County Government of Kilifi v Kai & 4 others; National Environment Management Authority & 2 others (Interested Parties) (Environment & Land Case E045 of 2024) [2024] KEELC 13211 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13211 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE E045 OF 2024

EK MAKORI, J

NOVEMBER 14, 2024

BETWEEN

COUNTY GOVERNMENT OF KILIFI ..... APPELLANT

AND

JACKSON CHITENGELE KAI ..... 1ST RESPONDENT

LINET TUMA MWAKAMSHA ..... 2ND RESPONDENT

PETER YAA MANGI ..... 3RD RESPONDENT

JOSEPH MALUSHA ABEDI ..... 4TH RESPONDENT

PROJECT KENYA YOUTH ORGANIZATION ..... 5TH RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY

VIPINGO DEVELOPMENT LIMITED ..... INTERESTED PARTY

LAKE GAS LIMITED ..... INTERESTED PARTY

(Being an Appeal against the Ruling and Order of the National Environment Tribunal at Nairobi (Coram: Mr. Emmanuel Mumia, Chairman, Ms. Winnie Tsuma, Vice Chairman, Member, Duncan Kuria, OGW, Member, and Ronald Allamano, Member) dated the 8th day of August 2024 in National Environment Tribunal Appeal No. 3 of 2024 as consolidated with Appeal No. E40 of 2024)

JUDGMENT

1. The Judgment arises from the ruling and orders of the National Environmental Tribunal (NET) dated the 8th day of August 2024 in NET Appeal No. 3 of 2024. A similar appeal was filed - No. E040 2024 raises similar issues. For disposal purposes, a consolidation was ordered.

2. The Preliminary Objection dated 1st day of July 2024 in the said appeal raised issues that:

    i. The Honourable Tribunal is bereft of jurisdiction to hear and determine the appeal by virtue of the express provision of Section 129 (1) (c) and (e) of the Environmental Management & Coordination Act Cap 387 Laws of Kenya as read with Regulation 46(2) of the Environment (Impact Assessment and Audit Regulations, 2003 that the Appellants having filed the same outside the mandatory sixty days requirement of issuance of the EIA Licence on the 10th day of December 2019.

    ii. The Honourable Tribunal is deprived of jurisdiction in view of the unequivocal provisions of Rule 4 (2) of the NET Procedure Rules.

3. The Court directed the two appeals to be canvassed through written submissions. Parties did comply.

4. Having reviewed the appeal record and the submissions placed before me, the issues that I frame for the determination of this Court is whether NET has jurisdiction to hear NET Appeal No. 3 of 2024 given the Preliminary Objection raised by the appellants subject of the current appeals and who should bear the costs of these appeals.

5. The appellants in Appeal No. E040 of 2024 submitted that the Honourable Tribunal Members made two consequential findings in their ruling. Firstly, they erroneously presumed that the 1st to 5th respondents' appeal was filed pursuant to Section 129(2) of the Environmental Management and Coordination Act, 1999 (EMCA), which presumption, in their view, is without basis. Secondly, they noted that the Preliminary Objection dated 21st June 2024 classified the appeal as being founded on Section 129(1) of EMCA. As such, they concluded that the Preliminary Objection was based on contested/disputed facts. They needed to interrogate evidence to decide which Section, between Section 129(1) and 129(2) of EMCA, the appeal No. NET 3 of 2024 fell under based on whether they participated in the process leading to the impugned decision. From this point, they would then interrogate the computation of time and, ultimately, determine whether the appeal was time-barred. They, therefore, declared that the Preliminary Objection fell below the threshold set in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd. vs. Westend Distributors Ltd)1969) EA 696 and dismissed it.

6. The appellants submitted that the appeal in question is time-barred. The 1st to 5th respondents (appellants in NET No. 3 of 2024) failed to specify in their pleadings (Notice of Appeal) which Section (between 129(1) and 129(2) their appeal was founded on. This failure to clarify their pleadings is crucial in their argument in the appeals before this Court—the locus standi of 1st to 5th respondents in filing Appeal No. NET 3 of 2024 could only be pursuant to Section 129(1) of EMCA. The case law and legal provisions that the Tribunal relied upon in their ruling are no longer good law. From the appeal and the submissions before the NET, the authorities relied to discover what stream the appeal fell was bad in law and overtaken by an amendment of Section 129 of EMCA in 2015.

7. A look at the Notice of Appeal filed by the 1st to 5th respondents before the Tribunal (pages 5 to 15 of the Record of Appeal) will inform that the 1st to 5th respondents in their appeal did not invoke

either of Sections 129(1) or 129(2) as the foundation of their appeal. They ran afoul of the peremptory requirement of invoking the foundational provisions for appeals before the Tribunal. Whereas one might argue that this omission is easily curable under Article 159(2)(d) of *the Constitution*, it creates difficulty in determining whether such an appeal is filed within time and, if not, whether there can be an extension of the time.

8. Having read the substance of the Notice of Appeal filed by the 1st to 5th respondents, the appellants argue that they noticed that it challenged the issuance of an Environmental Impact Assessment Licence No. NEMA/EIA/*PSL/8728*, which was granted on the 10th of December 2019, and as such, the appeal fell under Section 129(1)(a) of EMCA – hence the Preliminary Objection against the appeal filed out of the time stipulated under Section 129(1).

9. Having established that the 1st to 5th respondents never invoked either of the EMCA provisions that establish locus standi to file an appeal before the Tribunal, both in their pleadings and not in their non-existent submissions, the Tribunal should not have concluded at paragraph 15 of the ruling that their Preliminary Objection raised factual contestations and disputed facts. None existed.

10. The appellants stated that the 1st to 5th respondents did not state that they invoked Section 129 (2) of EMCA in their Notice of Appeal. When they raised the Preliminary Objection classifying their appeal under Section 129(1) of EMCA, they did not argue this legal proposition. The Honourable Members of the Tribunal could not invoke facts that had not been pleaded nor argued. The Tribunal's deviation from its role and expectation of impartiality is critical in the appellants' argument in these appeals. The Tribunal could not descend to the arena of dispute. The Honourable Members of the Tribunal were expected to be impartial and erred in this case by fronting arguments on behalf of less-than-diligent appellants (the 1st to 5th respondents).

11. The appellants further proceeded to aver the Tribunal relied heavily on the decision of Vincent Kioko Suing in his Capacity as Chairman for and on Behalf of Runda Gardens Residents Association v National Environment Management Authority & another. However, this authority is distinguishable from the circumstances of NET No. 3 of 2024. In the above-quoted case, the appellant before the Tribunal had expressly stated in their Notice of Appeal that their appeal was premised on Section 129(2) of EMCA. In contrast, the notice of Preliminary Objection by the respondents invoked Section 129(1) of EMCA. This factual contestation would necessitate the Tribunal to interrogate and investigate specific factual/evidential issues.

12. The appellants contend that the circumstances of NET 3 of 2024 differed, and the Tribunal failed by misapplying this judicial precedent. The Tribunal's misapplication of the judicial precedent in NET 3 of 2024 is critical to the appellant's argument. The Tribunal ought to have determined the Preliminary Objection based on the facts before it, notably that the Preliminary Objection invoked Section 129(1), which provides for 60 days for filing an appeal, yet the appeal NET 3 of 2024 was filed over 4 years after the grant of the license in question. In the absence of any controverting arguments, the Tribunal ought to have allowed the Preliminary Objection.

13. The appellants proceed to argue that the interpretation of this Section has been buttressed by Angote J. in 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 (Supra) [2024] KEELC 4360 (KLR). The facts of the dispute in the Mathu case bear a striking resemblance to the present case, underscoring its relevance. In that case, the Tribunal noted that the appeal challenged NEMA's grant of an EIA license and concluded that the appeal fell under Section 129(1) of EMCA. The Tribunal then allowed the Preliminary Objection

because the appeal had been filed past the 60 days. The appellants then preferred an appeal, which Angote J. dismissed, upholding the Tribunal's finding.

14. The appellants contend that a similar jurisprudential school of thought was adopted by Bor J. in Runda Association v National Environment Management Authority, Nairobi City County, Kiwa Runda Association & Kinuthia Macharia [2019] KEELC 14 (KLR). In this case, NEMA issued an EIA license for constructing an access road, which was challenged before the Tribunal. The Tribunal dismissed the appeal based on a preliminary objection that was filed, prompting the appeal before Bor J., who agreed with the Tribunal and dismissed the appeal. The appellant concludes that Appeal No. NET 3 of 2024 was premised on Section 129(1) of EMCA; the 60-day window for filing an appeal started running on 10th December 2019 and lapsed on 10th February 2020. The 1st to 5th Respondents' Appeal No. NET 3 of 2024 was filed on 20th February 2024, over four (4) years out of the statutorily limited period. The appeal was dead on arrival, without a chance of resuscitation. The Tribunal could not, in all fairness and conscience, be allowed to adjudicate over such an egregious appeal.

15. The appellants contend that the 1st to 5th respondents' Appeal No. NET 3 of 2024 in the interpretation of the current Section 129(1) is the one postulated by Angote J. in 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 (Supra) and which requires all Appeals concerning licensing to be filed under Section 129 (1) of EMCA. The Court is urged to be guided by this decision as the appellants believe it is sound, persuasive, and current.

16. Thus, the appellants argue that the Preliminary Objection before NET ought to have been sustained so that the project's investors should be allowed to function, all regulatory requirements having been fulfilled, and that it would be late in the day to halt a concluded project, which will tend to scare away investors.

17. In the current appeal, the County Government of Kilifi (CGK) supports the appellants' appeal in Appeal No. 40 of 2024. The GCK's submissions took a similar stance to that of the Appellants in Appeal No. 40 of 2024, with a background of litigations over licensing of the current project since 2018, before the ELC and now NET, then back to the ELC representing convoluted litigation over the same matter.

18. The CGK reiterates that the 1st to 5th respondents, in their pleading before the Learned Tribunal, are aggrieved by the Environment Impact Assessment License Number NEMA/EIA/*PSL/8728* grant dated the 10th day of December 2019. The respondents' Appeal in NET Tribunal Appeal No. 3 of 2024 is founded on Section 129 (1) (a) and (c) of the Environmental Management and Coordination Act. The Respondents' Appeal in NET Tribunal Appeal No. 3 of 2024 leaves no room for speculation as to whether their Appeal is founded on Section 129 (1) of the *Environmental Management and Co-ordination Act* or Section 129 (2) thereof as found by the Learned Tribunal at paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of their ruling of the 8th day of August 2024.

19. The CGK submitted that in dealing with matters not pleaded by the respondents in the Appeal, the Learned Tribunal prejudiced the Appellant and limited its right to a fair trial. A fair hearing is a tenet of International Law that is a fundamental safeguard to protect individuals from unlawful or arbitrary deprivation of their human rights and freedoms. This right is a cornerstone of justice, guaranteed under Article 50(1) of *the Constitution* of Kenya, 2010, which encompasses the right to a fair hearing, a non-derogable right protected under Article 25 (c) of *the Constitution* of Kenya, 2010. The essential elements of a fair hearing include equality of arms between the parties to a proceeding, whether they be administrative, civil, criminal, or military, the right to adduce and challenge evidence, as well as

an entitlement to have a party's rights and obligations affected only by a decision based solely on the evidence presented to the judicial body.

20. The CGK submits, therefore, that the Learned Tribunal erred in law by relying on grounds and introducing grounds that were not pleaded in the Appeal in NET Tribunal Appeal No. 3 of 2024 contrary to trite law stemming from Articles 10 (1) and (2) (a) & (b), 25 (c), 47, 50 (1) & (4) of *the Constitution* of Kenya, 2010.

21. The CGK is of the view as the appellants in Appeal No. 45 of 2024 that the respondents are indeed and without a doubt aggrieved with the issuance and grant of the Environment Impact Assessment License Number NEMA/EIA/*PSL/8728* on the 10th day of December 2019 by the 1st interested party as provided for in Section 129 (1) (a) of the Environmental Management and Coordination Act. In their prayer in the Appeal in NET Tribunal Appeal No. 3 of 2024, the respondents seek the cancellation/ revocation of the aforesaid Environment Impact Assessment License Number NEMA/EIA/*PSL/8728* as provided for in Section 129 (1) (c) of the Environmental Management and Coordination Act as can be seen at pages 03 – 04 of the Record of Appeal. It is submitted that the Learned Tribunal has no jurisdiction to hear and determine the Appeal NET Tribunal Appeal No. 3 of 2024.

22. Therefore, the CGK believes that the Learned Tribunal erred and misdirected itself in fact and law in failing to hold that the mandatory provisions of Section 129(1) of the Environmental Management and Coordination Act, Cap 387 Laws of Kenya as read together with Regulation 46(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003, and Rule 4 (2) of the National Environmental Tribunal Procedure Rules, 2003 ousted the Tribunal's jurisdiction to hear and determine NET Tribunal Appeal No. 3 of 2024.

23. Significantly, the CGK cited the decision in Tom Kipng'etich (Suing on behalf of the residents of South C Mugoya Phase 4) v National Environment Management Authority & another [2020] eKLR, where the NET upheld a Preliminary Objection based on Section 129(1) of EMCA and that decision binds it.

24. The CGK cited several cases on what amounts to a Preliminary Objection, notably Ebrahim v Kalama (Land Case 35 of 2023) [2024] KEELC 3833 (KLR) (8 May 2024) (Ruling), Public Service Commission & 2 others v Eric Cheruiyot & 16 others consolidated with Civil Appeal No 139 of 2017 County Government of Embu & another v Eric Cheruiyot & 15 others [2022] eKLR, and Mary Wambui Munene v Peter Gichuki Kingara & 6 others, [2014]eKLR - the authorities express the view that Preliminary Objections are purely based on points of law and should be raised immediately.

25. In their submissions, the 1st to 5th respondents contend that this Court is the final Court of Appeal from the decisions of the National Environment Tribunal—Section 130 (5) of the Environment Management and Coordination Act (EMCA).

26. They aver that in the case of Vincent Kioko Suing, the Chairman of Runda Gardens Residents Association v National Environment Management Authority & Another [2023] eKLR, Oguttu J. opined that appeals to the National Environment Tribunal are two-streamed an appeal which is anchored on the provisions of section 129(1) of the EMCA, 1999 and which can only be mounted by an aggrieved person, who was a party to the proceedings and process before the National Environment Management Authority, must be lodged within 60 days of delivery/issuance of the impugned decision and Section 129(2) of EMCA, which concerns appeals by such other persons who are aggrieved and or affected by the decisions of National Environment Management Authority (NEMA) and her offices; but who are not party to the proceedings/processes leading to the impugned decision. Eboso J. took the same view in Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another (2017) eKLR.

27. The 1st to 5th respondents believe there is enough precedent pointing towards the fact that an appeal must first be categorized as falling under Section 129(1) or Section 129(2) of EMCA. This is critical because section 129(1) relates to decisions made by persons aggrieved by issuing a license in which they were part and parcel and, therefore, bound by the 60-day rule. When the person does not participate in the proceedings before NEMA, then the appeal would fall under section 129(2) of EMCA, which requires an 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.

28. The 1st to 5th respondents opine they were never a party to the decision-making process at NEMA. Their appeal, therefore, falls under Section 129 (2) of EMCA, and the 60 days do not apply until they are made aware of its existence. There is enough precedent pointing towards the fact that an appeal must first be categorized as falling under Section 129(1) or Section 129(2) of EMCA. This is critical because section 129(1) relates to decisions made by persons aggrieved by issuing a license in which they were part and parcel and, therefore, bound by the 60-day rule. When the person does not participate in the proceedings before NEMA, then the appeal would fall under section 129(2) of EMCA, which requires an 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. Awareness of its existence is factual and cannot be raised through a Preliminary Objection. That is why the Tribunal clarified that the proper approach to this issue would have been through filing an application where both issues of law and facts can be entertained. That was not done.

29. The contention of the 1st to 5th respondents is that the Director General decided on the issues raised in the appeal before NET under Section 129 (2) of the Act. Therefore, the 60-day period does not apply until the service of the decision by NEMA is brought to the attention of the aggrieved party. On that point, reliance is placed on Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Avic International Real Estate (EA) Ltd [2017] KEELC 310 (KLR).

30. The role of this Court at this stage, although this is an appeal from interlocutory proceedings before the Tribunal, is to re-evaluate the evidence and make its independent conclusion. In the often-cited case of Okeno v Republic [1972] EA 32 at 36, the East Africa Court of Appeal stated the duty of the Court on a first appeal as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

31. This appeal arises from a Preliminary Objection raised before the NET questioning its jurisdiction. As correctly submitted by parties in the cited authorities, a Preliminary Objection is primarily anchored on pure points of law and must flow from pleadings filed by parties. Whenever raised, it must be dealt with at once as it can potentially dispose of a matter. The jurisdictional question is that NET should not have admitted to hearing NET Tribunal Appeal No. 3 of 2024, a time-barred appeal. This Court reiterates what the Court of Appeal stated in Public Service Commission & 4 others v Cheruiyot &

20 others (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) in a decision rendered on 8th February 2022 on the jurisdiction question in general as follows:

> "Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders, in "Words and Phrases Legally Defined," Volume 3, Page 113, defines court jurisdiction as follows:
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> > "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."
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> 37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:
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> > "...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
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> 38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
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> 39. The Supreme Court, In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No 2 of 2011, held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at, paragraph 30 of its decision, held in part as follows:
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> > "...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament,

where the wording of Legislation is clear and there is no ambiguity."

40. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

> "(68). A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law."

32. The NET's jurisdiction was challenged on the import of appeals arising under Sections 129(1) and 129(2) of the EMCA—referred to as the two-streamed appeals. This is what the NET said in its impugned ruling concerning the Preliminary Objection subject of this appeal:

> " Having set out the position of the 2nd and 3rd Respondents, we now set out to resolve the question presently before us. Section 129 EMCA, which forms the nub of the arguments before us, provides as follows;
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> 129 (1) Any person who is aggrieved by: -
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> a. A refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
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> b. Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority, or the Committees of the Authority 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.
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> The Environment and Land Court has innumerably pronounced itself on the letter and import of Section 129 of the EMCA. The court has interpreted Section 129 of the EMCA as creating two streams of appeal. According to the court's interpretation, Section 129 (1) of the EMCA is invoked by aggrieved parties who were part and parcel of the licensing process; on the other hand, Section 129 (2) of the EMCA is to be invoked by parties who were not involved in the licencing process.

Hon Justice Oguttu Mboya explained the two streams in Vincent Kioko suing in his capacity as Chairman for and on behalf of Runda Ganden Residents Association v NEMA & another [2023] eKLR in the following manner: -

> "For good measure, an appeal which is anchored on the provisions of Section 129 (1) of EMCA, 1999 and which can only be invoked by an aggrieved person, who was a party to the proceedings and or process before the NEMA, must lodge within 60 days of delivery/ issuance of the impugned decision. On the contrary, the appeal provided for by dint of Section 129 (2) of EMCA relates to and or concerns appeal by such other person who are aggrieved and or affected by the decisions of NEMA and her officers, but who were not parties to the proceedings/process leading to the impugned decision."
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> In a similar breath, Hon. Justice Eboso made a similar finding in Simba Corporation Limited v Director General, NEMA & another 2017 eKLR: -
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> > "In the jurisprudence interpreting the two categories of the appeal filed to the NET under Section 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.
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> > That the Tribunal must correctly identify the stream with which Section 129 EMCA appeal lies cannot be gainsaid."
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> > The Tribunal continued:
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> > > " The factual contestations before the tribunal regarding notifications of the decision and the appellant's involvement in the licencing process call for further interrogation. It is trite law that a Preliminary Objection cannot be anchored on disputed facts. In Simba Corporation Ltd v Director General, NEMA & another (Supra), Hon Justice Eboso observed that the question of whether an appeal falls under Section 129 (2) of the EMCA cannot be resolved by a Preliminary Objection but through a substantive motion as in calls for interrogation of evidence.

See also Justice Oguttu in Vincent Kioko Case
Supra."

33. Having independently reviewed the record of appeal, the grounds of appeal, the materials placed before me on the two appeals, and the submissions by the parties and the warring authorities on the question of the two - streamed appeals under Section 129(1) and 129(2) of EMCA the question whether the respondents approached the NET under Sections 129 (1) or 129 (2) was not decided on its merit by the NET. The NET proposed that the issue can only be interrogated through a substantive motion supported by affidavit(s) or at a prior hearing since the NET Tribunal Appeal No. 3 of 2024 did not disclose under what stream the appellants approached the Tribunal. The issue remains moot before the Tribunal and can be revisited at any time since the appeal has not been heard. 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 v 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."

34. This Court is called upon to interfere with a trial Court's discretion and disturb its findings. I do not think this Court can reverse the findings by the NET through this appeal. Parties can revisit the issues raised and resolved before the NET f because the appeal before it had not assigned which stream it was brought under. The NET suggested the issue can only be resolved through a substantive Notice of Motion or a hearing. It was suggested that a motion or a hearing rather than a Preliminary Objection was necessary. I think then it was premature to originate this appeal before having the NET have a bite of the issues raised in NET Tribunal Appeal No. 3 of 2024 in the first instance.

35. This is an interlocutory appeal, and since the NET has not conducted a hearing yet, the issues raised here can be revisited in the pending appeal before it. Given the provisions of Section130(5) of the EMCA that this is a final Court on licensing issues arising from NEMA, whose appeals lie to the NET and then the ELC, at this point, it will not be in the best interest to lock the 1st and 5th respondents from the seat of justice when the substantive issues raised are pending before the NET in the NET Tribunal Appeal No. 3 of 2024.

36. I hear the appellants in the two appeals loud and clear that the project subject in NET Tribunal Appeal No. 3 of 2024 is up and ready for inauguration, and any further disruption will scare away investors. The stoppage orders issued by the NET will particularly stifle investment for the Country and the people of Kilifi County—that cannot be gainsaid, but then the NET has given a roadmap on how to proceed before it—through a Notice of Motion or a substantive hearing.

37. In Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), the Supreme Court has recently pronounced itself that parties should not be limited in access to justice whenever they seek to ventilate their matters - the only catch is - that the forum in which they seek redress is efficacious and that the doctrine of abstention/exhaustion is applied by the Courts where there exists such primary forum:

> "It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC, and looking at the orders that the appellant had set

out in his constitutional petition; it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations, as is the case in the present dispute. The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.

119. Similarly, in respect of the *Energy Act*, section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal's attention.

120. In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC, which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts, therefore, clearly fell into an error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals."

38. Based on the cases cited by the NET in its impugned ruling, the ELC is of the view that the NET is created to hear matters relating to licensing by NEMA under Section 129 of EMCA as the primary body mandated to do so. Therefore, parties should approach that forum as their first port of call.

39. The Supreme Court's ruling in the Abidha Nicholus Case emphasizes that the established forum of the first instance must be effective, prompting, for example, a rethinking of the 60 days for appealing decisions related to EIA licenses to the NET, as well as the 14-day timeframe specified in Section 72(3) of the *Physical and Land Use Planning Act* for appealing development permission decisions to the County Physical and Land Use Planning Liaison Committee. These timelines hinder environmental justice, as the parties likely to be impacted by projects subject to EIA licenses often lack the necessary information to comply with them. This issue was notably discussed in the Simba Case (supra), where the ELC pointed out critical gaps in how statutory decisions by NEMA are communicated to the public. The Court recommended that the relevant agencies develop a clear and prescriptive framework for how NEMA should inform the general public about statutory decisions that can be challenged under the EMCA. Additionally, in the case of Albert Mumma, acting as Chairman of the Karen Langata District Association (KLDA) v Director General - National Environmental Management Authority (NEMA), Afrigo Development Co Limited & Faith Mugure Mukunga (Lead Consultant) [2018] KENET 31 (KLR), the Tribunal acknowledged that the failure to communicate decisions granting EIA licenses creates a loophole. In such cases, objections may lead to dismissals, undermining litigants' access to justice as Article 48 of *the Constitution* intended.

40. Access to timely and adequate information is essential for realizing environmental justice. Principle 10 of the Rio Declaration on Environment and Development, adopted in 1992, asserts that everyone should have the right to information access, participate in decision-making, and seek justice in

environmental matters. This principle aims to safeguard the right to a healthy and sustainable environment for both current and future generations. Established in 1998, the Aarhus Convention provides the public with rights related to access to information, public engagement, and justice in government decision-making processes regarding local, national, and transboundary environmental issues. It emphasizes the importance of public access to environmental information in fostering an informed citizenry capable of defending environmental rights. Broad, inclusive, and democratic decision-making processes are essential for achieving distributive justice. Procedural injustice, which encompasses a lack of information, exclusion from participation, and barriers to justice access, can lead to distributive injustice.

41. Given that environmental challenges frequently go beyond individual permits or development approvals and involve broader issues like community rights and the safeguarding of the environment for future generations, a more comprehensive approach may be required. Therefore, courts must modify their dispute resolution processes to address urgent environmental crises effectively using adaptive environmental adjudication mechanisms – the NET is not left out.

42. Responsive environmental adjudication recognizes the unique characteristics of environmental issues, acknowledges their effects on the law and dispute resolution, and formulates legal doctrines, procedures, and remedies that meet the ongoing challenges. Consequently, Courts handling environmental cases (including NET) need to identify and utilize specific adjudicative forms and functions to support this process. These matters will be discussed in a different forum, as the appeal encompassed the issue of the NET's jurisdiction and timelines for appeals only.

43. Concerning the appeals before this Court, it is my view, after examining the submissions from both parties regarding the NET's ruling, the central question is whether NET has the authority to adjudicate NET Tribunal Appeal No. 3 of 2024. The conclusion is that, as asserted by the NET, which I concur with, this matter has been preserved and is to be addressed through evidence presented through a substantive motion supported by affidavit(s) or during a hearing rather than through a Preliminary Objection before the NET. This Court will postpone this issue until NET thoroughly resolves it, after which it will have a bite as a substantive appeal to the ELC given Section 130(5) of the EMCA.

44. The current appeal and Nos E040/2024 are hereby dismissed with costs to the 1st to 5th Respondents.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 14TH DAY OF NOVEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Binyenya, for the Appellant

Mr. Musangi and Mr.Makora for the Appellants in E040 of 2024,

Mr. Muchiri, for the 1st to 5th Respondents

Happy: Court Assistant

In the Absence of: