Waste Africa Limited v Hassan & 79 others & another (Environment and Land Appeal 96 of 2019) [2022] KEELC 15433 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15433 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 96 OF 2019

LC KOMINGOI, J

NOVEMBER 24, 2022

BETWEEN

WASTE AFRICA LIMITED .... APPELLANT

AND

HASSAN NOOR HASSAN & 79 OTHERS .... 1ST RESPONDENT

DIRECTOR GENERAL NEMA .... 2ND RESPONDENT

(Being an Appeal for the Judgment of the Hon. National Environment Tribunal delivered on 5th December 2019 in NET 144 of 2016 Hassan Noor Hassan & 79 Others vs Director General, NEMA & Another)

JUDGMENT

1. At the core of this dispute is the environment impact assessment licence to own /operate waste treatment plant/disposal site at LR No Laikiapia/Nanyuki South, Timau Block 2/185 in Ethi sublocation, Likipia county issued to the appellant by the 2nd respondent on November 19, 2012. The 1st respondents challenged the said licence by filing an appeal at the National Environment Tribunal being NET 114 of 2016 seeking for its cancellation and revocation among other prayers. The 1st respondents argued that the EIA licence was unlawfully issued, there was no public participation, disposal was not compliant with NEMA guidelines and that the distance from the site to the residents was close.
2. At the National Environment Tribunal, the appellant herein filed a preliminary objection challenging the jurisdiction of the tribunal on the basis that the appeal was time barred. The preliminary objection was dismissed by the Hon tribunal and the appeal was heard and determine on December 5, 2019 in

favour of the 1st respondents. Dissatisfied, the appellant challenges the entire judgement of the Hon tribunal delivered on December 5, 2019 on the following grounds of appeal;

1. That the tribunal awarded itself jurisdiction where it had none by allowing the matter to proceed before it when the same was already time barred.
2. That the honourable NET tribunal erred in law and in fact in failing to find that the appellant had lawfully obtained EIA licence and fully complied and/ or as far as practicable fully copied with the conditions of the licence.
3. That the honourable NET tribunal erred in law and fact in finding that the appellant did not conduct reasonable public participation despite the overwhelming evidence tendered by the appellant in proof of the same.
4. That the honourable NET tribunal erred in law and fact in failing to find that the process of disposal of asbestos by the appellant was in compliance with the best world practices, the set guidelines, and the visit by the prior bench of the NET tribunal that had visited the side and satisfied itself on the same.
5. The honourable tribunal erred in law and fact in finding that the asbestos landfill was a threat to the health of the 1st respondents despite the appellant having complied with all the set guidelines on disposal of asbestos and in absence of any proof of health effects to the 1st respondents.
6. The honourable tribunal erred in law and fact in failing to find that the appellants had not provided an alternative disposal site for the disposal of asbestos by ordering the decommission of the properly disposed asbestos.

3. On the July 19, 2021, the court with the consent of the parties directed that the appeal be canvassed by way of written submissions

The Appellant's Submissions

4. They are dated September 2, 2021.They address the following issues:-

a. Whether the tribunal awarded itself jurisdiction by allowing the matter to proceed before it when the same was already time barred.
b. Whether the honourable NET tribunal erred in law and fact in failing to find that the appellant had lawfully obtained EIA licence and conducted effective public participation.
c. Whether the Hon NET tribunal erred in law and fact in failing to find that the process of disposal of asbestos by the appellant was in compliance with the best world practices, the set guidelines, and the visit by the prior bench of the NET tribunal that had visited the site and satisfied itself on the same.
d. Whether the honourable NET tribunal erred in law and fact in finding that the asbestos land fill was a threat to the health of the 1st respondents despite the appellants having complied with all the set guidelines on disposal of asbestos and in absence of any proof of health effects to the 1st respondents.

e. Whether the Hon NET tribunal erred in law and fact in failing to find that the appellants had not provided an alternative disposal site for the disposal of asbestos ordering the decommission of the properly disposed asbestos.

5. Relying on the case of *Republic v Public Procurement Administration Review Board & another, ex parte Teachers Service Commission* [2015]e KLR and the case of *South Nyanza Sugar Company Limited v Joshua Aloo Aloo* [2021] e KLR, counsel for the appellant submitted that this court has jurisdiction to address the issue of jurisdiction afresh. He reiterated the appellant's position at the tribunal that the 1st respondents' notice of appeal dated March 27, 2015 filed at the national environment tribunal was time barred. He pointed out that the appeal sought cancellation of the EIA licence issued to the appellant on November 19, 2012,3 years after the said licence had been in operation thus it was filed outside the 60 day period set by section 129(1) of the *Environmental Management & Coordination Act,1999*(EMCA).It faulted the tribunal for extending time to appeal on the EIA licence on the assumption that the appeal was brought under section 129(2).

6. Counsel submitted that the appeal by the 1st respondent at the tribunal was brought under section 129(1).He relied on the case of *Gigiri Village Association v Director General (NEMA) & 2 others* [2018]e KLR.He added that the Hon tribunal could not invoke its powers and extend time within which to file an appeal under rule 7 of the National Environmental Tribunal Procedure Rules 2003 since the timeline under section 129(1) is limited by the Act to 60 days from the date of the decision/ act the subject of the appeal. He put forward the case of *Runda Association v National Environment Management Authority & 3 others* [2020] e KLR.

7. It was counsel's submission that the 1st respondents' argument that the EIA licence was unlawful was based on the 1st respondents' argument that the EIA licence issued to the appellant by the 2nd respondent was issued contrary to the provisions of EMCA, for failure to conduct public participation and agreeing with them, the Hon tribunal held, "....the presentation of public participation in the EIA is inadequate and does not address the dictates of the *Constitution* of Kenya and the *Environmental Management and Coordination Act*(EMCA).The upshot of the above is that the tribunal finds that there was no public participation in the preparation of the EIA project report."

8. Counsel faulted that finding and submitted that it was based on wrong interpretation of the law, being section 58 of EMCA and jurisprudence being the standards set in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR. He added that the appellant complied with the standards in *Mui Coal Basin* case by conducting public participation by way of interviews facilitated by questionnaires. He further submitted that the tribunal's consideration of minutes of meeting, venue of the meeting, date, and when the meeting was held and mode of invitation and number of attendees was in error. He added that courts test the effectiveness of a methodology of public participation but cannot prescribe a methodology for that matter.

9. Counsel also submitted that the tribunal's finding that from the ten questionnaires that were submitted in the EIA report, five swore affidavits and denounced participating and 3 out of the 5 testified and denounced their signatures was contrary to one of the tests set in *Mui Coal Basin c case* which provides that public participation does not dictate that everyone must give their views on an issue of environmental governance. He added that during the tribunal's site visit, it observed that there was only one residential dwelling within 500 meters of the site and the said resident(interested party) bought the property in 2014,2 years after the licence had been issued hence was not available when public participation was conducted.

10. It was also argued that the 1st respondents never reported any grievance to the 2nd interested party but they claimed that they reported their grievances to the police yet no police report was tabled thus their allegations of fact were not proven in line with section 107 of the *Evidence Act*. He relied on the case of *AAT Holdings Limited v Diamond Shields International* [2014]e KLR.

11. Counsel also faulted the tribunal on its finding that the process of disposal of asbestos by the appellant was not in compliance with best world practices .He argued that the 1st respondents' allegations that the appellant failed to mark their transportation trucks, failed to put warning signs on the property and that its employees were working without protective gear were fully rebutted by the appellant.

12. Counsel further faulted the tribunal for basing its finding on the appellant's compliance with the guidelines on the issue that the EIA report was prepared without a hydro geological report. He submitted that the EIA license may not have had the hydrological report but a report filed by the 1st respondents themselves at the Hon tribunal demonstrated that the landfill had no negative effect on the water bodies existing within the site. He relied on the case of *Jane Ngonyo Muhia v Director General, National Environmental Management Authority & another* [2017]e KLR .

13. It was also counsel's submission that the application of the precautionary principle by the tribunal in this matter was without any basis as its application is only limited as per principle 15 of the *Declaration of the 1992 UN Conference on Environment and Development* (the "Rio Declaration"), which Kenya is signatory which provides that: - "in order to protect the environment, the precautionary approach shall be widely used by states according to capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.". He pointed out that there was no evidence that the appellant's waste treatment plant has exposed the 1st respondents to health complications .He further submitted that no tests on birds, residents or the soil to demonstrate any negative effects on the residents' environment. He added that the appellant demonstrated that it put up stringent measures to ensure high safety and health standards not only for their employees but also for the residents and that it was corroborated by the tribunal's site visit where they confirmed that asbestos disposal was as per NEMA guidelines. He relied on the case of *Republic v Ministry of Health & 3 others ex –parte Kennedy Amdany Langat & 27 others* to reiterate that there was no objectivity in the application of the precautionary principle.

14. On the issue of the tribunal's directions that the appellant decommissions the landfill within 60 days, counsel submitted that the order was issued in error without an alternative decomposition site and without due consideration of the real threat to the respondents. He pointed out that decommissioning the land fill would be a process that would involve; obtaining project approvals, access to a new site for disposal and that there would be risk of asbestos fibre breakage and exposure to the air which would pose a real threat to the respondents as asbestos is dangerous if inhaled or released to water bodies.

The 1st Respondent's Submissions

15. They are dated March 1, 2022.On the issue that the Hon tribunal awarded itself jurisdiction, it was counsel for the 1st respondents submission that the 1st respondents filed an application to have the appeal admitted out of time and since they were not barred under section 129(2) of EMCA, the tribunal was right in allowing the appeal to proceed. He relied on the case of *Runda Association v National Environment Management Authority & 3 others*[2020]e KLR.

16. On whether the appellant had lawfully obtained the EIA licence and fully complied with the conditions, counsel reiterated that the licence issued to the appellant was unlawful land that the

appellant did not meet the requirements of public participation in *Mui Coal Basin Case*(supra) ,since it failed to offer a reasonable opportunity to the members of the public to participate and the fact that the alleged questionnaires produced as evidence of public participation were found to be forgeries and denounced by the members who were alleged to be the makers of the said questionnaires. He added that the issue of minutes of the meeting, venue and date and mode of invitation did not amount to rigid participation as alleged.

17. On the issue whether the process of disposal of asbestos by the appellant was in compliance with best world practice, the appellant submitted that it was in evidence that the appellant was a very young company incorporated on July 10, 2012 thus it had no prior knowledge of handling asbestos waste. He added that it was unable to comply with local basic guidelines and could not meet international standards.

18. Counsel pointed out that the 1st respondents' 2nd witness produced photographs showing the appellants' employees working on the landfill without personal protective equipment and that there was no warning notices/signage at the main entrance of the site showing that it was an asbestos hazardous area. He added that the appellant had not dug pits but shallow openings that are not more than 3 feet deep. He added that it was the responsibility of the 2nd respondent to produce a hydrological report.

19. On whether the tribunal erred in its finding that the asbestos landfill was a threat to the health of the 1st respondents, counsel submitted that based on the concept of precautionary principle, it was not necessary for the 1st respondents to produce specific evidence on exposure to health complication of the residents as a result of the operation as an asbestos dumping site and not "waste treatment plant"

20. He urged the court to dismiss ground 6 of the grounds of appeal since it was the appellant's responsibility to undertake any risks that would be involved in the whole process of disposal of asbestos including decommissioning.

The 2nd Respondent's Submissions

21. They are in opposition to the appeal and are dated June 23, 2022. They raise the following issues for determination:-

    a. Whether the tribunal awarded itself jurisdiction by allowing the matter to proceed before it after it was already time barred.

    b. Whether the tribunal erred in law and in fact in failing to find the appellant had lawfully obtained the EIA licence.

22. On the issue of jurisdiction, counsel cited the case of the *Owners of Motor Vesses "Lilian S" v Caltex Oil Kenya Ltd*[1989]e KLR to submit that jurisdiction is everything and a court without the same must down its tools. He argued that the tribunal had no jurisdiction to award the orders it did since the appeal filed by the 1st respondents herein was time barred as expressed by section 129(1) of EMCA. He relied on the case of *Simba Corporation Limited v Avic International & another* (supra).

23. On the issue whether the appellant obtained the EIA licence procedurally, he submitted that there was as much public participation incorporated in the project as it was sufficiently required. He added that the EIA report submitted by the appellant met all the prerequisite details that the law demanded of it as prescribed in the *Environmental (Impact Assessment and Audit)Regulations,2003* and EMCA. He relied on the case of *National Association for the financial inclusion of the informal sector v Minister for Finance & another*[2012]e KLR.

24. It was also counsel's submission that that the court's role on the prayers of this nature is first, to be satisfied if the decision maker, the 2nd respondent undertook the decision in compliance with the process stipulated in the law and once it is so satisfied, then it should find that the 2nd respondent discharged its mandate as required under the law and therefore uphold the decision that arose in the proper exercise by the 2nd respondent of its mandate.

25. Finally, relying on the decision in *Republic v County Government of Kiambu ex parte Robert Gaakuru & another*[2016]e KLR, counsel submitted that public participation is not the same as saying that public views must prevail.

The Interested Party's Submissions

26. They are dated June 13, 2022.Relying on the case of *Simba Corporation Limited v Director General National Environment Management Authority(NEMA)& another* [2017] e KLR, section 129 (2) of EMCA and rule 7 of NET Procedure Rules,2003counsel for the interested party submitted that the 1st respondents were not time barred.

27. Counsel also submitted that the EIA licence was unlawful since the appellant failed to comply with international law, being principle 10 of the *Rio declaration on the Environment and Development(1992),* provisions of section 58,59 (1) of EMCA as well as article 69(1) (d) of the *Constitution*. He added that the appellant failed to conduct public participation and instead falsified and forged signatures and names of the proponents alleged to have signed questionnaires. He put forward the case of *Kan Kasinga v Daniel Kiplangat Kirui & 5 others* [2015]e KLR.

28. Relying on the case of *Martin Wanyonyi CEO Centre for Human Rights Organization & another v County Government of Bungoma & 2 others*[2019]e KLR the case of *Moffatt Kamau & 9 others v Actors Kenya Ltd & 9 others[*2016]e KLR as well as the case of *Halai Concerete Quarries & 4 others v County Government of Machakos & 4 others;Kenya Power & Lighting Company & another(interested parties)*[2020]e klr, counsel submitted that the appellant is in blatant breach of articles 40,42,and 70 of the *Constitution* as read with sections 3,58,87 of EMCA and in violation of the 1st respondents' and the interested party's right to a clean and healthy environment, their socio-economic rights and their right to property. He urged the court to uphold the hon. tribunal's orders on decommissioning the asbestos.

Analysis and Determination

29. I have considered the grounds of appeal, the written submissions filed on behalf of the parties and the authorities cited. The issues which emerge for determination are:-

    i. Whether the appeal before NET was time barred.

    ii. Whether public participation was conducted before the licence was granted to the appellant.

    iii. Whether the asbestos landfill is a threat to the health of the 1st respondent.

    iv. Who should bear cost of this appeal?

30. Section 129(1) and (2) of *Environmental Management And Co-Ordination Act* provides as follows:-

    " (1) 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.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the director-general, the authority or committees of the authority to make decisions, such decisions may be subject to an appeal to the tribunal in accordance with such procedures as may be established by the tribunal for that purpose."

31. Rule 7 of the NET Procedure Rules provides as follows:-

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

In the case of *Simba Corporation Limited v Director General, NEMA & another* [2017] eKLR, the court observed thus:-

> "In the jurisprudence interpreting the two categories of appeals filed to the NET under sections 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".

The above decision was followed in *Runda Association v NEMA & 3 others* [2020] eKLR.

32. Going by the above decisions, I find that the 1st respondent was not time barred. In section 129(2) of EMCA, the tribunal (NET) did not err in allowing the appeal to proceed before it.

33. One of the grounds raised by the appellant in NET (1st respondent herein) was that no meaningful public participation was conducted. That most of the persons named as the 1st respondent herein were not aware that asbestos was being dumped there.

34. The tribunal in its judgment considered the issue of public participation at length. It referred to several authorities including the legal notice No 121 of EMCA Regulations 2006; the Waste Management

Regulations 2006 and the guidelines for safe management of asbestos on handling, packaging, transportation and final disposal by the Act.

35. The significance of public participation is amplified under article 10 of the *Constitution*. The question of public participation and the circumstances in which it will be deemed sufficient has been the subject of various judicial determinations. In the case of *Consumer Federation of Kenya (COFEK) v Public Service Commission & another*; Pet No 263 of 2013 the court elaborated on the meaning of public participation as follows:-

> " The petitioner has latched on to the phrase "participation of people" in a selective and selfish manner. I have said there is no express requirement that participation of the people should be read to mean that the people must be present during interviews but taken in its widest context that their input is recognized".

The tribunal in its judgment considered the issue of public participation in paragraphs 21, 22, 23 and 24 of the judgment and came to the conclusion that the requirements set out in *Mui Coal Basin Local Community & 15 others v Permanent Secretary, Ministry of Energy of 17 others* [2015] e KLR had not been met.

36. The alleged public participation did not offer a reasonable opportunity to the members of the public. The tribunal found that the said questionnaires were found by the tribunal to be forgeries and were denounced by the members who were alleged to be the makers of those questionnaires.

37. One witness, Christian Charles Lamberts told the tribunal that some residents informed him on January 24, 2015 that asbestos waste was being dumped in the area. He told the court that he lives about 25 km from the site. He stated that most of the residents were not informed of the site in question.

38. Another witness Peter Kimathi Kinyua told the tribunal that he saw children playing inside the site. He also stated that he was not aware of the said asbestos landfill until he bought the land.

39. David Sikoi Kisio, also testified and informed the tribunal that he was not consulted on the project. He denied that he signed any document. He stated that the signature on the questionnaires not his. He said he lives about one kilometre from the site. Peter Muchemi Gichohi, another resident in the area denied that he completed any questionnaire. He said his signature was forged.

40. Two other witnesses denied that they signed the questionnaires. I am satisfied that the tribunal's conclusion that proper public participation had not been conducted was on the basis of the evidence tendered.

41. The appellants (1st respondents herein) produced several photographs showing the (appellants herein) employees working on the landfill without protective equipment, there was signage at the main entrance showing that it was an asbestos hazardous area, the fence or on the lorries ferrying asbestos with a members of the public walking next to the landfill. This was confirmed by the testimony of Peter Kimathi Kinyua.

42. Dr Edward Kaarisa Irigia an EIA expert told the court that asbestos is highly carcinogenic. When cross examined he told the tribunal that though he had not studied asbestos, he had studied dumping of asbestos. He was of the view that the standards on asbestos disposal should be developed and coordinated by NEMA. Patrick Chege Kariuki another EIA expert told the tribunal that asbestos is mainly harmful if carried by wind and if one inhales it and it gets into the lungs. That it is also harmful if it gets to the ground water. He also stated that asbestos should not be left in the open. I find that the appellant was unable to convince the tribunal that measures were in place to ensure that the residents

would not be harmed by the dumping. It also failed to demonstrate that it had attained the fair and reasonable safety benchmark in the amenities.

43. I am satisfied that the tribunal came to a correct conclusion that the asbestos landfill was a threat to the health of the 1st respondent.

44. I agree with the 1st respondent's submission that reasonable suspicion that there was dumping of asbestos which may cause environmental harm is adequate for precautionary principles to be sustained especially where it involves the most dangerous material as asbestos.

45. On the issue that the tribunal erred in finding that the asbestos landfill was a threat to the health of the 1st respondents, and hence the appellant's submission that the precautionary principle was not applied objectively, the tribunal needed not to have evidence of sickness and death for it to reach that finding. In *County Government of Kitui v Sonata Kenya Limited & 2 others* [2018] eKLR, the court held as follows while issuing an interim order under the precautionary principle:-

> "consequently, and on the basis of the report of the Water Resources Authority, it is not plausible to argue, as the respondents have argued, that there is no evidence to show that the asbestos are likely to degrade the water catchment area. Under the precautionary and prevention principles, and on the basis of the letter of the Water Resources Authority, lack of full scientific certainty of what will happen to the underground water cannot be a reason for this court not to issue interim conservatory orders."

46. I have considered the grounds of appeal and the evidence tendered at the tribunal and I find that the tribunal properly considered the evidence adduced before it before coming up with the decision it made.

47. I see no reason to fault the decision by the tribunal to warrant this court to set it aside. I find no merit in this appeal and the same is dismissed in its entirety with cost to the 1st respondent.

48 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTURALLY AT NAIROBI ON THIS 24TH DAY OF NOVEMBER 2022.

L. KOMINGOI

JUDGE

In the presence of:

Mr. Angwel advocate for the Appellant

Ms Njoroge for Mr. Mareka advocate for the 1st Respondent

No appearance for the 2nd Respondent

Mr. Ndichu advocate for the 1st Interested Party.

Mutisya – Court Assistant