



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 100 OF 2015

SIMBA CORPORATION LIMITEDAPPELLANT

VERSUS

THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY (NEMA)1ST RESPONDENT

AVIC INTERNATIONAL REAL ESTATE (EA) LTD2ND RESPONDENT

(Being an appeal against the ruling and order of the National Environment Tribunal at Nairobi [The Honourable Chairperson Jane Dwasii; Members: Francis Situma, Tom Ojienda & Maureen Mathenge J] delivered on 18/12/2015 in Tribunal Appeal No. Net 158 of 2015)

JUDGMENT

1. The appellant, **SIMBA CORPORATION LIMITED**, is the registered proprietor of Land Reference Number 209/73/5 situated in Westlands, Nairobi City County. The appellant has constructed on the said piece of land a high end hotel currently going by the name **Kempinski Villa Rosa Hotel**.
2. The 1st Respondent is the **DIRECTOR GENERAL AND SECRETARY TO THE BOARD OF DIRECTORS OF THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)**, a statutory body established under the **Environmental Management & Co-ordination Act (Act No. 8 of 1999)**. NEMA has the statutory state mandate of exercising general supervision and co-ordination over all matters relating to the environment. Besides this, NEMA is the principal state organ entrusted with the statutory function of implementing all policies relating to the environment.
3. The 2nd respondent, **AVIC INTERNATIONAL REAL ESTATE (EA) LIMITED**, is a limited liability company and owns Land Reference Numbers 209/73/1, 209/73/6, 209/74/3, 209/74/4 and 209/74/6 all situated along Chiromo Lane, Westlands, Nairobi. These properties neighbour the appellant's property, Land Reference Number 209/73/5.
4. On 15/7/2015, NEMA through the 1st respondent, issued to the 2nd respondent a conditional environmental impact assessment licence granting it permission to build on its pieces of land a 43 level office tower, a 35 level hotel tower, four apartment towers (of 2 x 24, 1 x 25 and 1 x 28 levels), two commercial podiums, two level bridge and associated facilities and amenities.
5. Aggrieved by the 1st respondent's decision to issue the licence to the 2nd respondent, the appellant on 15/9/2015 lodged an appeal in the National Environmental Tribunal [*hereinafter referred to as "the NET"*] at Nairobi, to wit, Tribunal Appeal No. NET 158 of 2015. Through the appeal, the appellant sought, among other prayers, an order revoking the 1st respondent's decision to grant the licence to the

2nd respondent. Upon being served with the appeal papers, the respondents filed their responses, opposing the appeal. In addition, on 5/11/2015, the 2nd respondent filed a Notice of Preliminary Objection to the appeal, seeking to have the appeal struck out on the following grounds:

- i. The appeal was frivolous and without basis because it was filed out of time.*
- ii. The 2nd respondent obtained all requisite statutory approvals prior to commencement of the project in question.*
- iii. The matters raised in the appeal were not within the jurisdiction of the tribunal; and that*
- iv. The appeal was oppressive and an abuse of the tribunal process and should be dismissed.*

The Preliminary objection was argued, and on 18/12/2015, the Tribunal rendered a ruling in which its members unanimously upheld the preliminary objection and dismissed the appellant's appeal.

6. Dissatisfied with the Tribunal's ruling, the appellant lodged the present Appeal in this court on 23/12/2015. The appellant seeks an order setting aside the ruling of the tribunal delivered on 18/12/2015. The appellant also seeks an order directing that Nairobi NET Appeal No. 158/2015 be reinstated and do proceed to full hearing and determination on merit. This judgment relates to the said Appeal.

7. Through its Memorandum of Appeal dated 23/12/2015, the appellant has raised the following seven (7) Grounds of Appeal:

- i. The learned Chairperson and Members of the Tribunal erred in law and in fact in failing to appreciate that the time vis-à-vis the lodging of appeals arising from Section 129(2) of the Environmental Management & Co-ordination Act (hereinafter referred to as EMCA) was as stipulated under Rule 4 (2) of the National Environmental Tribunal Procedure Rules, 2003.*
- ii. The learned Chairperson and the Members of the Tribunal erred in law and in fact in failing to uphold that the 2nd Respondent's Preliminary objection resultant into the ruling was urged on the basis that the contention by the Appellant that it was notified for the first time of the 1st Respondent's grant of EIA Licence No. NEMA/EIA/PSI/2038 to the 2nd Respondent as pleaded under paragraph 8 of the Notice of Appeal dated 15/9/2015 and filed at the National Environment Tribunal on the same date was correct.*
- iii. Consequently, the Learned Chairperson and Members of the Tribunal erred in law and in fact in failing to find and hold that time limited for the filing of an appeal under Rule 4 (2) of the National Environmental Tribunal Rules, 2003 for the case of the Appellant began to run on 10/8/2015 and not on the date the decision of the Director General granting the aforementioned licence upon the 2nd Respondent was given to or served upon the 2nd Respondent.*
- iv. The Learned Chairperson and Members of the Tribunal misinterpreted the words "to reach it not later than sixty (60) days after the date on which the disputed decision was given to or served upon him" as used in Rule 4(2) of the National Environmental Tribunal Rules, 2003 as applying to the 2nd Respondent rather than the appellant in the aforesaid appeal.*
- v. The Learned Chairperson and Members of the Tribunal erred in law and in fact in finding that the Appellant's appeal filed [sic] out of time on 15/9/2015.*
- vi. The Learned Chairperson and Members of the Tribunal erred in law and in fact in holding that the Appellant needed to first apply for the extension of time under Rule 7 of the National Environmental Tribunal Rules, 2003.*
- vii. Consequently, the Learned Chairperson and Members of the Tribunal lacked any sound legal and/or factual basis upon which they allowed the 2nd Respondent's preliminary objection dated*

4/11/2015 and the attendant dismissal of the Appellant's Notice of Appeal dated and filed on 15/9/2015.

8. This file was assigned to me this year. At the hearing of the appeal, both Mr Imende, counsel for the appellant and Mr Monari, counsel for the 2nd respondent, indicated that their respective arguments were adequately captured in their written submissions filed on 15/8/2016 and 27/10/2016 respectively. The 1st respondent did not file any response in this appeal.

9. Mr Imende, counsel for the appellant submitted that this appeal raises a single issue namely: in relation to a person who was not a party to an environmental impact assessment licence application, when does time start to run for the purpose of filing an appeal to the National Environmental Tribunal [NET] against the grant of the licence? Mr Monari, counsel for the respondent was of the view that the appeal raises three issues to be determined, namely:

a) whether the tribunal erred in law and fact in determining the time for lodging an appeal;

b) whether the tribunal erred in law and in fact in upholding the 2nd respondent's preliminary objection and dismissing the appellant's notice of appeal dated and filed on 15/9/2015; and

c) whether the tribunal erred in law and in fact in holding that the appellant needed to first apply for an extension of time under Rule 7 of the National Environmental Tribunal Rules 2003.

Determination

10. I have carefully considered the seven grounds set out in the memorandum of appeal. I have also considered the single issue framed by Mr Imende, counsel for the appellant. Similarly, I have considered the statement of three issues framed by Mr Monari, counsel for the 2nd respondent. In my view, the seven grounds of appeal and the two sets of issues framed by counsel for the parties revolve around the question as to whether the Tribunal erred in law in finding that the appellant's appeal was filed out of time on 15/9/2015. There are four issues that emerge for determination within the above broad question. These four issues are as follows:

*a) Is there a limitation period for lodging an appeal to NET under **Section 129 (2) of EMCA**? If so, when does time start to run?*

*b) Does the limitation period of 60 days stipulated under **Rule 4 (2) of NET Procedure Rules** apply to an appeal under **Section 129 (2) of EMCA**?*

*c) When is an appellant under **Section 129 (2) of EMCA** required to apply for extension of time under **Rule 7 of the NET Procedure Rules**?*

*d) Does the extension of limitation period contemplated under **Rule 7 of NET Procedure Rules** relate to the 60 days period stipulated under **Rule 4 (2) of the NET Procedure Rules**?*

11. I have considered the parties' elucidating submissions on the broad question as to whether the NET erred in law in finding that the appellant's appeal filed on 15/9/2015 without leave of the NET was time-barred. I have similarly considered the legal framework governing limitation under **EMCA**, the **Interpretation and General Provisions Act [Cap 2]** and the **NET Procedure Rules**. I have also considered the existing judicial pronouncements on the broad question of limitation for the purpose of an appeal under **Section 129 (2) of the EMCA**. Much of the available jurisprudence is from NET itself and from the Environment and Land Court of Kenya.

12. **Part XII of the EMCA** establishes the National Environmental Tribunal and provides a broad framework on how the Tribunal should conduct its proceedings. It also sets out the Tribunal's jurisdiction and powers and gives general guidelines on how litigants would access the Tribunal. Because the present appeal revolves around the reckoning of limitation period under **Section 129 (2)** as read

together with **Rule 4 (2) and Rule 7 of the NET Procedure Rules**, it is important that I outline the framework before determining the four issues set out in the preceding paragraphs.

13. **Section 129 of EMCA** provides as follows:

“(1) Any person who is aggrieved by—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, 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.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority 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.

(3) Upon any appeal, the Tribunal may—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.”

14. **Rule 4 (1) and (2) of the NET Procedure Rules** provides as follows:

“4. (1) An appeal to the Tribunal shall be made by written notice, and where the Tribunal has approved a form of notice for the purpose, in the form so approved.

(2) The 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.”

15. **Rule 7 of the NET Procedure Rules** provides as follows:

“7. 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 appear to it just and expedient.”

16. **Sections 58 and 59 of the Interpretation and General Provisions Act** contains the following framework on the broad subject of limitation:

“58. Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.

59. Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”

17. In the jurisprudence interpreting the two categories of appeals filed to the NET under **Sections 129 (1) and (2)** the NET and the superior courts of record have held that the framework in **Sections 129 (1) and 129 (2)** relate to two different categories of appeals: the framework in **Section 129 (1)** relates to an appeal by a person who was a party to a decision or determination made by NEMA within the framework of EMCA; and **Section 129 (2)** provides a framework for an appeal by a person who was not a party to a decision or determination made by NEMA within the framework of EMCA.

18. There is common ground by the appellant and the 2nd respondent that the material appeal to NET was lodged within the framework of **Section 129 (2) of EMCA**. What is in contestation is whether or not the appeal was lodged outside the prescribed limitation period, if any.

19. The first issue to be determined in this appeal is whether there is a prescribed limitation period for appeals filed under **Section 129 (2) of EMCA**. There is no doubt that **Section 129 (1) of EMCA** provides a limitation period of 60 days from the date of occurrence of the impugned event, within which the dissatisfied party is to present an appeal to NET. The framework in **Section 129 (1)** does not provide for extension of the 60 days period. In the same vein, **Rule 7 of the NET Procedure Rules** prohibits extension of time in a scenario where the limitation period is expressly limited by EMCA. The legal ramification of the framework in **Rule 7 of NET Procedure Rules** is that the extension contemplated under **Rule 7** does not relate to appeals falling under **Section 129 (1)** because limitation period for appeals falling under **Section 129 (1)** is limited by the Act. The extension contemplated in **Rule 7 of NET Procedure Rules** therefore relates only to appeals falling under **Section 129(2)** because these are the only appeals in respect of which the Act does not set a limitation period.

20. The answer to the question as to whether or not there is a limitation period for **Section 129 (2)** appeals is to be found in **Rule 2, Rule 4 (2) and Rule 7 of the NET Procedure Rules**. **Rule 2** defines an appellant as “a person who makes an appeal to the Tribunal under **Section 129 of the Act** and includes a duly authorized agent or legal representative of that person”. **Rule 4 (2)** requires the appellant to send or deliver six copies of the notice of appeal to the tribunal so as to reach the tribunal not later than sixty [60] days after the date on which the disputed decision was given to or served upon the appellant. **Rule 7** provides a framework for extension of the 60 days period subject to any applicable limitation set out by EMCA as explained in the preceding paragraphs. My interpretation of **Rules 2, 4 (2) and 7 of the NET Procedure Rules** is that **Rule 4 (2)** provides a limitation period of 60 days within which **Section 129 (2)** appeals are to be lodged. The limitation period is to be reckoned from the time when a **Section 129 (2)** appellant is given or served with notice of the disputed decision by NEMA. The rules imply that NEMA has an implied obligation to notify the public about all decisions contemplated under **Section 129 of EMCA**. In the absence of any prescriptive legal framework, this notification takes various forms, including a notice published in the Kenya Gazette or service of the decision upon the appellant on request or otherwise.

21. The issue as to whether the limitation period of 60 days stipulated under **Rule 4 (2) of NET Procedure Rules** apply to **Section 129 (2)** appeals has been answered in the affirmative by my pronouncements in the preceding paragraphs.

22. I now turn to the third issue which is: when is an appellant under **Section 129 (2) of EMCA** required to apply for extension of time under **Rule 7 of the NET Procedure rules**. Any framework on extension of

time would invariably be founded on the existence of a limitation period prescribing the time frame within which legal proceedings are to be taken. An application for extension of time becomes necessary because the prescribed period for taking the legal proceedings has lapsed. In this regard, limitation period is computed from the day when the prescribed event, act or thing happened, exclusive of the day on which the event, act or thing happened or the act or thing is done. [See **Section 57 of the Interpretation & Generation Provisions Act, Cap 2**]. Suffice to observe that the happening of the event or act or thing is key because that is what triggers the running of time. Until that event or act or thing happens, time does not run.

23. In their wisdom, the framers of the NET Procedure Rules set a limitation period of 60 days “*after the date on which the disputed decision was given to or served upon”* the appellant. I have underlined the words ‘*given to*’ and ‘*served upon*’ because in my view, time starts to run for the purpose of **Rule 4 (2) and Rule 7 of the NET Procedure Rules** only after the disputed decision is given to or served upon the appellant. I have held that ‘*giving to*’ or ‘*serving upon*’ takes many forms, including notice in the Kenya Gazette, notice in newspapers with wide national circulation or personal service of the decision upon the appellant. In my view, to argue that limitation period for a **Section 129 (2)** appeal starts running before the decision is given to or served upon the appellant would fly in the face of the unambiguous provisions of **Rule 4 (2)** and would defeat the philosophy underpinning the doctrine of limitation. In the appeal before NET, it was incumbent upon the respondent to place before the Tribunal evidence to satisfy the Tribunal that the impugned decision was given to or served upon the appellant more than 60 days prior to the filing of the appeal.

24. The last issue to be determined in this appeal is the question as to whether the extension contemplated under **Rule 7 of the NET Procedure Rules** relates to the 60 days period stipulated under **Rule 4 (2) of the NET Procedure Rules**. I have observed that NET has no jurisdiction to extend the limitation period of 60 days stipulated under **Section 129 (1) of EMCA**. It automatically follows that the extension contemplated under **Rule 7 of NET Procedure Rules** relates to appeals falling under **Section 129 (2) of EMCA**. The limitation period for **Section 129 (2)** appeal is set out in **Rule 4 (2) of the NET Procedure Rules**. That limitation period of 60 days starts running after the date on which the disputed decision is given to or served upon the appellant.

25. The Tribunal’s decision to dismiss the appellant’s appeal was based on the ground that the appellant did not obtain leave to file the appeal out of time. I have carefully gone through the Ruling of the Tribunal. Regrettably, the Tribunal did not pronounce itself on the exact date when time started running and when limitation period lapsed. In my view, a determination on an issue relating to limitation ought to commence with a clear outline of the applicable legal framework on limitation, followed by an unequivocal pronouncement on the exact date when limitation period started running and the date when the limitation period lapsed.

26. Secondly, I have observed that the appellant moved the court by way of a notice of preliminary objection as opposed to a substantive motion. A perusal of the framework in **Rule 4 (2) of the NET Procedure Rules** suggests that to determine whether or not an appeal is time barred, the Tribunal would have to look at the evidence confirming the date when the disputed decision was given to or served upon the appellant. In my view, in the absence of a clear concession by way of relevant pleadings, this is an issue that calls for adducement of evidence confirming the exact date when the disputed decision was given to or served upon the appellant. To this extent, the efficacy of a bare notice of preliminary objection as a mechanism for disposing an appeal on the ground of limitation under **Rule 4 (2) of the NET Procedure Rules** is doubtful. A substantive motion supported with an affidavit together with relevant evidence would be more efficacious and would afford the opposing party the opportunity to respond to the motion.

27. Before I make my disposal order, I wish to make some observations concerning communication of NEMA’s statutory decisions to the general public. I have observed in this Judgment that under **Section 129 of EMCA** and **Rule 4 (2) of NET Procedure Rules**, there is an implied obligation on the part of NEMA to give to or serve upon interested parties notices of statutory decisions made by it within the framework of EMCA. More often than not, those decisions have significant bearings on environmental

management and investor projects in the country. For this reason, there is need for appellants to promptly lodge all resultant appeals within well-ascertained time-frames. I would advise the Attorney General, the Law Reform Commission, the Cabinet Secretary responsible for environment and the relevant committees of both Houses of Parliament, to consider the appropriateness of a clear prescriptive framework on how NEMA should notify the general public about its statutory decisions which are subject to appeals contemplated under **Section 129 of EMCA**. This will eliminate endless litigations which adversely affect investor projects and the country's environmental management programmes. In this regard, the Registrar of this court shall cause copies of this Judgment to be supplied to the relevant offices for perusal, should it be deemed necessary.

28. In light of the reasons and findings outlined above, I will allow this Appeal and make the following disposal orders:

i. The ruling of the National Environmental Tribunal delivered and given on 18/12/2015 is hereby set aside.

ii. The Appellant's Appeal filed before the National Environmental Tribunal in NET 158/2015 shall be heard and determined on merit.

iii. Because of the unique questions raised in this Appeal, parties to this Appeal shall bear their respective costs.

Dated, signed and delivered at Nairobi on this 20th day of December, 2017.

B M EBOSO

JUDGE

In the presence of:

Amgwenyi holding brief for Imende: for the Appellant

Kimani holding brief for Monari: for the 1st respondent

None appearance: for the 2nd respondent

Halima Abdi: Court Assistant