



Kiliavo Fresh Limited v National Environment Tribunal; Big Life Foundation & 3 others (Interested Parties) (Environment and Land Case Judicial Review Application E002 of 2021) [2024] KEELC 3843 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E002 OF 2021
MN GICHERU, J
MAY 15, 2024**

BETWEEN

KILIAVO FRESH LIMITED APPLICANT

AND

THE NATIONAL ENVIRONMENT TRIBUNAL RESPONDENT

AND

BIG LIFE FOUNDATION INTERESTED PARTY

THE CONSERVATION ALLIANCE OF KENYA INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT - AUTHORITY.. INTERESTED PARTY

COUNTY GOVERNMENT OF KAJIADO INTERESTED PARTY

RULING

1. The facts of this case as I understand them from the record are as follows. The ex-parte applicant filed a chamber summons dated 10/5/2021 seeking leave to apply for orders of certiorari, prohibition and that leave operates as a stay of the implementation, operation and coming into effect of the decision of the respondent dated 26/4/2021.
2. On 26/4/2021, the respondent had dismissed the ex parte applicant’s appeal without hearing the said applicant. The reason given for the dismissal of the appeal was that the ex parte applicant and its witnesses did not attend court.
3. Leave was granted to the applicant to file the substantive motion on judicial review orders of certiorari and prohibition. The said motion was to be filed within 21 days from 16/9/2021 when the said leave was granted.



4. In the meantime on 14/6/2021, the respondent filed a preliminary objection dated 11/6/2021 in which it is stated as follows.
 1. That this suit offends the provisions of Section 130 of the *Environmental Management Coordination Act* (EMCA) which provides that any person aggrieved by a decision of the Tribunal may appeal such decision or order to the High Court.
 2. That this suit contravenes the provisions of Section 133 of *EMCA* which gives the respondent tribunal immunity from being sued. The same preliminary objection was filed afresh by the respondent on 22/11/2021.
5. On 21/2/2022, the 4th interested party also filed a notice of preliminary objection on points of law dated 20/2/2023 on the following grounds.
 1. The ex-parte applicant filed its notice of motion on 2/11/2021 after leave had lapsed on 7/10/2021 rendering the entire proceedings a nullity.
 2. The proceedings are an affront to the provisions of Section 131 of *EMCA* which provides for a statutory remedy for the decision, subject matter of these proceedings.
 3. By reason of the foregoing, the notice of motion and the entire proceedings are incompetent and incurably defective and the same should be struck out with costs.
6. The court gave directions that judgment be on 15/5/2024 but upon perusal of the two files, i.e. this file and JR No. 2 of 2021, the proper order should have been that the court rules on the two preliminary objections.
7. Counsel for the parties filed written submissions as follows. Applicant filed on 30/5/2023, 1st interested party on 15/11/2023, the respondent on 14/7/2022 while the 2nd interested party filed grounds of opposition on 20/6/2022. The applicant identified the following issues for determination.
 - a. Does this court have jurisdiction to admit and adjudicate over the legality and propriety of the respondent's decision of 26/4/2021?
 - b. Whether in undertaking the impugned administrative action, the respondent acted unlawfully, rendering its decision invalid for violating and threatening to further violate not just the law but also the ex parte applicant's fundamental rights and freedoms.

The respondents identified two issues as follows.

- a. Whether this application offends the provisions of Section 130 of *EMCA*?
- b. Whether this application contravenes the provisions of Section 133 of *EMCA* which gives the tribunal immunity from being sued.

The first interested party identified one issue similar to the respondent's first issue and four more as follows.

- i. Whether the ex-parte applicant's substantive motion dated 21/10/2021 is incompetent, incurably defective and a nullity for being filed outside the 21 days ordered by the court and prescribed by statute.
- ii. Whether judicial review proceedings are concerned with the decision making process or the merits of the decision.



- iii. Whether the respondent can dispose of an appeal for non-attendance and want of prosecution.
- iv. Whether a declaration can be issued in these judicial proceedings.

I find that a determination of the above issues will sufficiently determine the two preliminary objections.

8. I have carefully considered the preliminary objections as well as the submissions by Learned Counsel for both sides on the issues and I make the following findings.

Firstly, I am easily persuaded by the poignant submissions that the entire suit offends (i) the provisions of Sections 130 of *EMCA*. It provides as follows.

“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 Environment and Land Court”.

What this means is that the only way the ex parte applicant could approach this court by way of appeal but not by way of Judicial Review. As correctly submitted by the Honourable the Attorney General, “aggrieved parties should strictly follow any procedures that are specifically prescribed for resolution of particular disputes”. In the case of *Mutanga Tea and Coffee Company and Shikara Limited and Municipal Council of Mombasa*, Civil Appeal No. 54 of 2014, the above words which had been earlier on used in the case of *Speaker of the National Assembly v Karume* (1992) KLR 21 and *Narok County Council v C.A.* No. 25 of 2000 were repeated. Precedent is therefore emphatic that the only way to approach this court in a matter coming from the tribunal is by way of appeal. I therefore find that this court has no jurisdiction to entertain this suit as presented.

9. On the second issue of immunity of members of the tribunal from suits as per Section 133 of *EMCA*, I find that the immunity from suits relates to the chairperson and other members of the tribunal but not to the tribunal itself. There is nothing wrong with joining the tribunal as a party to a suit. It would be wrong to join the chairperson or other members of the tribunal as parties to a suit for an act done or omitted to be done or ordered to be done by them in the discharge of their duty as members of the tribunal. No tribunal member is a party in these proceedings.
10. There is the third issue of whether the respondent could dispose of an appeal for non-attendance and want of prosecution. I do not have sufficient material, in the absence of a certified copy of proceedings and ruling to decide on this issue. If I had the advantage of such proceedings, I would be able to see if after the application for adjournment was refused, counsel for the ex parte applicant was otherwise ready to proceed. This is because if an application for adjournment is disallowed, the party seeking an adjournment can still proceed with the available witnesses and evidence. Only the record of what transpired on 26/4/2021 at the tribunal would assist me in making a determination of this issue. It is also not clear to me if the ex parte applicant went back to the tribunal to seek the setting aside of the order dismissing the appeal.

Since I have decided on the key issue of jurisdiction, I think all the remaining issues are superfluous as they are merely auxiliary to the main issue of jurisdiction.

For the above stated reasons, I uphold the preliminary objection by respondent dated 11/6/2021 and dismiss this suit. No order as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 15TH DAY OF MAY 2024.



M.N. GICHERU
JUDGE

