



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waweru v Director General, Nema & another (Environment and Land Appeal  
E038 of 2023) [2025] KEELC 3019 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3019 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E038 OF 2023**

**YM ANGIMA, J  
MARCH 27, 2025**

**BETWEEN**

**MONICA NZILANI WAWERU ..... APPELLANT**

**AND**

**DIRECTOR GENERAL, NEMA ..... 1<sup>ST</sup> RESPONDENT**

**ABDULAFIDH SHEIKH AHMED ZUBEDI ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal against the judgment of the National Environment Tribunal  
(NET) dated 29.07.2022 in Nairobi Tribunal NET Appeal No.74 of 2011)*

**JUDGMENT**

**A. Introduction**

1. This is an appeal by the Director General National Environment Management Authority against the judgment of the National Environment Tribunal (NET) dated 29.07.2022 in Nairobi Tribunal NET Appeal No.74 of 2011. By the said judgment the NET allowed the 1<sup>st</sup> respondent's appeal and awarded her costs of the appeal to be borne jointly by the appellant herein and the 2<sup>nd</sup> respondent.

**B. Background**

2. The material on record shows that the 1<sup>st</sup> respondent, who was the owner of Mombasa/Block/561, filed an appeal dated 04.04.2011 before the NET seeking the following reliefs against the appellant and the 2<sup>nd</sup> respondent;
  - a. That the 1<sup>st</sup> respondent be ordered to strictly enforce compliance with all the conditions of approval contained in the letter of approval and conditions of the EIA License dated 8<sup>th</sup> July 2010.



- b. The Respondent be ordered to demolish any structure that is erected or developed in contravention or the conditions of approval and conditions of the EIA License.
  - c. The 2<sup>nd</sup> Respondent be ordered to observe the setback line and any part of the project that does not adhere to the setback line to be demolished at the 2<sup>nd</sup> Respondent's cost.
  - d. An order to seal all windows and doors that open onto the Appellant's property and to remove all balconies that are overhanging Appellant's property; and
  - e. An order for costs and interest.
3. The 1<sup>st</sup> respondent contended that the 2<sup>nd</sup> respondent, who was the owner of Mombasa Block/ XI/1061, was undertaking construction thereon in breach of the terms and conditions of the Environmental Impact Assessment (EIA) licence for various reasons pleaded in the appeal. It was also contended that the appellant had failed to enforce compliance with the terms and conditions of approval to her detriment.

### **C. Decision by NET**

4. The record shows that upon a full hearing of the appeal the NET was largely satisfied that there was merit in the appeal. As a result, the following orders were made against the respondents in the appeal;
- a. The 2<sup>nd</sup> respondent is hereby ordered to repair the cracked boundary wall and demolish any structures that are offensive to the appellant's property within 45 days from the date of this judgment.
  - b. An order is hereby issued to have 1<sup>st</sup> respondent's Environmental Inspectors to visit and inspect the 2<sup>nd</sup> respondent's structure and appellant's property and file compliance report within 60 days from the date of the judgment.
  - c. A mention is hereby set on 30.9.2022 to confirm compliance.
  - d. Costs of this appeal to be borne by the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent.

### **D. Grounds of appeal**

5. It would appear that the appellant was aggrieved by the order on costs hence it filed a memorandum of appeal dated 11.05.2023 raising the following grounds;
- a. The Honourable Tribunal erred in law and fact by failing to acknowledge that the 1<sup>st</sup> Respondent is a public regulatory body dealing with matters relating to protecting the environment and implementing environmental policies in all Sectors within the country on behalf of the people of Kenya.
  - b. That the Honorable Tribunal erred in law and fact by failing to recognize that the subject suit touched on the public interest issues enforcing compliance with the conditions of the approvals and Environmental Impact Assessment license and is not a fit case for penalizing the Appellant in costs since courts do not award costs in public interest litigation.
  - c. That the Honorable Tribunal erred in law and fact by failing to take judicial notice that the Appellant is merely a regulatory body mandated with implementation of all policies relating to the environment.
  - d. That the Honorable Tribunal erred in law and fact by failing to note that the Appellant was dragged into the suit by the mere fact indicated in (3) above.



- e. That the Honorable Tribunal erred in law and fact by failing to acknowledge that in public interest litigation each party bears its costs regardless of the outcome of the suit.
  - f. That the Honorable Tribunal erred in law and fact by failing to take note that awarding costs against the Applicant on a matter of public interest related to environmental policies shall discourage patriotic, good-willed citizens and government agencies from litigating of such matters for general public good.
6. As a result, the appellant sought the following reliefs in the appeal;
- a. The ruling of the National Environment Tribunal delivered on 29<sup>th</sup> July 2022 be set aside as to costs awarded to the Respondent.
  - b. The cost of this appeal be borne by the 2<sup>ND</sup> Respondent.

#### **E. Directions on submissions**

7. It would appear that when the appeal was listed for directions it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the appellant filed submissions dated 25.10.2024 but none of the respondents filed submissions. The record shows that the 2<sup>nd</sup> respondent had informed the court on 20.10.2024 that he did not wish to participate in the appeal.

#### **F. Issues for determination**

8. Although the appellant listed 6 grounds in its memorandum of appeal, the court is of the opinion that all those grounds boil down into a single issue. The real issue is whether or not NET erred in law in directing both respondents before it to bear costs of the appeal.

#### **G. Applicable legal principles**

9. The court is aware that in making the impugned order on costs the NET was exercising judicial discretion. Such discretion ought to be exercised upon sound reasons and principles and not capriciously or on mere sympathy. It is well settled that an appellate court ought not to lightly interfere with the exercise of such discretion unless the case falls with some recognized exceptions.
10. For instance, in the case of *Mbogo and another vs Shah* [1968] EA 93 it was held, inter alia, that;

“.....i think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decisions is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

#### **H. Analysis and determination**

11. Section 129 (3) of the *Environmental Management and Co-ordination Act* states as follows on the award of costs;

“upon any appeal, the tribunal may make such order, including an order as to costs, as it may deem just.”



12. The court is in agreement with the appellant that an appellate court may interfere with the exercise of judicial discretion by a lower court or tribunal where an error of principle is manifest such as where the court took into account irrelevant factors or where it failed to take into account relevant factors, it was bound to consider. However, the error of principle must be clearly evident or capable of demonstration to the satisfaction of the appellate court.
13. The appellant took the view that it was merely a regulatory authority hence it ought not to have been condemned to pay costs. It also contended that the appeal before NET was in the nature of public interest litigation where courts and tribunals do not usually award costs against the losers.
14. The court is not aware of any general principle of law to the effect that public regulatory agencies ought not to pay costs in civil litigation. However, the court is aware of the general practice in Kenya to the effect that parties in public interest litigation should bear their own costs hence the loser should not be condemned to pay costs unless there are good reasons for doing so.
15. The material on record shows that the 1<sup>st</sup> respondent who had filed the appeal before the NET was a private citizen who was out to vindicate her property rights over Mombasa/Block/561. She was not doing so on behalf of the general public or the residents of her estate, zone or county. She was complaining about specific violations by the 2<sup>nd</sup> respondent against her property. The appellant herein was joined in the appeal as the regulatory agency which had failed to enforce the terms and conditions of the licence it had issued to the 2<sup>nd</sup> respondent. Such an appeal cannot constitute public interest litigation by any stretch of imagination.
16. The court is further of the view that the decision of the NET was well founded in the circumstances. The appellant had clearly failed to enforce the terms and conditions of the licence it had issued. The 1<sup>st</sup> respondent had written to the appellant seeking its intervention in view of the 2<sup>nd</sup> respondent's blatant violation of the conditions of approval of the construction.
17. The material on record further shows that the appellant herein had all along sided with the 2<sup>nd</sup> respondent in opposing the appeal before the NET. The court is of the opinion that the appellant was properly condemned to pay costs in view of its conduct in unreasonably opposing the appeal and seeking to obstruct the 1<sup>st</sup> respondent's access to justice before the NET. It is strange that at all material times the appellant was reluctant to take action as a regulatory authority in the face of the blatant and egregious violations by the 2<sup>nd</sup> respondent.

### **I. Conclusion and disposal orders**

18. The upshot of the foregoing is that the court finds absolutely no merit in the appellant's appeal. Accordingly, the appeal is hereby dismissed in its entirety. Since the appeal was not opposed by the respondents, there shall be no order as to costs.

It is so ordered.

**JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 27<sup>TH</sup> DAY OF MARCH 2025.**

.....

**Y. M. ANGIMA**

**JUDGE**

In the presence of:



Court assistant Gillian

No appearance for the appellants

No appearance for the respondents

