IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & MURGOR, JJ.A)

CIVIL APPEAL NO. 9 OF 2011

NATIONAL ENVIRONMENTAL TRIBUNAL.....APPELLANT

AND

OVERLOOK MANAGEMENT LIMITED.....1ST RESPONDENT

SILVER SAND CAMPING SITE LIMITED.....2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY.....3RD RESPONDENT

MALINDI GREEN TOWN MOVEMENT.....4TH RESPONDENT

MALINDI SOUTH RESIDENTS ASSOCIATION.....5TH RESPONDENT

SYCAMORE INVESTMENT LIMITED.....6TH RESPONDENT

(Being an appeal against the whole of the Ruling and Order of the High Court of Kenya at Nairobi (*M. J. Emukule, J.*) dated 9th May, 2008

in

H.C. Misc. No. 391 of 2006)

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JUDGMENT OF THE COURT

This appeal is by the **National Environmental Tribunal** "*the appellant*" which emanates from the Ruling and orders of the High Court (**Emukule, J.**) dated 9th May 2008 in **Judicial Review application number No. 391 of 2006**. The appeal is predicated upon a memorandum of appeal dated 17th January 2011 containing 12 grounds. A close reading of the said grounds however, reveals a common thread and or the crux of the appeal being that the appellant is aggrieved by the High Court's holding that **Malindi Green Town Movement** "*the 4th respondent*" and **Malindi South Residents Association** "*the 5th respondent*" lacked *locus standi* to lodge an appeal against the decision of the **National Environmental Management Authority**, the *3rd respondent*, approving construction of proposed luxury villas on LR No. Portion No. 4381 "*the suit property*" situate within Malindi town, adjacent to the Indian

Ocean, by the Overlook Management Limited and Silver Sand Camping Site Limited, the *1st* and *2nd respondents* respectively. Though Sycamore Investment Limited "*the 6th respondent*" were enjoined in the application as an interested party, it hardly participated in the suit or in this appeal. The core question in this appeal is therefore the issue of *locus standi* in environmental matters and the extent to which such standing extends. Specifically, the appellant faults the High Court's decision for failing to appreciate the expanded *locus standi* in the realm of environmental matters pursuant to sections **3, 111** and **129** of the Environmental Management and Coordination Act "*the Act*".

The genesis of the dispute was a proposed development on the suit property by the 2nd respondent. The 1st respondent, being in the hotel and

tourism business assets development and management was contracted by the 2nd respondent to develop seven luxury villas on the suit property. In furtherance thereof, the 1st respondent applied for an environmental impact assessment license from the 3rd respondent. The application was opposed by different parties and stakeholders but the 3rd respondent ultimately approved the proposed project and communicated its decision to the 1st respondent in a letter dated 1st December 2005.

Following the approval, the 4th and 5th respondents filed an appeal against the decision to the appellant. The appellant thereafter and pursuant to section **129 (4)** of the Act directed the 1st and 2nd respondents to stop the construction of the villas pending the determination of the appeal. That decision triggered the institution of the judicial review proceedings in the High Court by the 1st and 2nd respondents whose ruling and final orders is now being impugned in the present appeal. In the judicial review proceedings, the 1st and 2nd respondents sought orders of *certiorari* to quash **Nairobi Tribunal Appeal No. NET/06 of 2005**, the appellant's decision stopping further activities on the suit property as contained in its letter dated 30th December 2005 aforesaid, and an order of prohibition to prohibit the appellant from hearing and determining the appeal.

The judicial review orders were based on grounds that by entertaining the appeal, the appellant was acting *ultra vires* the powers conferred upon it by law; that the jurisdiction of the appellant could only be invoked on matters within its jurisdiction as set out in section 129 (1) and (2) of the Act and that in this case, the 3rd respondent had not made a decision that would be amenable or subject to an appeal. They contended that they had not been furnished with the Environmental Impact Assessment licence *per se* by the 3rd respondent despite the approval. They also argued that only a person capable of being granted a licence under the Act or against whom an environmental restoration or improvement order could be imposed could bring an appeal under the Act. In any event, they contended, the proceedings before the appellant were unreasonable, oppressive, irrational, vexatious, arbitrary and capricious, and as such, the same were inconsistent with section **75 (1)** of the now rested Constitution. With regard to the 4th and 5th respondents' *locus standi* to lodge an appeal, the 1st and 2ndrespondents were categorical that they had no such right.

They asserted that they had followed the law strictly by conducting an **Environmental Impact Assessment "***EIA*" and had consulted the various stakeholders before embarking on their project. According to them, the 4th and 5threspondents complaints could only be pursued under section 3 (3) of the Act. The said provision entitles a person who alleges that his right to a clean and healthy environment has been or is likely to be contravened to, on his behalf or on behalf of a group or class of persons, members of an association or in the public interest, apply to the Environment and Land Court for appropriate relief.

In its reply to the proceedings, the appellant stated that its powers pursuant to section **129 (2)** of the Act was to hear appeals from the decisions of the 3rdrespondent, it's the Director-General and committees. In response to the allegation that it lacked jurisdiction to hear and determine the appeal filed before it by the 4th and 5th respondents, the appellant took the view that the 3rd respondent had made a decision which *any* aggrieved party could appeal before it. It denied that the proceedings before it were unreasonable, irrational, vexatious, arbitrary and capricious. It clarified that the proceedings remained un-concluded in light of the review proceedings by the 4th and 5th respondents. More relevant to this appeal, the appellant asserted that the 4th and 5th respondents had requisite *locus* standi to appeal before it against the decisions of the 3rd respondent. According to it, the stringent requirements of *locus standi* in environmental matters hitherto had been done away with the coming into force of the Act.

The gist of the 3rd respondent's response to the proceedings was that section 129 (2) of the Act conferred jurisdiction on the appellant in cases where it has made a decision to entertain appeals. Therefore, since the 3rd respondent had made a decision approving the proposed construction of the villas, then that was a decision capable of being appealed against before the appellant. In its view, an aggrieved party has an option to appeal to it as provided under section 129 (2) or could seek redress from the Land and Environmental Court, pursuant to section 3 of the Act. This is because the two provisions were not couched in mandatory terms. In its view, if the 1st and 2nd respondents wished to pursue redress for alleged breach of their fundamental rights, then they ought to have filed a constitutional reference as opposed to judicial review.

The 4th and 5th respondents hinged their right of appeal before the appellant not on section 3 (1) of the Act, but pursuant to section 129 (2) of the Act. They took the view that the basis of their appeal was on the question of land use and not title or ownership of the land. Though they recognized their right to pursue redress for their grievances in the High Court under section 3 (1) of the Act, they asserted that they instead elected to pursue an appeal under section 129 of the Act which was perfectly in order.

No doubt the dispute herein had to be determined in accordance with the law as it was then, that is, when the 3rd respondent approved the EIA report by the 1st and 2nd respondents by its letter dated 1st December 2005. By then the Act, as the substantive law dealing with environmental matters had come into force and established the appellant and the 3rd respondent. The Act had preceded a period where ordinary Kenyan's efforts at environmental conservation and protection were often thwarted or sacrificed at the altar of the common law doctrine of *locus standi*. The period is described in the Hansard report during the consideration and debate of the Act as follows;

> **"In the absence of this bill, we have witnessed some of the worst environmental degradation in this country. We have witnessed the environment being 'raped'. We have seen our environment being destroyed and polluted with impunity....very little has been done because there was no legal framework in this particular area."**
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> Further,
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> **"…the best thing about this Act is that now it gives *locus standi* to the ordinary Kenyan citizen to sue when he believes that his environment is affected. This was not there. It is the responsibility of ordinary Kenyans to be aware about the Act now in place so that whenever our environment is being polluted deliberately, they have got the legal framework within which to seek redress in our courts."**

The Act heralded Parliament's intention to give litigants on environmental matters necessary standing to institute an action against environmental violators even if such a litigant may not have been directly or personally affected by the actions or omissions of such violators but which may negatively impact or harm the environment. The Act was conceived in public interest and calls for interpretation that gives effect to the purpose and intention of expanding *locus standi* in matters concerning environmental protection.

The question of *locus standi* in environmental matters has previously been canvassed in our courts and in particular, the High Court. Unfortunately, conflicting decisions have emanated as to the interpretation of the appellant's jurisdiction under section 129 of the Act. Emukule J. in this appeal held that the appellant's jurisdiction to hear appeals could only be invoked by parties who were or are parties affected by the grant or denial of licences or as stipulated under section 129 (1) (a)-(e). The Judge however failed to consider sub section (2) which clothed the 4th and 5th respondents with *locus standi* since they were appealing against a decision made by the 3rd respondent. The Judge held that parties like the 4th and 5th respondents, were busy bodies since they had not participated in the whole process and could not qualify as aggrieved parties for purposes of an appeal. According to the Judge, such parties could only invoke the mechanisms under section 3 (3) of the Act and seek redress from the High Court and not the appellant. In **Republic v The National Environmental Tribunal ex parte OlKeju Ronkai Ltd & Anor (2010) eKLR**, a three Judge bench of the High Court held that the appellant therein could not be considered "*an aggrieved party*' for purposes of instituting an appeal before the instant appellant. This was because the appellant had not participated in the EIA process leading to approval and no decision had been made against it that would have led to a challenge by way of an appeal. The court held that if the appellant had any grievance it ought to have complied with section 3 (3) of the Act and approached the High Court for a remedy.

In **Republic v NET & 2 Ors ex parte Abdulhafidh Sheikh Ahmed Zubeidi (2013) eKLR,** Justice Odunga held that an appeal filed before the appellant in that matter did not fall under section 129 (1) since the party who lodged it was not a participant in the licensing process nor did it lodge any complaint with the 3rd respondent or even its committees when the license was issued. However, the Judge found that the party qualified to lodge an appeal in light of section 129 (2) of the Act since the 3rd respondent had made a decision approving the EIA report. According to the Judge, all aggrieved parties not qualifying under section 129 (1) of the Act had a recourse under subsection (2) which provided for appeals against the decisions of the 3rd respondent, the Director-General and or its committees. Lastly, in **Amos Njoroge Kamweru & 5 Ors v Kajiado County Government & 2 Ors (2015)eKLR, Gitumbi J.** concurred with the decision of Justice Odunga in the earlier case.

In our view and to reconcile the conflicting decisions, where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the Act, such a party may as of right appeal to the appellant. Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd respondent, its Director-General or its committees, then such a party may lodge an appeal pursuant to sub-section 2 of that provision. We take the view that such a party does not have to demonstrate that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed. This is in line with the expanded *locus standi* in the Act and gives effect to its legislative purpose.

It is prudent to restate how the learned Judge delivered himself on the issue of locus in order to put the appellant's contention on *locus standi* before this Court into context. The learned Judge stated as follows,

> **"…the phrase Locus Standi, connotes two distinct concepts, a right to bring action, I would agree with the Learned respondent Chairman's contention. And whereas I also agree on the basis of the universality of the environmental principles now enshrined in section 3 (5), 111 (1) and 112 (1) of the Environmental Management and Co-ordination Act, that strict locus standi requirements have been vacated not only in Kenya EMCA where they have been vacated by parliament but also to varying degrees, in other jurisdictions across the world, I do not however agree with the contention that the right of locus standi, includes or means the right to bring action or appeal before any fo rum, or put differently, the requirements of locus standi have not been vacated in every respect, and in every forum.**
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> **I hold that firm view because under Kenyan law, that is to say EMCA, the strict requirements of locus standi have been vacated in respect of only one forum, namely the High Court of Kenya, and on specific grounds. The strict requirements of locus standi have not been vacated in respect of the Respondent Tribunal, which has a specific jurisdiction under EMCA, namely appeals**."

With those sentiments the Judge went on to find that the 4th and 5th respondents lacked *locus standi* to institute an appeal before the appellant against the 3rd respondent's decision approving the construction of the proposed villas and dismissed their application. As can be gleaned from the paraphrase, the Judge acknowledged the expanded *locus standi* in environmental matters as envisaged by Parliament. The Judge, however, did not think that the strict requirements of *locus standi* had ended or been done away with in every forum, such as was before the appellant. If we understand the Judge's sentiments correctly, he expressly acknowledged that any person, not necessarily one who has a right or interest in the property, environment or land, could approach the High Court to raise environmental concerns and seek appropriate relief. But for purposes of an appeal under section 129 or before the appellant, the Judge was of the view that *locus standi* was limited to the aggrieved persons specifically described in section 129 (1) (a)-(e) and which the Judge felt the 4th and 5th respondents did not qualify. The Judge in essence considered them as not qualifying under both sub-sections of section 129. To the Judge, expanded *locus standi* to any person or the world at large as he put it did not extend to appeals lodged pursuant to that provision. The Judge rejected the argument made before him by the appellant, the 4th and 5th respondents that sections **3 (1)**, **111** and **129 (1**) of the Act implied that *any* person, whether on his behalf or on behalf of a group or class of persons, members of an association or in the public interest, could seek redress in any forum on environmental matters notwithstanding that such a person cannot show that the act or omission has caused or is likely to cause him any personal loss or injury and further provided that such action is not frivolous or vexatious or an abuse of the court process.

E. N. Mwangi, learned counsel for the appellant, in his submissions before us faulted the learned Judge's interpretation of section **129** as being too restrictive and further argued that pursuant to section 3 of the Act, any aggrieved person could appeal a decision made by the 3rd respondent and not necessarily parties to the dispute.

Similarly, **Mr. Ian Mwiti Mathenge** learned counsel for the 3rd respondent in supporting the appeal also submitted that the Act had given any aggrieved person the right to pursue redress before the appellant. That if the intention of the law was to restrict accessibility to court or the tribunal, then the law would have done so expressly.

Despite service having been duly effected, the rest of the parties in this appeal did not attend or participate in the hearing of the appeal.

So does the expanded *locus standi* in environmental matters extend to other forums other than the High Court and to such bodies as the appellant? The appeal before the appellant was made pursuant to section 129 (1) of the Act which governs appeals. The said section provides *inter alia*;

> **"Any person who is aggrieved by—**
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> **(a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;**
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> **(b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;**
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> **(c) the revocation, suspension or variation of the person's licence under this Act or its regulations;**
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> **(d) the amount of money required to paid as a fee under this Act or its regulations;**
>
> **(e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.**
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> **(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents 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."**

The issue then becomes whether the 4th and 5th respondents met the conditions set out above for institution of the appeal. It is provided that '*any person who is aggrieved*' may appeal to the appellant within 60 days of the occurrence of the event against which the person is aggrieved. The legal personality of the 4th and 5th respondents has not been challenged or disputed and even without belabouring the point, they qualify as *persons*. Can they be considered as aggrieved for purposes of the provision? Have they met the conditions set out above? As already stated, what triggered the instant appeal was the letter dated 1st December 2005 from the 3rd respondent approving construction of the villas as proposed in the EIA by the 1st and 2nd respondents. It has been contended that the 3rd respondent had not *per se* issued or furnished the EIA licence to the 1st and 2nd respondents and even that they had jumped the gun in lodging the appeal. Granted that, that may be so, but it cannot however be denied that the 3rd respondent did not make a decision in the form of an approval of the proposed project which they duly communicated and informed the 1st and 2nd respondents. In the circumstances, such a decision is subject or amenable to an appeal as expressly provided under section 129 (2) of the Act.

No doubt expanded *locus standi* in environmental matters extends to every Kenyan.

Thus, the 4th and 5th respondents had the necessary standing to challenge the 3rd respondent's decision to approve the construction of the villas by the 1st and 2nd respondents. This is especially since the 4th respondent is a community based organisation with its core mandate being sustainable development with its focus on Malindi, where the suit property is located. The 5th respondent is the residents' association of the area. The respondents brought the proceedings in public interest and their main concern was that the construction of the villas was being undertaken on a public beach. They produced evidence to show that the lease had been issued to the 2nd respondent on condition that the suit property be utilised as a camping site and hence for public use as opposed to cottages. In the circumstances, it was imprudent to find and hold that they lacked *locus standi* to pursue an appeal before the appellant. The Judge therefore erred in his finding that the 4th and 5th respondents were strangers or busy bodies in lodging the appeal. It would also set back the advances or leaps made in expanding the strict requirements of the capacity to sue especially in environmental matters envisaged by the Act. As already explained, the Act expanded *locus standi* to enable any person, group or association whether acting on its behalf or in public interest to raise environmental concerns geared at environmental conservation. And this still holds while recognising the requirements that existed under the former constitution to the effect that only a party aggrieved and whose interests were directly affected could institute proceedings before courts.

Indeed courts have been more inclined in environmental matters to increase access rather than place hurdles to such access but such decision is always hinged on the circumstances of each case. This is demonstrated by the English case of **R v Paddington Valuation Office ex parte Peachey Property Corporation Ltd 1(1966) 1 QB 380; (1965) 2 All ER 836** in which a rate- payer alleged that the valuation list of the whole area had not been properly prepared and so he sought to have it quashed. He was however unable to show that his own property was rated wrongly. The court declared the valuation list invalid and quashed same. Lord Denning phrased the issue as below;

> **"The question is whether the Peachey Property Corporation are Persons aggrieved" so as to be entitled to ask for mandamus. Mr. Blain contended that they were not persons aggrieved because even if they succeeded in increasing all the gross values of other people in the Paddington area, it would not make a penny worth of difference to them…. But I do not think grievances are to be measured in pounds, shillings and pence. If a rate-payer or any other person finds his name included in a valuation list, which is invalid, he is entitled to come to court and apply to have it quashed. He is not to be put**

off by the plea that he has suffered no danger any more than others. The court would of course not listen to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interest is affected by what has been done… so, here, it will listen to any rate payer who complains that the list is invalid."

Other jurisdictions are also embracing the expanded locus standi and are willing to allow an ordinary individual gain access to the fountain of justice if he has sufficient interests to warrant the attention of the court. Perhaps closer home and more recently, the Supreme Court of Nigeria held in **Elendu v Ekwoaba (1998) 12 NWLR (Pt.578) 320** that in determining whether a person has *locus standi* or not, the following factors may serve as guidelines;

i) For a person to have locus standi in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed.

ii) The fact that a person may not succeed in an action does not have anything to do with whether or not he has a standing to sue.

iii) Whether a person's civil rights and obligations have been affected, depends on the particular facts of the case.

iv) The court should not give an unduly restrictive interpretation to the expression locus standi. [Emphasis put]"

In addition, the court further held that in determining a person's capacity to sue, the court had to be satisfied the action was justiciable and a dispute between the parties existed. The said guidelines appear applicable and reasonable although they cannot be said to be conclusive. Ultimately each case is to be decided on its own peculiar set of circumstances and not on a one-size-fits-all basis. In our jurisprudence, and although decided under the auspices of the current Constitution, the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** observed that the conservative requirements of *locus* that existed in the old regime that treated litigants, other than those directly affected, as mere or meddlesome busy bodies had the negative effect of limiting access to justice. These are the ills that existed in our law that the Act and more recently the Constitution 2010 intended to cure and which must be emphasized. The Supreme Court in the same case (**Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)** remarked on the importance of public interest litigation which had been thwarted under the old constitutional regime and stated as follows;

"**Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis-a-vis the status of the parties before it.**"

Public interest litigation of course runs the risk of abuse and exploitation and courts have to be keen to enforce the proviso in section 3 (4) of the Act and ensure that such action is not frivolous or vexatious or an abuse of the court process.

The 3rd respondent further contended that if the 1st and 2nd respondent's intention was to pursue redress for alleged breach of their fundamental rights, then they ought to have filed a constitutional reference as opposed to judicial review. It was argued that judicial review was concerned not with the merits of a decision but with the manner in which the decision was made. Though the scope of judicial review has expanded with the enactment of the new Constitution, that was the law as it was then. In the instant case, the implication is that the 1st and 2nd respondents were challenging the approval or the decision as contained in the letter dated 1st December 2005 as opposed to the decision making process. However, this issue is a non-starter as rightly found by the Judge since in their judicial review proceedings; the 4th and 5th respondents were not seeking constitutional reliefs but judicial review remedies of *certiorari* and prohibition.

The upshot therefore, is that this appeal succeeds as the 4th and 5th respondents had the requisite *locus standi* to appeal to the appellant. The 3rd respondent had similarly made a decision approving the proposed construction of the villas and that decision was be amenable or subject to appeal as provided for in section 129 (2) of the Act. The ruling and order of the High Court, **Miscellaneous Civil Application number 391 of 2006** made on 9th May, 2008 is accordingly set aside. In lieu thereof, we substitute an order dismissing the 1st and 2nd respondents'' application dated 24th July 2006. There shall be no order as to costs.

Dated and delivered at Nairobi this 8th day of February, 2019.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR