



Kiliavo Fresh Limited v National Environment Tribunal & 4 others (Civil Appeal E446 & E447 of 2024 (Consolidated)) [2025] KECA 623 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 623 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E446 & E447 OF 2024 (CONSOLIDATED)
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
APRIL 4, 2025**

BETWEEN

KILIAVO FRESH LIMITED APPELLANT

AND

THE NATIONAL ENVIRONMENT TRIBUNAL 1ST RESPONDENT

BIG LIFE FOUNDATION 2ND RESPONDENT

THE CONSERVATION ALLIANCE 3RD RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 4TH
RESPONDENT**

COUNTY GOVERNMENT OF KAJIADO 5TH RESPONDENT

(Being an appeal from part of the ruling and order of the Environment and Land Court at Kajiado (M.N. Gicheru, J.) dated 15th May 2024 in ELC J.R NO. E002 OF 2021)

JUDGMENT

1. The appellant, Kiliavo Fresh Limited, is a limited liability company that is the registered proprietor of land parcels Loitoktok/Kimama-Tikondo/4209, 4210 and 4211 (the suit properties) measuring about 180 acres. On the farm, the appellant was undertaking an integrated mixed-use farm comprising of conservation agriculture, livestock production, wildlife rangers base, and necessary farm infrastructure (the project). It was the appellant's case that the project was preceded by an extensive Environment Impact Assessment (EIA) Report Ref. No. NEMA/PR/KJD/5/5408 which was approved by the National Environmental Management Authority (NEMA) (the 4th respondent). On 6th August 2020, the appellant was issued with EIA licence No. 0068059.
2. The appellant's EIA application had been preceded by the appropriate applications and consultations with the relevant stakeholders, who were advised as to the nature, scope, and extent of the project, as



well as the benefits the project sought to bring in the subject area. There were no objections. After the approvals, the appellant fenced off the suit properties; commissioned two (2) boreholes that had been sunk here; employed at least 300 locals; and prepared the farm beds and planted the seedlings for the growing of the highest quality of organic fruits and vegetables for sale within Kenya and beyond. This was a great financial investment.

3. The appellant stated that various much bigger farms had been established in the area, and gave the example of Ngong Veg. Farm that is 600 acres big.
4. Through notices to show cause dated 9th and 18th September 2020, 4th respondent threatened to cancel the appellant's EIA licences. The appellant was aggrieved by the notices, and lodged an appeal to the National Environment Tribunal (the 1st respondent), that is NET Appeal No. 38 of 2020. The notice had, among other things, ordered and directed the appellant to stop any further development on the suit properties. These notices had been occasioned by various complainants who were objecting to the EIA Licence on the basis that the appellant's project was within a zoned wildlife corridor and thus violated the provisions of the Amboseli Ecosystem Management Plan (Ref. KWS/AMB/6006); that the Amboseli was a fragile ecosystem and that the local plan of the Amboseli Land Owners Conservancies Association (ALOCA) had zoned areas for conservation and livestock grazing in line with the Amboseli Ecosystem Management Plan (AEMP) and thus the proposed project violated the provisions of the plan which had been endorsed by all stakeholders and gazette under the Wildlife Act, 2015; and, lastly, that key stakeholders had not been consulted during the EIA approval process.
5. Various parties joined in the appeal, some seeking that the interim orders be vacated. On 31st March 2021 all parties agreed that the appeal and the various applications do receive filings and responses, and be heard together on 26th April 2021 and 27th April 2021. On 26th April 2021, all the other parties and their advocates were present. The appellant and its advocates were absent. The appeal was dismissed because of the non-attendance of the appellant, its advocates and witnesses.
6. Aggrieved by the decision of the 1st respondent, the appellant filed a chamber summons in ELC (Kajiado) JR Application No. E002 of 2021 on 10th May 2021 seeking leave to apply for orders of certiorari and prohibition and that the leave does operate as a stay of the implementation, operation and coming into effect of the decision of the 1st respondent dated 26th April 2021. Leave was granted on 16th September 2021, and the appellant given 21 days to file the substantive motion.
7. In the meantime, on 14th June 2021 the 1st respondent filed a preliminary objection dated 11th June 2021 in which it stated as follows:-
 - a. that the suit offended the provisions of section 130 of the *Environmental Management and Co-ordination Act* (EMCA) which provides that any person aggrieved by a decision of the Tribunal, may appeal against such decision to the High Court; and
 - b. that the suit contravenes the provisions of section 133 of EMCA which gives the 1st respondent immunity from being sued.
8. After the substantive motion was filed on 2nd November 2021, the 1st respondent refiled the preliminary objection.
9. On 21st February 2022, the 4th respondent filed preliminary objection to the motion by stating that it was null and void having been filed beyond the 11 days which had ended on 7th October 2021.
10. The Conservation Alliance, (3rd respondent), filed grounds to oppose the motion.



11. The Environment and Land Court (ELC) (M.N. Gicheru, J.) made directions for the filing of written submissions as a way of dealing with the objections. In the written submissions by the appellant, the following issues were to be determined:-

- a. Did the ELC have jurisdiction to admit and adjudicate over the legality and propriety of the 1st respondent's decision of 26th April 2021?, and
- b. Whether in undertaking the impugned administrative motion, the 1st respondent acted unlawfully, rendering the decision invalid for violating and threatening to further violate not just the law but also the appellant's fundamental rights and freedoms.

The respondents identified the following issues:-

- a. Whether the application offended the provisions of section 130 of EMCA; and
- b. Whether the application contravened the provisions of section 133 of EMCA which gives the tribunal immunity from being sued.

Big Life Foundation (the 2nd respondent) identified the section 130 of EMCA issue, and four other issues as follows:-

- a. Whether the notice of motion dated 21st October 2021 was incurably incompetent, having been filed beyond the 21 days of the leave;
- b. Whether Judicial Review proceedings are concerned with the decision-making process or the merits of the decision;
- c. Whether the 1st respondent could dispose of the appeal by dismissing it on basis of the non-attendance of the appellant; and
- d. Whether a declaration can be issued in those Judicial Review proceedings.

12. In his determination, the learned Judge, while making reference to the decisions in *Mutanga Tea and Coffee Company -vs- Shikara Limited & Municipal Council of Mombasa*, Civil Appeal No. 54 of 2014, *Speaker of the National Assembly -vs- Karume* [1992] KLR 21 and *Narok County Council -vs- Trans Mara County Council & Another*, Civil Appeal No. 25 of 2000, found that, under section 130 of EMCA, the only way that the appellant could approach the ELC was by way of appeal against the decision of the 1st appellant; that by coming to the court by way of Judicial Review proceedings the appeal had gone against the express provisions of the Act.

13. It is this substantive finding that led to the present appeal whose grounds are as follows:-

- “1) The learned judge erred in law and fact by holding that the only way to approach the Environment and Land Court in a matter coming from the National Environment Tribunal is by way of appeal under section 130, Environment Management and Coordination Act (EMCA).
2. The learned judge erred in law and fact by consequently finding that the subject judicial review proceedings were supposedly defective and a nullity.
3. The learned judge erred in law and fact by disregarding that the Environment and Land Court, has the same power, authority and status, in respect of matters that fall within its subject matter jurisdiction: which power, authority and status, includes supervisory jurisdiction over the National Environment Tribunal, pursuant to articles 47 and 162(2)



(b) as read with 165(6) of *the Constitution* and sections 7(1) (a) and 9 of the Fair Administrative Actions Act.

4. The learned judge erred in law and fact by failing to determine the substantive merits of the judicial review application.”

14. When the appeal came for hearing on 27th November 2024 vide the virtual platform, learned counsel Mr. Luci was present for the appellant, learned counsel Ms. Kerubo was present for the 1st respondent, learned counsel Mr. Sankale was for the 2nd respondent, learned counsel Mr. Gitari and learned counsel Mr. Okoth represented the 3rd respondent while the 5th respondent was presented by learned counsel Mr. Nyaosi. At the request of learned counsel Mr. Luci, with the other parties agreeing, this appeal was consolidated with Civil Appeal No. E447 of 2027 whose grounds were similar to those in the instant appeal. Each counsel orally highlighted his/her written submissions.
15. Learned counsel Mr. Luci submitted that the appeal challenged the holding by the superior court that the only way to approach the court in a matter coming from the 1st respondent was by way of appeal and not by Judicial Review. It was argued that under the current legal dispensation of the post-promulgation of *the Constitution* 2010, the scope and breath in the regulation of administrative actions or decisions pursuant to section 2 of the *Fair Administrative Action Act* and Articles 47, and 165(3) (d)(ii) and 6, has been expanded; that Judicial Review was no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes, and intended to control the exercise of public power. (See Republic -vs- Kenya Revenue Authority Ex parte Stanley Mombo Amuti [2018] eKLR). Learned counsel cited the Supreme Court decision in Edwin H.D. Dande & Others -vs- Inspector General of Police & Others, S.C Petition No. 6 (E007) of 2022 (Consolidated with Petition No. 4 (005) & No. 8 (E010) of 2022 in which it was affirmed that: –
- “The entrenchment of judicial review under *the Constitution* of Kenya 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, Article 47 provides that:-
- “every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.””
16. Learned counsel for the appellant submitted that, under the *Fair Administrative Action Act* and *the Constitution*, a person aggrieved by an administrative action may apply for judicial review to the High Court and, therefore, the 1st respondent’s decision was amenable to challenge by Judicial Review. He added that, Judicial Review was a constitutional mechanism to supervise public authorities, and that power involved the challenge to the legal validity of a decision. Both procedure and substantive fairness were supposed to be supervised, and that the court should boldly recognize *the Constitution* as the basis for Judicial Review. (See Republic - vs- Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments [2019]eKLR).
17. Counsel for the 1st respondent submitted that Judicial Review was not available to the appellant as the remedy was concerned with the decision-making process, while the remedy of appeal deals with the merits of the decision. It was urged that in the instant case, EMCA provides that an appeal is the only remedy provided for an aggrieved appellant.
18. Counsel for the 2nd respondent submitted that the appellant’s approach to the ELC by way of Judicial Review was improper given section 130 of EMCA. Secondly, that the appellant had failed to demonstrate why the dispute ought to be resolved by way of Judicial Review, and not by an appeal.



- (See Vania Investments Pool Limited –v- Capital Markets Authority, Rea Trading Limited, Centum Investments Limited, Tausi Assurance Co. Limited, G.A Insurance, Savco Stores Limited, Kenyalogy Com Limited, Rea Vipingo Plantations Limited and Kilifi County Government [2014] KECA 452 (KLR)). Reference was made to a plethora of decisions in which it had been held that a procedure laid down in *the Constitution* or an act of Parliament ought to be adhered to. The decisions included Bridge Gate Holding Ltd -vs- NEMA & Dominic Kibicho Karanja [2015] KEHC 2854 (KLR); Speaker of the National Assembly -vs- Karume (Civil Application No. 92 of 1992 [1992] KECA 42 (KLR); and Ketupe Ole Ateti Maya -vs- County Land Registrar Kajiado & County Surveyor Kajiado [2017] KEHC 6914 (KLR).
19. Counsel for the 3rd respondent submitted that pursuant to section 130 of EMCA, there was a clearly laid down procedure for remedy which the appellant failed to adhere to. The learned Judge therefore could not be faulted for holding that the Judicial Review proceedings were defective; that the learned Judge was correct in finding that he had no jurisdiction to entertain the motion. It was further submitted that the ELC had supervisory jurisdiction over subordinate courts, bodies or tribunals that were exercising judicial or quasi-judicial functions, but that, in this case, section 130 of EMCA provided a remedy which had not been exhausted by the appellant. Counsel referred to the decision in Speaker of the National Assembly -vs- Karume (supra). In regard to the provisions of section 9(2), (3) and (4) of the *Fair Administrative Action Act*, learned counsel submitted that the remedy of Judicial Review provided therein was not available where a party had failed to exhaust internal mechanism for appeal and review. Reference was made to Market Plaza Limited -vs- Commissioner of Lands and Three Others [2019] eKLR in which the Court held that an order of Judicial Review ought to be sought as a last resort and only where there were exceptional circumstances; that, therefore, the appellant ought to have pursued the remedy of appeal.
 20. Counsel for the 5th respondent submitted that, pursuant to section 130 of EMCA, the appellant's remedy was to appeal. With respect to section 9(2) of Fair Administration Action Act, the same was only applicable wherein all internal mechanisms for appeal or review and all other lawful remedies had been exhausted. We were referred to the case of Secretary County Public Service Board, Secretary, Wajir County Government -vs- Hulbhai Gedi Abdille (Civil Appeal No. 202 of 2015) [2017] KECA 643 (KLR) Civ (24 March 2017) (Judgment) in which this Court faulted the appellant therein for initiating Judicial Review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the *County Governments Act*. The Court found that section 77 of the Act offered a specialized forum and jurisdiction for addressing grievances, and that invoking Judicial Review was premature and unwarranted as no exceptional circumstances justified the by-passing of the statutory appellate process.
 21. We have considered the appeal, the impugned decisions, the rival submissions and the authorities cited. In doing this, we are aware that this is a first appeal and our jurisdiction entails the fresh reconsideration of all the evidence that was tendered before the superior court to be able to reach our own conclusions on facts and the law, while bearing in mind that we did not have the benefit of seeing or hearing the witnesses. (See Ephantus Mwangi & Another -vs- Duncan Mwangi Wambugu [1982- 88] 1 Kar 278).
 22. That said, we consider the central point for determination as being whether the learned Judge erred in dismissing the appellant's Judicial Review motion filed on 2nd November 2021 for want of jurisdiction. This being a jurisdictional question, it has to be determined first. Should we find for the respondents on the question, all the other issues would not merit discussion.
 23. The appellant maintains that, subject to the provisions of Articles 47, and 165(3)(d)(ii) and 6 of *the Constitution*, as read with section 9(i) of the Fair Administrative Actions Act, any person aggrieved by an administrative action may apply to the superior court by way of Judicial Review; that, when it was



aggrieved by the decision of 26th April 2021 by the 1st respondent, it was entitled to file for Judicial Review now that the 1st respondent had acted ultra vires and beyond its jurisdiction. It was pointed out to us that under Rule 25(1) and

(2) of the National Environment Tribunal Procedure Rules, when the appellant failed to attend the hearing that led to the dismissal of its appeal, the 1st respondent was required to hear and determine the appeal in its absence, or adjourn it.

24. We consider that the chamber summons and notice of motion that the appellant had filed were under Articles 2, 4, 6, 7(1) and (2), 40, 47, 48, 50(1) and 159(2)(d) of *the Constitution*; sections 2, 4, 6 and 7 of the *Fair Administrative Action Act*; section 26(5) of EMCA; and Rule 25 of NET Procedure Rules. It is now trite that Judicial Review as a remedy is no longer just a common law prerogative but is now entrenched in *the Constitution* to safeguard its principles, values and purposes. (See Edwin H.D. Dande & Others -vs- Inspector General of Police & Others (Supra)). So that, by dint of Article 47 of *the Constitution*, every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The *Fair Administrative Action Act* is the legislation that actualized the Article, so that a person who is aggrieved by an administrative action may, without delay, apply for Judicial Review to the High Court or to any other court.

25. However, section 130 of EMCA provides as follows:-

“(1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.”

26. It is clear to us that, when the appellant was aggrieved by the decision of the 1st respondent which had dismissed its appeal, there was a remedy provided under section 130 of EMCA for it (the appellant) to appeal to the ELC at Kajiado. Instead, it filed a Judicial Review application. It has been emphasized many times before that aggrieved parties should strictly follow any procedures for dispute resolution that have been prescribed by the law. (See Mutanga Tea & Coffee Company Limited -vs- Shikara Limited & Another (Supra). This Court in Speaker of National Assembly -vs- Karume (Supra) stated as follows:-

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”

27. If the appellant was aggrieved by the act of the 1st respondent in dismissing the appeal, that was an appealable act. If it was considered that the 1st appellant was demonstrably wrong, or had misdirected itself, or had acted on irrelevant considerations or had failed to consider relevant factors, thereby leading to a plainly wrong outcome, the remedy provided by the Act was to appeal.

28. In the circumstances of this appeal, we find that the Judicial Review Proceedings were not the route to go. No exceptional circumstance was demonstrated by the appellant as to why Judicial Review proceedings was the preferred mode to resolve its complaint when there was a statutorily laid down procedure.

29. The Supreme Court of Kenya in the case of Abidha Nicholus - vs- The *Attorney General & others* *Petition No E007 of 2023* held that where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court



can resort to any other process known to law. In reaching the decision, the Supreme Court cited this Court's decision in R. -vs- National Environmental Management Authority, C.A. No. 84 of 2010; [2011]eKLR where it was observed as follows:-

“The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”.

30. The consequence is that, the learned Judge did not err when he found that he lacked jurisdiction to determine the Judicial Review application. We dismiss the appeal with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL 2025

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

