**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL NO 26 OF 2017**

**MICAH MUTOKO.....1ST APPELLANT**

**LORESHO NORTH RESIDENTS COMPANY LIMITED....2ND APPELLANT**

**KAUMONI ROAD COMPANY LIMITED.....3RD APPELLANT**

**LORESHO SOUTH RESIDENTS ASSOCIATION**

**(suing through Dr Charles W Kariuki).....4TH APPELLANT**

**ALMAZ YOHANNIS.....5THAPPELLANT**

**VERSUS**

**DIRECTOR GENERAL, NATIONAL**

**ENVIRONMENT MANAGEMENT AUTHORITY.....1ST RESPONDENT**

**SHREE NAIROBI STHANAKVASI**

**JAIN MANDAL REGISTERED TRUSTEES.....2ND RESPONDENT**

**AND**

**LORESHO PRIMARY SCHOOL.....INTERESTED PARTY**

**(Being an Appeal against the ruling and order of the National Environment Tribunal at Nairobi *[the Honourable Chairperson - Jane Dwasi; Members: Hon Bahati Mwamuye & Hon Waithaka Ngaruiya]* delivered at Nairobi on 27/6/2017 in Tribunal Appeal No 203 of 2017)**

**J U D G M E N T**

**Background**

1. On 3/11/2016, the National Environment Management Authority **(NEMA),** through its Director General **(the 1st Respondent),** issued an Environmental Impact Assessment Licence (**the EIA Licence**) to Shree Nairobi Sthanakvasi Jain Mandal Registered Trustees **(the 2nd Respondent)** to construct a two level temple building for religious purposes on Land Reference Nos 9729/7, 9729/6 and 9729/2 within Loresho Area of Westlands Sub County in Nairobi City County. Subsequently, on 6/4/2017, the appellants herein filed an application dated 4/4/2017 in the National Environment Tribunal **(the Tribunal)** at Nairobi, to wit, **NET (Nairobi) Tribunal Appeal No. 203 of 2017; Micah Mutoko & Others v Director General-National Environment Management Authority & Another,** seeking an order extending the time within which to lodge an appeal in the Tribunal against NEMA's decision to licence the 2nd respondent. The specific substantive prayer was framed as follows:-

> **That the Honourable Tribunal be pleased to extend time for filing an Appeal against the decision of the 1st Respondent dated 3rd November 2016 and issued to the 2nd respondent licensing the development on LR Nos 9729/2, 9729/6 and LR No 9729/7 located along Loresho Ridge, Loresho Area, Nairobi.**

2. The Tribunal considered the application and, in a ruling dated 27/6/2017 and delivered on the same day, found that the application was not merited and dismissed it. Arising from the dismissal, on 10/7/2017, the appellants lodged the present appeal in this Court through a

Memorandum of Appeal dated 10/7/2017, seeking to set aside the Tribunal's decision of 27/6/2017. They also sought an order granting the prayers that were denied by the Tribunal.

**Appeal**

The Memorandum of Appeal contains the following twenty grounds of appeal:-

**(a) The Tribunal erred in law and in fact by failing to take into account that the 1st respondent did not gazette the EIA report as required by law under Section 59 of the Environmental Management and Coordination Act, effectively ensuring the appellants had no information and or participation before the issuance of the Environmental Impact Assessment (EIA) Licence.**

**(b) The Tribunal erred in law and fact by selectively relying on minutes of meetings between some of the appellants and the respondents which in any event occurred after the development had began and an EIA license issued by the 1st respondent.**

**(c) The Tribunal erred in law and fact by selectively relying on correspondence between some of the appellants and the respondents which in any event also occurred after the development had began and an EIA licence issued by the 1st respondent.**

**(d) The Tribunal erred in law and fact in failing to recognize that the doctrine of public participation as a constitutional right was intended to be carried out before the enactment, approval and or licensing of an act or activity in order to enable any affected party of the intended enactment, approval and or licensing of an act or activity raise objections beforehand.**

**(e) The Tribunal erred in law and in fact and made a monumental error in failing to find that the 2nd respondent despite numerously undertaking to supply the appellants with a copy of the EIA Licence as per the minutes dated 19th November 2016 had failed and or refused to do so thus causing the delay in filing the Appeal.**

**(f) The Tribunal failed in their analysis to take into account any of the appellants' submissions, affidavits and documents and authorities filed and therefore came to an unjust and biased determination that the appellants were guilty of material non-disclosure and or perjury.**

**(g) The Tribunal erred in both law and fact by failing to take into account the 2nd respondent in its replying affidavit dated 25th April 2017 at page 2. Paragraph 5 had perjured itself by providing false information on oath.**

**(h) The Tribunal erred in law and in fact and failed to take into account the issue of public interest which is a cornerstone of the Constitution of Kenya, 2010 and which was in any event admitted to and supported by the 1st respondent who did not oppose the application and whose decision was the subject of the intended appeal.**

**(i) The Tribunal misconstrued and misapplied the minutes dated 19th November 2016 and failed to consider that the 2nd respondent had in fact admitted in the said minutes that they had not consulted the appellants and or involved them before seeking approvals and or commencing the construction.**

**(j) The Honourable Tribunal erred in law and in fact by shifting the burden of obtaining the EIA Licence to the appellants in view of a clear and an unequivocal admission and undertaking by the 2nd respondent to supply the approvals and licenses which they failed to do.**

**(k) The Tribunal erred in law and fact by contradicting themselves in their analysis (Par. 22 of the Ruling), on the one hand quoting Rule 4 of the National Environmental Tribunal Rules, Subsection (2) and emphasizing the same where it states 'Not later than sixty (60) days after the date on which the disputed decision was given to or served upon him', and on the other hand the Tribunal concedes at paragraph 35 and 36 of their said Analysis (in its Ruling), term the issue of the respondents availing the EIA as a 'different ball game all together' and further concede that the appellants might not have had sight of it being the EIA License, the issuance of which was the subject of the intended appeal. This means that the issue of service upon the appellants was not ascertained.**

**(l) The Tribunal erred in law and fact in failing to critically analyzes the affidavits filed by the several appellants, where none claimed that they were not aware that the EIA Licensee existed but instead stating categorically that they did not have information as to when and how the impugned license was issued.**

**(m) The Tribunal erred in both law and fact by failing to acknowledge that the 1st respondent's action of failing to follow the statutory mandatory requirements of engagement with the affected community, publication of the EIA Report and Gazettment let and added to the appellants' uncertainty as to when and how the EIA License was issued, the appellants had a legitimate expectation that the 1st respondent would not issue an EIA license without following the statutory procedures set down in the Environmental Management and Coordination Act (EMCA).**

**(n) The Tribunal failed to consider that the 2nd respondent having undertaken to supply the appellants with the approvals and EIA license and the appellants having consistently stated that they never received the license the burden was on the 2nd respondent to prove that they had indeed supplied and or delivered the licence to the appellants and that they had failed to appeal in time.**

**(o) The Tribunal failed to consider that the appellants application was anchored on among other laws Section 129(2) of the Environment Management Coordination Act and that the 1st respondent, NEMA (whose decision was the subject of the intended appeal) despite participating in the proceedings did not oppose and or controvert the issues of law and fact raised by the appellants.**

**(p) The Tribunal erred in law and in fact by holding that the 2nd respondent had spent a lot of money without any evidence thereby compromising the law, the appellants', entire community and public rights over money.**

**(q) The Tribunal ruling is inconsistent with their previous decisions in which the Tribunal has always held that where there is failure by the 1st respondent and developers to consult affected parties before obtaining approvals and licenses the chance to challenge the decision should not be foreclosed.**

**(r) The Tribunal erred in law and fact by failing to consider that the appeal had 5 Appellant/Appellant Communities with more than 300 members and instead selectively relied on correspondences between the Appellant Community to arrive at their decision.**

**(s) The Tribunal erred in both law and fact by failing to consider and or pronounce themselves on the fact that the intended appeal raised triable and uncontroverted (by NEMA the 1st respondent) issues which has in past decisions by the said Tribunal been a determinant factor in allowing appeals out of time.**

**(t) The Tribunal failed to exercise its discretion judiciously and failed to consider all relevant facts.**

3. The appeal was canvassed through written submissions. The appellants were represented by Mr Joseph Murage who presented written submissions dated 8/2/2018. The 2nd respondent was represented by Mr Mwangi who presented written submissions dated 21/2/2018. The 1st respondent elected not to participate in the appeal.

**Appellant's Submissions**

4. The appellants submitted that the present appeal is centered on three key questions, namely: (i) whether the Tribunal considered the merits of the appeal, pleadings, evidence and authorities of each of the five appellants in arriving at its decision; (ii) whether the Tribunal in arriving at its decision contradicted previous holdings; and (iii) whether the Tribunal's decision was grounded in law and in line with precedent.

5. Counsel for the appellants submitted that the Tribunal failed, refused and or neglected to consider the issues of merit raised in the notice of appeal which the appellants had filed contemporaneously with the application for leave and instead restricted itself to communication between the 2nd appellant's director, Mr Peter Herrmann and members of the 2nd respondent. Counsel outlined the issues as: (i) the contention that the EIA licence was issued unprocedurally; (ii) the contention that the environmental impact assessment report (EIA report) was not gazetted; (iii) the contention that there was no public participation before issuance of the EIA licence, and (iv) the allegation that the development would adversely affect the environment and the community living around the development. Counsel further submitted that the Tribunal failed to address issues touching on public participation and on the environmental issues raised in the individual affidavits filed by the appellants. Counsel also submitted that the Tribunal failed to consider the affidavits and evidence of the 1st, 3rd and 5th appellants.

6. Counsel for the appellants further submitted that the Tribunal, in arriving at its decisions, contradicted its decisions on a similar issue in previous cases. Counsel cited **NET 113 of 2013 Maraba Lwatingu Residents Associations & Others v Director General NEMA and Others; and NET 143 of 2015 Isaac Gitoho & 2 Others v Nema & Grove Limited** as examples of the previous decisions which the Tribunal had contradicted.

7. Lastly, counsel submitted that, in determining whether to extend time for the filing of the appeal, the Tribunal failed to pronounce itself on the exact date when time started running and or when it lapsed. In this regard, counsel contended that there was no evidence confirming when the impugned decision was given or served upon the appellant. Counsel relied on the decision of this court in **Simba Corporation Limited v Director General, Environment Management Authority (NEMA) & Another (2017) eKLR** in which this court held that the limitation period for a Section 129(2) of EMCA appeal starts running from the date on which the decision is given to or served upon the appellant. Counsel urged the court to allow the appeal in the interest of justice and judicial expedience.

**2nd Respondent's Submissions**

8. In his submissions, counsel for the 2nd respondent outlined a brief summary of the contextual background of the present appeal, referencing it to particular pages of the record of appeal bearing the relevant evidence. Counsel further framed five issues under which he submitted.

9. Counsel for the 2nd respondent submitted that when the 2nd respondent decided to undertake the subject project, it applied for and obtained all the requisite approvals and licences. He itemized them as: (i) approval for amalgamation of the three plots; (ii) approval for change of user; (iii) approval of building plans; (iv) NEMA approval through an EIA licence; (v) National Construction Authority Licence; and (vi) Construction Permit by Nairobi City County Government. Counsel contended that the appellants had fully participated in the EIA report culminating in the issuance of the impugned EIA licence. Counsel also submitted that when the 2nd respondent's contractor took site in November 2016, the appellants raised objection culminating in the issuance of an improvement notice dated 23/11/2016 by the 1st respondent, requiring the 2nd respondent to put in place specified mitigation measures to address the appellants' concerns. He added that the 2nd respondent complied and held various meetings with the appellants pursuant to which parties reached an agreement whereupon the 1st respondent allowed the 2nd respondent to proceed with the project. Last on the aspect of background, counsel submitted that whereas the appellants had on 11/1/2017 declared that they would appeal against the EIA licence, they did not initiate the process until 6/4/2017 when they brought the motion culminating in the challenged ruling.

10. Counsel for the 2nd respondent submitted that the appellants became aware of the EIA licence on or prior to 23rd November 2016 because they objected to it, resulting into the issuance of an improvement notice dated 23/11/2016 by the 1st respondent. Counsel added that on 19/11/2006, the appellants' representatives met the 2nd respondent's representatives and the 2nd respondent disclosed to the appellants that all the licenses had been issued. Counsel referred the court to various pages of the record of appeal and contended that the appellants were fully aware of the EIA licence. Counsel added that all the meetings held between the parties focused on mitigating measures that were to be put in place by the 2nd respondent as opposed to revocation of the EIA licence. Counsel urged the court to be guided by the decision in **Addax (K) Limited v National Environmental Management Authority & Another [2014] eKLR**.

11. Counsel for the 2nd respondent further submitted that there was deliberate suppression of information to the Tribunal by the appellants in that they failed to present to the Tribunal minutes of the meetings they had held with the respondents and agreements they had reached. In this regard, counsel submitted that the Tribunal was entitled to make the conclusion that it made.

12. Counsel for the 2nd respondent also submitted that the delay by the appellants was inordinate. He added that the Tribunal had carefully scrutinized the reasons advanced by the appellant and found them unconvincing and lacking in candor.

13. Further, counsel for the 2nd respondent submitted that under Section 129 of the EMCA, if leave to file an appeal out of time is granted and the appeal is filed, that appeal will automatically operate as a stoppage order and this will undermine the construction process and expose the 2nd respondent to greater prejudice and would undermine the 2nd respondent's entitlements under the doctrine of legitimate expectation.

14. On cost of the appeal, counsel for the 2nd respondent submitted that the delay to file an appeal in NET was caused by the appellants and they should bear the costs of the present appeal. Counsel urged the court to dismiss the appeal.

**Analysis & Determination**

15. I have considered both the application and the ruling which gave rise to the present appeal. I have also considered the appellant's twenty grounds of appeal and the parties' respective submissions in this appeal. Similarly, I have considered the relevant legal framework and the jurisprudential principles which govern the exercise of the discretionary jurisdiction to extend time for lodging an appeal. Lastly, I have considered the jurisprudential principles which govern the appellate court's power to interfere with the lower court's decision made in exercise of discretionary jurisdiction.

16. The application leading to the challenged decision invited the Tribunal to exercise its discretion under rule 7 of the National Environment Tribunal Procedure Rules 2003 **(the NET Procedure Rules 2003)**. The rule gives the Tribunal the discretionary power to extend the time for filing an appeal to the NET under Section 129(2) of the Environmental Management and Coordination Act **(the EMCA).** Rule 7 provides thus:

> **The Tribunal may for good reason shown, on application, extend the time appointed by these Rules (not being a time limited by the Act) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appears to it just and expedient.**

17. The central issue in the twenty grounds set out in the appellants' memorandum of appeal, and indeed the appellants' gravamen, is that the Tribunal failed to properly exercise its discretion in its ruling of 27/6/2017. The 2nd respondent opposes the appeal, contending that the Tribunal properly exercised its discretion. Therefore the broad and single issue to be determined in this appeal is whether the Tribunal exercised its discretion properly in declining to extend the time for filing an appeal against the EIA licence issued by the 1st respondent to the 2nd respondent on 3/11/2016. The above broad issue raises the following three key questions for determination: (i) whether the Tribunal considered the relevant principles that govern the exercise of the jurisdiction to extend time for lodging an appeal; (ii) whether the Tribunal erred in law or otherwise in its ruling of 27/6/2017; and (iii) whether the appellants have satisfied the criteria for setting aside a decision made by a lower court/tribunal in exercise of discretionary jurisdiction to extend time for filing an appeal. Before I pronounce myself on the above questions, I will first outline the relevant principles. The relevant legal framework has partially been outlined in the preceding paragraph.

18. The jurisdiction to extend time for filing an appeal or for doing anything prescribed by legislation is ordinarily donated by a legislation. Unless that power is expressly limited by the donating legislation, the discretion is unfettered. Secondly, there are settled guiding principles that are applied whenever a court or tribunal is invited to exercise the discretionary jurisdiction to extend time for filing an appeal. The Supreme Court of Kenya in **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others (2015) eKLR** laid down the following guiding principles to be applied when a court is invited to exercise the jurisdiction to extend time for filing an appeal:

> **As regards extension of time, this court has already laid down certain guiding principles. In the *Nick Salat* case, it was thus held:**
>
> ***it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.***
>
> **We derive the following as the underlying principles that a court should consider in exercising such discretion:**
>
> **(a) extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court;**
>
> **(b) a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;**

**(c) whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;**

**(d) where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the court;**

**(e) whether there will be any prejudice suffered by the respondents, if extension is granted;**

**(f) whether the application has been brought without undue delay; and**

**(g) whether in certain cases, like election petitions, public interest should be a consideration for extending time".**

In addition to the above jurisprudential guidelines given by the Supreme Court, I would add that an applicant inviting a court to exercise the discretionary jurisdiction to extend time for filing an appeal is obligated to satisfy any prescribed statutory criteria for grant of extension.

19. As a general trite principle of our jurisprudence, an appellate court will not liberally interfere with the exercise of discretion by a trial court or tribunal even if, were the appellate court to be in the shoes of the trial court, it would have come to a different conclusion. This general principle is informed by the fact that the discretion involved is that of the trial court, not the appellate court. The circumstances under which an appellate court will interfere with the exercise of discretion by the trial court are therefore limited. These circumstances were articulated by **Madan JA** (as he then was) in **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd (1985) EA 898** as follows:

**The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.**

20. Section 129 of the EMCA contemplates two categories of appeal. The first category consists of Section 129(1) appeals whose limitation period is limited by the Act at 60 days from the date of occurrence of the event appealed against. By dint of the proviso in rule 7 of the NET Procedure Rules, the Tribunal has no discretionary jurisdiction to extend the limitation period for Section 129(1) appeals. The second category consists of Section 129(2) appeals whose limitation period is not set by the substantive legislation but is prescribed by rule 4(2) of the NET Procedure Rules at 60 days from the date when the decision is given to or served upon the appellant. Rule 7 of the NET Procedure Rules 2003 donates discretionary jurisdiction to the Tribunal to extend the limitation period for bringing Section 129 (2) appeals. The prescribed criteria is that there should be a good reason for granting the extension.

21. Lastly, it is important to point out at this point that a party bringing a motion for extension of time under rule 7 of the NET Procedure Rules 2003 does so from the premise that the limitation period prescribed under rule 4 (2) has lapsed. The party has a legal duty to satisfy both the criteria of "good reason" and the guiding principles outlined in the preceding paragraphs. Before I make specific pronouncements on the key questions in this appeal, I will outline a brief contextual background to the pronouncements.

22. The appellants in the present appeal presented a motion to the Tribunal seeking extension of time, and prosecuted the application from the premise that the limitation period prescribed by the law had lapsed. The Tribunal exercised its jurisdiction against that contextual background and declined to grant the extension.

23. The grounds upon which the appellants sought extension of time in the Tribunal were that: (i) they lacked information on when the EIA licence was issued and on the process leading to its issuance; (ii) delay was caused by the refusal by the "respondent" to give a full and accurate disclosure of the process that was being undertaken to obtain the licence; (iii) the change of user of the suit properties were for construction of a temple for 350 people but it was evident the 2nd respondent was constructing a rental events centre with an auditorium for 800 people, around 450 underground parking bays and outside garden area; (iv) the 2nd respondent was guilty of material non-disclosure of the true nature and purpose of the project; and (v) the appellants had made it clear they were opposed to the project.

24. The 2nd respondent opposed the application for extension of time on the grounds that: (i) the appellants were involved during the preparation of the EIA reports leading to the licensing; (ii) there was public participation in which the appellants were represented; (iii) information of the 2nd respondent's intention to build a temple was available all along as there was a change of user posted in newspapers and had been in the knowledge of the appellants; (iv) the appellants wrote a detailed letter to the County Governor in January 2017 providing numerous details of the project hence must have been fully aware of the project; (v) one of the appellants wrote an email to the 1st respondent in January 2017 in which he threatened to institute proceedings at NEMA Tribunal (sic).

25. In its determination of the application, the Tribunal observed that the question before it was whether the appellants had presented good reason(s) to warrant enlargement of time to enable them file an appeal out of time. The Tribunal further observed that the power to enlarge time for filing an appeal is discretionary and the requirement to be met by an applicant seeking extension of time is that there must be good reason(s) for the delay in filing the appeal.

26. In arriving at the challenged decision, the Tribunal noted that it had perused uncontested emails, minutes and correspondence between representatives of the appellants and the 2nd respondent, and it was clear from the materials before it that: (i) the appellants were aware that the project was under construction; (ii) the appellants were also aware that an EIA report had been prepared; and (iii) the appellants were aware that an EIA licence had been issued. The Tribunal also came to the conclusion that there were lengthy engagements between the applicants and the 2nd respondent on matters relating to the project and that the appellants had failed to make full disclosure to the Tribunal at the time of seeking extension of time. Some of the matters which the Tribunal considered are summarized at paragraphs 25 to 32 of the ruling thus:

**25. In the instant case, the applicants aver that they were not aware that there was a licence granted for the construction of the proposed project, however, the applicants by the admission of a director of Loresho North Residents Company Ltd one Mr Peter Hermann stated that the letter wrote to the 2nd respondent's architect complaining about the lack of consultation before commencement of the project. He proceeded to state that a stop order was later issued by NEMA on 23rd November 2016.**

**26. We further note the minutes of a meeting between the applicants and the 2nd respondent which meeting was held on 19th November 2016 where a detailed coverage of the issues surrounding the project was presented. It is apparent that the applicants were aware that a licence for the project existed as discussed during the meeting.**

**27. At paragraph 2 of the said minutes, it was stated that there was a question by the applicant's representatives where they asked, "what are the construction approvals obtained so far? SSJS response: Approvals have been obtained for NCCC, NEMA licence, NCA registration". It will be noted that from the correspondence on record, SSJS is an alias for the 2nd respondent.**

**28. One of the agreements listed as a 'Way Forward' of the meeting was that "copies of approvals that have been requested for to be provided to Loresho residents through Peter Herrmann by the 25th November 2016".**

**29. The said minutes appear to have been circulated through email and to cite just one, "on Thu, Nov 24, 2016 at 9.15 pm, Patter Hermann Pherrmann@gmx.net wrote.**

***Deer Deepa,***

***Thank you very much indeed for preparing minutes of our constructive meeting last Saturday which was highly appreciated. We are going through your records and in case of any queries we shall get back to you. The only thing I already noticed is the wrong date mentioned. It was Saturday the 19th November.***

***Best regards,***

***Peter Hermann."***

**30. In a communication to the Loresho residents through a letter on the letterhead of 'Loresho North Resident Company Limited' where Peter Herrmann (who describes himself in his Affidavit as a Director of Loresho North Resident Company Limited) sent a copy of the said minutes to the residents on 26th November 2016. Among the conclusions in the said minutes was that, 'Approvals (NCCG, NEMA, Change of User) copy of EIA report by consultant received, but no copy of approval by NEMA'.**

**31. On 15th December 2016, the applicants and the respondents again had a meeting to discuss the affairs of the project and there were agreements on the progress of the development.**

**32. Finally, there was an email apparently sent to NEMA's representative by Mr Peter Hermann on 11th January 2017 where he stated:-**

***"Dear Catherine,***

***This morning we (LNRC) had a meeting about the still ongoing construction of the project. Until now the developer has not presented the plans for traffic management, noise reduction, sewerage treatment as agreed at our meeting on 15th December.***

***On our part the Loresho communities filled in 32 EIA questionnaires that we are aware of, to express their comments and sent them to spaceplanners. In summary the community members are not happy with the size of the project and we want to engage the NEMA Tribunal.***

***Please kindly advise on the best way forward***

***Best regards***

***Peter Herrmann"***

27. I have deliberately set out verbatim the above excerpts from the ruling of the Tribunal because it is part of the role of this court, while sitting as an appellate court interrogating the exercise of discretionary power by the Tribunal, to examine the matters which the Tribunal considered in arriving at the decision it made.

28. The first question to be determined is whether the Tribunal considered relevant principles that govern exercise of the discretionary jurisdiction to extend time for lodging an appeal. I have carefully analyzed the appellants' application before the Tribunal. I have also carefully analyzed the impugned ruling of the Tribunal. A highlight of some of the matters which the Tribunal considered would be necessary in answering the above question. At paragraphs 20 and 24 of the ruling, the Tribunal stated thus:

**20. The question before the Tribunal at this point is whether the applicants have presented good reasons to warrant**

**enlargement of time to enable them file the appeal out of time……"**

**24. Appeals to the Tribunal ought to be filed within 60 days of the disputed decision. The power to enlarge time to allow the filing of an appeal out of time is discretionary. The requirement to be met by an applicant seeking leave to file an appeal out of time is that there must have been a good reason(s) for the delay in filing the same within the statutory period".**

29. Paragraphs 34, 36, 41 and 42 of the ruling of the Tribunal similarly contains the following key matters which informed the Tribunal's decisions:

**34. It is clear to us that the applicants were aware that the project was under construction, that an EIA report had been prepared and that the EIA licence had been issued. It emerges there were lengthy engagements between the applicants and the 2nd respondent on matters of the project but these were not disclosed to the Tribunal by the applicants.**

**36. A party approaching the seat of justice especially seeking the discretion of the Tribunal is under obligation to place all material available to it to guide the Tribunal in reaching a just conclusion. The concealment of material facts and the representation of sworn affidavits that they did not know about the existence of the EIA licence yet the existence of the same had already been communicated to them in the meeting of 19th November 2016 amounts to perjury! The applicants, going by the uncontested minutes presented by the 2nd respondent, were well aware of the existence of the licence. The question of whether the licence had been availed to them for perusal is a different ball game all together.**

**41. On the other hand, the applicants were aware that construction was ongoing in their neighbourhood and engaged the 1st respondent formally through an email on 11th January 2017 when he threatened to institute proceedings but none were instituted until 6th April 2017. We note that the applicant did not furnish any material before this Tribunal to show that it had demanded for a copy of the EIA licence from the 1st respondent which is a public body and custodian of such documents.**

**42. This Tribunal notes that whereas it had discretion to allow the filing of an appeal out of time there must be good reasons for the delay. In this case we find none. The applicants are guilty of material non-disclosure of information on one hand and are also unable to provide any good reasons for the delay. It is also not lost on the Tribunal that there is no dispute that the 2nd respondent has been carrying out development works for the past five months and may have spent a tidy sum in the construction. To stop a development project at the instance of applicants who are guilty of material non-disclosure of information and unable to give good reasons for delay in filing an appeal within the statutory timelines may be too punitive, prejudicial and out rightly illegal as against the 2nd respondent.**

30. It is clear from the ruling of the Tribunal that the Tribunal considered the relevant legal framework, the equitable nature of the relief sought and the need to make full disclosure in the application, the prescribed statutory criteria, the element of public participation in the process leading to the issuance of the licence, and the principle of proportionality with regard to the effect of allowing an appeal out of time in the context of a project which was five months under implementation with the appellants' full knowledge of existence of prerequisite licences. Consequently, this court is satisfied that the Tribunal considered appropriate principles in exercising its discretionary jurisdiction under rule 7 of the NET Procedure Rules 2003. There is therefore no sound basis for faulting the Tribunal in that regard.

31. The second question is whether the Tribunal erred in law or otherwise in its ruling of 27/6/2017. One of the grounds upon which the appellants fault the Tribunal is that it erred in law and in fact in failing to take into account the fact that the 1st respondent did not gazette the EIA report as required by law under Section 59 of EMCA. I have gone through the application presented to the Tribunal on 6/4/2017. The issue of gazettment was not raised as one of the grounds why the appellants sought extension of time. It was first raised by Mr Murage during oral submissions before the Tribunal on 26/5/2017. In my view, it was wrong for the appellants to raise that issue at that point. Similarly, it is wrong for the appellants to raise that issue as one of their grounds of appeal yet by failing to formally raise it as one of the grounds constituting "good reasons", they denied the respondents the opportunity to properly respond to the issue through evidence or legal material. In my view, the Tribunal properly disregarded this ground because it had not been properly raised as a ground and the respondents had not been invited to respond to it by way of presenting evidence or legal material to rebut it.

32. The issue having been formally raised for the first time through the Memorandum of Appeal filed in this appeal, the 2nd respondent has responded through written submissions by way of referring to Legal Notice No 150 which they contend exempted the material project from the requirement for gazettment. I would not say more on this issue because, as observed, it was not one of the matters which the Tribunal was formally invited to consider.

33. The appellants have similarly faulted the Tribunal for placing too much premium on minutes and correspondence involving some of the appellants and the respondents. Three of the appellants are representative bodies and or entities representing residents of the neighbourhood. The key reason cited by the appellants as a basis for extension of time was that they did not have information on the EIA licence and the process leading to its issuance. In my view, the Tribunal's reference to correspondence, minutes and any other material addressing the question as to whether indeed the appellants did not have the above information as alleged by them was proper. I say so because, it is through a critical examination and analysis of the correspondence, minutes and other relevant materials that the Tribunal would be able to verify the rival contentions by the parties and make a decision that is informed by evidence.

34. Another key ground raised by the appellants in this appeal is that there was no public participation. The appellants contended at the Tribunal that the respondents had "refused and or ignored to include, consult, involve and or take into consideration the view of the applicants and or immediate neighbours to the Project Site". The Tribunal considered the issue of public participation and came to the following conclusion at paragraph 34 of its ruling:

**It is clear to us that the applicants were aware that the project was under construction, that an EIA report had been prepared and that an EIA licence had been issued. It emerges that there were lengthy engagements between the applicants**

**and the 2nd respondent on matters of the project but these were not disclosed to the Tribunal by the applicants.**

This finding by the Tribunal is indeed supported by evidence which was placed before the Tribunal to indicate that there was public participation.

35. The other key ground raised by the appellants is that the Tribunal failed to take into account submissions, affidavits and documents by the five appellants and further that the Tribunal failed to consider the fact that the appeal had five appellants. All the five appellants were represented by the same law firm. The law firm filed documents and submitted on behalf of all the five appellants. Three of the five appellants are representative bodies and entities. I have examined the materials presented on behalf of the five appellants. I do not find any material which suggest that any of the appellants presented before the Tribunal a separate set of evidence on any of the issues before the Tribunal which, if considered independent of the other appellants, would result into a different finding.

36. The appellants have similarly faulted the Tribunal on the ground that it failed to take into account the fact that the 2nd respondent had failed to supply the appellants with a copy of the EIA licence. I have examined the material presented to the Tribunal. It is clear from the minutes and correspondence in the record of appeal that the appellants were aware of the existence of the licence in November 2016 when the construction started. What followed were engagements between the residents representative bodies and the respondents, culminating in an agreement allowing the 2nd respondent to proceed with the project. It is also clear from the email dated 11/1/2017 from Peter Herrmann to Catherine Tahithi that the appellants were not happy with the fact that the 2nd respondent had not presented the plans for traffic management, noise reduction and sewerage treatment and as a result of this failure on part of the 2nd respondent, the appellants, unhappy with the size of the project, expressed their desire to engage the NET. It thereafter took the applicants up to 6/4/2017 to file a motion before the NET.

37. Lastly, learned counsel for the appellants urged this court to be guided by the decision in **Simba Corporation Limited v Director-General NEMA & Another (2017) eKLR** in which this court held that a determination on whether a suit is statute-barred ought to bear an unequivocal pronouncement on the exact date when limitation period started running and when it lapsed. In the present appeal, the issue before the Tribunal was not whether the appeal was statute-barred. The appellants in the present appeal moved the Tribunal and prosecuted their application from the premise that their intended appeal was statute-barred hence the need for extension of time. Indeed, that is the reason why they sought extension of time. That was the context in which the Tribunal exercised its jurisdiction. The holding in **Simba Corporation Limited v Director General NEMA & Another** is therefore not relevant in the present case where limitation was not contested.

38. This court's finding on the second issue therefore is that, the materials placed before this court in this appeal do not disclose any substantial error of law or fact on part of the Tribunal to warrant interference with its exercise of discretionary jurisdiction.

39. The sum total of the findings on the above two questions is that, the appellants have not satisfied the criteria upon which this court would be entitled to interfere with the discretionary decision of the Tribunal made on 27/6/2017.

**Disposal**

40. In light of the foregoing, it is the finding of this court that this appeal lacks merit and the same is dismissed. I have deeply reflected on the issue of costs. In view of the fact that this appeal bears elements of public litigation, I direct that each party shall bear own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MARCH 2018.**

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**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Juma holding brief for Mr Murage instructed by M/S Murage Juma & Co. Advocates for the Appellants.

Mr. Mwangi instructed by M/S Macharia Mwangi & Njeru Advocates for the Respondents.

Ms Halima Abdi - Court Clerk