



Mathu, Shah & Ndegwa (All Jointly Suing as and on Behalf of Kyuna Neighbours Association - KNA) & another v National Environment Management Authority (NEMA) & 2 others; Director General, Nairobi Metropolitan Services (Interested Party) (Environment and Land Appeal E075 of 2022) [2025] KEELC 663 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E075 OF 2022
OA ANGOTE, J
FEBRUARY 20, 2025**

BETWEEN

KIMANI MATHU, ATUL SHAH, AND CHRIS NDEGWA (ALL JOINTLY SUING AS AND ON BEHALF OF KYUNA NEIGHBOURS ASSOCIATION - KNA) 1ST APPELLANT

ISAAC MRUTTU (SUING ON BEHALF OF SHANZU ROAD RESIDENTS ASSOCIATION) 2ND APPELLANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 1ST RESPONDENT

MAAR PETROLEUM LIMITED 2ND RESPONDENT

THE UNIVERSITY OF NAIROBI 3RD RESPONDENT

AND

DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES INTERESTED PARTY

(Being an appeal against the whole of the undated Ruling of the Honourable National Environment Tribunal at Nairobi delivered electronically on 2nd September, 2022 in NETT Appeal No 8 of 2022)



JUDGMENT

Background

1. The Appellants filed net Appeal 008 of 2022 before the National Environment Tribunal (net) challenging the decision of the National Environment Management Authority (NEMA) to issue License No. NEMA/EIA/PSL/15911 to the 2nd Respondent authorizing it to commence the “proposed construction of tier 3 petrol station comprising 4 underground petrol storage tanks, 4 pump tiers, office block, service bay, tyre-centre, car wash, commercial section and associated facilities and amenities on plot L.R No 11870/III/74 along Lower Kabete Road, Westlands, Nairobi.
2. It was their case, inter-alia, that their neighbourhood, where the proposed project was set to be undertaken is defined by single dwelling residential homes zoned in that respect by the Nairobi County Government and that the project would not only materially alter the user of the land but required an EIA study which was not undertaken.
3. Similarly, they urged, no public participation was undertaken for the change of user and proposed developments, which developments would have negative environmental consequences, and that the licence was issued outside the 60-day timeline as required by Section 58(8) of the Environmental Management Co-ordination Act (EMCA).
4. In response, the 2nd Respondent filed a Preliminary Objection dated the 28th February, 2022 premised on the grounds that the Tribunal did not have jurisdiction to entertain the Appeal because the same offended Section 129 of the EMCA as well as Rule 4(2) of the Environmental Tribunal Procedure Rules; and that the Appeal was fatally and incurably defective for having been filed after the lapse of sixty (60) days.
5. The 1st Respondent equally filed a Preliminary Objection on the 28th February, 2022 contending that the Tribunal did not have jurisdiction to entertain the matter in view of the provisions of Section 129 of the EMCA and that the same was statute barred.
6. The Tribunal found merit in the 2nd Respondent’s Preliminary Objection noting that the Appeal fell within the province of Section 129(1) of the EMCA and not Section 129(2), and as such, it ought to have been filed within 60 days after the issuance of the impugned license. The Tribunal found that the Appeal was filed 14 days after the lapse of the sixty- days period prescribed by Section 129(1) and that it had no jurisdiction to extend or enlarge time for such appeals.
7. Ultimately, the Appeal was struck out for non-compliance with Section 129(1) of EMCA and the consequent want of jurisdiction on the part of the Tribunal.
8. Aggrieved by the foregoing, the Appellants lodged this Appeal vide the Memorandum of Appeal dated 2nd September, 2022 on the following grounds:
 - i. The Hon Tribunal erred in law and fact by finding that it had no jurisdiction to hear the Appeal, (on the basis that the appeal was filed more than 14 days after NEMA issued the EIA License): whereas the Hon Tribunal had not, first satisfied itself whether the Appellants participated in the process leading to the issuance of the EIA license for its Appeal to fall under Section 129(1), Environment Management and Coordination Act, (EMCA)1999.
 - ii. The Hon Tribunal erred in law and fact by disregarding binding precedents from the Environment and Land Court in 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; Simba Corporation Ltd vs Director General, NEMA & Another [2017] eKLR and John Kabukuru Kibicho & Anor vs County Government of Nakuru & 2 Ors[2016]eKLR as well as the Court of Appeal decision in National Environment Tribunal vs Overlook Management Ltd & 5 Others[2019]eKLR on the judicially determined applicability and indeed differentiated locus standi accruing under Section 129(1), EMCA as distinguished from that accruing under Section 129(2), EMCA.

- iii. The Hon Tribunal erred in law and fact in violating the doctrine of stare decisis, contrary to the Court of Appeal holding in Abu Chiaba Mohamed vs Mohamed Bwana Bakari & 2 Others, Civil Appeal No 238 of 2003(cited and followed by Odunga J in Republic vs Chairman, Political Parties Tribunal & 2 Others, Ex-parte Susan Kihika Wakarura[2017]eKLR.
 - iv. The Hon Tribunal erred in law and fact in disregarding that the Appellants had in fact unequivocally pleaded that their Appeal was premised on Section 129(2), EMCA, which premised a factual enquiry and, inexplicably disregarded by the Hon Tribunal.
 - v. The Hon Tribunal erred in law and fact by failing to find and hold that Section 129(1) EMCA relates only to Appeals in respect of decisions made in which the person aggrieved by the issuance of the license participated in the decision making process, and would therefore be required to lodge an appeal within 60 days of the date the decision was made.
 - vi. The Hon Tribunal erred in law and fact by failing to find and hold that where a person does not participate on the proceedings leading to the issuance of the license, then the appeal would fall under Section 129(2), EMCA; which requires that such 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) & (2) of the netT Procedure Rules.
 - vii. The Hon Learned Tribunal erred in law and fact by admitting for determination a fatally defective preliminary objection which centres on factual disputations, which required adduction of evidence.
 - viii. By failing to dismiss the Notice of Preliminary Objection dated 28th February, 2022 and award costs on a full indemnity basis; the impugned Ruling of the Hon National Environment Tribunal is erroneous in law and fact and contrary to equity, and is for setting aside on appeal.
4. The Appellants therefore seek that;
- a. The undated Ruling by the Hon Tribunal, electronically transmitted on the 2nd September, 2022 be and is hereby set-aside, and the Notice of Preliminary Objection dated 28th February, 2022 declared dismissed.
 - b. The Appellant be awarded costs of the Notice of Preliminary Objection dated the 28th February, 2022 in National Environment Tribunal Appeal No 008 of 2022, on a full indemnity basis as against the 2nd Respondent.
 - c. The Appeal in net Appeal 008 of 2022 be remitted for hearing and determination before the Hon Tribunal on priority basis.
 - d. The restraining injunctive orders issued by the Hon Tribunal in net Appeal 008 of 2022 be and are hereby reinstated, pending hearing and determination of the Appeal.
 - 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 Appellants costs herein be provided for, on a full indemnity basis.
9. The 2nd Respondent, through its Manager, Samuel Nuthu Kega, filed a response to the Appeal on the 10th November, 2022. He deposed that the present Appeal is unmerited and has in any event been overtaken by events as the project has already been completed; that only branding remains before the opening and start of operations of the petrol station and that the Appeal is intended to delay the planned operation of the business.
10. It was deposed by the 2nd Respondent's Manager that the business is located on a commercial area touching the main road and there are no residential properties as alluded to in the present Appeal; that the Ruling by the net was meritorious and grounded in law; that the 2nd Respondent has a registered lease with the 3rd Respondent for 20 years, which lease has never been objected to and that the 2nd Respondent has all the necessary approvals and legal documents for the land.
11. It was urged that the 2nd Respondent has been greatly affected by the long and frivolous court cases by the Appellants; that any orders against them would be prejudicial as they continue paying monthly rent of Kshs 1,000,000/= under the lease they hold with the 3rd Respondent; that contrary to their assertions, the 2nd Respondent obtained letters of no objection from the neighbors and the same were accepted and that there is no direct imminent environment threat posed by the development.

Submissions

12. The Appellants, through Counsel, submitted that vide its Appeal of 21st February, 2022, the Appellants were aggrieved by NEMA's unfair administrative action of inordinately delaying in responding to their letter of 28th July, 2021, and the irregular issuance of the EIA License ref: NEMA/EIA/PSL/15911 dated 10th December, 2021 and served upon them on 11th February, 2022.
13. It was submitted that the cause of action with respect to the Appellants' second grievance is in respect to the irregular issuance of the EIA license stemming from Sections 58(2) and 64 of the EMCA as read with regulation 7(2)(iv), 11, 16, 17 & 20 of the EIA Regulations and paragraphs 3(1) & (2), L.N No 31 and 32 of 2019 in so far as the project sought to materially alter the user of the land.
14. It was submitted that the Appellants invoked Section 129(2), EMCA as read with Rule 4(2), netT Procedure Rules, 2003 to urge that NEMA failed in the discharge of its constitutional duty.
15. According to Counsel, upon NEMA giving and/or serving on the Appellants a copy of the EIA license vide the letter dated 11th February, 2022, the Appellants lodged an appeal on the 21st February, 2022 approximately ten days later which under Section 129(2), EMCA as read with Rule 4(2), netT Procedure Rule, is indisputably not later than 60 days from the date on which the disputed decision was given to or served upon him.
16. Without prejudice to the foregoing, it was urged, upon issuance of the license on 10th December, 2021, the 2nd Respondent lodged the Appeal approximately 47 days later computed as follows: 10th to 20th December, -10 days; 14th January to 21st February-39 days; exclude 10th December being the date of license & 21st February being the date of filing.
17. Counsel referred the Court to the case of Gabriel Osimbo vs Chrisinus Mandare[2020]eKLR and Keziah Stella Pyman & 2 Ors vs Paul Mwololo Mutevu & 8 Others[2013]eKLR on computation of time.
18. It was submitted that Section 129(1) and (2), of the EMCA creates two streams of locus standi and establishes two different categories of jurisdiction for the net; that under Section 129(1), the law



imposes a time limit of 60 days from the occurrence of the listed events within which timeline an appeal must be lodged and that an appeal lodged outside this timeline is fatally defective because this timeline is statutorily prescribed and the law does not confer jurisdiction for extension.

19. On the other hand, it was submitted, the second stream availed under Section 129(2) of the EMCA which must be read together with Rules 3 & 4(2) of the net Rules allows for a challenge of any administrative, quasi administrative or quasi-judicial decision made or proposed to be made or required to be made as the case may be not later than 60 days after the date on which the disputed decision was given to, or served upon the Appellant and that under Rule 7 of the net Rules, the net has jurisdiction to extend time under this limb.
20. It was submitted that in *Simba Co-orporation Limited vs Director General, NEMA*[2017]eKLR, the court discussed the two categories of Appeals under net noting that Section 129(1) relates to an appeal by a person who was a party to a decision or determination by NEMA within the framework of the EMCA whereas 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 the EMCA.
21. Counsel for the Petitioner urged that time for purposes of Section 129(2) begins running when the Appellant is given or served with a notice of the disputed decision by NEMA and NEMA bore the onus of evincing when the impugned decision was served on the Appellant. Reliance was also placed on the cases of *Runda Gardens Residents Association (RGRA) vs NEMA & Registered Trustees of the Foundation Gate Church, ELCA E086 of 2022*; 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.
22. Counsel submitted that in the circumstances, the net did not address this differentiated locus and set its course on an erroneous misapprehension leading to an erroneous outcome and that when misapplied, the dual avenues for appeal would have the effect of curtailing a litigant's right of access to justice.
23. According to counsel, as expressed by the Court of Appeal in *National Environment Tribunal vs Overlook Management Limited & 5 Others* [2019]eKLR, the court ought to adopt the approach that enhances and not limits access to justice and that net incorrectly computed time within which the Appellants' Notice of Appeal was to be filed.
24. Counsel further submitted that the Preliminary Objection before the net was irregular and fatally defective as it set out factual disputations whereas the law on Preliminary Objections as discussed in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd*(1969) EA 696 and *Hon Attorney General of Kenya vs Independent Medico-Legal Unit, EACJ Appeal No 1 of 2011* and *Ahmed Noorani & Anor vs Rajendra Ratilal Sanghani*[2020]eKLR provides that they must be on pure questions of law and cannot be raised if any fact has to be ascertained.
25. It was noted that whereas disputation on locus and time bar ordinarily lie as preliminary objections, where the same extends to contestation on disputed facts, it fails the threshold of a proper matter capable of being summarily determined; that the Appellants expressly pleaded that it only learned of the EIA license in February, 2022 upon service and notification by NEMA on 11th February, 2022 and was consequently aggrieved by the belated notification after the fact of the grant of the license and the fact of the issuance of the license.
26. Equally, it was submitted, the Appellants pleaded that there was no robust public participation nor input from the relevant lead agencies; that it would have had an opportunity to have addressed the numerous negative effects of the project under an EIA study; that a dispute as to the extent and/or limit of the Tribunal's jurisdiction under Section 129(1)&(2), EMCA as read with Rule 3, 4(2) and 7, net



Procedure Rules calls for interrogation of facts which the Tribunal failed to do and that the Tribunal's decision was made in error and only serves to deprive the Appellants of a fair opportunity to have its grievance on the impugned project adjudged on merit.

27. The 2nd Respondent filed submissions on the 9th October, 2024. Counsel submitted that the Appeal is a well-orchestrated scheme by the Appellants to destroy the reputation of the 2nd Respondent and the processes of obtaining the NEMA License and that in this case, the Tribunal lacked jurisdiction because the Appeal was time barred.
28. Counsel submitted that net Appeal 008 of 2022 was filed in opposition to the issuance of the EIA License; that the Appellant's failure to submit the Appeal to the net within 60 days after the occurrence of the event complained of as specified in Section 129(1) of EMCA left the appeal beyond the Tribunal's jurisdiction as expressed in *Pakwood Investments Limited & Anor vs NE,A & 7 Others*[2021]eKLR and that the Appellants' reliance on the interpretation of the court in *Simba Corporation Limited vs Director General National Environment Management Authority(NEMA) & Anor*[2017]eKLR is misleading since the court in this case interpreted Section 129(2) of EMCA.
29. Counsel submitted that as the Appellants grievance was against the issuance of the EIA License, they could not invoke Section 129(2) of the EMCA as expressed by the Court in *Runda Association vs National Environment Management Authority, Nairobi City County, Kwa Runda Association & Kinuthia Macharia*[2019]KEELC 14(KLR).
30. It was submitted that in any event, if the Appellant wished to rely on Section 129(2) of the EMCA, the correct thing would have been for them to seek leave before filing the Appeal before net pursuant to Rule 7 of the net Rules. Reliance in this respect was placed on the case of *Kimani Mathu, Chairman & 2 Others (All suing jointly as and on behalf of Kyuna Neighbours Association vs NEMA & Anor: Director General, Nairobi Metropolitan Services(Interested Party)*[2004]KEELC 4360.
31. It was urged that neither the date of the issuance of the impugned license nor the date of the filing of the appeal were in dispute; that the Tribunal properly admitted the Objection and the appeal constitutes a waste of judicial resources and that the 2nd Respondent is entitled to costs having suffered financially in defending the matter. None of the other parties participated in this Appeal.

Analysis & Determination

32. 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.
33. This being a first Appeal, the court is required to re-evaluate the evidence tendered and make its own findings and conclusions. The court is not bound by the findings of fact and law made by the lower court or Tribunal as in this instance, 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.”



34. This court has considered the pleadings and submissions filed by the parties. While the Appellants set out eight grounds of appeal, these grounds can be summarized thus;
- i. Whether or not the Preliminary Objection of 28th February, 2022 was premised on contested facts and therefore ought not to have been allowed?
 - ii. Whether the Tribunal erred in finding that the Preliminary Objection was merited?
35. The threshold of a preliminary objection was set out by the Court of Appeal in the locus classicus case of *Mukhisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696* at 700 wherein Law, JA stated that:
- “...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
36. Newbold, P further held as follows:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
37. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR* re-affirmed the principle as set out in the *Mukhisa Case* stating as follows:
- “A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
38. The court is so guided.
39. The Appellants filed net Appeal No. 008 of 2022 before the Tribunal aggrieved with, inter-alia, the issuance of an EIA License with respect to the construction of a petrol station by the 2nd Respondent.
40. The 2nd Respondent filed a Preliminary Objection asserting that the Tribunal did not have jurisdiction to entertain the Appeal as the same offended Section 129 of the EMCA, and Rule 4(2) of the Environmental Tribunal Procedure Rules, 2003; and that the Appeal was fatally defective having been filed after the lapse of sixty days. The Tribunal found merit in the objection and struck out the Appeal.
41. The Appellants contend that the Objection was fatally defective and ought not to have been admitted by the Tribunal. They assert that it was not a proper objection founded on pure points of law but was



based on contested facts. In their view, the Tribunal was required to inquire into the existence of facts either supporting or disproving a claim under Section 129(1) or (2) of EMCA.

42. Further, they state, they pleaded that they only learned of the issuance of the license in February, 2022 upon notification by NEMA and were aggrieved by the belated notification as well as the issuance of the license and that they further contended that there was no public participation, and input from the relevant agencies nor an EIA study.
43. The 2nd Respondent maintains that the objection was well taken.
44. As aforesaid, the Objection by the 2nd Respondent was that the Appeal was time barred and subsequently, the Tribunal was devoid of jurisdiction. Issues of jurisdiction and statutory timelines are generally regarded as pure legal questions suitable for determination by way of a PO. Indeed, the Mukisa Case(supra) cites as examples of pure questions of law, an objection to the jurisdiction of the court or a plea of limitation.
45. Considering the parties' submissions to the Objection before the Tribunal, it is not in dispute that they fundamentally disagreed on the legal foundation of the Appeal, that is whether it fell under Section 129(1) or (2) of (EMCA). This was, in fact, the Tribunal's first point of inquiry.
46. In the court's opinion, the classification of the Appeal under either Section 129(1) or (2) was not contingent on contested facts requiring evidentiary determination. Rather, it was a question of law—one that could be resolved by an objective examination of the pleadings. Or, as stated in the Mukhisa case(supra), arose by clear implication out of the pleadings.
47. In its analysis of this question, the Tribunal simply referred to the Appellants' pleadings noting as follows:

“Our consideration of the Notice of Appeal and the Appellants statement in support of the Appeal informs us that this Tribunal cannot determine the Appeal herein without deeply interrogating the process that led to the issuance of the impugned EIA License, the decision to grant the license and the conditions therein. These are all aspects that squarely fall within the province of Section 129(1) of EMCA and not Section 129(2) of the Act.”
48. Indeed, the Appellants' additional arguments, including their claim that they only became aware of the issuance of the EIA License in February 2022 upon notification by NEMA, and their contention that the licensing process was fundamentally flawed due to the absence of public participation, lack of input from relevant agencies, and failure to conduct an Environmental Impact Assessment (EIA) study—formed part of the broader context of their case, which the Tribunal considered in determining under which section of the law their appeal fell. Notably, these assertions were uncontested.
49. Ultimately, the court opines that the objection was well taken by the Tribunal.
50. Having found that the Preliminary Objection was well taken, the court now turns to whether the Tribunal erred in finding merit therein.
51. Vide its Ruling, the Tribunal found that whereas the Appellants attempted to move their appeal away from Section 129(1) of the EMCA and situated it within subsection (2), the Appeal called upon them to interrogate the process leading to the issuance of the impugned EIA License, the decision to grant the license and the conditions therein, which are matters falling within the province of Section 129(1).



52. The Appellants oppose this finding and urge that the Tribunal erred in disregarding binding precedents on the judicially determined applicability and differentiated locus standi accruing under Section 129(1) of the EMCA as distinguished from that accruing under Section 129(2) of the EMCA.

53. Section 129 of the EMCA establishes the framework governing appeals to the Tribunal. In particular, Section 129(1) & (2) provide thus:

“ 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;
- (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.”

54. The foregoing is buttressed by the National Environmental Tribunal Procedure Rules, 2003. Rule 4 (1) thereof provides that:

“ An appeal to the Tribunal shall be made by written notice and where the Tribunal has approved a form of notice for the purpose, in the form so approved.”

55. Rule 4 (2) further provides that:

“ The appellant shall send or deliver six copies of the Notice of Appeal to the Tribunal so as to reach it not later than sixty days after the date on which the disputed decision was given or served upon him.”

56. The question of the differentiated jurisdiction of the Tribunal under Section 129(1) and (2) of EMCA has been the subject of intense deliberations by the courts.



57. Indeed, this court recently pronounced its stance on this issue in *Mathu, Chairman & 2 others (All Jointly suing as and on behalf of Kyuna Neighbours Association (KNA) vs 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)*, thus:

“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*.

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 of 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.

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.”

58. The court maintains its aforesaid position. In reaching the foregoing determination, this court had the opportunity to interrogate the decisions in *Prof Albert Mumma vs Director General, NEMA & 2 Others* and the *SDA Church E.A. Ltd [2021] eKLR* and *Simba Corporation Limited vs National Environment Management Authority (NEMA) [2017] eKLR*, both of which took the position that:

“Section 129 (1) relates to decisions made in which the person aggrieved by the issuance of the licence participated in the decision -making process while Section 129(2) relates to those who did not participate in the proceedings leading up to the decision. This court respectfully disagrees.”



59. The court has keenly perused the pleadings before the Tribunal. Vide the Notice of Appeal, the Appellants sought an order vacating the decision of the 1st Respondent made under license NEMA/EIA/PSL/15911; permanent injunctive orders restraining the 2nd and 3rd Respondents from carrying out further developments on the property and orders directing them to restore the suit plot, to its original condition; and an order that the 1st Respondent violated their rights to property and fair administrative action.
60. The Appellants' grievances are as a direct consequence of the issuance of the NEMA License to the 2nd Respondent. Guided by this court's exposition in the Mathu Case(Supra), the court agrees with the Tribunal's findings that the Appeal fell within the precincts of Section 129(1) of the EMCA.
61. On whether the Appeal was indeed statute barred, the Appellants have all along contended that guided by Section 129(2), they were within the requisite timelines for filing the appeal. Based on the court's finding on this issue, this argument is moot.
62. The Appellants have however proffered an alternative argument stating that even if the Appeal fell within Section 129(1) of the EMCA, it would still not be statute barred. They contend that even if the court were to begin its calculations from the time of the issuance of the license being the 10th December, 2021 to the lodging of the Appeal on the 21st February, 2022, the total duration would be approximately 47 days.
63. In this respect the Appellants place reliance on the decision in Gabriel Osimbo vs Chrispinus Mandare[2020]eKLR and Keziah Stella Pyman & 2 Others vs Paul Mwololo Mutevu & 7 Others[2013]eKLR.
64. Section 57(b) of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya), states as follows:
- “In computing time for the purpose of a written law, unless the contrary intention appears-
- a. period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which that event happens, or the act or thing is done;
 - b. if the last day of the period is Sunday, or a public holiday or official non-working days (which days are in this Section referred to as excluded days), the period shall include the next following day not being an excluded day;
 - c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done on the next day afterwards, not being an excluded day.
 - d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time.”
65. Order 50 Rule 4 of the Civil Procedure Rules provides as follows:
- “Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time



(whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act.”

66. It is well established that the computation of time under Order 50 Rule 4 of the Civil Procedure Rules applies specifically to matters brought under the *Civil Procedure Act* and is, therefore, inapplicable in the present circumstances. The Environmental Management and Coordination Act (EMCA), being a substantive statute, takes precedence over subsidiary legislation such as the Civil Procedure Rules.
67. Furthermore, the statutory framework of the EMCA does not envisage a scenario in which the Tribunal is permitted to extend time by incorporating the concept of excluded days in a manner akin to the provisions of Order 50 Rule 4. [See Also *Pakwood Investments Limited & another v National Environment Management Authority & 7 others* [2021]eKLR].
68. Turning to the *Interpretation and General Provisions Act*, it is evident that the second limb of the Appellant’s argument is premised on a misreading of Section 57(d) thereof.
69. The provision is clear in its application—excluded days, which include Sundays, public holidays, and official non-working days, are only disregarded when computing time not exceeding six days. Beyond this threshold, excluded days are counted in the computation, and there is no basis for applying the exclusion principle to longer timeframes such as the 60 days herein.
70. In the premises, after the issuance of the license on the 10th December, 2021, the Appellants had sixty days within which to file the Appeal, which timeline lapsed sometime on the 7th February, 2022. Having been filed on the 21st February, 2022, the Appellants were out of time divesting the Tribunal of jurisdiction to determine the matter. The court agrees with the Tribunal’s findings in this respect.
71. In the end, the court finds the Appeal to be unmerited. The same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Lusi for Appellant

Mr. Abdulrazak for 2nd Respondent

Court Assistant: Tracy

