



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 60 OF 2019

RUNDA ASSOCIATION.....APPELLANT

VERSUS

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

NAIROBI CITY COUNTY.....2ND RESPONDENT

KIWA RUNDA ASSOCIATION.....3RD RESPONDENT

PROFESSOR KINUTHIA MACHARIA.....4TH RESPONDENT

(An Appeal from the Ruling & Decree of the National Environment Tribunal in Tribunal Appeal No. NET 006 of 2019)

JUDGEMENT

1. The Appellant filed the Memorandum of Appeal dated 27/08/2019 challenging the ruling and order of the National Environment Tribunal (NET) in Tribunal Appeal No. 006 of 2019, which was delivered on 28/06/2019. The appeal was premised on several grounds which can be summarised into two. Firstly, that NET erred in dismissing the Appellant's appeal based on a wrongful interpretation of Section 129(1) of the Environmental Management and Co-ordination Act (EMCA) when it held that an appeal brought under Section 129(1) of EMCA must be filed strictly within 60 days from the date of issuance or rejection of the impugned licence.

1. Secondly, the Appellant contended that NET failed to appreciate that the 60 days' timeline prescribed by Section 129(1) of EMCA runs from the date when the impugned licence is given to or served upon an Appellant. It added that NET failed to appreciate the fact that the Appellant had neither been given nor served with the impugned licence by the time the appeal was heard before NET. The Appellant prayed that the ruling of NET be set aside. It also sought an order for the dismissal of the 1st and 2nd Respondents' Notice of Preliminary Objections in Tribunal Appeal No. 006 of 2019 and an order to reinstate Tribunal Appeal No. 006 of 2019 for hearing on merit.

3. The background of these proceedings is that on 6/4/2018 the National Environment Management Authority (NEMA) issued Environmental Impact Assessment (EIA) Licence number NEMA/EIA/P5L/5960 to the 4th Respondent for the construction of an access road to Runda Road and Kwaheri Road measuring a kilometer. The proposed road was intended to serve land reference numbers 7785/1260, 788, 790 among others and would incorporate storm water drainage, footpaths and associated facilities and amenities.

4. The Appellant claimed that it became aware of the issuance of that licence on 19/1/2019 when excavation on the road commenced and the 4th Respondent erected a notice board on the site indicating that the works were being undertaken pursuant to EIA Licence number NEMA/EIA/P5L/5960 issued by the 1st Respondent. The Appellant lodged an appeal against the issuance of the EIA licence before NET on 15/3/2019. The 1st and 2nd Respondents filed notices of preliminary objections before NET seeking to strike out the appeal on the ground that it was filed out of time. The Appellant filed a Replying Affidavit in opposition to the preliminary objection. NET upheld the objections vide its ruling of 28/6/2019 and proceeded to strike out the appeal for being filed out of time. Aggrieved by that decision, the Appellant brought the present appeal.

5. The issue for determination in this appeal is whether NET erred in striking out the Appellant's appeal on the basis that it had been filed out of time. The matter was canvassed through written submissions which the court has considered. The Appellant submitted that in **Addax (K) Limited v National Environmental Management Authority & Another [2014] eKLR**, the court interpreted Section 129(1) of the EMCA as read with Rule 4(2) of the National Environmental Tribunal Rules 2003. It contended that in that case, the court found that although Section 129(1) of EMCA provided for a 60 days' time limit for filing appeals before NET, time started to run either from the time of the occurrence of the event giving rise to the appeal or the date on which the disputed decision was given to or served upon the aggrieved party. In addition, that the fact of when time starts to run for purposes of the 60 days timeframe has to be determined first before it can be

ascertained whether the appeal was time barred or not.

6. The Appellant submitted that the court made a similar interpretation in **Simba Corporation Limited V. Director General National Environment Management Authority (NEMA) & another [2017] eKLR**. The Appellant further submitted that by the time the preliminary objection before NET was heard, it had not been served with the EIA licence in issue, and therefore contended that time for purposes of Section 129 (1) of EMCA had not started to run and is yet to start running to date. The Appellant maintained that it only became aware of the grant of the EIA licence to the 4th Respondent on 17/01/2019 when construction commenced on the development site.

7. The Appellant submitted that it filed the appeal on 15/03/2019 which was within time, because 60 days from the date it became aware of the licence would have expired on 20/03/2019. It further submitted that the issue of it not being served with the EIA licence was deponeed to on oath in the affidavit of Professor Helga Schroeder sworn on 06/05/2019 and was not controverted by the Respondents by way of affidavit hence NET should have taken it as an admission on the Respondents' part that the Appellant was never served with the EIA licence. The Appellant added that it was denied its constitutional right to be heard since it was driven away from the seat of justice without a hearing. It pleaded to be heard on merit.

8. The 2nd Respondent submitted that the Appellant's application was brought under Section 129(1) and there was no chance that the NET could have entertained it since it was brought out of time. It submitted that Section 129(1) of EMCA does not have a requirement for any party to be informed of the decision. The relevant portion reads as follows:

“...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...”

9. The 2nd Respondent further argued that the Appellant's reliance on the interpretation of the court in **Simba Corporation Limited V. Director General National Environment Management Authority (NEMA) & Another [2017] eKLR** was misleading since the court in that case interpreted Section 129(2) of EMCA. It contended that if the Appellant wished to rely on Section 129(2) of EMCA, the correct thing would have been to seek leave before it filed the appeal before NET pursuant to rule 7 of the NET Procedure Rules. It also contended that since the Appellant was directly aggrieved by the decision of the 1st Respondent and was entitled as a matter of right to lodge its appeal with NET as it did under Section 129(1), it cannot therefore invoke the provisions of Section 129(2) and the NET Rules.

10. The 3rd and 4th Respondents submitted that there was no distinction to be made premised on the date of service of the EIA licence on a party as the Appellant suggested in its submissions. They submitted that the EIA licence was issued on 06/04/2018 and that a strict application of Section 129(1) of EMCA meant that the appeal should have been filed by 05/06/2018 yet the Appellants filed it on 15/03/2019, which was nearly 9 months after the EIA licence was issued. They faulted the averment as to service of the EIA licence in Professor Helga's affidavit as a belated and sketchy factual response to a purely legal challenge in respect of timelines.

11. The court has considered the rival arguments of the parties as well as the authorities cited by the parties in support of their arguments. Section 129 (1) of EMCA allows any person who is aggrieved by the grant of a licence or permit or refusal to grant a licence or permit; or the imposition of conditions or restrictions on the grant of a licence; or the revocation, variation or suspension of a licence; or the fees payable or the imposition of a restoration order on a person, under the Act or the regulations made under the Act to appeal against such a decision within sixty days of the decision being made.

12. NET vide its decision dated 28/06/2019 determined that that the 60 days within which the Appellant's appeal was supposed to be filed started running from 06/04/2018 when the licence was issued up to 05/06/2018 and that since the appeal was filed on 15/03/2019, it was lodged out of time. This court notes that the 60 days' time limit within which an appellant should lodge an appeal under Section 129 (1) of EMCA cannot be extended. This dispute stems from the interpretation of when time started to run for purposes of the 60 days' time limit. According to NET, time ran from the date when the licence was issued.

13. The Respondents agreed with NET that Section 129(1) of EMCA does not provide for any party to be informed of the decision contemplated by that section. The Appellant's position is that time only starts to run after issuance of the licence or permit once is served on prospective appellants.

14. Rule 4(2) of the National Environmental Tribunal Rules 2003 which the Appellant relied on provides that an 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. Rule 2 of the National Environmental Tribunal Rules 2003 defines an appellant as a person who makes an appeal under Section 129 of the Act, and includes a duly authorised agent or legal representative of that person. Rule 4 would only apply to Section 129 (2) which does not expressly give the 60 days' time limit for lodging an appeal in the Act.

15. The authorities cited by the Appellant relate to decisions made under Section 129(2) of EMCA and not licences or permits issued under Section 129(1) and they do not therefore support the Appellant's case.

16. Section 129(1) of EMCA relates to appeals against licences or permits by persons aggrieved by the grant or refusal to grant licences or permits while Section 129(2) relates to decisions rendered by NEMA or its agents in the discharge of NEMA's powers under EMCA. In this court's view Section 129(1) only requires the occurrence of the events stipulated there as a pre-condition for time to start running for purposes of an aggrieved person who may wish to lodge an appeal while Section 129(2) relates to decisions issued by NEMA in the discharge of its role under EMCA which the law requires to be served upon or given to the Appellant in line with rule 4(2).

17. Section 129 (1) does not impose an obligation on a successful applicant or NEMA to serve its decision to grant, revoke or refuse to grant a licence or permit on those who are likely to be affected by it and who may wish to challenge that decision. That observation was made by Eboso J. in **Simba Corporation Limited V Director General, National Environment Management Authority (NEMA) & Another**

[2017] eKLR regarding the persistent issue of the need for NEMA to notify persons who are likely to be affected by the issuance of a permit or licence under Section 129 (1) so that they can appeal against those decisions within the statutory period.

18. The court notes that even though the rules provide that an appellant under Section 129(2) should be served with NEMA's decision, there is no framework on how that service is to be effected. There certainly is need for a clear prescriptive framework on how NEMA should notify members of the public about its statutory decisions which are amenable to appeal pursuant to Section 129 of EMCA to enable persons aggrieved to exercise their right of appeal.

19. The court upholds the finding of NET dated 28/06/2019 and dismisses the appeal. Costs are awarded to the 1st, 3rd and 4th Respondents and will be borne by the Appellant.

Delivered virtually at Nairobi this 9th day of December 2020

K.BOR

JUDGE

In the presence of:-

Mr. Paul Wafula for the Appellant

Mr. Erastus Gitonga for the 1st Respondent

Mr. Mokua Ndubi for the 2nd Respondent

Mr. G. Darr for the 3rd & 4th Respondent.

Mr. V. Owuor- Court Assistant.