REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL

AT NAIROBI

TRIBUNAL APPEAL NO. NET/005/ 2018

PROF ALBERT MUMMA in his capacity as CHAIRMAN,

KAREN LANGATA DISTRICT ASSOCIATION (KLDA).....APPELLANTS

VERSUS

DIRECTOR GENERAL - NATIONAL ENVIROMENTAL

MANAGEMENT AUTHORITY [NEMA].....……..……...1st RESPONDENT

AFRIGO DEVELOPMENT CO LIMITED.....2ND RESPONDENT

FAITH MUGURE MUKUNGA (LEAD CONSULTANT).....3RD RESPONDENT

RULING ON PRELIMINARY OBJECTION

1. By a Notice of Appeal dated 29th March 2018 and filed on 3rd April 2018 the Appellants challenged NEMA's issuance of an Environmental Impact Assessment (EIA) License No. NEMA/EIA/ DSL/5084 to the 2nd Respondent for the proposed development of offices, staff quarters and conference hall.

2. The reliefs sought by the Appellants include: -

i) Stop Order

ii) Cancellation of the EIA licence and

iii) Restoration of the Environment under Section 108 of the Environmental Management and Coordination Act, 1999.

3. Alongside the Notice of Appeal, the Appellant also filed an application dated 3rd April 2018 under certificate of urgency seeking inter alia a stop order, a declaration that the EIA licence issued on 4th August 2017 was illegal, null and void as well as cancellation of the said licence.

4. On 20th April 2018, the 1st Respondent filed a Notice of Preliminary Objection on the grounds that this Tribunal lacked jurisdiction to entertain this appeal as it sought to challenge an EIA licence issued on 4th August 2017 and thus outside the 60 day period set by Section 129(1) of the Environmental Management and Coordination Act, 1999 (EMCA);

5. .On 7th May 2018, parties, through their lawyers, appeared before the Tribunal. Mr Agwara appeared for the appellants, while the 1st respondent was represented by Ms Sakami. Ms Kashindi and Mr Kiragu Kimani appeared for the 2nd Respondent. Upon hearing all counsels on which matter was to be first heard, the Tribunal directed that submissions be made on the Preliminary objection first.

THE SUBMISSIONS BY THE PARTIES

6. Mr Kiragu Kimani, for the 2nd respondent, submitting on the law, stated that EMCA contemplated two (2) distinct scenarios. One, a person who participated in the process of EIA licence, who then fell within section 129 (1) of the Act when challenging a licence, could not have an extension of time under rule 7. In his view, as the EIA licence was issued on 4th August2017 then the last day for filing would be 4th October 2017. The second scenario contemplated, according to the 2nd respondents, was where a person did not participate in the process: his recourse would be under section 129 (2) of EMCA. Mr Kimani pointed the tribunal to the appellants own affidavit confirming that they were aware and participated in the process. Thus, in his view, section 129(2) did not apply.

7. Ms Sakami, advocate for the 1st Respondent, supported the submissions of the 2nd Respondent.

8. The Appellant on the other hand submitted, through their advocate, Mr Agwara that the Tribunal could not establish the facts of the case and ascertain relevant dates except by reference to affidavit evidence thus, relying on the authority of *Mukisa Biscuit*, removing the issue from the ambit of a preliminary objection. Mr Agwara, learned counsel for the Appellants, submitted that, in any event, the Appeal was filed within time.

9. According to the Appellant Rule 4 of the National Environment Tribunal Procedure Rules, 2003 provided for the time frame to be calculated with reference to the date of the decision appealed from ie 60 days from the date of the decision. That the appellant only became aware of the decision on 1st February 2018 at a meeting between the appellants chairman and the lawyers for the 2nd respondent at Karen County Club but had first sight of the EIA Licence when sent to them on 7th February 2018. In his submission, knowledge of the decision, as opposed to making of the decision, was the determinative factor in commencing the count-down of 60 days.

10. In the appellant's view, if 7th February was the start day then 60 days would bring us to 9th April 2018 (making allowance for 28 day calendar for February) and having filed their appeal on 3rd April then they were well within time. Mr Agwara further stated that even if we took 1st February 2018 as the relevant start date, 60 days would terminate on 3rd April 2018 in view of the fact that February had 28 days and for the year 2018, the Easter holiday fell on the weekend of Friday 29th March to Monday 2nd April. The next working day being 3rd April.

11. Mr Agwara further pointed out that relying on the case of *Simba Corporation*, section 129 (1) of EMCA was in respect of Appeals filed by the proponent and section 129 (2) was for all other persons who wished to object. Rule 4 covered appeals under section 129 (2) thus buttressing his submissions that the date of the communication of the decision was the relevant date under rule 4 of the Rules. He relied further on section 5 of the Fair Administrative Action as read with Article 47 of the Constitution of Kenya 2010 to support his contention that a public body had a duty to communicate its decisions to persons adversely affected by them.

12. .In reply, Mr Kiragu Kimani, downplayed the appellants contention that the issuance of the EIA Licence had been kept secret and not notified to them within time, submitting that there was no obligation imposed on NEMA, by either the EMCA or the EIA Regulations, to notify persons objecting to applications for EIA licenses. It may be a lacuna in law, but nonetheless did not impose a burden on the 1st Respondent to notify the public once a licence was issued regardless of whether they participated or not.

ISSUES

13. The submissions made on the Preliminary Objection have raised a number of important issues which we have set out below:-

i. What is the difference in Section 129(1) and section 129 (2) EMCA and whether the present Appeal is one under Section 129(1) or section 129 (2) EMCA and what are the consequences of each provision.

ii. The efficacy of approaching the court by way of preliminary objection

FINDINGS

What is the difference in Section 129(1) and section 129 (2) EMCA and whether the present Appeal is one under Section 129(1) or section 129 (2) EMCA

14. The difference in the two sub sections of section 129 essentially deal with:

a. The nature of the subject matter under challenge

b. The time lines within which to file an appeal (and ability to expand that time)

c. locus standi

15. In addressing the nature of the subject under challenge it will be noted that until the 2015 amendments to EMCA, section 129(1) remained clouded in uncertainty as to whether it covered appeals by persons challenging the issuance of a license or merely the proponent whose application was rejected. It was generally presumed appeals against the issuance of a license by persons other than the proponent lay under section 129(2).

16. Prior to 2015, section 129 (1) of EMCA read as follows:-

"Any person who is aggrieved by:-

(a). a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority 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."

17. It did not include appeals by person aggrieved by the grant of a licence.

18. This Tribunal had previously ruled, in Tribunal **NET/23/2007**: ***Hon Beth Mugo & 7 others vs NEMA & Another*, (citing its decision in NET/15/2007: *James Mahinda Gatigi & 3 others vs NEMA &Universal Corporation Ltd*)**, as follows:

" *…Section 129 of EMCA prescribes a time limit of sixty days within which appeals may be filed. The limitation applies with regard to appeals brought under section 129(1)(a)-(e), specifically, by persons aggrieved by a refusal to grant or transfer licence, imposition of licence conditions, restrictions and/ or limitations, revocation, suspension or variation of licence, amount of fees required under the Act and imposition against them of environmental easements, restoration orders or environmental improvement orders. Appellants in this case are not the kind of persons envisaged under this section. The present appeal falls under section 129(2) for which there is no prescribed time limitation. With regard to appeals under section 129(2), the tribunal shall regulate its procedure as it deems fit under section 126 of EMCA. In this regard, the Tribunal Rules of Procedure specifically Rule 7 are the ones that apply. The Rule authorizes the Tribunal to extend time to appeal as appears to it just and expedient."*

19. The Tribunal agrees with this analysis in the previous decisions of this Tribunal to the extent that where an appeal is brought under section 129(1) a party aggrieved by the refusal to grant a license must have done so strictly within the 60 days. This time limit is incapable of extension.

20. On the question of locus, it is now also accepted that the appellant bringing an appeal under section 129(1) of EMCA must have participated in the process leading up to the issuance of a license in order to have *locus standi*.

21. In Milimani HC Judicial Review Misc Applic 217 of 2015: ***Ex parte Athi Water Services Board: Rep. vs. National Environmental Tribunal and 2 others*** *the issue of locus and jurisdiction of the Tribunal were extensively addressed by the learned Judge. The Court held that:*

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

22. Further in a three bench decision of the High Court at Nairobi in Misc Application 111 of 2008 the court held that:

"there is no dispute that the 1st interested party did not participate in the EIA study process for the development in question, in NEMAs process of approval of the development or complaint to the PCC. It cannot be said that was aggrieved by this entire process which led to the issuance of the licence as it did not participate in it and no decision was made against it that would have led to a challenge by way of appeal to the respondent. There is no way one can read section 19 of EMCA to make the 1st interested party "an aggrieved party"."

On this second issue, it is clear that by dint of section 129(1) of EMCA an appeal is to be filed within the strict time lines of the statute i.e. 60 days from the date of the licence. The applicant's prayer in his application seeks an extension of time to file an appeal out of time.

The said Application has been brought under various provisions of the National Environmental Tribunal Procedure Rules 2003 including the provisions of Rule 7 which provides as follows:

"7. The Tribunal may for good reason shown, on application, extend the time appointed by these Rules (**not being a time limited by the Act**) (emphasis added) for doing any act or taking any proceedings, and may do so upon such terms and conditions, if any, as appear to it just and expedient."

23. In **ELC 100 of 2015: Simba Corporation Limited vs Avic International & another**, the court in considering the powers of the tribunal to extend time for filing an appeal said as follows:

"In the jurisprudence interpreting the two categories of appeals 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 within the framework of EMCA"

In addition:

"There is no doubt that **Section 129 (1) of EMCA** provides a limitation period of 60 days from the date of occurrence of the impugned event, within which the dissatisfied party is to present an appeal to NET. **The framework in Section 129 (1) does not**

provide for extension of the 60 days period. In the same vein, **Rule 7 of the NET Procedure Rules** prohibits extension of time in a scenario where the limitation period is expressly limited by EMCA. The legal ramification of the framework in **Rule 7 of NET Procedure Rules** is that the extension contemplated under **Rule 7** does not relate to appeals falling under **Section 129 (1)** because limitation period for appeals falling under **Section 129 (1)** is limited by the Act. The extension contemplated in **Rule 7 of NET Procedure Rules** therefore relates only to appeals falling under **Section 129(2)** because these are the only appeals in respect of which the Act does not set a limitation period."

24. The wording of section 129(1) thus presented the judicial bodies with difficulty even as they grappled to grant a right of appeal to parties objecting to the grant of a license.

25. The 2015 amendments clarified the position by introducing the following words to section 129(1)(a):-

"(a). **the grant of a licence or a permit** or a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder

26. Essentially, with the 2015 amendment all appeals either challenging *the grant* or refusal of a licence now fell under section 129(1). Section 129(2) was left to decisions made by the Director General, the committees of the Authority or its agents under the Act.

27. From a plain reading of EMCA, it is clear that decisions under section 129(2) entailed appeals on matters, other than licensing issues, made by the Director General under powers conferred by the Act.

28. This is consistent with the position taken by the court in *Misc Civil application 155 of 2012: Republic v NET ex parte Abdulhafidh Sheikh Zubedi* where the court stated as follows:-

"30. It is therefore clear that only the Authority that is empowered to issue a licence under section 63 of the Act. ***Since section 129(1) of the Act deals with the issuance of a licence and the conditions attached thereto, that subsection cannot be said to cover the acts and omissions of the Director General or a Committee of the Authority or even the Authority itself in matters not covered under of the section 129(1).***

31. Accordingly, it is my view and I so hold that ***section 129(2) of the Act deals with appeals other than appeals covered under section 129(1) as long as the same are not otherwise expressly provided****"*

29. We adopt this ratio of the decision in above cited case as the correct position in law in so far as section 129(2) is concerned. Any appeal that seeks to challenge or touch on matters surrounding, inter alia, the grant or refual to grant a licence falls within the ambit of section 129(1). Section 129(2) covers appeals against acts or omissions of the Director General or the committee of the authority or its agents on matters outside the issue of licensing.

30. Whereas appeals under section 129 (1) are bound by strict time limits incapable of extension, the position is not the same for appeals under section 129(2). Section 129(2) appeals are capable of extension. The dicta of the court in ***ELC 100 of 2015: Simba Corporation Limited vs Avic International & another*** *has captured this matter*

"*The answer to the question as to whether or not there is a limitation period for* ***Section 129 (2)*** *appeals is to be found in* ***Rule 2, Rule 4 (2)*** *and* ***Rule 7 of the NET Procedure Rules****.* ***Rule 2*** *defines an appellant as "a person who makes an appeal to the Tribunal under* ***Section 129 of the Act*** *and includes a duly authorized agent or legal representative of that person".* ***Rule 4 (2)*** *requires the appellant to send or deliver six copies of the notice of appeal to the tribunal so as to reach the tribunal not later than sixty [60] days after the date on which the disputed decision was given to or served upon the appellant.* ***Rule 7*** *provides a framework for extension of the 60 days period subject to any applicable limitation set out by EMCA as explained in the preceding paragraphs. My interpretation of* ***Rules 2, 4 (2) and 7 of the NET Procedure Rules*** *is that* ***Rule 4 (2)*** *provides a limitation period of 60 days within which* ***Section 129 (2)*** *appeals are to be lodged. The limitation period is to be reckoned from the time when a* ***Section 129 (2)*** *appellant is given or served with notice of the disputed decision by NEMA. The rules imply that NEMA has an implied obligation to notify the public about all decisions contemplated under* ***Section 129 of EMCA****. In the absence of any prescriptive legal framework, this notification takes various forms, including a notice published in the Kenya Gazette or service of the decision upon*

the appellant on request or otherwise.

*The issue as to whether the limitation period of 60 days stipulated under **Rule 4 (2) of NET Procedure Rules** apply to **Section 129 (2)** appeals has been answered in the affirmative by my pronouncements in the preceding paragraphs.*

*I now turn to the third issue which is: when is an appellant under **Section 129 (2) of EMCA** required to apply for extension of time under **Rule 7 of the NET Procedure rules**. Any framework on extension of time would invariably be founded on the existence of a limitation period prescribing the time frame within which legal proceedings are to be taken. An application for extension of time becomes necessary because the prescribed period for taking the legal proceedings has lapsed. In this regard, limitation period is computed from the day when the prescribed event, act or thing happened, exclusive of the day on which the event, act or thing happened or the act or thing is done. [See **Section 57 of the Interpretation & Generation Provisions Act, Cap 2**]. Suffice to observe that the happening of the event or act or thing is key because that is what triggers the running of time. Until that event or act or thing happens, time does not run.*

*In their wisdom, the framers of the NET Procedure Rules set a limitation period of 60 days "after the date on which the disputed decision was given to or served upon" the appellant. I have underlined the words **'given to'** and **'served upon'** because in my view, time starts to run for the purpose of **Rule 4 (2) and Rule 7 of the NET Procedure Rules** only after the disputed decision is given to or served upon the appellant. I have held that 'giving to' or 'serving upon' takes many forms, including notice in the Kenya Gazette, notice in newspapers with wide national circulation or personal service of the decision upon the appellant. In my view, to argue that limitation period for a **Section 129 (2)** appeal starts running before the decision is given to or served upon the appellant would fly in the face of the unambiguous provisions of **Rule 4 (2)** and would defeat the philosophy underpinning the doctrine of limitation. In the appeal before NET, it was incumbent upon the respondent to place before the Tribunal evidence to satisfy the Tribunal that the impugned decision was given to or served upon the appellant more than 60 days prior to the filing of the appeal.*

*The last issue to be determined in this appeal is the question as to whether the extension contemplated under **Rule 7 of the NET Procedure Rules** relates to the 60 days period stipulated under **Rule 4 (2) of the NET Procedure Rules**. I have observed that NET has no jurisdiction to extend the limitation period of 60 days stipulated under **Section 129 (1) of EMCA**. It automatically follows that the extension contemplated under **Rule 7 of NET Procedure Rules** relates to appeals falling under **Section 129 (2) of EMCA**. The limitation period for **Section 129 (2)** appeal is set out in **Rule 4 (2) of the NET Procedure Rules**. That limitation period of 60 days starts running after the date on which the disputed decision is given to or served upon the appellant.*

The Tribunal's decision to dismiss the appellant's appeal was based on the ground that the appellant did not obtain leave to file the appeal out of time. I have carefully gone through the Ruling of the Tribunal. Regrettably, the Tribunal did not pronounce itself on the exact date when time started running and when limitation period lapsed. In my view, a determination on an issue relating to limitation ought to commence with a clear outline of the applicable legal framework on limitation, followed by an unequivocal pronouncement on the exact date when limitation period started running and the date when the limitation period lapsed."

31. The Tribunal is alive to the problem that befalls most appeals, that of non-communication of the decision to grant a licence to a proponent under section 129(1). This omission or lacuna in the law is a serious consideration that has been discussed by the court in ***Simba Corporation*** where the honourable judge observed:

*"Before I make my disposal order, I wish to make some observations concerning communication of NEMA's statutory decisions to the general public. I have observed in this Judgment that under **Section 129 of EMCA** and **Rule 4 (2) of NET Procedure Rules**, there is an implied obligation on the part of NEMA to give to or serve upon interested parties notices of statutory decisions made by it within the framework of EMCA. More often than not, those decisions have significant bearings on environmental management and investor projects in the country. For this reason, there is need for appellants to promptly lodge all resultant appeals within well-ascertained time-frames. I would advise the Attorney General, the Law Reform Commission, the Cabinet Secretary responsible for environment and the relevant committees of both Houses of Parliament, to consider the appropriateness of a clear prescriptive framework on how NEMA should notify the general public about its statutory decisions which are subject to appeals contemplated under **Section 129 of EMCA**. This will eliminate endless litigations which adversely affect investor projects and the country's environmental management programmes. In*

this regard, the Registrar of this court shall cause copies of this Judgment to be supplied to the relevant offices for perusal, should it be deemed necessary."

32. In the instant case, the Appellants sought to challenge the issuance of a license to the 2nd Respondent. Accordingly, in doing so, *prima facie* they fell within the ambit of Section 129(1) of the Act.

33. They were bound by the sixty-day period. They could not file a competent appeal after the expiry of that time.

34. As regards the mode of notification of delivery of that licence and whether the time when an appellant became aware of that decision is a material factor in filing an appeal under section 129 (1) is a matter for the legislature to consider when making amendments to the law as suggested by the High Court in the *Simba Corporation* case.

The efficacy of approaching the court by way of preliminary objection

35. As regards the concern raised by the counsel for the appellant on the propriety of bring this objection as a preliminary objection as opposed to an application supported by affidavit, it is the Tribunals position that for all intents and purposes a prleimnary objectin should be based on pure point of law that would require the tribual to determine that question of law without resort to contested matters of fact. Having said that, when the facts are not in dispute the tribunal is not prevented from referring to such uncontested facts.

36. In **ELC 100 of 2015: Simba Corporation Limited vs Avic International & another**, it was held as follows*:*

" the appellant moved the court by way of a notice of preliminary objection as opposed to a substantive motion. A perusal of the framework in ***Rule 4 (2) of the NET Procedure Rules*** *suggests that to determine whether or not an appeal is time barred, the Tribunal would have to look at the evidence confirming the date when the disputed decision was given to or served upon the appellant. In my view,* ***in the absence of a clear concession by way of relevant pleadings, this is an issue that calls for adducement of evidence confirming the exact date when the disputed decision was given to or served upon the appellant****. To this extent, the efficacy of a bare notice of preliminary objection as a mechanism for disposing an appeal on the ground of limitation under* ***Rule 4 (2) of the NET Procedure Rules*** *is doubtful. A substantive motion supported with an affidavit together with relevant evidence would be more efficacious and would afford the opposing party the opportunity to respond to the motion*."

37. It has long been held that a preliminary objection is one which that touches on jurisdiction and is based on a point of law that does not require the judicial body to delve into the facts of the case.

38. In the celebrated case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Limited [1969] EA 696,** the principles of a preliminary objections were set out. The court stated as follows:-

*"So far as I'm aware, 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.***"**

It was further stated that:

"*The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertaine****d 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 increase costs and, on occasion, confuse the issue. The improper practice should stop***"**

39. In the present case, the point of law the respondents seek to raise requires the Tribunal to ascertain facts from affidavit evidence as to the date of issuance of the EIA licence. The licence and date of the licence is not controverted but readily accepted by all parties. The only matter of contention is when the appellant becae aware of the decision.

40. The Respondents contend that the Appeal was not filed within Sixty (60) Days after the date of the decision being the grant of the EIA License issued on 4th August 2017 . The appeal was filed on 3rd May 2018. This means that the appeal was filed close to 240 days after the date of the licence.

41. The date of the EIA licence is apparent from the Appeal itself and this date is not in contention.

42. In the instant case, at the time of filing the appeal and the preliminary objections it was possible to identify the time lines so as to state precisely when the licence was granted and thereby make a determination whether the appeal is incompetent or not.

43. As the appeal was one brought under section 129(1)(a) of EMCA and for the foregoing reasons, it meant that rule 4 of the National Environment Tribunal Procedure Rules 2003 was inapplicable (as rule 4 only covered appeals under section 129(2)) and the date when the appellat became aware or had knowledge of the decision became immaterial in determining whether the appeal was competent or not.

44. Accordingly, in the instant case, this matter is properly brought before the tribunal in the form of a preliminary objection and the preliminary objection was founded on a solid foundation.

ORDER

45. For the reasons stated the 2nd Respondents' Preliminary Objections is hereby allowed and the appeal is hereby dismissed.

DATED & DELIVERED at NAIROBI this 8th day of June 2018

MOHAMMED S BALALA.....CHAIRMAN

CHRISTINE KIPSANG.....MEMBER

BAHATI MWAMUYE.....MEMBER

WAITHAKA NGARUIYA.....MEMBER

KARIUKI MUIGUA.....MEMBER