



County Government of Kitui v Sonata Kenya Limited & 2 others (Environment & Land Petition 16 of 2021) [2023] KEELC 16543 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION 16 OF 2021**

LG KIMANI, J

MARCH 23, 2023

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT
OF THE RIGHTS AND FREEDOMS IN ARTICLES 2,3, 10, 19(1) & (2),
21(1), 23,27(1), (2), 28, 42, 69, 70(1), 162(2)(B) OF THE CONSTITUTION;**

AND

**IN THE MATTER OF: ALLEGED VIOLATION OF SECTION 3, 58(2), (5), 59,60, 87, 89
OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, CAP 387;**

AND

**IN THE MATTER OF: ALLEGED VIOLATION OF THE ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION (WASTE MANAGEMENT) REGULATIONS 2006.
SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT NO.19 OF 20**

BETWEEN

COUNTY GOVERNMENT OF KITUI PETITIONER

AND

SONATA KENYA LIMITED 1ST RESPONDENT

MALUKI KITILI MWENDWA 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY

(NEMA) 3RD RESPONDENT

JUDGMENT

1 The petition dated January 16, 2018 and amended on November 22, 2021 seeks the following orders;

1. The honourable court be pleased to issue a declaration that the 1st respondent's acts are in contravention of article 42 of the *Constitution, 2010*.



2. The honourable court be pleased to issue a declaration that the violation of article 42 of the [Constitution , 2010](#), by the 1st respondent and 2nd respondent has resulted to a denial of the right to a clean and healthy environment to the residents of Kitui County and specifically the residents of Maluma Location, Nzambani Ward in Kiongwe area.
 3. The honourable court be pleased to issue a declaration that in breach of (3) above the Petitioner has a right to redress for an order of injunction, pursuant to article 23(3) b of [the Constitution](#) of Kenya, 2010 as read with section 13(7) (a) of the [Environment and Land Court Act](#), No. 19 of 2011.
 4. The honourable court be pleased to issue a mandatory injunction compelling the 1st, 2nd and 3rd respondents to identify and relocate the aforesaid asbestos to a different and suitable site for disposal of waste in accordance to the Environmental Management and Coordination Act, 1999, at their cost.
 5. The honourable court be pleased to issue a mandatory injunction to compel the 1st, 2nd and 3rd Respondents and/or their employees and/or agents and assigns and/or anybody whosoever to bear the cost of restoring the environment where the hazardous asbestos had been dumped by the 1st respondent at Kiongwe area as far as practicable to its immediate condition prior to the depositing.
 6. The honourable court be pleased to issue an environmental restoration order to be issued against the 1st respondent and 2nd respondent.
 7. The honourable court be pleased to issue a prohibitory injunction to the 1st respondent and/or its employees and/or agents/or assigns and/or anybody whosoever to permanently restrain them and/or permanently stop them from depositing any hazardous waste at L.R No. Nzambani/Maluma/690.
 8. The honourable court be pleased to issue an order compelling the 3rd Respondent to revoke the Environmental Impact Assessment licence issued to the 1st Respondent.
 9. The Honourable court be pleased to issue a mandatory order compelling the 1st Respondent to refund to the Petitioner, the sum of Kshs. 5,434,600.00 incurred by the Petitioner in engaging a licensed asbestos handler to remove the disposed asbestos from the disposal site. at Maluma Location in Nzambani Ward, other administrative costs and legal costs incurred by the Petitioner in the process of mitigating the effects of the illegal dumping of the hazardous materials.
 10. A declaration that the 3rd Respondent , NEMA, has in breach of the Petitioners fundamental rights under article 42 of [the constitution](#) failed to discharge the statutory obligations and responsibilities under the [Environmental Management and Co-ordination Act](#). Number 8 of 1999 to safeguard Nzambani water catchment at Maluma location in Nzambani ward and its environs against exposure to pollution by hazardous asbestos waste.
 11. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient to the circumstances of this case.
 12. Costs of this Petition
2. The Petition is supported by the affidavit of Agnes Mulewa, the Acting County Secretary of the County Government of Kitui and states that the Petitioner acts in public interest and the subject matter of the suit has implications for the health and constitutional rights of the residents of Kitui



- County. It is stated that the petition relates to deposit of asbestos materials which are classified as one of six naturally occurring fibrous minerals that are high risk, harmful and hazardous materials which does not decompose, decay nor burn and once inhaled or exposed to the environment, the fibers cling to the respiratory system and can cause mesothelioma cancer, lung cancer and asbestosis.
3. The Petition is premised on violation and infringement of the rights and freedoms under Articles 2,3, 10, 19 (1) & (2), 21 (1), 23, 27 (1), (2), 28, 42, 69, 70 (1), 162(2)(b) of *the Constitution* of Kenya 2010; and Section 3, 58 (2), (5), 59,60, 87, 89 of the *Environmental Management and Co-ordination Act*, CAP 387; and Environmental Management and Co-ordination (Waste Management) Regulations 2006 and Section 13 of the *Environment and Land Court Act* No.19 of 2011
 4. The Petitioner's case is that the 3rd Respondent granted the 1st Respondent an Environmental Impact Assessment License for asbestos disposal site (Landfill) at Ngai Ndethya Ranch, a water catchment area which feeds into Thua River, in Maluma Location on land parcel No. Nzambani/Maluma/690, owned by the 2nd Respondent. The said license was for disposal of asbestos material which are classified as one of the high risk, harmful and hazardous materials.
 5. The Petitioner averred that the license was issued without public participation. That in the period between March and April 2017, the 1st Respondent violated the conditions of license by illegally depositing the hazardous asbestos at the site which is in a water catchment area. The said acts posed a health hazard to the residents of Maluma location and violated their fundamental rights and freedoms under Article 42 of *the constitution* on the right to a clean and healthy environment.
 6. The 3rd respondent also confirmed to the Petitioner that it had issued a cessation and Restoration Order dated June 8, 2017 to the 1st respondent pursuant to condition 1.10 and 2.15 of the license to own/ operate a waste treatment plant/disposal for asbestos.
 7. That pursuant to the *Water Act* No. 43 of 2016, section 22 and 23 the Water Resources Authority (WARMA) on July 6, 2017 issued an order to the 2nd respondent to cease any dumping at Maluma Location which is a water catchment area.
 8. Despite these orders, the petitioner avers that the 1st and 2nd respondents failed to remove the hazardous asbestos materials and restore the disposal site to its original state. The Petitioner states that it wrote letters dated September 20, 2017 and September 22, 2017 to the 1st Respondent ahead of the rainy season to inform them that after carrying out technical and legal due diligence concerning the disposal of the asbestos material in the site and due to the urgency of the imminent contamination of soil and water resources, they intended to engage one of the firms registered with NEMA to urgently but safely dispose the asbestos deposit at the 1st and 2nd Respondents' cost.
 9. Following the failure of the 1st and 2nd Respondents to remove the asbestos, the Petitioner wrote to the 3rd Respondent seeking advice on the imminent danger and the 3rd Respondent vide a letter dated October 4, 2017, gave the Petitioner a go ahead for the removal and temporary storage of the disposed material.
 10. The Petitioner procured the services of Waste Afrika Kenya Limited for the removal and temporary storage of the disposed asbestos material which was done on or about 2nd to October 5, 2017 and the same was stored temporarily in Kitui County Stadium before final disposal at a NEMA registered site as Kitui County did not have a registered site for the disposal of asbestos.
 11. The Petitioner stated that the hazardous asbestos material was at the time of filing this petition still stored at the Kitui County Stadium, despite the storage going against Clause 4.2 of the National Guidelines on Safe Management and Disposal of Asbestos 2013, which directs that the duration for the



temporary storage of asbestos waste should not exceed thirty days from the time of removal. Following the ruling of this Court on September 28 2018, the hazardous asbestos materials were removed from Kitui County by the 1st respondent.

12. The petitioner contends that the 1st, 2nd and 3rd Respondents are directly and indirectly responsible for the illegal disposal of this hazardous asbestos material to the County and should be held liable and accountable to safely dispose of them.
13. Further, the petitioner contends that the 3rd respondent should be held liable for issuing the license for disposal to the 1st respondent unprocedurally as it was done without involving the residents of Maluma location and for going ahead to issue the license against its own advisory dated December 7, 2017 that asbestos materials should not be disposed of in a water catchment area. The petitioner also prays that the respondents pay costs to the petitioner for the expense that they incurred in removing the hazardous waste from Plot No.LR No.Nzambani/Maluma/690.
14. In addition, the petitioner states that the respondents' actions are in breach of the 'polluter pays' principle in the Rio Declaration on Environment and Development (1992) which Kenya is a signatory to and forms part of the law under Article 2(5) of *the Constitution*. The principle is also adopted under Section 3(5) (e) of the *Environmental Management and Co-ordination Act* CAP 387.
15. The petitioner prays for declarations as more particularly set out in the petition.

3rd Respondent's Case

16. David Ong'are, the 3rd respondent's Director in charge of compliance and enforcement swore an affidavit in reply to the petition, deposing that he was taken aback by the petitioner's averments since all material acts taken by the 3rd respondent were in close consultation with the Petitioner.
17. The 3rd respondent challenged the jurisdiction of this court claiming that a challenge to issuance of the Environmental Impact Assessment License issued to the 1st Respondent should be canvassed before the National Environment Tribunal or the Public Complaints Committee as provided under Section 129 of the *Environmental Management and Co-ordination Act*.
18. The 3rd respondent admitted that the 1st respondent applied for an Environmental Impact Assessment License for disposal of asbestos at the Ngai Ndethya Ranch and that they submitted an EIA Project Report on January 24, 2017. That the report was dispatched to lead agencies including Kitui County Public Health Officer, Kitui County Physical Planning Officer, Sub-regional manager Water Resource Management Authority, NEMA Kitui Director of Environment/Secretary of Kitui County Environment Committee and the Kitui County Chief Officer in charge of Water, Environment and Natural Resources seeking their comments. According to them, no comments were received from the lead agencies.
19. The 3rd respondent then made a determination that the proposed project would have no significant impact on the environment and that the proposed mitigation measures were adequate and proceeded to issue an Environmental Impact Assessment License and a license to operate a waste disposal plant for the proposed asbestos disposal site.
20. The 3rd respondent notes that the petitioner submitted its comments long after the Environmental Impact Assessment License had been issued and the same could only have been accommodated through improvement orders as part of monitoring and inspection.
21. Due to a huge public outcry the 3rd Respondent issued a Cessation and Restoration Order stopping all disposal activities and ordering rehabilitation of the site due to a confirmed breach of the



Environmental License Conditions. Further, the Petitioner sent a letter to the 3rd respondent dated July 20, 2017 requesting revocation of the Environmental Impact Assessment License issued to the 1st Respondent. On July 11, 2017, the 3rd Respondent invoked its delegated prosecutorial powers and arraigned a director of the 1st Respondent at the Kitui Law Courts charged with the offence of breaching license conditions and failing to comply with a lawful order made by an environmental inspector while the Public Complaints Committee (PCC) on Environment also commenced investigations into the complaints.

22. The 3rd respondent sought to exonerate itself from blame stating that they had exercised a significant amount of statutory effort and action and sought to have the petitioner invoke its inherent powers to arrest and stop any business concern within its jurisdiction by revoking and withholding business permits. They accused the Petitioner of indolence and negligence.
23. Further, the 3rd respondent accused the Petitioner of ignoring a letter they wrote to them dated September 20, 2017 informing them that the dumped asbestos waste could only be excavated for transfer if the handling was done by licensed handlers and to a designated/licensed site and not dumping it at Kitui Stadium, which is not a licensed site. According to the 3rd respondent, the Petitioner's actions amounted to an attempt to correct a wrong with an even bigger wrongful act and seeking to insulate themselves by blaming others instead of executing the contract with Waste Afrika Ltd to completion by taking the asbestos to any other designated and licensed asbestos waste disposal plants in the vicinity including in the neighboring Makueni County.
24. The other parties did not file their responses to the main petition. Counsel for the 1st and 2nd respondents filed applications to cease acting for their respective clients and the same were allowed. The 1st and 2nd Respondents were served but did not file any reply to the petition or submissions.

Petitioners Submissions

25. The petitioner submitted that the 3rd respondent granted an Environmental Impact Assessment License to the 1st respondent for the disposal of asbestos which is classified as one of the high risk, hazardous materials that neither decomposes, decay nor burn and once inhaled, the fibers cling to the respiratory system and exposure thereof can cause mesothelioma cancer, lung cancer and asbestosis.
26. Counsel for the petitioner submitted that the process of issuance of the license to the 1st Respondent was marred by irregularities as there was no public participation involving the residents of Maluma Location who would be affected by the disposal of the hazardous material as per Regulation 17, 21, and 22 of the Environmental (Impact Assessment and Audit) Regulation 2003.
27. According to the Petitioner, the 1st respondent violated license conditions 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 3.4, 3.5, 3.10, 3.12 by illegally depositing the hazardous asbestos in the water catchment area and posing a health hazard to the resident of Maluma Location thereby violating Article 42 of *the Constitution*. That the 3rd Respondent issued the Cessation and Restoration Order dated June 8, 2017 but the petitioner submitted that the 3rd respondent failed to enforce that order.
28. The Petitioner submitted that it procured the services of Waste Afrika Kenya Ltd for the removal of the hazardous waste in Maluma Location which was excavated and stored in two containers at the Kitui County Stadium before final removal to a NEMA registered site since Kitui does not have a registered site for the disposal of asbestos.
29. The Petitioner noted that Angote J in his ruling in this case delivered on September 28, 2018 made several preliminary findings that this court has jurisdiction to hear and determine this petition, that the evidence shows that the Respondents breached sections 58 and 59 of the *Environmental Management*



and Co-ordination Act and Article 69(1)(d) and that the level of due diligence in dealing with hazardous asbestos waste seems not to have been undertaken. After the above ruling the hazardous asbestos waste was taken from the two containers at the Kitui stadium and disposed of as directed and what remains for determination is who should pay for the relocation of the hazardous waste and whether the prohibitory injunction against depositing the asbestos waste on Nzambani/Maluma/690 should be issued.

30. The Petitioner submitted that they spent a sum of Kes 5,434,600, to relocate the asbestos waste from the 2nd Respondent's property and to deposit it in two containers at Kitui County Stadium through a contract with Waste Afrika Limited and that it claims the recovery of this amount on the basis of the polluter-pays principle. They relied on the cases of Micheal Kibui & 2 others vs Impresa Construzioni Giuseppe Maltauro SPA & 2 others (2019) eKLR where the principle was applied and the cases of Jane Wagathuitu & 2 others vs Sojanmi Springfields Ltd & 2 others (2019) eKLR; Benson Ambuti Andega & 2 other vs Kibos Sugar and Allied Industries Ltd & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party (2019) eKLR and KM & 9 others vs Attorney General & 7 others.
31. The Petitioner submitted that the 1st respondent has responsible for bringing the hazardous material into the suit property and they should refund the Petitioner the costs of KES 5,434,600 incurred in relocating it.
32. The Petitioner urged the court to issue a permanent prohibitory injunction prohibiting the Respondents from depositing any hazardous waste on Nzambani/Maluma/690 being a water catchment area, they are apprehensive that they shall return the asbestos to the suit property upon conclusion of this Petition.
33. The Petitioner relied on the cases of Homeway Poultry Farm Ltd vs John Mutunga Mwangi & 6 others (2012) eKLR and the case of Avid Developers Limited vs Blue Horizon Properties Limited & 2 others (2021) eKLR where the court issued permanent mandatory injunctions.
34. According to the Petitioner, they have adduced sufficient evidence to demonstrate their case and that the Respondents have not disputed the facts as presented. They also prayed for costs and relied on Mativo J's holding in the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another (2016) eKLR where he held that costs are for compensating the successful party for the trouble taken in prosecuting and defending the case.

Analysis and Determination

35. I have considered the amended petition, the supporting affidavit and the reply filed to the Petition and written submissions by the Petitioner and the authorities cited. The Respondents did not file any submissions. The Petitioner submitted issues listed below as B), C) and D) as the issues for determination. However, due to the nature of the objection raised by the 3rd Respondent in their replying affidavit on whether this court has jurisdiction to hear and determine this petition, I do wish to make a brief comment on the issue ;
 - A. Whether this court has jurisdiction to hear and determine this petition.
 - B. Who should pay the cost of relocation of the hazardous waste?
 - C. Whether the Court should issue a permanent prohibitory injunction prohibiting the Respondents from depositing any hazardous waste on parcel of land known as Nzambani/Maluma/690.
 - D. Who bears the costs of the Petition?



A) Whether this court has jurisdiction to hear and determine this petition.

36. The 3rd respondent claimed in their replying affidavit that this court lacks the requisite jurisdiction to hear and determine the petition herein as the same ought to have been filed before the National Environment Tribunal (NET) under Section 129(1) of the *Environmental Management and Co-ordination Act* (EMCA).
37. This issue was determined by this court when it heard and determined the interlocutory application dated January 16, 2018 in County Government of Kitui v Sonata Kenya Limited & 2 others [2018] eKLR where Angote J stated;

“Under Section 129(1) of the *Environmental Management and Co-ordination Act*, the National Environment Tribunal (NET) is empowered to hear and determine appeals arising from persons aggrieved by decisions of National Environmental Management Authority (NEMA), such as the issuance of a license by the 3rd Respondent to the 1st Respondent.

However, the Petition before the court is a Constitutional Petition alleging violations of various rights enshrined in *the Constitution*, including a violation of the right to a clean and healthy environment provided for in Article 42 of *the Constitution*. Article 162(2) (b) of *the Constitution* and Section 13(1) of the *Environment and Land Court Act* provides that this court can hear and determine any matter related to the Environment and Land. Section 13(3) of the *Environment and Land Court Act* further provides as follows:

“13(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of *the Constitution*.”

It is therefore this court, and not the National Environment Tribunal, that has the jurisdiction to hear and determine any dispute under Article 70 of *the Constitution*.”

38. As a final finding of this court in this matter, I agree with the courts initial determination above that this court has jurisdiction to hear and determine this petition and no submission has been put forth that changes the position taken by the court.

B. Who should pay the cost of relocation of the hazardous waste?

39. The 3rd respondent acknowledged that it granted to the 1st Respondent an Environmental Impact Assessment License for asbestos disposal site (landfill) at Ngai Ndethya Ranch in Maluma Location on parcel of land known as Nzambani/Maluma/690. Asbestos materials are classified as one of the high risk, harmful and hazardous materials whose exposure is likely to cause mesothelioma cancer, lung cancer and asbestosis.
40. It is the petitioner’s case that the issuance of the license was marred by illegality and irregularity and was issued without public participation or involvement of the residents of Maluma Location who were likely to be affected by the disposal of the hazardous waste materials.
41. The petitioner has set out in the amended petition details of infringement of the constitutional rights of the residents of Maluma location, Nzambani in Kitui including Article 10 on the national provisions of governance which include sharing and devolution of power, participation of the people, good governance, integrity, transparency and accountability and sustainable development and they claim that allowing the disposal of asbestos in the suit land has breached these principles.



42. The petitioner cited violation of Article 42 of *the Constitution*, which provides that:
- “Every person has the right to a clean and healthy environment, which includes the right—
- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
 - (b) to have obligations relating to the environment fulfilled under Article 70.”
43. Pursuant to article 70 of *the Constitution* the Petitioner has a right to bring this petition for legal redress if article 42 of *the Constitution* has been or is likely to be infringed. It stipulates as follows:
- (1) If a person alleges that a right to a clean and healthy environment recognized and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
 - (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
 - a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
 - b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
 - (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”
44. The amended Petition seeks reliefs provided for under Article 70(2) (a), to prevent, stop or discontinue any act or omission that is harmful to the environment. The Petitioner claims that there was no public participation prior to issuance by the 3rd respondent of an Environmental Impact Assessment License. From the evidence adduced before court. I am satisfied that there is no proof that there was any public participation in this matter as envisaged by Article 10 of *the Constitution* and Section 58 of *Environmental Management and Co-ordination Act*. Section 58 stipulates the procedure to be followed when applying for an Environmental Impact Assessment license. The Section provides as follows:
- (1). Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
 - (2). The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the



intended project may or is likely to have or will have a significant impact on the environment, so directs.

- (3). The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.
 - (4). The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.
 - (5). Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.”
45. Section 59(1) of the Act stipulates that upon receipt of an Environmental Impact Assessment Study Report, the 3rd Respondent is required to publish it in the gazette, in at least two newspapers circulating in the area and over the radio calling for submissions. There is no evidence that indeed the 3rd Respondent complied with the provisions of Section 59(1) before it issued to the 1st Respondent with an Environmental Impact Assessment (EIA) license by publishing in the gazette and newspapers. There is also no evidence that the Respondents complied with Regulation 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 which stipulates that upon receipt of both oral and written comments as specified under Section 59 and 60 of the Act, the Authority may hold a public hearing. As was found by this court while dealing with the interlocutory application;
- “The few ineligible questionnaires annexed on the Environmental Impact Assessment Study Report do not meet the threshold that is required under Section 59 of the Act. Indeed, the said questionnaires do not even give the description of the people who were interviewed or if they are residents of Maluma Location, where the suit land is situated.”
46. Further, the evidence before this court shows that the Respondents did not only breach the provisions of Section 58 and 59 of the *Environmental Management and Co-ordination Act*, they breached Principle 10 of the Rio Declaration on Environment and Development (1992) which states as follows: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process...”
47. By virtue of the provisions of article 2(5) of the *Constitution*, the Principles in the Rio Declaration on Environment and Development are binding on the Respondents. The 3rd Respondent should have complied with both the domestic and international law on involving the public fully, and giving the said public information about the project, before issuing the license to the 1st Respondent to operate an Asbestos waste disposal site on the suit land. That seems not to have happened in the instant case. (insert from notes)
48. I therefore find that there was no public participation as provided by the law before the 3rd respondent issued the Environment Impact Assessment Licence. This violates the right to public participation of the residents, also enshrined in Article 69(1) (d) of the *Constitution* which provides that the State shall encourage public participation in the management, protection and conservation of the environment.



49. It was held in the case of *Ken Kasinga vs. Daniel Kiplagat Kirui & 5 others* (2015) eKLR, where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat which is the same position the court took in the case of *Moffat Kamau & 9 Others vs. Actors Kenya Ltd & 9 Others* [2016] eKLR.
50. The other issue of significance is that the 3rd Respondent exhibited a letter dated 24th January, 2017, through which it received an application for an Environmental Impact Assessment License by the 1st Respondent for the excavation of asbestos graves, packing and sealing, offloading and burying, general truck cleaning and associated facilities located at parcel number Nzambani/Maluma/690. It is claimed that the report was dispatched to lead agencies seeking including the Petitioner herein seeking their comments but no comments were received.
51. Indeed, the petitioner herein does not deny having received the EIA study report as stated by the 3rd respondent, the 3rd respondent claims that failure by the Petitioner to give its comments on the report, contributed a lot to the problems that arose since the petitioners concerns would have been addressed before the license was issued.
52. Indeed, this averment may be true however; the fact that the lead agencies did not comment on the report did not of itself absolve the 3rd respondent of its responsibility to ensure that the proposed project was carried out in a manner that protected the rights of the parties that were likely to be affected. Further, the comments by lead agencies would not have taken the place of participation by members of the public and persons who were likely to be affected by the proposed project.
53. In its letter dated February 20, 2017, the 3rd respondent issued to the 1st respondent License No. NEMA/EIA/PCL 4315 subject to the conditions which were attached to the license. I have perused the copy of the Environmental Impact Assessment Project Report and the license note that the Report recognizes the fact that asbestos is heat resistant and mostly impervious to chemical treatment. When asbestos fibers are airborne, they cause health risk to people in the surrounding area, including causing lung cancer, mesothelioma, cancer of pleura and peritoneum, cancer of bronchus, cancer of intestines amongst other diseases.
54. According to the Environmental Impact Assessment Project, once the asbestos have been buried, the site is decommissioned, not to be used again. The site is also supposed to be fenced with a chain link, lockable-fence with a warning notice that reads “Asbestos Hazard Area, keep off.”
55. The *Environmental Management and Co-ordination Act* (Waste Management) Regulations, 2006 categorize hazardous wastes and non-hazardous. The fourth schedule of the Regulations, Item 136, categorizes waste containing asbestos in the form of dust or fibers as hazardous.
56. The license issued to the 1st respondent had certain conditions and of note are the following conditions; 1.6 where the license is not to be taken as a statutory defence against charges of pollution in respect of pollution not specified in the license. Condition 2.1 provides that the proponent shall obtain the requisite approvals from the Kitui County Government and all other relevant Authorities prior to commencement of works. Condition 2.2 provides for compliance with regulation 6(c) of the Water Quality Regulations 2006, for protection of the riparian, where the project borders a river or stream. Further the conditions provide that the project must be as far as practicable from the nearest human settlements. Conditions 2.5, 2.6 and 2.7 provide for the proper design of the disposal pit and fencing of the same in order to ensure safety. Further Condition 2.19 provides for adherence with zoning specifications issued for the development of such a project within the jurisdiction of the County Government of Kitui with emphasis on the approved land use for the area.



57. Condition 3.12 provided that the proponent would comply with the relevant principal law , by-laws and guidelines issued for development of such a project within the county Government of Kitui and all relevant Government ministries
58. As proof of failure by the 1st respondent to adhere to the conditions of license as herein set out and others not set out, a letter dated July 6, 2017 from the Water Resources Authority addressed to the 1st Respondent was exhibited stating that the Authority’s previous direction that the 1st Respondent submit a design of the landfill they intended to dispose the asbestos waste in had gone unheeded and the disposal had taken place before the design was approved. The letter further stated that the waste deposited is a health hazard and its contact with the groundwater and surface water will pollute Thua River which is a source of water for the local community. They further observed that the deposit was on the surface and the surface run off ends up in the river. The Authority issued an order to the 1st Respondent as follows;
1. Stop further disposal of asbestos at Ngai Ndethya site which will contaminate the adjacent Thua River.
 2. Remove already disposed asbestos within 14 days”
59. The above order was not appealed against and the same is in force to-date and was issued pursuant to the provisions of Section 23 of the [Water Act, 2016](#) the section provides for conservation of ground water and states that;
- “Where the Authority is satisfied that, in any area, special measures for the conservation of ground water are necessary in the public interest for —
- a. the protection of public water or water supplies used for industry, agriculture or other private purposes.
 - b. the conservation of the water resources of the aquifer of the ground water resources;
 - (c) or ecological reasons, it may by Order published in the Gazette, declare the area to be a ground water conservation area.
- (2) The Authority may impose such requirements or prohibit such conduct or activities in relation to a groundwater conservation area as it may consider necessary for the conservation of the ground wate.”
60. Further to the above stop order, the 3rd respondent also confirmed by a letter dated July 20, 2017 that it had issued to the 1st respondent a cessation and restoration order dated June 8, 2017 pursuant to condition 1.10 and 2.15 of the license to own/operate waste treatment plant/disposal for asbestos. The 3rd respondent indicated that during an inspection carried out they had discovered that the 1st Respondent had not obtained a license from Kitui County Government and they sought enforcement of this by the Petitioner herein. The report generated by the 3rd respondent that led to the cessation and Restoration order was not attached to the 3rd respondents affidavit.
61. It is clear that the above Stop Order from Water Resources Management Authority and the Cessation and Restoration Order issued by National Environment and Management Authority were not complied with by the 1st Respondent since as stated by the Petitioner at the time of filing the petition herein the waste had not been removed and the petitioner had been forced to remove the asbestos from the site and store it at a temporary site at the Kitui Stadium.



62. In my view the failure and/or refusal by the 1st respondent to comply with conditions of license and the two orders from the two statutory bodies which are mandated to manage and conserve the environment was unlawful and an act of impunity that endangered the environment and the lives of the people of Maluma location, Nzambani in Kitui County. It also resulted in violation of the constitutional rights of the said members of the community and residents of Maluma location as envisaged under the provisions of Article 10, 69 and 70 of the [Constitution of Kenya 2010](#).
63. This court through its ruling dated September 28, 2018 ordered as follows;
- “The issue of who should pay for the relocation of the hazardous waste can only be handled after the hearing of the Petition. Suffice to say that the 1st Respondent, having moved the hazardous waste to the suit land, which has since been excavated and stored at the Kitui Stadium, should relocate the waste to another licensed site at its own cost pending the hearing and determination of the Petition.
- For those reasons, I partially allow the Application dated January 16, 2018 in the following terms:
- a) A mandatory injunction be and is hereby issued compelling the 1st Respondent to identify and relocate the asbestos which had been deposited on the suit land to a different and suitable site, within fifteen (15) days, for disposal of the waste in accordance with the provisions of the Environmental Management and Coordination Act pending the hearing and determination of the Petition.
 - b. A prohibitory injunction be and is hereby issued prohibiting the respondents from depositing any hazardous waste on parcel of land known as Nzambani/ Maluma/690 pending the hearing and determination of the petition.
 - c. The respondents to pay the Petitioner the costs of the Application.”
64. The above order was not appealed against and in my view the same is still in force to date. It was the duty of the 1st respondent to identify and relocate the asbestos which had been deposited on the suit land to a different and suitable site.
65. The Petitioner claimed that prior to filing of this petition, it wrote letters dated September 20, 2017 and September 22, 2017 to the 1st respondent ahead of the rainy season to inform them that it had carried out technical and legal due diligence concerning the disposal of the asbestos material in the site and due to the urgency of the matter and the imminent contamination of soil and water resources, they were engaging one of the firms registered with NEMA to urgently but safely dispose the asbestos deposit in a different site at the 1st and 2nd respondent’s cost.
66. Following the failure of the 1st and 2nd respondent to relocate the waste as requested, the petitioner wrote to the 3rd Respondent seeking advice on the imminent danger and the 3rd respondent vide a letter dated October 4, 2017, gave the Petitioner a go ahead for the removal and temporary storage of the disposed material. Thereafter the Petitioner procured the services of Waste Afrika Kenya Limited for the removal and temporary storage of the disposed asbestos material which was done on or about 2nd to October 5, 2017 and temporarily stored in Kitui County Stadium before final disposal at a NEMA registered site as Kitui County does not have a registered site for the disposal of asbestos. In my view a good reason was given for initial removal of the waste to a temporary site as a prudent act to prevent the imminent contamination of water, soil and the environment due to the rainy season. The Respondents



- failed to take action and cannot blame the petitioner for taking necessary action to avoid disastrous consequences and loss.
67. Subsequent to hearing and determination of the interlocutory application dated January 16, 2018 the court issued orders on September 28, 2018 ordering the 1st Respondent to relocate the materials to a suitable site. As per the petition the said 1st Respondent did remove and relocate the asbestos materials as directed by the court at its own expense and the only issue that remains for determination is who should bear the cost of relocating the materials from the initial site on land parcel Nzambani/Maluma/690 to the temporary site at Kitui County Stadium from where the 1st Respondent relocated the hazardous materials.
68. The 1st respondent was responsible for the disposal of the hazardous waste material in a manner that violated the constitutional rights of the Petitioner and the rights of the residents of Maluma location, Nzambani within Kitui County. It has not been denied that the Petitioner is the one who bore the cost of removal of the asbestos deposited on the site in question in this suit. I do find that the said 1st Respondent was responsible for the cost of removal and relocation from the initial site on land parcel number Nzambani/Maluma/690.
69. The Petitioner supported its claim for the sum of Kshs 5,434,600/- as the sum of money paid to Waste Africa Kenya Limited for relocation of the hazardous waste from the initial site. They exhibited an award of tender No. CGOKTI/22/2017-2018 dated September 19, 2017 for the proposed disposal of asbestos at Kiongwe locality. (Kitui County). The Petitioner further exhibited an agreement stated to be for the same purpose dated September 25, 2017 and executed by the County Government of Kitui and Waste Africa Kenya Ltd.
70. The Petitioner further based their claim for the sum of Kshs 5,434,600/- on the “Polluter Pays Principle” which states that is provided for under Section 2 of the [Environmental Management and Co-ordination Act](#) which defines the principle as
- “Means that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law;”
71. Section 3(5)(e) of the Act provides that:
- “In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development:
- (e) the polluter-pays principle.”
72. Further, Article 2(5) of the [Constitution](#) provides that all general rules of international law shall form part of the law of Kenya and (6) that any treaty or convention ratified by Kenya shall form part of the law of Kenya. The Rio Declaration on Environment and Development (Agenda 21) (1992) which Kenya acceded to states at Principle 16 that:
- “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”



73. This principle has been applied in many cases as enumerated by the Petitioner in submissions. In the case of Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impresa Construzioni Giuseppe Maltauro SPA & 2 others [2019] eKLR the court stated as follows;

“The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.”

74. While I do accept the principle that the polluter should bear the costs of pollution, I do find that the documents preferred by the Petitioner as proof of the cost of disposal of the asbestos and remedying of defects caused by the deposit, fall short of the required standard of proof on a balance of probability. I observe from the evidence on record that the petitioner herein and/or Waste Africa Limited did not dispose of the asbestos materials to its final disposal site. This is borne by the fact that by September 28, 2018 when the court issued the interlocutory order directing the 1st Respondent to identify and relocate the asbestos to a different and suitable site, the said asbestos was still stored at the Stadium at the Kitui County. Further, the contract exhibited by the Petitioner does not show the destination for disposal of the asbestos materials. The sum claimed is a sum of money stated to have been expended as at the time when the Petition was filed or in any event at the time when the petition was amended. It is a sum that was already known and had been presumably paid to the contractor. The said amount is thus in the nature of special damages for re-imbursement of an amount stated to have already been spent and it was upon the Petitioner to prove by way of documentary evidence that it had actually spent the sum claimed. However the Petitioner has not shown proof of any payment to the said company Waste Africa Limited.

75. In the case of Llyod Patrick Wafula Wanyonyi t/a Llyods (1996) Molasses Supply Agencies v Attorney General [2016] eKLR the court found as follows with regard to special damages;

“These claims were essentially special damages claim. They therefore ought to have been specifically claimed and proved. This is what the court in the case Zacharia Waweru Thumbi Vs Samuel Njoroge Civil Appeal No. 445 of 2003 stated:-

“ The law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 (1985)KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:- “Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from



the act. The decrees of certainty and particularity of proof required depend on the circumstances and nature of the acts themselves.” If I were to explain or define, special damages to a layman, I would say “they are a reimbursement of the Plaintiff/victim of the tort, for what he has actually spent as a consequence of the tortuous act (s) complained of”. This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test”

76. In the case of *China Wu Yi Limited & another v Irene Leah Musau* [2022] eKLR, the court held that;

“Special damages are those damages which are ascertainable and quantifiable at the date of the action.

Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

77. From the foregoing, I am persuaded that the sum of Kshs 5,434,600/- claimed by the Petitioner is in the nature of special damages and in my view the claim was not proved to the standard required in law and the same is hereby disallowed.

B. Whether the Court should issue a permanent prohibitory injunction prohibiting the Respondents from depositing any hazardous waste on parcel of land known as Nzambani/Maluma/690

78. The Petitioner submits that this court in its ruling of September 28, 2018 issued an order of prohibitory injunction prohibiting the Respondents from depositing any hazardous waste on parcel of land known as Nzambani/Maluma/690 pending the hearing and determination of the Petition. The Petitioner prays that the said order be confirmed and made permanent.

79. The Water Resources Authority issued a Stop Order against the 1st respondent under Section 23 of the *Water Act* while the 3rd respondent found that the 1st Respondent had breached certain conditions of license and issued a cessation and restoration order. The said orders were not challenged and neither have they been denied and in my view the orders are in force to date.

80. No evidence has been placed before this court to challenge the position that the area where the suit parcel of land Nzambani/Maluma/690 is situated is a water catchment area and any deposit of asbestos waste material would be detrimental to the land, air and water resources in particular the Thua River. The evidence on record confirms that in the event that the asbestos waste material were to find its way into the land, air and water and into contact with the residents of Maluma location the same will cause serious harm to health as the said asbestos is said to be high risk, harmful and hazardous materials which does not decompose, decay nor burn and once inhaled or exposed to the environment, the fibers cling to the respiratory system and can cause mesothelioma cancer, lung cancer and asbestosis.

81. The Petitioner relies on the “precautionary principle” as the basis for making the prayer for the orders herein. The said principle is provided for under Principle 15 of the Rio Declaration which provides that where there are warnings of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason of postponing cost-effective measures to prevent environmental degradation. This principle has been repeated at Section 3 (5) (f) of the *Environmental Management and Co-ordination Act* and Section 18 of the *Environment and Land court Act*.



82. The other principle which should guide an environmental court at all times is the ‘prevention’ principle. Experience and scientific expertise demonstrate that prevention of environmental harm should be the golden rule for the environment, for both ecological and economic reasons. The principle is enunciated at Section 3 (3) of the *Environmental Management and Co-ordination Act*. The prevention principle gives rise to a multitude of legal mechanisms in environmental law, including prior assessment of environmental harm, licensing or authorization that set out the conditions for operation and the consequences for violation of the conditions.
83. In the case of *Halai Concrete Quarries & Others vs. County Government of Machakos & Others*, Machakos ELC Petition No. 19 of 2020, Angote J held as follows:
- “The precautionary principle is one of the most popular and commonly applied principles of ecologically sustainable development.”
84. The prevention and precautionary principles are the basis upon which a properly conducted Environmental Impact Assessment (EIA) might serve as a standard for determining whether or not due diligence was exercised. Mechanisms that prevent harm to the environment include monitoring, notification and exchange of information with the public and the lead agencies, especially when dealing with hazardous waste, or any other project that is likely to have an environmental impact.
85. Having been found the 1st respondent to have breached the law by the Water Resources Authority and the National Environment Authority and having been found to have violated the conditions of license, leads to the inescapable conclusion that any disposal of asbestos waste material on land parcel Nzambani/Maluma/690 will lead to pollution of the water catchment area to the detriment of the water, air and land resources and the environment in general and to the detriment of the residents of Maluma area, Nzambani ward, Kitui County and the same ought to be stopped by an order of this court in breach of the Constitutional rights to protection of the environment.
86. In the case of *Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 others* [2018] eKLR where the court adopted the decision in Communication No.155/96: *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria the African Commission on Human and People’s Rights* stated as follows:
- “These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”

B. Who should bear the costs of the suit?

87. The 1st and 3rd respondents have been shown to have violated the rights of the residents of Mauluma location, Nzambani ward, Kitui county thus necessitated the filing of the petition herein. They failed to ensure that the project proposed to be carried out was on a water catchment area and thus posed a danger to the environment and the residents of the area. However, it has been noted that the 3rd respondent did forward to the petitioner and other lead agencies the Environment Impact Assessment report for their comments and input and the Petitioner failed to respond to the request in the time required. Further, I have noted that the 3rd Respondent acted upon the public outcry and issued a Cessation and Restoration order and that the 1st Respondent failed to act in accordance with the Stop



order issued by the Water Resources Authority, the Cessation and Restoration order issued by the 3rd Respondent and the letters of protest sent to them by the Petitioner. I therefore find that the Petitioner is entitled to costs of this petition payable by the 1st Respondent.

88. In a case which involved lead pollution, the ELC court sitting at Malindi noted as follows regarding the National Environment and Management Authority(NEMA):

KM & 9 others v Attorney General & 7 others [2020] eKLR

“*Constitution* thus bestows a responsibility on the State to ensure that her citizens enjoy a clean and healthy environment. One of the State actors that are obligated to ensure this right is realized is the 4th respondent. DW3 conceded that it was the mandate of National Environment Management Authority to measure the lead levels in the air; the Water Resources Management Authority to measure the levels of lead in water and the Ministry of Labour to ensure the Occupational Safety of workers in the work place.....

The petitioners also prayed to be awarded costs of the petition. The 1st – 6th Respondents also submitted that the petition should be dismissed with costs. The practice of the courts has been not to award costs in constitutional petitions. However before costs are waived a basis must be laid for the same. The history of this petition reveals non-action by the Respondents inspite of several complaints received from the petitioners and failing to act on their own (Respondents) recommendations to remedy the environment. Therefore their inaction having led to the filing of this suit, it is my considered view and I so hold that the petitioners are entitled to costs of the petition.”

B. What orders should the Court make?

89. From the foregoing findings of the court, the final orders are that the petition is hereby allowed in the following terms;
- A. A declaration be and is hereby issued that the 1st and 2nd Respondent’s acts of depositing asbestos waste material on land parcel No. Nzambani/Maluma/690, are in contravention of Article 42 of *the Constitution* of Kenya, 2010 and the said acts resulted in a denial of the right to a clean and healthy environment to the residents of Kitui County and specifically the residents of Maluma Location, Nzambani Ward in Kiongwe area.
 - B. A mandatory injunction be and is hereby issued to compel the 1st, and 2nd respondent and/or their employees and/or agents and assigns and/or anybody whosoever to restore at their own cost the environment where the hazardous asbestos had been dumped by the 1st respondent at Kiongwe to its immediate condition prior to the depositing.
 - C. A permanent prohibitory injunction be and is hereby issued prohibiting the respondents from depositing any hazardous waste on parcel of land known as Nzambani/Maluma/690.
 - D. An order be and is hereby issued compelling the 3rd respondent to revoke the Environmental Impact Assessment license issued to the 1st Respondent.
 - E. Costs of the petition are awarded to the petitioner to be paid by the 1st respondent.

Dated, signed and delivered at Kitui this 23rd day of March, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI



In the presence of:

C/A Musyoki

Makau for the Petitioner

K. Gitonga for the 3rd Respondent

ELC. Petition No. 16 of 2021

10

