



**Orata International Limited v Director General National Environmental
Management Authority (Environment and Land Appeal E008 of 2021)
[2023] KEELC 20042 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E008 OF 2021
MN GICHERU, J
SEPTEMBER 27, 2023**

BETWEEN

ORATA INTERNATIONAL LIMITED APPELLANT

AND

**DIRECTOR GENERAL NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY RESPONDENT**

*(Being an appeal from the Judgment of the National Environmental
Tribunal at Nairobi chaired by Hon. Muhammed S. Balala in
Tribunal Case No. NET 12 of 2019 delivered on 19th February, 2021)*

JUDGMENT

1. On 19/2/2021, the National Environment Tribunal dismissed the Appellant's appeal filed under a Notice of Appeal dated 2/4/2019. In its judgment, the tribunal found no fault in the Environmental Restoration Order issued by the Respondent to the Appellant. The said order required the Appellant to close its factory situated on L.R. Kajiado/Noonkopir/Trading Centre/209 within 24 hours of receipt of the order.
2. The Environmental Restoration Order dated 5/3/2019 gave the following as the reasons for its issue.
 - a. Operating for 24 hours a day thereby causing nuisance at night to the neighbours and aggravating environmental pollution.
 - b. Failure to comply with improvement orders previously issued by the Respondent to the Appellant to institute measures to eradicate pollution from the factory.
 - c. Failure to demonstrate ability to mitigate air and noise pollution.



- d. Expiry of the period agreed between the stakeholders for the decommissioning and relocation plan for the factory from the current location to a new site.
3. Dissatisfied with the dismissal of its appeal by the Tribunal, the Appellant filed a memorandum of appeal dated 5/3/2021 raising the following grounds.
- i. The tribunal erred in law and in fact by holding that there was no fault in the Environmental Restoration Order dated 5/3/2019 issued by the Respondent.
 - ii. The Tribunal erred in law and fact by confirming the Environmental Restoration Order dated 5/3/2019 issued by the Respondent.
 - iii. The Tribunal erred in law and fact by dismissing the Appellant’s appeal.
 - iv. The Tribunal erred in finding that by a response dated 25/10/2016 by the Appellant to the Respondent, they intended to relocate the site and/or the premises entirely.
 - v. The Tribunal erred in law and in fact by failing to adjudicate on the relevant issues that pertained to the appeal at the Tribunal vide the Environmental Restoration Order dated 5/3/2019.
 - vi. The Tribunal failed to exercise its discretion judiciously and failed to properly and comprehensively consider all relevant facts.
 - vii. The Tribunal failed to consider the Appellant’s testimony and submissions that clearly explained the issue of relocating the site.
- The Appellant sought the following reliefs;
- a. That the tribunal’s judgment dated 19/2/2021 be set aside.
 - b. The costs of the Appeal be awarded to the Appellant in any event.
4. The Appellant’s counsel filed written submissions dated 1/4/2022 and identified the following issues for determination of this appeal.
- i. Whether the tribunal erred in identifying issues for determination which were different from those identified by the two counsel for the parties.
 - ii. Whether the tribunal based its entire decision on a letter dated 25/10/2016 in which the Appellant said it would relocate its factory to another site instead of on the issues mutually identified by the two counsel for the parties.
5. On the other hand, the Respondent’s counsel filed written submissions dated 18/7/2022 and identified the seven grounds of appeal in the memorandum of appeal dated 5/3/2021 as the issues for determination in this appeal. The same seven grounds are set out in paragraph 3 of this judgment.
6. I have carefully considered the entire appeal including the memorandum, the record, the submissions and the issues raised therein. It is trite law that in dealing with this appeal, this court,
- “Must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.

See *Selle –versus- Associated Motor Boat Company* (1968) EA 126.



I find that the Appellant's issues for determination in this appeal are not well set out in the written submissions dated 1/4/2022 because at paragraph 18 to 34, they are not clear cut and easy to pick out. There is also repetition and over explaining. Just like the Respondent's counsel did, I will treat the grounds of appeal as the issues that will determine this appeal.

7. On the first ground, I find that the tribunal did not err in finding no fault with the Environmental Restoration Order dated 5/3/2019 issued by the Respondent. This order was a culmination of a process that started before 22/7/2016 when officers of the Respondent inspected the factory following complaints by neighbours that their right to a clean and healthy environment was being violated by the Appellant.

There is cogent and credible evidence that the Appellant, even after being served with the improvement order by the Respondent dated 25/10/2016, did not comply. The authority of the Respondent to issue such orders and the duty of the Appellant to comply are beyond argument. It is my finding that Appellant did not do what it was required to do by the order dated 25/10/2016 to mitigate the noise and dust emitted by the factory. This failure by the Respondent to mitigate the above violations justified the order of 5/3/2019.

8. The finding in paragraph (7) above necessarily covers the second ground of appeal because after finding no fault with the Environmental Restoration Order dated 5/3/2019, the Tribunal had no other option but to confirm it.
9. The finding in paragraph (7) above also necessarily covers the third ground of appeal because the crux of the matter in the entire appeal was whether or not the Respondent had restored the Environment to the desired level of controlling the noise and dust complained of.

Having found that the Respondent had failed in such restoration, the tribunal could not allow the Respondent's appeal. The dismissal of the appeal was therefore proper.

10. Regarding the fourth ground of appeal, I find no error on the part of the tribunal. The tribunal did not base its decision on the Appellant's response dated 25/10/2016 in which they said that they were to relocate to a new site in Athi River. The decision of the tribunal as can be seen in paragraphs 17, 18, 19, 20, 21, 22, 23 and 24 of the judgment dated 19/1/2021 was based on failure by the Appellant to mitigate the noise and dust pollution.

Had the Appellant complied with the improvement order, there would have been no other order. In fact, it is the Appellant who brought up the issue of relocation to Athi River and not the Respondent.

11. On the fifth ground of appeal, I find that failure by the tribunal to identify identical issues for determination as identified by Appellant did not occasion a failure to justice.

The appellant had identified the following issues in their written submissions before the tribunal.

- a. Whether the Appellant had injured the environment as alleged by the Respondent?
- b. Did the Environmental Restoration Order (ERO) for closure of the Appellant's factory dated 5/3/2019 warranted? (sic)
- c. Who is to bear the costs of the appeal?

12. On the other hand, the tribunal identified the following issues for determination.

- a. Whether the Appellant's Appeal is merited?
- b. What order should the tribunal make?



13. The tribunal was not bound to identify the issues in the exact manner that the parties did. I find that the issues of whether the appeal has merit covers the two main issues raised by the Appellant.

From the Environmental Audit Report dated March 2018 and the Tribunal proceedings it is evident that there was indeed injury to the environment committed by the Appellant. It is immaterial therefore that this issue was not raised as a separate issue. All in all the tribunal's failure to duplicate the issues has not been shown to occasion a failure of justice on the part of the Appellant.

14. My findings under paragraphs (7), (10) and others necessarily cover grounds (vi) and (vii) of the memorandum of appeal. I have already comprehensively dealt with the tribunal's discretion to identify issues and not to be necessarily bound by the submissions by the parties to long as the real issue in dispute is identified and a finding made thereon.

15. Finally on costs, even though they should follow the event, since the tribunal found in its wisdom not to burden the losing party, I too, will not make any order on costs.

The upshot is that the Appellant's appeal lacks merit and is dismissed. No order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF SEPTEMBER, 2023.

M.N. GICHERU

JUDGE

