



**National Environment Management Authority v Ware Transport
Limited (Environment and Land Miscellaneous Application
E003 of 2024) [2024] KEELC 13200 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2024
OA ANGOTE, J
NOVEMBER 14, 2024**

**BETWEEN
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY APPLICANT
AND
WARE TRANSPORT LIMITED RESPONDENT**

RULING

1. Before this court is an application dated 29th April 2024, which was filed by the Applicant on 7th May 2024. The application is brought under Section 130 of EMCA, Order 50 Rule 6, Order 42 Rule 6(1) and (6), and Order 51 Rule 1 of the Civil Procedure Rules, and Sections 3A,63 and 95 of the *Civil Procedure Act*. The Applicant has sought for the following orders:
 - a. That the court be pleased to grant the Applicant leave to file an appeal out of time against the judgement of the National Environment Tribunal dated 18th March 2024 in National Environment Tribunal Appeal No. 47 of 2022.
 - b. Spent
 - c. That the costs of this application be in the cause.
 - d. Any other orders this Honourable court may deem fit and just to grant.
2. The grounds of the application, as set out in the Supporting Affidavit sworn by Mamo B Mamo, Director General of NEMA, are that the Respondent herein filed NET Appeal No. 47 of 2022 at the National Environment Tribunal, after the Applicant declined to grant an EIA License for a proposed project for reclamation of land from sea on Plot MN/V/2407.
3. He asserts that the Tribunal issued its judgment dated 18th March 2024, which was sent to parties' emails on 27th March 2024 and that the Tribunal allowed the Respondent's appeal and directed the



- Applicant to issue an Environment Impact Assessment License for the proposed reclamation of land from sea.
4. The Applicant is aggrieved by the judgment and wishes to appeal against the same. Mamo B. Mamo depones that the failure by the Applicant to file an appeal on time was inadvertent and was due to the procedural operations of the Applicant.
 5. It was deposed by the Applicant's Director General that the Applicant's Board deliberation and resolution is a prerequisite to decision making and that the resolution to appeal against the decision was passed on 26th April 2024 at a full board meeting. He stated that the minutes of the Board meeting and the resolution were still under drafting and could not be shared.
 6. The deponent asserts that the appeal seeks to raise weighty issues; that the Applicant has denied the Respondent an EIA license on the grounds that the proposed project was to be undertaken in an ecologically sensitive area; that the project is not environmentally beneficial and shall not enhance sustainable development and sound environmental management and that the Tribunal in its determination was guided by extraneous reasons as opposed to sound environmental management.
 7. It was deposed that the proposed project falls within the Tudor Creek/ estuary which has been identified as a sensitive ecosystem to be preserved and protected, as it supports marine ecosystems, including a mangrove forest and tidal lagoons that protect the shoreline from erosion and provides a habitat for marine life.
 8. The Director General indicated that Section 130(3) of the Environmental Management and Coordination Act empowers the Applicant to take action to avert serious injury to the environment, but it is a prerequisite that an appeal be in place for it to be able to exercise this mandate.
 9. He urged that not much time had lapsed before the filing of this application, and that the Applicant and the environment stands to suffer unmitigated prejudice and loss if the judgment of the Honorable Tribunal stands.
 10. The Respondent has opposed the application through a Replying Affidavit dated 27th May 2024 and sworn by Nazir Hussein, the contractor in this matter. Nazir Hussein deponed that this application is frivolous and is bad in law because under Section 130(1) of the EMCA, a person aggrieved by the decision of the National Environment Tribunal should lodge an appeal within thirty days of such decision.
 11. It was deposed that the application herein was filed way outside the statutory time limitation, to wit, 7th May 2024; that there is nothing under Section 130(1) of EMCA which suggests that the court may enlarge time for filing of appeals and that this application is an afterthought.
 12. Mr. Nazir Hussein asserted that the grounds for delay are insufficient; that the Applicant should have held a Special Board Meeting for purposes of procuring the said board resolution and that the statutory period defined in Section 130(1) of EMCA was within the Applicant's knowledge and the pre-requisite of a board resolution was a foreseeable hurdle.
 13. The Respondent's contractor deponed that it stands to suffer prejudice if the application is allowed because it has suffered a delay of over 7 years since the application was made by the Respondent to the Applicant; that the Applicant has delayed the project implementation from 6th April 2017 to date, despite the Respondent being in full compliance with the law and that the delay in the appeal process is calculated to stall or delay the project implementation and will infringe on the Respondent's rights.



Analysis and Determination

14. The application herein is one for enlargement of time to file an appeal. Section 16A of the *Environment and Land Court Act* provides that an appeal from subordinate courts and local tribunals should be filed within 30 days of the decision appealed from, which computation of time excludes the time for the preparation and delivery of the decision to the Appellant.
15. Subsection (2) prescribes that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.
16. A similar provision is set out in the proviso to Section 79G of the *Civil Procedure Act* as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
17. Similarly, Order 50 Rule 6 of the Civil Procedure Rules states as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
18. This court is further bound by the Supreme Court’s determination in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where it set out the underlying principles which a court should consider in exercising its discretion to extend time:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We derive the following as the underlying principles that a court should consider in exercising such discretion:-

 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;
 3. whether the courts should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;
 4. where there is a reasonable (cause) for delay, the same should be expressed to the satisfaction of the court;



5. whether there would be any prejudice suffered by the respondent, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
19. On the basis of the law and precedents quoted above, it is clear that this court has discretion to extend or enlarge the time for filing an appeal from the decision of a subordinate court or a tribunal. It is then upon this court to determine whether the Applicant has laid a sufficient base, whether there is a reasonable cause for delay, whether the Respondent shall suffer prejudice if the extension is granted, and whether the application has been brought without undue delay.
20. The Applicant in this matter has sought to file an appeal against the judgment of the National Environment Tribunal in NET Appeal No. 47 of 2022, which is dated 18th March 2024 and was served upon the parties on 27th March 2024. This is evidenced by the email sent and received from the Tribunal on 27th March 2024.
21. Under Section 130(1) of the Environmental Management and Coordination Act (EMCA) 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.
22. As to when the computation of time should begin, this court is guided by Rule 37 (6) of the National Environment Tribunal Rules which provides that:
- “Except where a decision is announced at the end of the hearing, it shall be treated as having been made on the date on which a copy of the document recording it is sent to the appellant.”
23. Consequently, while the judgment of the determination is dated 18th March 2024, computation of time of the thirty days cannot start from that date, because the parties were on that day unaware of the Tribunal’s findings. The thirty days is therefore calculated from the date of service of the decision to the parties which was on 27th March 2024, and lapsed on 26th April, 2024.
24. This application was filed on 7th May 2024, 10 days outside the statutory period for filing appeals, and served upon the Respondent on the same date.
25. The Applicant has submitted that this delay was occasioned by its procedural operations, as a Board deliberation and resolution is a prerequisite to decision making. It avers that the resolution to appeal against the decision was passed on 26th April 2024 at a full board meeting. The Director General of the Applicant submitted that the minutes and resolution of this meeting were still under drafting at the time at which this application was made and were therefore not availed to this court.
26. The Applicant has attached a Memorandum of Appeal to the Affidavit sworn by its Director General, in which the Applicant raises its grounds of appeal against the judgment of the appeal, which include that the Tribunal failed to address itself to the reasons advanced by the Respondent as the basis of its refusal to grant the EIA license; that the Tribunal failed to address itself to the ecological sensitivity of the proposed project which falls within the Tudor Creek and that the Tribunal failed to juxtapose the economic benefits of the project against the environmental impacts posed by the project, among others.



27. In this court's opinion, a delay of ten days does not constitute inordinate delay. In view of the short window of delay, this court must find that this application was filed without undue delay, the delay was reasonable and the Respondent does not stand to suffer prejudice based on the said delay.
28. This court consequently allows the application for leave to file an appeal against the judgement of the National Environment Tribunal in NET Appeal No. 47 of 2022. The Applicant shall file its Memorandum of Appeal within 7 days of the date of delivery of this Ruling.
29. The costs of the application shall be borne by the Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Muyai for the Applicant

Mr. Wambua for the Respondent

Court Assistant: Tracy

