



**REPUBLIC OF KENYA**

**IN THE NATIONAL ENVIRONMENT TRIBUNAL**

**AT NAIROBI**

**TRIBUNAL APPEAL NO. NET 36 OF 2020**

**1. BANJAN BHARAJ**

**2. LUCY WAWERU**

**3. RICHARD TOO**

**(Suing for and on behalf of Action Team of South C ward association).....APPELLANTS**

**VERSUS**

**NATIONAL ENVIROMENTAL MANAGEMENT**

**AUTHORITY [NEMA].....1<sup>ST</sup> RESPONDENT**

**ALEW INVESTMENTS..... 2<sup>ND</sup> RESPONDENT**

**RULING ON PRELIMINARY OBJECTION**

*[Ruling in respect of the 2<sup>ND</sup> Respondent’s Notice of Preliminary Objection dated 2<sup>nd</sup> October 2020 and filed on even date, objecting to the Appellant’s Notice of Appeal and Application dated 4<sup>th</sup> September, 2020]*

1. By a Notice of Appeal dated 4<sup>th</sup> September, 2020 the Appellants challenged NEMA’s issuance of an Environmental Impact Assessment (EIA) Licence No. “NRB/PR/1/13675 to the 2<sup>nd</sup> respondent Alew Investments Limited as contained in the Appellants advocates letter dated 6<sup>th</sup> July 2020. In the Notice of Appeal form the said development was to be constructed on LR No. 209/5156, Jombo Road , South C.

2. The reliefs sought by the Appellants were articulated at Paragraph 6 of the Notice of Appeal form dated 4<sup>th</sup> September, 2019 seeking, *inter alia*, the revocation and cancellation of the EIA license.

3. In support of their Application, the Appellants thereafter also filed a List and Digest of documents all filed on 4<sup>th</sup> September 2020, all attached to their certificate of urgency application and grounds of appeal. Importantly, the EIA Licence was not attached to any of the Appellants documents within the statement of ground of appeal or the annexures to the application under certificate of urgency.

4. On 2<sup>nd</sup> October 2020 the 3<sup>rd</sup> Appellant wrote to the tribunal seeking to have his name withdrawn from the Appeal. That issue as well as the inclusion of 2 interested parties remain pending the determination of this preliminary point.

5. In response to the Appellants’ Notice of Motion Application dated 4<sup>th</sup> September 2020, and to the Appeal as a whole, the 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection dated 2<sup>nd</sup> October, 2020 and filed on even date. The objection was

**NET 36 OF 2020: BANJAN BHARAJ v NEMA/ ALEW**

essentially premised on the allegation that the Appeal is time barred and contrary to section 129(1) of EMCA as it challenged a licence dated 3<sup>rd</sup> March 2020 in an appeal filed 6 months after the issuance of a licence. The 2<sup>nd</sup> respondent took the position that the Appeal and related proceedings were defective.

6. The 2<sup>nd</sup> respondent filed its Bundle of documents on 12<sup>th</sup> October 2020 and at page 40 annexed the EIA Licence dated 3<sup>rd</sup> March 2020

## THE SUBMISSIONS BY THE PARTIES

7. The matter was adjourned for the parties to address the Tribunal on the preliminary objection. The appellants filed their submissions on 14<sup>th</sup> October 2020, the 1<sup>st</sup> respondents filed theirs on 19<sup>th</sup> October 2020 and the 2<sup>nd</sup> respondent a Supplementary Submission on 21<sup>st</sup> October 2020

8. Learned counsel for the 2<sup>nd</sup> Respondent, submitting on the law, stated that the Environment Management and Co-ordination Act [ EMCA] at Section 129(1) required that a challenge against the issuance of an EIA Licence be filed in the Tribunal within 60 days of the date of the Licence. It was an undisputed material fact that the subject EIA Licence NRB/PR/1/13675 was dated 3<sup>rd</sup> March 2020; it had not been attached in the appeal documents but was eventually annexed to the 2<sup>nd</sup> respondent's bundle of documents filed on 12<sup>th</sup> October, 2020.

9. The 2<sup>nd</sup> respondents further submitted that the present Appeal was more than several months late having been filed on 3<sup>rd</sup> September 2020. Consequently, even the Application by the Appellants predicated on a time-barred Appeal was incompetent; and in those circumstances the Tribunal also lacked any jurisdiction to hear and determine the Application.

10. For those reasons the second respondent submitted that the Application and the Appeal should fail.

11. The 1<sup>st</sup> Respondent in its body of submissions supported the objection raised by the 2<sup>nd</sup> respondents. The 1<sup>st</sup> Respondent was, however, unclear in its conclusion as to the outcome it wished the Tribunal to reach.

12. In reply, the Appellants, submitted that the ground of the Preliminary Objection was not well-founded as the present appeal in his view was filed within time. The appellants submitted that they did not know of the issuance of the licence until 6<sup>th</sup> July of 2020. As they had not seen the EIA Licence the appellants begun by casting doubt on the date of the EIA Licence itself. Notwithstanding, as the appellant only got to learn of the EIA Licence on 6<sup>th</sup> July 2020 the Appellant seemed to urge the Tribunal to undertake the computation of time from the date the licence became known to them and not the date of issuance.

## ISSUES

13. The submissions made on the Preliminary Objection raise a single issue for determination; which is:-

- i. Whether the provisions of section 129(1) EMCA providing for a 60 day mandatory period begins to run from the date of the EIA Licence or from the date of knowledge of the issuance of the licence?

## FINDINGS

14. Section 129(1)(a) of EMCA provides:-

“(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.....

*...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.”*

15. In the instant case, both Counsel agreed that the Appeal was filed more than six months after the issuance of the Licence but the appellant was of the view that as they only got to learn of the EIA licence on 6<sup>th</sup> July 2020, then that should be the determinative date.

16. . The Tribunal shall be guided by its decision in ***Tribunal Appeal No. 006 of 2019, Runda Association –vs- National Environmental Management Authority (NEMA) & 3 Others*** where it made the following decision with regards to computation of the

60 days period of filing appeals under section 129 (1) of EMCA:

*“It is now trite law following a number of cases determined up to the High Court that where an appeal is brought under section 129(1) a party aggrieved by the grant or rejection of an application for a licence must do so within 60 days from the date of the occurrence of the event ie. The date of the issuance or the rejection of the licence (emphasis added). It is also now well established that the time line of 60 days in section 129(1) of EMCA cannot be extended.”*

17. The Tribunal further decided that:

*“It is therefore the Tribunals finding that the appeal filed by the Appellant is one falling under section 129(1) of EMCA. Having also found that the 60 days' count of the time limit ran from 6<sup>th</sup> April 2018 to 5<sup>th</sup> June 2018, the appeal filed on 15<sup>th</sup> March 2019 was already clearly out of time. The time limit of 60 days runs from the date of issuance of the licence on 6<sup>th</sup> April 2018 and in the instant case was filed outside the statutory period (emphasis added).”*

18. Given that it was an agreed material fact that the EIA Licence was issued on 3<sup>rd</sup> March 2020; the Tribunal finds that under the provisions of Section 129(1) of EMCA the Appeal herein should have been filed on or before 3<sup>rd</sup> May 2020. However, the

present Appeal was filed on 3<sup>rd</sup> September, 2020; four clear months after the cut-off date of 3<sup>rd</sup> May 2020 and a total of six months after the date of the EIA Licence in question.

19. In the instant case, the Appellants sought to challenge the issuance of a licence to the 2<sup>nd</sup> Respondent. Accordingly, in doing so, *prima facie* they fell within the ambit of Section 129(1) of the Act. The Appellants were bound by the sixty-day period. They could not file a competent Appeal after the expiry of that time; and as such there is no legal substratum upon which the Appellants' Application or Appeal could be founded.

20. The Appellants argument that the computation of time runs from the date of knowledge of the EIA licence is not supported by an legal authority. For purposes of section 129(1) of the Act the date when the appellant became aware of the issuance of the licence is immaterial in the computation of time.

21. As the Appeal was one brought under section 129(1)(a) of EMCA and for the foregoing reasons, the Tribunal is incapable of admitting the Appeal or granting an extension of time. Accordingly, in the instant case, the Preliminary Objection is properly taken and founded and both the Appeal and the Appellants' Application must fail.

**DETERMINATION**

22. For the reasons stated the 1<sup>st</sup> Respondent's Preliminary Objections is allowed and the Appeal is hereby dismissed.

23. Each party shall bear its own costs.

**DATED AND DELIVERED AT ONLINE THIS 7TH DAY OF DECEMBER 2020.**

**Mohammed S. Balala .....Chairperson**

**Christine Mwikali Kipsang' ..... Vice-Chairperson**

**Bahati Mwamuye ..... Member**

**Waithaka Ngaruiya ..... Member**

**Kariuki Muigua ..... Member**