



**Mathu, Chairman & 2 others (All Jointly suing as and on behalf of Kyuna Neighbours Association (KNA) v National Environment Management Authority (NEMA) & another; Director General, Nairobi Metropolitan Services (Interested Party) (Environment and Land Appeal E032 of 2022) [2024] KEELC 4360 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4360 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E032 OF 2022**

**OA ANGOTE, J  
MAY 30, 2024**

**BETWEEN**

**KIMANI MATHU, CHAIRMAN, ATUL SHAH, VICE CHAIRPERSON AND  
CHRIS NDEGWA (ALL JOINTLY SUING AS AND ON BEHALF OF KYUNA  
NEIGHBOURS ASSOCIATION (KNA) ..... APPELLANT**

**AND**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY  
(NEMA) ..... 1<sup>ST</sup> RESPONDENT**

**MONTESORI LEARNING CENTRE (MLC) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES INTERESTED  
PARTY**

*(Being an Appeal against the whole of the Ruling of the Honourable  
National Environment Tribunal at Nairobi delivered electronically on 14th  
April 2022 in National Environment Tribunal Appeal No. 10 of 2022)*

**JUDGMENT**

1. The Appellant (the Association) has filed this appeal, being dissatisfied with the ruling of the National Environment Tribunal dated 14<sup>th</sup> April 2022 in NET Appeal No. 10 of 2022. The Appellants have sought for the following orders, that:



- a. The ruling by the tribunal be and is hereby set aside and the Notice of Preliminary Objection dated 5<sup>th</sup> August 2021, nor the objection reposed in para 17(a) and (b) of the Respondent's Reply to Appeal dated 14<sup>th</sup> July 2021 be declared dismissed.
  - b. The Appellant be awarded costs of the Notice of the Preliminary Objection dated 5<sup>th</sup> August 2021 and the objection reposed in para 17(a) and (b) of the 2<sup>nd</sup> Respondent's Reply to Appeal dated 14<sup>th</sup> July 2021 in National Environment Tribunal Appeal No. 10 of 2021 on a full indemnity basis as against the 2<sup>nd</sup> Respondent.
  - c. The Appeal in NET Appeal 10 of 2021 be remitted for hearing and determination before the Hon. Tribunal on priority basis.
  - d. The restraining injunctive orders issued by the tribunal on 5<sup>th</sup> July 2021 be and are hereby reinstated.
  - e. The Hon. Court be pleased to issue any further appropriate order within its jurisdiction, to give effect to the preceding reliefs; and
  - f. The Applicant's costs herein be provided for on a full indemnity basis.
2. This appeal is based on the grounds that the Tribunal erred in law and in fact in the following ways:
- a. By finding that it had no jurisdiction to hear the appeal on the basis that the Appeal was filed more than 60 days after NEMA issued the EIA License, without establishing whether the Applicant participated in the process leading to the issuance of license, for its appeal to fall under Section 129(1) Environment Management and Coordination Act, 1999.
  - b. By disregarding binding precedents on the judicially determined applicability and differentiated locus standi accruing under Section 129(1) EMCA as distinguished from that accruing under Section 129(2) EMCA. These are the decisions of the Environment and Land Court in Prof Albert Mumma v Director General, NEMA & 2 others and the SDA Church E.A. Ltd [2021] eKLR, Simba Corporation Limited v National Environment Management Authority (NEMA) [2017] eKLR, John Kabukuru Kibicho & another v County Government of Nakuru & 2 others [2016] eKLR as well as the Court of Appeal's decision in National Environment Tribunal v Overlook Management Ltd & 5 others [2019] eKLR.
  - c. By failing to find that Section 129(1) EMCA related only to appeals in respect of decisions made, in which the person aggrieved by the issuance of title participated in the decision-making process and would be required to lodge an appeal within 60 days of the date of the decision made.
  - d. By failing to hold that where a person does not participate in the proceedings leading to the issuance of the licence, the appeal would fall under Section 129(2) EMCA, which requires that an appeal be filed within 60 days of the date the disputed decision is given or served upon the Appellant pursuant to Rule 4(1) and (2) of the NET Procedure Rules.
  - e. In disregarding the binding provisions of Section 126(5) EMCA as read with Rule 9(1) NET Procedure Rules by admitting a Notice of Preliminary Objection lodged outside 30 days from the date when the party objecting was notified of the appeal.
  - f. By anchoring its decisions on matters not pleaded in the Notice of Preliminary Objection dated 5<sup>th</sup> August 2021, nor the objection reposed in para 17(a) and (b) of the 2<sup>nd</sup> Respondent's Reply



to Appeal dated 14<sup>th</sup> July 2021, amounting to gross violation of the Appellants' right to fair administrative action.

- g. By admitting for determination a fatally defective preliminary objection which centers on factual disputations which require evidence.
- h. By failing to dismiss the notice of preliminary Objection dated 5<sup>th</sup> August 2021 nor the objection in para 17 (a) and (b) of the 2<sup>nd</sup> Respondent's Reply to Appeal dated 14<sup>th</sup> July 2021 and award costs on a full indemnity basis.

### **The Appellant's Submissions**

3. Counsel for the Appellant submitted that the impugned ruling allowed the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> August 2021 and held that the Notice of Appeal dated 9<sup>th</sup> June 2021 was time barred and was in violation of Section 129(1) EMCA and that the Tribunal erred when it held that it did not have jurisdiction to admit and determine the appeal before it.
4. According to the Appellant, the substantive appeal at NET concerns the failure by the 2<sup>nd</sup> Defendant to undertake an appropriate environmental assessment that would address the negative impact of the project; that the Appellant's neighborhood is strictly characterized as single dwelling residential homes, and that the 2<sup>nd</sup> Respondent's proposed project is out of character with its surroundings, as it seeks to alter the user of the land.
5. They claim that such a key change obliged NEMA to conduct a full Environmental Impact Assessment Study in accordance with Section 58(2) of the EMCA, as read with Regulations 11, 16, 17 & 20 Environmental (Impact Assessment and Audit) Regulations. They argue that having failed to undertake an EIA Study, no robust public participation nor input from relevant lead agencies was undertaken, which would have been an opportunity to address the numerous negative effects of the project.
6. The Appellant's Counsel submitted that NEMA's refusal or neglect to require strict compliance with the applicable laws amounts to dereliction of statutory duty, compromising the Appellant's Constitutional rights under Article 40, 42 and 69 of the Constitution and that it is on this basis that the Appellant invoked Section 129(2) of the EMCA.
7. Counsel submitted that through allowing the preliminary objection, the Tribunal determined that the Appellant did not have the right to be heard on merit in its appeal, which was incorrect. He relied on the Supreme Court's decision in Mumo Matemu vS Trusted Society of Human Rights Alliance & 5 others [2014] eKLR on locus and Runda Gardens Residents Association (RGRA) vS NEMA & Registered Trusteed of the Foundation Gate Church.
8. It was submitted that under Section 129 of the EMCA as read with Sections 3, 4 and Section 7 of the Fair Administrative Actions Act 2015, any displeased person can lodge an appeal before NET to challenge the action, inaction and decision by NEMA and that the locus standi accorded under the law includes persons directly affected by the project and those acting in a representative capacity who seek to assert sustainable development and sound environmental management.
9. It was Counsel's submission that Section 129(1) and (2) EMCA creates two streams of locus standi and established two different categories of jurisdiction for NET; that the first stream under Section 129(1) EMCA imposes a 60 day time limit from the occurrence of the event against which the person is dissatisfied, within which time an appeal must be lodged.



10. The second stream, it was submitted, is under Section 129(2) of the EMCA, as read with Rule 3 & 4(2) of the NET Rules, the Fair Administrative Actions Act and Articles 47 and 50(1) Constitution; that under section 129(2) of the EMCA an appeal may be lodged not later than sixty days after the date on which the disputed decision was given to or served upon a person and that under Rule 7 of the NET Rules, the Tribunal has jurisdiction to extend time for this second limb.
11. Counsel relied on the cases of Simba Corporation Limited vS National Environment Management Authority (NEMA) [2017] eKLR, Runda Gardens Residents Association (RGRA) vS NEMA & Registered Trusteed of the Foundation Gate Church and Prof Albert Mumma (in his capacity as Chairman Karen Langata District Association-KLDA) vs Director General, NEMA & 2 others and the SDA Church E.A. Ltd [2021] eKLR where the court distinguished the jurisdiction under Section 129(1) and 129(2) of EMCA.
12. It was Counsel's submission that NEMA has to date never served on the Appellant its impugned decision to bring the Appellant within the ambit of time limitation under Rule 4(2) of the NET Procedure Rules. Counsel relied on the Court of Appeal's decision in National Environment Tribunal vs Overlook Management Limited & 5 others [2019] eKLR which articulated the expansion of locus under the EMCA.
13. Counsel argued that the 2<sup>nd</sup> Respondent's preliminary objection was irregularly admitted for determination as there were factual disputations which were never enquired into or considered and that whereas a disputation on locus and time-bar could lie as a preliminary objection, where the same concerns disputed facts such as the founding cause of action, the matter cannot be determined as a preliminary objection.
14. Counsel for the Appellant postulated that in determining whether it has jurisdiction on a particular appeal, the Tribunal has to peremptorily inquire into the existence of the facts supporting or disproving a claim under Section 129(2) of the EMCA in order to decide whether it has jurisdiction, which the Tribunal failed to do.
15. It was Counsel's final submission that the Tribunal's ruling was made in violation of binding precedent and contrary to the doctrine of stare decisis and that the Tribunal noted per incuriam that the authorities cited by the Appellant are distinguished from the appeal before it as they dealt with the law before it was amended.
16. Counsel submitted that this holding is erroneous as Section 129 on standing was amended vide the Environmental Management and Co-ordination (Amendment) Act, 2015 and that the two decisions, being Prof Albert Mumma (in his capacity as Chairman Karen Langata District Association-KLDA) vs Director General, NEMA & 2 others and the SDA Church E.A. Ltd [2021] eKLR, and Simba Corporation Ltd vs Director General NEMA & Another [2017] eKLR, were made in 2021 and 2017.
17. Counsel asserted that the recent amendments to Section 129 of the EMCA on 3<sup>rd</sup> June 2015 through the EMCA Amendment Act, on 20<sup>th</sup> April 2017 through Section 29 of the [\*Prevention of Torture Act\*](#), 2017 and on 21<sup>st</sup> May 2018 in Statute Law (Miscellaneous Amendments) Act, 2018, never touched on the dual locus standi.
18. On the principle of stare decisis, counsel relied on the Supreme Court's decision in Geoffrey M. Asanyo & 3 others v Attorney General [2020] eKLR, and Republic vs Chairman Political Parties Disputes Tribunal & 2 Others ex parte Susan Kihika Wakarura [2017] eKLR.



## **The 2<sup>nd</sup> Respondent's submissions**

19. Counsel for the 2<sup>nd</sup> Respondent submitted that NET Appeal No. 10 of 2021 was filed in opposition of the issuance of licence Ref. NEMA/EIA/PSL/10439; that the 2<sup>nd</sup> Respondent filed the preliminary objection on the grounds that the appeal was filed outside the sixty-day period provided under Rule 4(2) of the NET Rules 2003 without the leave of the Tribunal, and that the Tribunal did not have jurisdiction to hear and grant the reliefs sought in the appeal, as such grievances lay with other public authorities not contemplated under Section 129 of the EMCA.
20. Counsel for the 2<sup>nd</sup> Respondent argued that objections to development permission and change of user should be directed to the County Physical and Land Use Planning Liaison Committee, and not NET.
21. It was Counsel's submission that an appeal to NET must be filed within 60 days after the occurrence of the event complained of, as specified in Section 129(1) of EMCA and that the Appellant's failure to file the appeal within the statutory time left the appeal beyond the Tribunal's jurisdiction. Counsel relied on the case of Pakwood Investments Limited and another vs National Environment Management Authority & 7 others [2021] eKLR.
22. Counsel submitted that the Tribunal properly admitted the Preliminary Objection as it raised matters on jurisdiction and limitation of time and that costs usually follow the event.

## **Supplementary submissions**

23. Through supplementary submissions dated 5<sup>th</sup> March 2024, the Appellant's Counsel submitted that while indeed the 2<sup>nd</sup> Respondent raised preliminary objections on the grounds that the issues raised in the NET appeal lay with other public authorities, the Tribunal dismissed this objection and only considered whether the appeal was time barred.
24. They submitted that while the 2<sup>nd</sup> Respondent's objection was raised with respect to Rule 4 of the NET Rules, the Tribunal proceeded suo moto to dismiss the Appeal for violation Section 129(1) of the EMCA, which had not been invoked by the 2<sup>nd</sup> Respondent. Counsel relied on the Court of Appeal's determination in Habib NIC Bank Limited vs Nashitex International Limited and Simba Corporation Limited vs Director General, National Environment Management Authority (NEMA) [2017] eKLR.
25. It was counsel's submission that no evidence exists or was led to establish whether or when the Appellant was given or served with the disputed decision and that this disputed factual situation cannot be the basis of a preliminary objection. He relied on the case of Oraro vs Mbaja [2005] 1 KLR 141.
26. Counsel distinguished the case of Pakwood Investments Limited and Another vs National Environment Management Authority & 7 others [2021] eKLR, relied on by the 2<sup>nd</sup> Respondent, as the court found that the Appellants therein had in fact participated in the public participation for an EIA licence, and that Section 129(1) EMCA therefore applied to them. He urged that in this case, no public participation was undertaken, contrary to Para 17(1) and (2), 20, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

## **Analysis and Determination**

27. This Appeal arises with respect to the dispositive ruling of the National Environment Tribunal dated 14<sup>th</sup> April 2022 in NET Appeal No. 10 of 2022, in which the Tribunal dismissed the Appellant's appeal dated 9<sup>th</sup> June 2021 and struck it out for having been filed out of time, contrary to Section 129(1)(e) of the EMCA and the consequent want of jurisdiction on the Tribunal's part.



28. This determination was pursuant to a Notice of Preliminary Objection filed by the 2<sup>nd</sup> Respondent dated 5<sup>th</sup> August 2021 and an objection raised under Paragraph 17 of the 2<sup>nd</sup> Respondent's Reply to Appeal dated 14<sup>th</sup> July 2021.
29. The 2<sup>nd</sup> Respondent contended that the Tribunal lacked jurisdiction on two grounds, that the Appeal was time-barred and that the substance of the Appeal was out of the statutory scope of the Tribunal.
30. The Appellant has in this suit challenged the above decision on the grounds that the Notice of Preliminary Objection was filed out of time and was fatally defective and that the Tribunal erroneously found that the appeal before it fell within Section 129(1) of EMCA and not Section 129(2).
31. The Appellate jurisdiction of this court in relation to this Appeal is defined under Article 162 (2) (b) of *the Constitution* as read together with Section 13(4) of the *Environment and Land Court Act* and Section 130 of the Environmental Management and Coordination Act.
32. As the first Appellate Court, this Court is obligated and is under a duty to re-evaluate the evidence that was adduced before the Tribunal. It is not bound by the findings of fact and law made by the Tribunal and may, on re-evaluation, reach its own conclusion and findings. This principle was aptly enunciated in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court of Appeal stated thus:
- “This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”
33. This position was recently re-affirmed by the Court of Appeal in the case of *Peter M. Kariuki vs Attorney General* [2014] eKLR, where it was held that:
- “We have also, as we are duty bound to do as a first appellate Court, reconsider the evidence adduced before the trial Court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
34. As to the circumstances under which this Court can interfere with the decision by the subordinate Court, including a Tribunal, the Court of Appeal in *Khalid Salim Abdulsheikh vs Swaleh Omar Said* [2019] eKLR expressed itself as follows:
- “We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”
35. This court has considered the pleadings and submissions filed by the parties. While the Appellant set out eight grounds of appeal, these grounds boil down to the following issues:
- a. Whether the Preliminary Objection raised was fatally defective
  - b. Whether the Tribunal disregarded binding precedents with respect to Section 129(1) and (2) of EMCA



- c. Whether the Appellant’s appeal before the tribunal fell within Section 129(1) or Section 129(2) of EMCA.
36. The Appellant has contended that the learned Tribunal erred by disregarding the binding provisions of Section 126(5) EMCA as read with Rule 9(1) of the NET Procedure Rules by admitting a Notice of Preliminary Objection lodged outside 30 days from the date when the party objecting was notified of the appeal.
37. Section 126(5) of EMCA on the proceedings of the Tribunal prescribes that except as expressly provided in this Act or any regulations made thereunder, the Tribunal shall regulate its proceedings as it deems fit.
38. Rule 9 of the National Environmental Tribunal Procedure Rules on preliminary objections provides as follows:
- “ (1) Any objection to the jurisdiction of the Tribunal or to the admissibility of an appeal or other objection, the Tribunal’s decision upon which is requested before proceeding to consider the merits of the appeal, shall be made to the Tribunal in writing within thirty days from the date when the party objecting was notified of the appeal, and a copy of the preliminary objection shall be served on the appellant immediately.
- (2) On receipt of any preliminary objection, the Tribunal shall suspend the proceedings on merits and shall require the appellant to submit written observations and submissions on the objection within seven days from the date of service on him of notice of the objection.
- (3) The Tribunal shall suspend the proceedings on merits pending its ruling on the objection.”
39. In this case, the 2<sup>nd</sup> Respondent raised a preliminary objection in its Response to the Appeal dated 14<sup>th</sup> July 2021 as well as through a Notice of Preliminary Objection dated 5<sup>th</sup> August 2021. According to the proceedings of the Tribunal, the 2<sup>nd</sup> Respondent filed the Notice of Preliminary Objection pursuant to the court’s directions issued on 5<sup>th</sup> August 2021.
40. From the Affidavit of Service dated 15<sup>th</sup> June 2021 at page 119 of the Appellant’s Record of Appeal, the 2<sup>nd</sup> Respondent was notified of the Appeal on 10<sup>th</sup> June 2021. The 2<sup>nd</sup> Respondent ought to have filed its preliminary objection by 10<sup>th</sup> July 2021. There was therefore a delay of 26 days before filing the notice of Preliminary Objection.
41. In its ruling, the Tribunal dismissed the Appellant’s contention that the Preliminary Objection ought to be precluded under Rule 9 of the NET Rules, as it was filed more than thirty days after the date of service of the Appeal upon It.
42. The Tribunal held that for it to overlook the question of whether the suit was time-barred on the basis that it was not raised in the text of the Notice of Preliminary Objection or submissions would be to pay undue regard to procedural technicalities contrary to Article 159(1) of *the Constitution*. The Tribunal further held that the Appellant had notice and opportunity to canvass the issue which it did in its submissions.
43. From the proceedings and ruling of the Tribunal, it is apparent that the Honourable Tribunal exercised its discretion in allowing the 2<sup>nd</sup> Defendant to file the Notice of Preliminary Objection out of time. The



Appellant has urged this court to find that the Tribunal wrongly admitted the Notice of Preliminary Objection.

44. This court is guided by the Court of Appeal's determination in *Mbogo and Another vs Shah* [1968] EA 93 at p 95, where it held that an Appellate Court should not interfere with the discretion of a trial court unless the determination is clearly wrong or it acted on matters it should not have acted or failed to consider matters it ought to have taken into consideration.
45. In this matter, this court is not persuaded that the Tribunal misdirected itself in allowing the Preliminary Objection which was filed out of time. It appears that the Tribunal took into consideration the timelines set out in Rule 9 of the NET Procedure Rules and its duty under Article 159(1)(d) of *the Constitution*, to administer justice without undue regard to procedural technicalities.
46. In any event, no prejudice was suffered by the Appellant, who took the opportunity through its Submissions dated 25<sup>th</sup> August 2021 to oppose the Notice of Preliminary Objection as well as the objection raised in the 2<sup>nd</sup> Respondent's Reply to Defence. Consequently, it is the finding of this court that the Notice of Preliminary Objection was properly filed and admitted for determination.
47. There is then the question of whether the Preliminary Objection raised by the 2<sup>nd</sup> Respondent raised factual disputants which required evidence. In its ruling, the Tribunal only pronounced itself on the question of whether the appeal was time-barred.
48. The question of whether the Appeal fell under Section 129(1) or Section 129(2) of EMCA was discernible from the Notice of Appeal and Statement in support of the Appeal filed by the Appellant, where they indicated that their grievance concerned the issuance of approval ref NEMA/EIA/PSL/10439 issued by NEMA for the construction of "Proposed School Development on Plot LR No. 1758/2 Kyuna, Nairobi".
49. From the pleadings, the Appellant was not a part of the process of issuance of the license. These facts were not contested by the Respondent. It is apparent that the Tribunal took these facts into consideration in determining whether the appeal fell under Section 129(1) or Section 129(2) of EMCA. In its decision, the Tribunal noted that the appeal challenged the grant to the 2<sup>nd</sup> Respondent of the license Ref: NEMA/EIA/PSL/10439 issued by NEMA on 26<sup>th</sup> March 2021, and consequently fell under Section 129(1) of EMCA.
50. This court is satisfied that the Preliminary Objection raised by the 2<sup>nd</sup> Respondent on time limitation was a pure issue of law and the Preliminary Objection was rightly admitted for determination.
51. Section 129 (1) and (2) of the EMCA provides as follows:
  - " 1) Any person who is aggrieved by-
    - (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;
    - (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
    - (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
    - (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.

(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.”

52. In its impugned ruling, the Tribunal was of the opinion that the cases cited by the Appellant are distinguished from present circumstances as they dealt with the law as worded before amendment by the legislature. It held that presently, any appeal that challenges the grant of a license is brought under Section 129(1) of the EMCA and can be brought by any person dissatisfied with such grant, irrespective of whether they participated in the process or not.
53. The Appellant has opposed this finding and has argued that the tribunal erred in disregarding binding precedents on the judicially determined applicability and differentiated locus standi accruing under Section 129(1) EMCA as distinguished from that accruing under Section 129(2) EMCA.
54. The Appellant referred to the following determinations: Simba Corporation Limited vs National Environment Management Authority (NEMA) [2017] eKLR, Prof Albert Mumma vs Director General, NEMA & 2 others and the SDA Church E.A. Ltd [2021] eKLR, as well as the Court of Appeal’s decision in National Environment Tribunal vs Overlook Management Ltd & 5 others [2019] eKLR.
55. Before considering the legal position established by the courts, it is prudent to interrogate the amendments to the Environmental Management and Coordination Act. Since EMCA was established in 1999, the Act has been amended on several occasions. Section 129 has been amended three times, through Act No. 5 of 2015, Section 69 of Act No. 12 of 2017 and Section 29 of Act No. 4 of 2018
56. The 2015 Amendment reviewed Section 129 (1)(a). The section before amendment, provided for appeal to the Tribunal by any person aggrieved by “a refusal or grant a licence or to the transfer of his licence under this Act or regulations made thereunder”. The reviewed Section 129(1)(a) provides that any person may appeal to the Tribunal if they are aggrieved by:
- “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 regulations made thereunder.”
57. The 2015 Amendment featured a prominent change in language, whose effect is to expand the locus standi under Section 129(1), allowing any person, regardless of whether they were part of the process seeking the licence, to file an appeal against the same before the Tribunal. This change was maintained in the 2017 amendment to EMCA and is the current position.



58. The Appellant in this matter has sought to rely on the determination in the case of *Simba Corporation Limited vs National Environment Management Authority (NEMA)* [2017] eKLR, where the court held that Section 129(1) and (2) provide for two streams of locus standi:

“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.

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.”

59. The Appellant has also quoted the case of *Prof Albert Mumma vs Director General, NEMA & 2 Others and the SDA Church E.A. Ltd* [2021] eKLR where it was held as follows:

“In the court’s view NET first needed to make a determination on whether the appeal was brought under Section 129 (1) or if it fell under Section 129 (2) of EMCA. This would be critical because Section 129 (1) relates to decisions made in which the person aggrieved by the issuance of the licence participated in the decision making process and was therefore required to lodge an appeal within 60 days of the date the decision was made. Where the person does not participate in the proceedings leading to that decision, then the appeal would fall under Section 129 (2) of EMCA which requires the appeal to be filed within 60 days of the date the disputed decision is given or served upon the Appellant pursuant to Rule 4 (1) and (2) of the NET Procedure Rules.”

60. The Court of Appeal in *National Environmental Tribunal vs Overlook Management Limited & 5 Others* [2019] eKLR sought to reconcile the conflicting decisions on the question of NEMA’s jurisdiction. The Court of Appeal held as follows:

“The issue then becomes whether the 4<sup>th</sup> and 5<sup>th</sup> 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 4<sup>th</sup> and 5<sup>th</sup> 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 1<sup>st</sup> December 2005 from the 3<sup>rd</sup> respondent approving construction of the villas as proposed in the EIA by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It has been contended that the 3<sup>rd</sup> respondent had not per se issued or furnished the EIA licence to the 1<sup>st</sup> and 2<sup>nd</sup> 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 3<sup>rd</sup> respondent did not make a decision in the form of an approval of the proposed project which they duly communicated and informed the 1<sup>st</sup> and



2<sup>nd</sup> respondents. In the circumstances, such a decision is subject or amenable to an appeal as expressly provided under section 129 (2) of the Act.

...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 2<sup>nd</sup> 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 4<sup>th</sup> and 5<sup>th</sup> 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.”

61. In *Republic vs National Environment Tribunal & 2 others Ex-parte Abdulhafidh Sheikh Ahmed Zubeidi* [2013] eKLR, Odunga J (as he was then) held that Section 129(1) applies to persons who participated in the EIA Study process while Section 129(2) applies to a person who did not participate in the license process. The Judge held as follows:

“Although subsection 129(1) of the Act in its opening seems to permit any person to appeal to the Tribunal, a reading of the clauses thereunder seems to limit the appeal thereunder only to a person who has applied for a licence. I therefore agree with the decision in *Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another* (supra) that under section 129(1) of the Act, a person who did not participate in the EIA study process for the development in question, in the NEMA’s process of approval of the development or complaint by to the PCC cannot be said to have been an aggrieved by the process which led to the issuance of the licence as no decision could be said to have been made against him hence could not challenge the decision by way of an appeal to the Tribunal and if the Tribunal purports to entertain such an appeal under the aforesaid section, the Tribunal would be acting ultra vires its authority hence its decision would be liable to be quashed.

Since section 129(1) of the Act deals with the issuance of a licence and the conditions attached thereto, that subsection cannot be said to cover the acts and omissions of the Director General or a Committee of the Authority or even the Authority itself in matters not covered under of the section 129(1).”

62. I am not entirely in agreement with the above decision of Odunga J (as he was then). My view is that an “aggrieved person” under section 129 (1) (a) of the EMCA is not limited to persons who have participated in the process of issuance of a license by NEMA. The word “aggrieved person” includes any person who is likely to be affected, either directly or indirectly, by the decision of NEMA in the issuance of a licence, or otherwise, to a proponent of a project.



63. This position is supported by the constitutional and statutory imperative that every person has the right to commence proceedings in environmental disputes. Section 129 (2) of the Act has nothing to do with section 129 (1). The two provisions deal with different issues and have nothing to do with “persons who can sue.”
64. Indeed, appeals under section 129 (2) of the EMCA are not concerned with the decisions of NEMA issued under section 129 (1). Appeals under section 129 (2) deal with all the other decisions made by the Director-General, the Authority or Committees of the Authority or its agents which are not covered under section 129 (1) of the Act.
65. Having perused the pleadings that were before the Tribunal, the question of whether the Appeal fell under Section 129(1) or Section 129(2) of EMCA was discernible from the Notice of Appeal and Statement in support of the Appeal filed by the Appellant’s members, where they indicated that their grievance concerned the issuance of approval ref NEMA/EIA/PSL/10439 issued by NEMA for the construction of “Proposed School Development on Plot LR No. 1758/2 Kyuna, Nairobi”.
66. Noting what I have said above, all Appeals with respect to licensing should be filed under Section 129 (1) of the Act, regardless of whether a person was part of the licensing process or not. Therefore, there was no need for a person who was not a party to the licensing process to rely on Section 129(2) of the EMCA, as their locus standi is expressly provided for under Section 129(1) of the EMCA.
67. This correct position was adopted by the Tribunal in its ruling, wherein it held that:
- “..presently, any appeal that challenges the grant of a license is brought under Section 129(1) of the EMCA and can be brought by any person dissatisfied with such grant, irrespective of whether they participated in the process or not.”
68. Having found that the Tribunal properly exercised its discretion to allow the 2<sup>nd</sup> Respondent’s Notice of Preliminary Objection and having found that the Tribunal correctly found that the Appellant’s appeal fell under Section 129(1) of EMCA and was filed out of time, this court finds that the appeal herein is not merited and is for dismissal.
69. As costs follow the cause, the Appellant shall bear the costs of this Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30<sup>TH</sup> DAY OF MAY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Lusi for Appellant

Mr. Kaston for 2<sup>nd</sup> Respondent

Court Assistant: Tracy

