



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 21 OF 2017

1. BONIFACE S. KATANA

2. CATHERINE MUINDE

3. SHABAN JUMA

4. MESHACK KALUNDU

5. PATRICK MUMO

6. ALICE MUTUA

7. LINAH JILO

8. RAMADHAN JUMA

9. PAMELA KICHOKOLA

10. NEEMA JAMBO

11. MERCY WANJIRU AND 109 OTHERS RESIDENTS OF

MIJANJUNI, KILIFI COUNTY.....PETITIONERS

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY(NEMA).....1ST RESPONDENT

COUNTY GOVERNMENT OF KILIFI.....2ND RESPONDENT

COUNTY DIRECTOR OF NEMA KILIFI COUNTY.....3RD RESPONDENT

JUDGMENT

1. By this Petition dated and filed herein on 6th November 2017 the 11 listed Petitioners and 109 other residents of Golden Key Area, Mikanjuni along the old Mombasa-Malindi Road pray for the following remedies against the three Respondents named herein: -

a. A declaration that the Respondents acts are in contravention of Article 42 of the Constitution, 2010;

b. A declaration that the violation of Article 42 of the Constitution, 2010, by the Respondents has resulted in a denial of the right to a clean and healthy environment to the Petitioners and the residents of the Golden Key Area, Mikanjuni, along the old Mombasa-Malindi Road in Kilifi County;

c. A declaration that in breach of (a) above the Petitioners have a right of 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 and Section 3 (3) (a) to (e) of the Environmental Management and Coordination Act, 1999;

d. A mandatory injunction compelling the Respondents to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance to the Environmental Management and Coordination Act, 1999;

e. A mandatory injunction to compel the Respondents and/or its agents and assigns to restore the degraded dumpsite within the Golden Key Area, Mikanjuni, along the old Mombasa-Malindi Road Kilifi County as far as practicable to its immediate condition prior to the damage;

f. A prohibitory injunction to the Respondents, their employees or assigns to permanently restrain them to stop or discontinue dumping refuse at Golden Key Area, Mikanjuni, along the old Mombasa-Malindi Road and or from doing any act or omission deleterious to the environment;

g. Any other relief this Court may deem fit and fair to grant; and

h. Costs of this Petition.

2. The Petition which is supported by an affidavit sworn on behalf of all the Petitioners by the 1st Petitioner Bonface S. Katana arises from the Petitioners' contention that sometimes in the year 2016, the County Government of Kilifi (the 2nd Respondent) and the County Director, National Environment Management Authority (NEMA) (the 3rd Respondent) started dumping garbage at the dumpsite as an overnight collection point and after a short while would collect the same for disposal elsewhere.

3. Overtime, the Petitioners aver that the Respondents have now turned the area into a full-fledged dumpsite in which garbage collected from the whole of Mtwapa Township is dumped. The 2nd and 3rd Respondents now take much longer to relocate the garbage with the effect that the same has become hazardous resulting in massive air pollution.

4. The Petitioners aver that there was no public participation before the dumpsite was located in the area and assert that no Environmental Impact Assessment was carried out or sanctioned by the Director General NEMA (the 1st Respondent) prior to the establishment of the dumpsite and hence the same is unlawful and illegal.

5. The Petitioners aver that as a result of the said actions that their right to a clean and healthy environment as guaranteed under Articles 42 and 70 of the Constitution have been violated, and threatened and that despite demand made and notice of intention to sue, the Respondents have failed, refused and or neglected to take any action thereby necessitating this Petition.

6. The Director General NEMA (the 1st Respondent) did not file any response to the Petition. However, in a Replying Affidavit sworn by the Kilifi County Director NEMA Samuel Lokokiyit (the 3rd Respondent) he avers that NEMA is a State Corporation established under Section 7 of the Environment Management and Coordination Act 1999 (EMCA) and that he is the officer responsible for the implementation and execution of the 1st Respondent's mandate on environmental matters within Kilifi County.

7. The 3rd Respondent avers that construction and grading of roads, zoning regulations and collection and disposal of garbage within Kilifi County neither fall within the mandate of the 1st nor the 3rd Respondent. He asserts that those functions strictly fall within the County's Department of Environment, Water, Natural Resources, Forestry and Waste Management which is responsible for the efficient collection and setting up of proper dumping sites.

8. The 3rd Respondent further asserts that in furtherance of his mandate, he has since checked and confirmed that the dump site under reference is not a designated dumpsite. The 3rd Respondent avers that a temporary waste holding site does not require a party to undertake any environmental audit and asserts that his office has no record of any complaints made by the petitioners regarding the temporary holding site at Mikanjuni.

9. The 3rd Respondent accuses the Petitioners of misinterpreting the provisions of the EMCA, the Environmental Management and Co-ordination (Waste Management) Regulations, 2006 and the Environmental (Impact Assessment and Audit) Regulations, 2003 and urge the Court to strike out the Petition as against the 1st and 3rd Respondents.

10. Similarly, the County Government of Kilifi (the 2nd Respondent) disputes the Petitioners' claims. In a Replying Affidavit sworn on its behalf by its Director Legal Services Michelle Bibi Fondo, the 2nd Respondent avers that pursuant to the Environmental Management and Co-ordination (Waste Management) Regulations and the National Solid Waste Management Strategy, it has in a bid to ensure a clean and healthy environment for all in line with Article 42 of the Constitution, designated a dumpsite at Mtondia in Kilifi County.

11. The 2nd Respondent further avers that despite the establishment of the dumpsite it is aware that some of the residents of the Mtwapa area have been illegally disposing waste by the road side and its efforts to stop the same has so far been futile.

12. The 2nd Respondent avers that to minimize the dumping, it has since resorted to having a special refuse tank manned by its staff who ensure that waste in the area is collected and dumped at the designated site after every 24 hours.

13. The 2nd Respondent denies that it has prior to the institution of this suit received any complaint whatsoever with regard to the illegal dumping in the area and accuses the area residents of themselves being responsible for the illegal dumping. Accordingly, the 2nd Respondent urges the Court not to allow the Petitioners to derive advantage from their own wrong and to proceed and dismiss this Petition with costs.

14. By the consent of the parties, it was agreed that the Petition would be disposed of by way of affidavit evidence and all parties thereafter filed written submissions thereon.

15. I have carefully considered the Petition and the responses thereto. I have similarly perused and considered the submissions and authorities as placed before me by the Learned Advocates for the parties.

16. The crux of the Petitioners case is that the Respondents have been dumping and/or are responsible for the dumping of solid waste in their Mikanjuni area of residence which area has since transformed into a full-fledged dumping site. The Respondents however separately deny that they have dumped waste in the area and/or that they are responsible therefor.

17. Under Section 2(g) of Part 2 of the Fourth Schedule of the Constitution, the functions of refuse removal, refuse dumps and solid waste disposal have been devolved to County Governments such as the 2nd Respondent herein. As it were, Section 86 of the Environmental Management and Coordination Act (EMCA), 1999 requires the Cabinet Secretary on the recommendation of the National Environment Management Authority (NEMA) to identify materials that are dangerous to human health and the environment.

18. Section 86 of EMCA further requires the Minister to issue guidelines and prescribe measures for the management of the materials and processes identified as dangerous to human health and environment; prescribe standards for waste, advise on standards of disposal methods or issue regulations for the handling, storage, transportation, segregation and destruction thereof.

19. Section 87 of EMCA on the other hand prohibits the discharge of any waste in such a manner as to cause pollution to the environment. It prohibits the transportation of waste without a licence and further prohibits the operation of a waste disposal site or plant without a licence. Section 87 further provides that every person whose activities generates waste shall employ measures essential to minimize the waste.

20. According to the Petitioners before me, the 2nd and 3rd Respondents started dumping waste on the impugned site sometime in 2016- as an overnight collection point and that after sometime, they would remove the same and dispose of it elsewhere. Overtime however, the Respondents turned the area into a full-fledged dumpsite in which garbage collected from the whole of Mtwapa Township is dumped. In support of this position, the Petitioners annexed photographs of the alleged dumpsite taken by the 1st Petitioner and showing what they stated were the 2nd Respondents trucks dumping garbage on the site.

21. I have taken a careful look at the photographs but was unable to see any evidence of dumping. The said photos taken from numerous angles merely depict a single truck parked near an area strewn with garbage with no activity around it. While the unmarked truck may as well belong to the 2nd Respondent as alleged, there was no evidence that it had dumped or was in the process of dumping anything in the area. As the Petitioners themselves agree that the 2nd Respondents' trucks occasionally collected garbage in the area for dumping elsewhere, that truck could as well be on that noble mission to rid the area of the garbage.

22. From the material placed before me, I did not hear the Petitioners accuse the Respondents of generating the said wastes. If that were so, the Respondents would have been under an obligation as required under Regulation 4 of the Environmental Management and Coordination (Waste Management Regulations) 2006, to collect and dispose of the waste.

23. From a perusal of the photographs placed before me, the garbage appeared to me to be consistent with the kind produced from domestic households and private businesses and there was every possibility as stated by the Respondents that the same had been dumped thereon by other area residents.

24. While I agree with the Petitioners that they are entitled to a clean and healthy environment, I did not think they were being candid in their submission that the Respondents had dumped the waste and turned their area of residence into a dumpsite. As envisaged under Article 69(2) of the Constitution, solid waste management is a shared responsibility among all actors including the waste generators, owners and occupiers of the premises within the area.

25. Accordingly, and while the 2nd Respondent in particular had greater responsibility to ensure a clean and healthy environment for its residents, those very residents of the Golden Key Area and the business community within the area also share the responsibility to ensure the safe and proper disposal of such waste.

26. While the Petitioners have told the Court that they had repeatedly brought the attention of the Respondents to the illegal dumpsite, they only produced a single letter addressed to the authorities some four months before this suit was filed. The Respondents deny receipt of the same and there was nothing indeed on the copy of the letter to demonstrate that it had been received by the Respondents before this Petition was instituted.

27. As it turned out, and as admitted by the Petitioners, when this matter came to Court, and the matter was brought to the attention of the 2nd Respondents, they proceeded to collect and remove the garbage from the site thereby rendering unnecessary prayers (d) and (e) of the Petition.

28. As I have stated hereinabove however, I was not satisfied that the Respondents were guilty of any violations and or that the Petitioners constitutional rights had been violated in any manner whatsoever.

29. The result is that I find no merit in the Petition and I dismiss the same.

30. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 25th day of September, 2020.

J.O. OLOLA

JUDGE