



Asili Mali Company Limited v County Government of Lamu & another (Environment & Land Petition E030 of 2022) [2024] KEELC 6258 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E030 OF 2022**

EK MAKORI, J

SEPTEMBER 25, 2024

IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES 22(1) (2) (B), 23, 70, 162(2)(B), AND ARTICLE 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: AN ALLEGED CONTRAVENTION OF ARTICLE 40(B), 42(A) & (B), 43(1)(B), 47(1) & (2) AND 69(D) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 268(1) AND 87 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT CHAPTER 387 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE ENVIRONMENT MANAGEMENT AND COORDINATION (ENVIRONMENTAL IMPACT ASSESSMENT/ENVIRONMENT AUDIT) REGULATIONS OF 2003

AND

IN THE MATTER OF: SECTIONS 24, 36 AND THE SECOND SCHEDULE OF THE PHYSICAL PLANNING CHAPTER 286 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: SECTION 118(1)(C) OF THE PUBLIC HEALTH ACT CHAPTER 242 OF THE LAWS OF KENYA

BETWEEN

ASILI MALI COMPANY LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF LAMU 1ST RESPONDENT



**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

RULING

1. The petition dated 16th December 2022 seeks:
 - a. A declaration that the 1st Respondent's acts contravened Articles 40, 42, 43, 47, and 69 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 and or threatening of the right to a clean and healthy environment to the Petitioners and residents.
 - c. A declaration that in breach of (a) above, the Petitioner has a right of redress for an order of injunction under 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 with the Environmental Management and Coordination Act, 1999.
 - e. Any other relief this Court may deem fit and fair to grant.
 - f. Costs of the petition.
2. The Petitioner avers that it is the proprietor of land parcel No. Lamu/Block I/1203, which is the property adjacent to the 1st Respondent's land parcel. The 1st Respondent's said land has been unlawfully placed as a waste disposal site without a license from the 2nd Respondent as provided under Section 88 of the Environment Management and Coordination Act (EMCA).
3. The 1st Respondent has unlawfully declared the land as a dumping site without conducting public participation and consulting the neighboring plot owners, thus violating their right to participate in decision-making and to safeguard their properties.
4. The neighboring plots are precious and directly face the ocean; thus, setting up a dumping site within the area shall reduce the value of the said plots and affect their viability in the tourism business, as some of the developed plots serve only tourists. The Petitioner intends to create a tourist hotel in the plot, and with the adjacent land declared a dumping site; it shall adversely interfere with its investment as the development shall not attract any tourist customers with a dumpsite next to it.
5. The waste disposal site directly faces the ocean, and the spill and spread of waste will cause undesirable environmental impacts by polluting the ocean water, damaging the soil quality, affecting the air quality, and negatively impacting the Petitioner's business environment. If an Environmental Impact Assessment is done, the 1st Respondent will not succeed in obtaining favorable results; thus, it will bypass a license from the 2nd Respondent.
6. The Petitioner further states that the land slated for waste disposal is not situated in an area conducive to holding a dumping site, as there are residential areas and tourist hotels within the region. There is no way such investments can exist together. The 1st Respondent is not licensed to operate and create a dumping site on the said property; this Court has to protect the Petitioner, together with the other



landlords within the said area, from the adverse effects that will be caused by having a waste disposal site within the region.

7. In rejoinder, the 1st Respondent states that under its function in matters of refuse removal, refuse dumps, and solid waste disposal, under Part 2 of the Fourth Schedule of *the Constitution*, on a sponsorship program by the Lamu Museum commenced the rehabilitation of the Kanu dump site on or about October 2022, which culminated to the filing petition by the Petitioner on the allegation that, the 1st Respondent was constructing a waste disposal site and is in the process of building a wall fence in readiness of operation of the dumping site by January 2023, which alleged facts are devoid of any truth and are meant solely to mislead this Court.
8. the 1st Respondent asserts that the area around Kanu was traditionally the sole dumping site, serving the entire locality, but the land was subsequently acquired at a place called Kandahari, which started serving as the dumping site, as Kanu dumping site had to be closed due to its proximity to the ocean. Though the dump site was relocated to Kandahari, the area residents continued dumping at Kanu dumping area as there was no waste collection point within the vicinity. With the advent of devolution and to control waste dumping in the Kanu area, the County Government, through the Department of Public Health and Sanitation, introduced skips. Still, unfortunately, they were misused and deliberately set on fire, prompting their removal for safety reasons; as indicated in the 1st respondent's replying affidavit, the removal of the skips compounded the problem of haphazard dumping of waste, hence the 2nd respondent's letter dated 15th March 2021.
9. The 1st Respondent, in its renewed effort to prevent dumping, rehabilitated the area through the Department of Public Health and Sanitation in 2019 and fenced it. The 1st respondent has annexed pictures of the area after the rehabilitation above.
10. The 1st respondent further deployed enforcement officers to patrol the area to stop the dumping. Unfortunately, it became a cat-and-mouse race as people continued to dump waste indiscriminately, necessitating the 1st respondent to reintroduce skips and ensure regular removal of dumped waste using trucks.
11. Despite concerted efforts by the 1st Respondent to stop the dumping, the efforts proved futile as people continued to indiscriminately dump waste all over the place, destroying both the land and marine environment.
12. The 1st Respondent contends that rehabilitation in the Kanu area is not just a priority but a top priority. The Lamu Municipality, which has jurisdiction over the region, had budgeted for the same in its annual budget for 2022 – 2023. Before the project was implemented, the 1st Respondent was approached by the Lamu Museum, which offered to do the same, as they had a project to clean/rehabilitate the Kanu area and some other parts of the heritage site. The 1st Respondent annexed pictures of the area after the rehabilitation in its replying affidavit, underscoring the seriousness of its commitment.
13. The 1st Respondent assures that there was never a plan to make or declare the Kanu area a dumping site, as alleged by the Petitioner. On the contrary, efforts have been made to rehabilitate the place and stop the dumping. The small temporary structure measuring approximately 5 meters by 6 meters serves as a waste collection point, an urgent intervention necessary to prevent haphazard waste dumping.
14. The 1st Respondent argued that the Petitioner's allegations that they have been deprived of their right to a clean and healthy environment are without any basis. They are well aware that the area on which their alleged land is situated was traditionally a waste dumping site, and dumping continued even after the dumping site was relocated to Kandahari. The land around the area where the waste collection point has been constructed is indicated in a map obtained from the Survey of Kenya and marked as



annexure “GN 6” as Government Land and Public Land. It appears the Petitioner’s alleged land was irregularly alienated, depriving the 1st Respondent of land to construct public amenities such as a waste transfer station, which is necessary to stop indiscriminate dumping. Still, the same has been rendered impossible due to the irregular public land allocation. The Petitioner is crying foul, yet it is the author of its misfortune, as it is alleged the land was traditionally a dumping site. It has taken concerted efforts by the 1st Respondent to rehabilitate the area and stop the haphazard waste dumping.

15. The 2nd Respondent states that it is not its duty to issue EIAs on waste collection sites like the Kanu waste collection site. However, the 2nd Respondent conducted an Environmental Audit in Lamu Municipality and raised concerns over the poor management of solid waste within Lamu town, highlighting the Kanu waste collection point. An Environmental Restoration Order was issued via letters marked NEMA -1 and 2.
16. Parties were directed to file written submissions on the matter. They complied.
17. The issues that I frame for the determination of this Court are -whether the Respondents have violated the provisions relating to the right to a clean and healthy environment and waste management. Have the Respondents’ actions infringed on the Petitioners’ constitutional rights to a clean and healthy environment? Whether the Petitioner is entitled to the reliefs sought? Who should bear the costs of these proceedings?
18. I should first deal with the issue of who should manage waste within a County, an issue raised here. The 2nd Respondent points out that it is the 1st Respondent. I already found that it is the 2nd Respondent in my ruling dated 31st January 2024, where I stated thus:

“I agree with the 2nd respondent that it’s the 1st respondent who should establish and manage waste sites within its County and that before founding a waste site, an Environmental Impact Assessment Report (EIA) has to be applied for and approval granted by the second respondent as elaborately held by Angote J. in the Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties) [2020] eKLR as follows:

“59. As already stated above, the 1st Respondent has the constitutional responsibility for refuse removal, refuse dumps, and solid waste disposal in the County, which mandate includes identifying and operating waste disposal sites within the County on application to the 2nd Interested Party. This was the position that was taken by the court in Castle Rock Gardens Management Limited vs. Attorney General & 4 others [2018] eKLR where the Court held as follows:

“The function of dealing with county health services including refuse removal, refuse dumps and solid waste disposal was devolved to the county under *the Constitution*.”

60. Consequently, it is the County Governments that are vested with the authority to issue business licences to parties that wish to carry out the business of waste collection and disposal within their boundaries after complying with the provisions of the *Environmental Management and Co-ordination Act* and the National Solid Waste Management Strategy Paper.



61. The 1st Respondent has not produced any Environmental Impact Assessment Report to show that an Environmental Impact Assessment was conducted before designating the endangered property as a dump site. The failure by the 1st Respondent to prepare an Environmental Impact Assessment Report left the following crucial areas unaddressed as mandated under Regulations 7 and 18 of the Environmental (Impact Assessment and Audit) Regulations, 2003;
- a) The nature of the project;
 - b) The location of the project including the physical area that may be affected by the project's activities;
 - c) The potential environmental impacts of the project;
 - d) A plan to ensure the health and safety of the workers and neighboring communities; and
 - e) The economic and socio-cultural impacts to the local community and the nation in general;
62. Having not conducted an Environmental Impact Assessment in respect of the dumpsite in question, the 1st Respondent ran afoul the law when it purported to licence the 2nd - 5th Respondents to dump solid waste on the suit property.
63. Section 87 of the Environmental Management and Coordination Act provides that no person shall operate a waste disposal site or plant without a licence issued by the 2nd Interested Party. Further, Section 88 of the *Environmental Management and Co-ordination Act* provides that any person intending to operate a waste disposal site or plant shall prior to commencing with the operation of a waste disposal site or plant apply to the Authority (the 2nd Interested Party) in writing for the grant of an appropriate licence.
64. The 1st Respondent, in contravention of Sections 87 and 88 of the *Environmental Management and Co-ordination Act* and Regulation 10 of the Environmental Management and Co-ordination (Waste Management) Regulations, 2006, and aware that it does not hold a licence to operate a dumpsite, proceeded and issued licences to the 2nd to the 5th Respondents directing them to dispose waste “at the only legal sub-county Disposal site next to Kay Construction Quarry.”
65. As evinced from the Affidavit filed by the 2nd Interested Party, the 2nd Interested Party has not issued any licence whatsoever to the 1st Respondent or any person for the operation of the endangered property as a dump site.
66. In fact, the 2nd Interested Party conducted a ground inspection on 17th July 2015 at Mulinge Scheme Area within the Athi River locality, which revealed that the 1st Respondent was operating a waste management facility where there was massive dumping of mixed solid waste-household, industrial and excavated soil without the requisite licence and without meeting the ‘10 minimum points’ for licensing of dumpsites as provided in the National Solid Waste Management Strategy, 2014.



67. Consequently, the 2nd Interested Party issued an improvement Order and an Environmental Restoration Order due to the continued dumping of waste by the 1st Respondent in four (4) different sites without an Environmental Impact Assessment licence which were not acted upon by the 1st Respondent.
68. Furthermore, from the admission of the 2nd to 5th Respondents, the said Respondents have, with the direction and authority of the 1st Respondent, been disposing refuse on the endangered property.
69. It is the finding of this court that the 1st Responding is operating an unlicensed disposal site on the endangered property, which activity constitutes a criminal offence under Section 87(5) of the Environmental Management and Coordination Act. That being so, it is the finding of this court that the establishment of a dumpsite at the impugned location by the 1st Respondent constitutes an infringement of the right to a clean and healthy environment of the Petitioners and the other residents of the area.”

19. In the said ruling, the Court proceeded to state:

“The recently enacted Sustainable Waste Management Act of 2022 has further clarified the legal and institutional framework for the sustainable management of waste to ensure the realization of the Constitutional provision on the right to a clean and healthy environment and for connected purposes. The Act provides under Section 9 (1) as follows:

“County governments shall be responsible for implementing the devolved function of waste management and establishing the financial and operational conditions for the effective performance of this function.

- (2) County governments shall ensure that county waste management legislation is in conformity with this Act within a period of one year of the coming into operation of this Act.
- (3) County governments shall ensure that the disposal of waste generated within the county is done within the county’s boundaries except where there is an agreed framework for inter-county transportation and disposal of waste.
- (4) County governments shall provide central collection centres for materials that can be recycled.
- (5) County governments shall establish waste management infrastructure to promote source segregation, collection, reuse, and set up for materials recovery.
- (6) County governments shall maintain data on waste management activities and share the information with the Authority.
- (7) County governments shall mainstream waste management into county planning and budgeting.
- (8) County governments shall develop, manage, and maintain designated disposal sites and landfills.
- (9) County governments shall maintain a register of all waste service providers operating within their boundaries.”



The Constitution, EMCA, the Sustainable Waste Management Act of 2022, and cases already decided by the ELC envisage that it is the responsibility of the County Governments to establish and manage disposal sites and landfills within their respective jurisdictions. The Act futuristically expects Counties to enact laws and regulations, budget and plan for and provide for funds in their annual budgets for that purpose to sustain a clean and healthy environment within their jurisdictions in a manner that recognizes and protects the right to a clean and healthy environment as reverberated in Article 42 of *the Constitution*:

“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.”

Section 14 of the new Act enacts for the establishment of materials recovery facilities in the Counties:

“

- “(1) Each county government shall establish a materials recovery facility.
- (2) A materials recovery facility shall be used for final sorting, segregation, composting, and recycling of waste generated or transported to the county and transport the residual waste to a long-term storage or disposal facility or landfill.
- (3) A materials recovery facility shall be licenced by the Authority.
- (4) The Cabinet Secretary shall, in consultation with the Authority and county governments, make regulations for the establishment and proper management of materials recovery facilities.”

As a result, the 1st respondent, the County Government of Lamu is required by *the Constitution* and the law to establish, manage, and regulate waste sites, or what is now known as Materials Recovery Facilities under the new Act. The 1st respondent is required to apply for an environmental impact assessment from the 2nd respondent to determine the viability of the waste site – whether it meets the threshold of an environmentally sound site - before obtaining a licence from the 2nd respondent to operate the same.

In this case from the materials placed before me, we are not dealing with a dumpsite, but a waste collection Centre, the impact it has on the neighbourhood and the sea – being proximate to it, cannot be gainsaid. The 1st respondent, although it is in the process, of closing completely this site to a place called Kandahari, measures recommended by the 2nd respondent have to be adhered to at this stage of the trial instead of total closure.

In an audit done by the 2nd respondent it was recommended through Restoration Orders issued on 15th March 2021 for the 1st respondent to undertake the following:

“As the principal agency of the Government mandated to ensure a clean and healthy environment, NEMA hereby orders you to undertake the following:



- a. Take action to clear the garbage from Kanu and Wiyoni transfer stations within 7 days from the date of receipt of this order.
- b. Ensure the garbage is regularly collected from these sites in order to prevent it from piling huge garbage heaps which will be washed away into the sea.
- c. Take action to relocate the Woyoni waste transfer station away from the sea. It should be relocated further inland out of the reach of the high tides in order to prevent the garbage from being washed into the sea. This should be executed within 14 days from the date of receipt of this order.
- d. Put in place waste receptacles at the transfer stations to prevent waste from spreading everywhere as the disposal continues. You are given 3 months to comply with this order.
- e. Ensure there is a clear plan for garbage collection and disposal in all towns and urban centres within the Municipality.
- f. Submit a commitment letter to the NEMA Lamu Office within 7 days from the date of this letter indicating the appropriate measures that you will put in place to ensure compliance.

Please take note that failure to comply with these orders by NEMA constitutes an offence under Section 143 – Sub Section 2 of EMCA, Cap. 387

The 1st respondent in the submissions and averments before this Court stated that the orders by the 2nd respondent are being implemented, and there are ongoing ventures with the Lamu Museum to mitigate environmental degradation.

As correctly held by the 2nd respondent closure of dumpsites, if the authorities from the ELC are anything to go by, requires a progressed effort. This court has severally discussed the difficulties encountered in the relocation, decommissioning, or shut down of dumpsites in this Country for instance in *Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR Ohungo J. held as follows:

- “76. However, I have found that the petitioners’ right to a clean and healthy environment under Article 42 has been breached and though the petitioners have sought a mandatory injunction compelling relocation of the Goto dump site as well as an order restraining further dumping of waste at the site, the solution to the problem at hand requires a delicate balancing act. The site currently receives waste from the whole of Nakuru Town. This waste is being generated daily and it has to be deposited somewhere. I am not aware of any alternative waste disposal site for Nakuru Town. An immediate relocation order or an order stopping delivery of waste at the site may sound enticing but will in reality be impractical. A cautious graduated approach would be more appropriate.”



A similar situation arose in the case of the African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR where Munyao J. held as follows:

“On my part, I think this is the best path to take. It would be easy, as was done in the Tanzanian case of Festo Balegele & 794 Others vs. Dar es Salaam City Council (supra), to issue orders stopping any further dumping on the site; neither is it hard to order that the dumpsite should be closed forthwith, but then I have to ask myself, where is the garbage that is going to be generated today be disposed of? I am alive to the fact that garbage is generated on a daily basis. There is no other alternative site, and if this is closed, then there will be nowhere to dump waste. I would not want to make an already bad situation worse. I think it is the role of the courts, especially, the Environment and Land Court, to be a part of the solution and not part of the problem, in so far as tackling environmental challenges is concerned. Ordering the dumpsite to be closed forthwith will not be helping matters.”

In *Odando & Another (Suing on their own behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 Others; County Government of Nairobi & 5 Others (Interested Parties) (Constitutional Petition 43 of 2019)* [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment), Bor J. held as follows while ordering decommissioning of Dandora dumpsite:

“The ELC is mandated by Section 3 of EMCA to make orders, issue such writs, or give directions it may deem appropriate to prevent, stop, or discontinue any act deleterious to the environment. The court may also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible for the environmental degradation to restore the environment to the position it was in before the damage and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulates that a person bringing a suit regarding the entitlement to a clean and healthy environment does not need to show that the defendant’s act or omission caused him personal injury or loss. All the person needs to show is that his suit is not frivolous, vexatious, or an abuse of the court process. Contrary to what the AG contended, EMCA does not require a person who claims that their right to a clean and healthy environment has been violated to establish a prima facie case with probability of success and show the harm they stood to suffer if the orders were not granted.”

Whereas we are dealing with a Waste Collection Centre, the petitioner is of the view that it is being run as a dump site. It cannot be said that since it is a collection Centre the environmental rights to a clean and healthy environment of the petitioner and the neighbouring communities are not being infringed. Whereas a mandatory injunction cannot be issued at this stage, equity and environmental justice unique to environmental matters and its preservation demands that restoration orders will need to be put in place and re-emphasized in the manner as proposed by the 2nd respondent and reinforced by this Court as follows:



- a. Within one month hereof, the 2nd respondent is to file a comprehensive report detailing the mitigation and implementation measures so far undertaken by the 1st respondent in the rehabilitation of the Kanu Waste Collection Centre following the Restoration Orders issued by it on 15th March 2021.
 - b. The Report emphasizes if those Orders have been complied with and if not, whether the sanctions and measures outlined thereon have been implemented.
 - c. The current petition be canvassed by way of written submissions.
 - d. Costs in the cause.”
20. In the ruling, the Court had already found that the 1st Respondent infringed on the Petitioner’s rights to a clean and healthy environment. The 1st Respondent averred that the property held by the Petitioner was grabbed. It was meant for waste disposal. This was not substantiated. The neighborhood requires a clean and healthy environment even if it were grabbed.
21. The 2nd Respondent filed a compliance report arising from the ruling. In an affidavit by David Ngare, its Director of Environment Compliance, deposed on 2nd April 2024, he averred that the County Director of Environment, Lamu County, had inspected the waste management within the County. Some marked improvement in mitigation measures, particularly regular garbage collection from the disputed site, had been noted. However, other measures were not undertaken. For example, the relocation of the site had not been achieved. It was said to be on the 2024-2025 County fiscal year budget. No licence had been applied for waste transportation. This could not be explained as it did not have financial requirements. The new County Director of Environment required more time to fulfill most of the requirements imposed by the 2nd Respondent and this Court.
22. Having found that the Petitioner’s rights to a clean and healthy environment have been violated and following precedents from the ELC on the graduated nature of relocation of dumpsites, the petition will succeed, and the following final declaration and orders will be issued as follows:
- a. A declaration be and is hereby issued that the acts by the 1st Respondent are in contravention of Article 40, 42 43, 47 and 69 of *the Constitution*.
 - b. A declaration be and is hereby issued that the Petitioner’s right to a clean and healthy environment and those of the adjoining Parcel No. Lamu/Block I/1203 and the general area, as guaranteed by Article 42 of *the Constitution*, have been violated by the acts and or omissions of the 1st Respondent.
 - c. A mandatory injunction be and is hereby issued compelling the 1st Respondent to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance with the Sustainable Waste Management Act, 2022, and the Environmental Management and Coordination Act, 1999.
 - d. A continuing mandamus be and is hereby issued directing the 1st Respondent to comply with the above orders within 120 days from the date of this judgment. The 2nd Respondent is to file a Compliance Report with this Court after the lapse of the said 120 days or earlier if the orders are complied with before the stated timelines.
 - e. Each party is to bear its costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER 2024



E.K. MAKORI

JUDGE

In the presence of:

Mr. Otieno, for the Petitioner

Mr. Moibeni, for the Respondents

Court Clerk: Happy

