



**Riunga v Director General National Environment Management
Authority & another (Environment and Land Appeal E005 of 2023)
[2024] KEELC 3624 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E005 OF 2023
EK WABWOTO, J
APRIL 30, 2024**

BETWEEN

SUSAN WANJIKU RIUNGA APPELLANT

AND

**THE DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST RESPONDENT**

SUTTON HOLDINGS LIMITED 2ND RESPONDENT

*(Being an Appeal from the decision made on 27th
September 2023 by the National Environment Tribunal)*

JUDGMENT

1. This Appeal relates to the decision of the National Environment Tribunal made on 27th September 2023 wherein the Tribunal dismissed the Appellant’s Notice of Motion application dated 2nd June 2022 and upheld the 2nd Respondent’s Preliminary Objection. The Appellant was seeking an order extending the time for filing an appeal against the decision made by the 1st Respondent on 30th July 2021 or such date approving the Environmental Impact Assessment Project Report vide application number NEMA/EIA/PSR/22107.
2. The Appellant being aggrieved by the said decision lodged the present appeal vide an amended Memorandum of Appeal dated 20th November 2023. The Amended Memorandum of Appeal contained the following grounds:
 - a. That the Tribunal erred in law in not determining the issue before it under the Application dated 2nd June 2022;



- b. That the Tribunal erred in failing to hold that the Appellant not being the Proponent to the Project was bound by timelines imposed by Regulation 10 of the Environmental (Impact Assessment and Audit) Regulations 2003;
 - c. That the Tribunal erred in holding that the challenge of a decision made by the Director General NEMA under Regulation 10 of the Environmental (Impact Assessment and Audit) Regulation 2003 was a Section 129(2) of the Environmental Management and Coordination Act 2019 matter, the process of challenging such a decision by a party not a proponent not having been expressly provided for under the Act
 - d. That the Tribunal erred in failing to assume powers donated to it under Article 47 of *the Constitution* 2010 as read together with the Fair Administrative Actions Act 2015 by which inviting for hearing, hearing and communication of a certain decision to a party affected thereby are now ingredients of fair administrative process and the time within which such an aggrieved party can challenge such a decision can only start running once the Administrator[Director General, NEMA] has satisfied that he communicated his decision to the affected party.
 - e. That the Tribunal erred in holding that it has no jurisdiction to grant the reliefs sought in the application.
 - f. That the Tribunal erred in converting a Section 129(2) application into a Section 129(1) application and in effect determining a matter not pleaded in the application
 - g. That the Honorable Tribunal erred in failing to determine the Application is in accordance with the directions issued by this Honorable Court vide a judgment delivered on 20th December 2022 delivered by Honorable Mr. Justice Wabwoto J in Nairobi ELCA Number E057 of 2022.
 - h. That the Tribunal erred in not considering the Appellant's written submissions and;
 - i. Such other grounds to be adduced at the hearing hereof.
3. The Appellant prayed that the Appeal be allowed and that the decision made by the National Environment Tribunal on 27th September 2023 be wholly set aside and substituted with an order allowing the Appellant's application dated 2nd June 2022 together with costs of the Appeal.
 4. The Appeal was canvassed through written submissions and oral submissions made by Counsel for the parties. Learned Counsel Mr. Steve Luseno, represented the Appellant while Learned Counsel Mr. Jackson Omwanza represented the 2nd Respondent and also held brief for Learned Counsel Ms. Cynthia Sakami for the 1st Respondent.
 5. The Appellant urged the Court to rely on her written submissions filed at the National Environment Tribunal and the case digest filed before the Tribunal. Learned Counsel Mr. Luseno submitted that the Application at the National Environment Tribunal was grounded under Section 129(2) of the Environmental Management and Coordination Act(EMCA) and other provisions of the law. It was submitted that before the Tribunal, the Appellant was seeking for extension of time.



6. Counsel made reference to Regulation 10(3) of the Environmental (Impact Assessment and Audit) Regulations 2003 and submitted that the Director General, NEMA had only two options either to approve the project or escalate the same to full a study and that the Director General, NEMA cannot act outside the said Regulation.
7. It was submitted that NEMA directed public participation to be conducted and that there was also an addendum sought by way of public participation.
8. Learned Counsel argued that the Regulation 10(4) deals with the aspects of the study report and only the proponent has the right to appeal under the said provision. It was also argued that a “neighbour” can seek a right to appeal under Section 129(2) of EMCA and that a decision approving a project report is appealable. It was also submitted that Regulation 10 of EIA Regulations 2003 is silent on the duration of other persons to appeal. Counsel stated that this prompted the Appellant to move the Tribunal under Section 129(2) of EMCA to extend time.
9. It was submitted that the Tribunal upon considering the Appellant’s application framed an issue that there was an appeal before them and fell in error and proceeded contrary to the judgment of this Court that had been delivered on 20th December 2022. Counsel reiterated that there was no such application under Section 129(1) before the Tribunal. It was argued that the Tribunal conceived an appeal when there was none that had been filed.
10. The Court was informed that the jurisdiction to extend time is donated under the Rules and reliance was placed to Rule 7 of the National Tribunal Rules. It was also argued that the Appellant was not aware of the process because the same was being conducted secretly during the COVID 19 Pandemic period and the Court was urged to take judicial notice of the same. Learned Counsel urged the Court to allow the appeal and extend time.
11. The 1st Respondent never filed any written submissions despite being granted an opportunity to do so.
12. The 2nd Respondent filed written submissions dated 13th February 2024. The 2nd Respondent in opposing the said grounds of appeal raised and submitted on the following grounds:
 - a. Does the Tribunal have jurisdiction to extend time within which an appeal under Section 129(1) of EMCA?
 - b. The application of Article 47 of *the Constitution* of Kenya 2010 and the Fair Administrative Act 2015 in the determination of extension of time that is expressly limited by EMCA?
13. It was submitted that time starts to run from the date of the issuance of a license or refusal to issue. Secondly, there is no imposition of an obligation upon the 1st Respondent to serve its decision and finally there is no statutory guidelines on how the said decision was to be served on any aggrieved individual.
14. It was submitted that Section 58(1) and (2) of EMCA provides that the submissions of a project report or a study report are the pre-requisites to the granting or denial of an EIA license. Environmental (Impact Assessment and Audit) Regulations, 2003 serve to expound as the steps to be followed for the approval of a project report, the grant of an EIA license and the remedies available to such persons who may be aggrieved by the decision of the 1st Respondent in the process of the issuance, denial, review or any other matter of the EIA license.



15. It was further submitted that Rule 10(2) Environmental (Impact Assessment and Audit) Regulations, 2003 specifically addressed itself to the issuance of an EIA license by the 1st Respondent if it is satisfied that the project report discloses sufficient mitigation measures. In summary, the outcome of the submission of an EIA study report or project report is the grant or denial of an EIA license. Any grievance to the grant or denial of an EIA license is a matter of appeal to the Tribunal under Section 129(1). The fact that the Appellant chooses to state that her dispute falls under Section 129(2) does not negate the clear provisions of statute and there cannot be judicial expansion of what is clearly set out in statute. It was submitted that the contested decision is on the grant of an EIA license and is clearly provided under Section 129(1) while any other decisions made on any other matters fall under Sections 129(2) of EMCA.
16. It was also submitted that the Appellant had described her appeal as an appeal from a decision made under Rules 10 and 46 of the Environmental (Impact Assessment and Audit) Regulations, 2003 approving an Environmental Impact Assessment Project over all that property known as LR No. 1159/323 Karen and it being an application to extend time within which to appeal against the decision of the Director General to approve an EIA project which was made known to the Appellant on 28th May 2022.
17. On the jurisdictional questions of time, it was submitted that the substance of the instant appeal is an application to extend time to appeal against a decision of the 1st Respondent to approve a project report and consequently issue a license to the 2nd Respondent and it was argued that in analyzing Section 129(1) of EMCA and Rule 7 of the National Environmental Tribunal rules for extension of time, the Courts have held that Courts cannot extend time where it is limited by Statute and reliance was placed on several cases including the following: ELC 100 of 2015, Simba Corporation Limited vs Avic International & Another, Pakwood Investment Limited & Another vs National Environment Management & 7 Others [2021]eKLR; Runda Association vs NEMA & 3 Others [2020 eKLR among others.
18. On the question of the application of Article 47 of *the Constitution* of Kenya 2010 and Fair Administration Act 2015, the 2nd Respondent relied on the case of Riunga vs County Planning Committee, 13604 (KLR)(13th October 2022, Judgment) and submitted that the impugned decision was made in compliance and adherence to the provisions of Article 47 of *the Constitution* as read with provisions of the *Fair Administrative Action Act*, 2015. It was also submitted that the Appellant had not provided any evidence of any requests made to the 1st Respondent for reasons to make the decisions on granting the EIA license as it did.
19. During the oral highlighting of the written submissions, Learned Counsel Omwanza added that the decision to issue a license or not is what the Appellant is contesting. He also stated that the decision on whether or not to deny or issue a license lies under Section 129(1) of EMCA and the Appellant ought to have filed on Appeal under that provision.
20. Counsel also added that the Regulation cited by the Appellant in her application does not provide for extension of time. It is limited to sixty (60) days. It was also argued that Justice Mboya had separately pronounced himself in another judgment that the Appellant was aware of the project and she had attended and participated in its meetings.
21. It was also submitted that the Tribunal was not wrong to pronounce itself as it did. The Tribunal duly exercised its discretion as it did and NEMA has no obligation to serve its decision.



22. The Court has considered the entire Record of Appeal, the supplementary record, written and oral submissions made together with all the authorities cited. The salient issues which arise for determination are as follows:
- i. Whether the Tribunal erred in framing the issue before it as an Appeal within the meaning of Section 129(1) of EMCA.
 - ii. Whether the Appellant's right to a Fair Administrative Action under Article 47 of *the Constitution* and Section 4(3) of Fair Administrative Action Acts were violated?
 - iii. What are the appropriate reliefs to issue herein?
23. The Court shall now proceed to analyze all the aforementioned issues sequentially.
24. It was the Appellant's position that she commenced the proceedings before the Tribunal by filing a Miscellaneous Application dated 2nd June 2022. The application was brought under the provisions of Section 129 (2) of EMCA, Rules 10 and 46 of the Environmental (Impact Assessment and Audit Regulations) 2003, Rules 3 and 7 of the National Environmental Tribunal Rules 2003 and Articles 49, 50, 69, 70 and Article 159 (2) of *the Constitution* and it sought the following prayers: "2. THAT pending the hearing and determination of this application, this Honourable Tribunal be pleased to issue a stop order restraining the 2nd Respondent either by itself, its agents and or servants, whosoever from undertaking any construction works on ALL THAT property known as Land Reference Number 1159/323 on the basis of a decision made by the 1st Respondent approving the Environmental Impact Assessment Project Report vide application Number NEMA/EIA/PSR/22107 by Sutton Holdings Limited, the 2nd Respondent.
3. That this Honourable Tribunal be pleased to extend time for filing an Appeal against the decision made by the 1st Respondent on 30th July 2021 or such date approving the Environmental Impact Assessment Report vide application Number NEMA/EIA/PSR/22107 by Sutton Holdings Limited, the 2nd Respondent."
25. The Respondents upon being served with the said application filed separate Notice of Preliminary Objections dated 23rd June 2022 and 15th June 2022.
26. The 1st Respondent's Preliminary Objection was raised on the following terms:
- "
1. That the Tribunal lacks the requisite jurisdiction pursuant to Section 129 of EMCA.
 - 2, That this application is frivolous, vexatious and an abuse of the court process.
 3. Consequently, the application should be dismissed with costs to the 1st Respondent."
27. The 2nd Respondent's Preliminary objection was raised on the following terms: -
1. The Appeal is statute barred in accordance with section 129 of Environmental Management and Coordination Act No. 8 of 1999 as read together with Regulations 46(1) of the Environmental (Impact Assessment and Audit)



Regulations 2003 the Appellant having filed the same outside the mandatory 60 days requirement.

2. The Honourable Tribunal lacks jurisdiction to hear and determine the matter regarding an application for development permission and the issuance of a change of user in view of the un-equivocal provision of section 61(3) as read together with Section 75(2) (d) of the *physical and Land Use Planning Act* 2019.
 3. That the instant Appeal is therefore frivolous and an abuse of the court process as this Honourable Tribunal's jurisdiction has been limited by statute.”
28. In its ruling delivered on 27th September 2023, the Tribunal dismissed the application and upheld the 2nd Respondent's preliminary objection.
29. The Appellant faulted the Tribunal for framing her application and considering it as an Appeal filed under Section 129(1) of EMCA. The 2nd Respondent on the other hand submitted that the Tribunal cannot be faulted since the issue before the Tribunal was simply challenging the decision to issue an EIA license.
30. In considering this issue, the Court has perused the application and the entire Record of Appeal. From the Record, it is evident that the application before the Tribunal was one that was filed under Section 129(2) of EMCA, Rules 10 and 46 of the NET Rules 2003 and Articles 49, 50, 69, 70 and 159(2) of *the Constitution*. The application was seeking for leave for extension of time to file an appeal against the decision of the 1st Respondent of 30th July 2021 or such date approving the Environmental Impact Assessment Project Report vide application Number NEMA/EIA/PSR/22107 by the 2nd Respondent.
31. There was no appeal filed for consideration and hence the Tribunal erred in considering an Appeal instead of an application before it. In further emphasis on this issue, it is worth noting that a Court or Tribunal is bound to consider an application or issue before it and cannot purport to consider anything else other than that which was presented by the parties.
32. On whether the Appellant's right to fair administrative action was violated, this Court wishes to make reference to its earlier judgment delivered on 20th December 2022 wherein the Court pronounced itself as follows:
- “...While the Director General is bound to comply with the provisions of the FAA Act, I wish to state that in the instant case, there was no evidence furnished to this court to confirm that indeed the Appellant engaged the 1st Respondent and her grievance was not addressed as provided for under the FAA Act. In view of the foregoing, the contention by the Appellant that the 1st Respondent violated her right to a fair administrative action as contemplated under Article 47 of *the Constitution* and Section 4(3) of the FAA Act is unfounded and has no basis.”
33. On the final issue as to what are the appropriate reliefs to issue, it is worth noting that Section 130(4) of EMCA provides as follows:
- “(4) Upon the hearing of an appeal under this section, the Environment and Land Court may—
- (a) confirm, set aside or vary the decision or order in question;



- (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
- (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
- (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.”

34. In the instant appeal, pursuant to its judgment delivered on 20th December 2022 in respect to *Riunga vs Director General, National Environment Management Authority & Another (Appeal E057 of 2022)* [2022] KEELC 15564 (KLR)(20th December 2022)(Judgment) which had directed the Tribunal to consider the application dated 2nd June 2022 filed by the Appellant. The Tribunal considered the said application pursuant to the orders emanating from that judgment and rendered its decision on 27th September 2023. In the circumstances this Court has no option but to consider the said application and issue the appropriate reliefs since the Appellant was equally aggrieved by the decision of the Tribunal and filed the instant Appeal.
35. In the application dated 2nd June 2022, the Appellant had sought inter alia an extension of time for filing an Appeal against the decision made by the 1st Respondent on 30th July 2021 or such date approving the EIA report vide application number NEMA/EIA/PSR/22107 by the 2nd Respondent.
36. From a perusal of the Record of Appeal, the 2nd Respondent filed a Notice of Preliminary objection in response to the application on the grounds that the “Appeal” was statute barred in view of Section 129 of EMCA.
37. The Appellant in as much as she referred to a decision made by the 1st Respondent on 30th July 2021, she did not attach the said decision for consideration. The 2nd Respondent argued that the same was nonexistent. On the same breath, the Appellant in her application had also stated that she was seeking for an extension of time against the decision by the 1st Respondent on any such date approving the EIA Assessment Report vide application number NEMA/EIA/PSR/22107 by the 1st Respondent. This Court having found that the Appellant did not attach the decision of 30th July 2021 can only consider the decision approving the EIA license by NEMA. That decision could only have been communicated through the EIA license issued on 9th November 2021.
38. In this context, the Court can only consider the Appellant’s application dated 2nd June 2022 for seeking for extension of time to appeal against the decision made on 9th November 2021. That particular decision was on the issuance of the EIA license by the 1st Respondent.
39. In the cases of *Runda Association v NEMA & 3 Others (Supra)* and *Simba Corporation Limited v Director General, NEMA & Another (Supra)* which decisions were cited by both the Appellant and 2nd Respondent, it was held that an appeal against a decision for issuance of an EIA license can only be filed under Section 129 (1) and not Section 129 (2) of EMCA and Courts or the Tribunal cannot extend time in respect to appeals filed under Section 129(1) of EMCA.
40. A perusal of the Record of Appeal filed shows that the Appellant was aware and participated in the EIA process and the only complaint she had was that she was never notified of the decision that was made by the 1st Respondent.



41. Unfortunately, to the Appellant and as was previously held in the case of Simba Corporation Limited vs Director General, NEMA(supra), EMCA does not have an express provision requiring NEMA to communicate its decision of granting an EIA license to the members of the public.
42. In view of the foregoing and considering the provisions of Section 130(4) of EMCA, this Court has no option but to decline the Appellant's application dated 22nd June 2022. The Court cannot extend time for filing the appeal before the Tribunal which extension was being sought to appeal against the 1st Respondent's decision of approving the 2nd Respondent's project.
43. In conclusion, it is the finding of this Court that the Appeal is unmeritorious and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

E. K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Steve Luseno for the Appellant.

N/A for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant: Caroline Nafuna.

