Section 129(2) EMCA; which requires that such an appeal be filed within 50 days of the date the dispute decision is given or served upon the Appellant pursuant to **Rule 4(1) & (2) of the NETT Procedure Rules**.
 - g) The Hon. Learned Tribunal erred in law and fact by admitting for determination a fatally defective Preliminary Objection which centers on factual disputations, which required adduction of evidence.
 - h) By failing to dismiss the Notice of Preliminary Objection dated 9th September, 2021 and award costs on a full indemnity basis, the impugned Ruling of the Hon. National Environment Tribunal is erroneous in law and fact, and contrary to equity, and is for setting aside on appeal.
9. The appellants have sought for the orders as follows;
- a. The ruling by the Hon. Tribunal, dated 23rd September, 2022 be and is hereby set-aside, and the Notice of Preliminary Objection dated 9th September, 2021 declared dismissed.
 - b. The Appellant be awarded costs of the Notice of Preliminary Objection dated 9th September, 2021 in National Environment

- Tribunal Appeal No.013 of 2021, on a full indemnity basis as against the 2nd Respondent.
- c. The Appeal in NET Appeal 013 of 2021 be remitted for hearing and determination before the Hon Tribunal, on priority basis.
 - d. The restraining injunctive orders issued by the Hon. Tribunal in NET Appeal 013 of 2021 be and are hereby reinstated, pending hearing and determination of the Appeal.
 - e. The Hon. Court be pleased to issue any further appropriate Order within its jurisdiction, to give effect to the preceding reliefs; and
 - f. The Appellant's costs herein be provided for, on a full indemnity basis.

The written submissions

10. In support of the appeal, the appellants submitted that the decision of the NETT, delivered on 23/9/22, was erroneous in holding that the Notice of Appeal dated 12/7/2021, lodged before the NETT, was time-barred and in contravention of Section 129 (1) EMCA. It was further contended that the NETT had jurisdiction to admit and determine the appeal on merit under Section 129(2) of EMCA, as it raised legitimate and substantive issues, to wit; NEMA abrogated its duty in approving the project, whereas the appellants and its members, being project-affected persons, were excluded from the Environment Impact Assessment [EIA] decision-making process; and NEMA failed to demand strict compliance with the applicable laws, including Section 58(2) EMCA 1999, as read together with Regulations 11, 16, 17 & 20 of the Environmental [Impact Assessment and Audit] Regulations 2003.
11. Counsel for the Appellant submitted that Section 129 of EMCA, read together with Section 3 thereof and Sections 4 and 7 of the Fair Administrative Actions Act, 2015, empowers any person aggrieved by NEMA's decisions to lodge an appeal before the NETT to challenge NEMA's action, inaction and/or decision.

12. Counsel further submitted that the legal framework under Section 129 of EMCA creates two types of locus and jurisdiction, and that an aggrieved Appellant may move the NETT; the first, under Section 129(1) of EMCA, imposes a time limit of 60 days from the occurrence of the listed event within which an appeal must be lodged; the second, under Section 129(2) of EMCA, allows a challenge against any administrative or quasi-judicial decision made, proposed to be made, or required to be made as the case may be.
13. While discussing the two separate and distinct pathways provided for under Section 129 (1) and (2) of EMCA, the Court was referred to a number of decisions, including *Simba Corporation Limited Vs The Director General, NEMA* [2017] ECLR; *Prof Albert Mumma [in his capacity as Chairman Karen Langata District Association - KLDA] Vs Director General, NEMA & 2 others and SDA Church, EA Ltd* (2021) ECLR; *Runda Gardens Residents Association [RGRA] Vs NEMA the Registered Trustees of Fountain Gate Church* among others.
14. It was further submitted that, guided by the decision in Prof Mumma's case above, the NETT was required to first determine whether the appellant participated in the decision-making process that led to the issuance of the EIA licence by NEMA, and subsequently establish the relevant timelines. For the court to do so, the parties needed to present evidence, which a preliminary objection would not accommodate. The NETT was found at fault for failing to address this issue. In addition, it was argued that the appellants' appeal fell within section 129 (2) of NEMA, and, as such, the respondents never notified the appellants of the issuance of the EIA licences, thereby preventing them from mounting a challenge.
15. That the Ruling of NETT had the effect of curtailing the appellants' right to access justice. For that reason, the court was urged to adopt an approach that enhances, rather than limits, the right to access justice by allowing the appellant's appeal to be heard on its merits at the Tribunal.

16. On the question of whether the preliminary objection dated 9/9/2021 was fact-dependent and therefore irregular and fatally defective, counsel submitted that the objection was grounded on facts that were disputed and required the interrogation of evidence. For instance, the appellants' plea that they were excluded from public participation and that the development was being undertaken without an EIA Licence from NEMA were facts that called for evidence, thereby ousting the objection from being a pure point of law.
17. Further, it was submitted that the impugned Ruling was made in violation of binding precedent and contrary to stare decisis. Counsel referred to the decision in Geoffrey Asanyo & 3 others Vs Attorney [2020] EKLK, where the court emphasised the need for courts to adhere to the doctrine of precedent. In Jasbir Singh Rai & 3 others Vs Tarcholan Singh Rai & 4 others [2013], the Supreme Court stated that adherence to precedent should be the rule, not the exception.
18. Counsel for the 2nd and 3rd Respondents submitted that the Tribunal did not consider any facts but focused solely on the question of whether the appeal was time-barred, examining only the appellant's pleadings and not considering any factual evidence.
19. On the meaning of the provisions of Section 129 (1) of EMCA, Counsel submitted that any person can challenge the grant of licences under the Act and that the person need not be associated with the licensing process. The Tribunal need not make an inquiry as to whether the appellant was involved in the process of granting the licence. In conclusion, it was submitted that the NETT correctly applied the provisions of Section 129(1) of EMCA.
20. Was the appeal filed out of time? It was submitted that Section 129(1)(e) of EMCA imposes a 60-day time limit within which an aggrieved person must file an appeal. In conclusion, the Court was urged to dismiss the appeal with costs.

21. Having considered the appeal and the parties' submissions, the key issue for determination is whether the appeal is merited. In other words, whether the Preliminary objection was a pure point of law, whether the appeal as filed in the Tribunal fell under Section 129(1) or 129(2) of EMCA, whether it was time-barred, and whether the Preliminary objection was a pure point of law.

21. As a first appellate Court, this Court has a duty to analyse, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial Court. The principles which guide a first appellate Court were summarised in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

22. Similarly, in the case of *Peters -vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not

enough that the appellate Court might itself have come to a different conclusion...”

23. Bearing the above principles in mind, I shall now undertake the analysis of the instant appeal.
24. The origin of the appeal arises from a Preliminary Objection premised on the applicable law and whether or not the appeal as filed in the tribunal was time-barred.
25. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“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 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.”
26. At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the 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 the exercise of Judicial discretion...”
27. To the extent that the preliminary objection was primarily based on whether the appeal before the Tribunal was time-barred, having been filed outside the period permitted by the Act, I find that the objection constituted a pure point of law. The next inquiry, therefore, is whether the said objection was merited.

28. The EMCA Act has provided an elaborate framework of dispute resolution which is available under section 129 (1) and (2).

29. Section 129 (1) and (2) of the EMCA provides as follows:

“1) 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 person's 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 be 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.

(2) 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.”

30. I have read the appeal, together with the statement in support of the claim dated 12/7/2021, filed by the appellant, which discloses the main grievance to be that the 2nd and 3rd Respondents undertook development/construction without an EIA licence and/or approval from NEMA, and that the licence issued on 20/5/2020, being ref

NEMA/NRB/PR/5/1/14.169, was irregularly issued retrospectively; the licence was issued 60 days after the project had commenced; the appellant and its members were denied an opportunity for public participation before the impugned licence was issued; the licence was issued without regard to the zoning requirements of the area; approval from NCA, which was a prerequisite before the licence was issued, was obtained 30 days later; the licence was obtained through false and misleading information.

31. In summary, the appellant's grievances centre on the licensing of the construction, which therefore brings the appeal within Section 129 (1) of EMCA
32. The Appellants' have premised their appeal on Section 129(2) of the Act. It is their position that, since they were not involved in the approval processes, they ought to have been notified to enable them to file their appeal. They contend that the correct provision should have been Rule 4(2) of the NETT Rules, which provides for 60 days after the decision was given to or served upon him, and that, in any event, the Tribunal has power to extend the time under this pathway.
33. The Court of Appeal in *National Environmental Tribunal vs Overlook Management Limited & 5 Others* [2019] eKLR sought to reconcile the conflicting decisions on the question of NEMA's jurisdiction. The Court of Appeal held as follows:

“The issue then becomes whether the 4th and 5th respondents met the conditions set out above for institution of the appeal. It is provided that ‘any person who is aggrieved’ may appeal to the appellant within 60 days of the occurrence of the event against which the person is aggrieved. The legal personality of the 4th and 5th respondents has not been challenged or disputed and even without belabouring the point, they qualify as persons. Can they be considered as aggrieved for purposes of the provision? Have they met the conditions set out above? As already stated, what triggered the instant appeal was the

letter dated 1st December 2005 from the 3rd respondent approving construction of the villas as proposed in the EIA by the 1st and 2nd respondents. It has been contended that the 3rd respondent had not per se issued or furnished the EIA licence to the 1st and 2nd respondents and even that they had jumped the gun in lodging the appeal. Granted that, that may be so, but it cannot however be denied that the 3rd respondent did not make a decision in the form of an approval of the proposed project which they duly communicated and informed the 1st and 2nd respondents. In the circumstances, such a decision is subject or amenable to an appeal as expressly provided under section 129 (2) of the Act....The respondents brought the proceedings in public interest and their main concern was that the construction of the villas was being undertaken on a public beach. They produced evidence to show that the lease had been issued to the 2nd respondent on condition that the suit property be utilised as a camping site and hence for public use as opposed to cottages. In the circumstances, it was imprudent to find and hold that they lacked locus standi to pursue an appeal before the appellant. The Judge therefore erred in his finding that the 4th and 5th respondents were strangers or busy bodies in lodging the appeal. It would also set back the advances or leaps made in expanding the strict requirements of the capacity to sue especially in environmental matters envisaged by the Act. As already explained, the Act expanded locus standi to enable any person, group or association whether acting on its behalf or in public interest to raise environmental concerns geared at environmental conservation. And this still holds while recognising the requirements that existed under the former constitution to the effect that only a party aggrieved and whose interests were directly affected could institute proceedings before Courts. Indeed, courts have been more inclined in environmental matters to increase access rather than

place hurdles to such access but such decision is always hinged on the circumstances of each case.”

34. My reading of the two provisions is that appeals under Section 129 (2) of the EMCA are not concerned with the decisions of NEMA issued under Section 129 (1). Appeals under section 129 (2) deal with all the other decisions made by the Director-General, the Authority or Committees of the Authority or its agents which are not covered under Section 129 (1) of the Act. Clearly, the Act under section 129(1) deals solely with licensing.
35. I concur with the Tribunal that to the extent that the Appellants grievance was on licensing the applicable law is Section 129(1) of the Act. In addition, there is no provision that the Appellant be a party to the approval process. The word "any person" clearly leaves the door open to any person or entity that may be affected or aggrieved by any licensing under Section 129(1) of EMCA.
36. Was the appeal time-barred? Having held that the appeal fell within the framework of section 129(1), any appeal against any occurrence cited under section 129(1) ought to have been brought within 60 days. My reading of this provision is that the time limitation is not subject to the court's discretion, unlike appeals arising from Section 129(2) of the Act which are subject to the procedures under Rules 4 and 7 of the NETT Rules.
37. On the face of the record, the impugned licence was issued on 20/5/2020, and the appeal was filed on 12/7/2021, well beyond the 60 days allowed by the Act. On this account, I concur with the Tribunal that the appeal was time-barred.
38. From the foregoing, I determine that the applicable law to the Appellants' appeal is Section 129(1) of the Act, which stipulates that the Appellants must lodge their appeal within 60 days. As the appeal was

filed outside this period, it is consequently time-barred. Therefore, the Preliminary Objection represents an indisputably pure point of law.

39. Consequently, the appeal is unmeritorious. It is dismissed with costs to the 2nd and 3rd Respondents.

40. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY
OF FEBRUARY 2026 VIA MICROSOFT TEAMS.**

**J G KEMEI
JUDGE**

Delivered Online in the presence of:

1. Mr. Muchiri H/B for Mr. Lusi for Appellant
2. N/A for 1st Respondent
3. Ms Kavata H/B for Mr. Shah for 2nd and 3rd Respondent
4. CA - Ms Yvette Njoroge