



**Salat & another v National Environmental Management Authority & another
(Tribunal Appeal 19 of 2023) [2024] KENET 520 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KENET 520 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 19 OF 2023**

**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR,
DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**

APRIL 26, 2024

BETWEEN

ABDIRAHIMAN MAOW SALAT 1ST APPELLANT

ABDI ALI MOHAMED 2ND APPELLANT

AND

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 1ST
RESPONDENT**

THE COUNTY GOVERNMENT OF WAJIR 2ND RESPONDENT

JUDGMENT

1. The Appellants moved the Tribunal by way of the Notice of Appeal and Statement on Grounds of Appeal both dated 5th August 2019.
2. The appeal is predicated on the grounds that the 1st Respondent through the County Director of Environment- Wajir County issued environmental restoration orders dated 7th June 2019 to the 2nd Respondent citing illegal waste management practices relating to the Wajir Waste Disposal Site situated in Alimaow Location, Wajir County.
3. Alongside other orders, the 2nd Respondent was directed to properly manage the waste disposal site, conduct a cleaning exercise on the site and further engage in discussions with the residents of Alimaow with a view of reaching an amicable solution to the dumping issue within 48 hours of receipt of the orders.
4. It is the Appellant's case that following non-compliance by the 2nd Respondent with the said orders, they proceeded to ask the 1st Respondent to issue fresh orders via the letter dated 10th June 2019. It is further urged that between 11th June 2019 and 12th June 2019, the representatives of Alimaow Location



including the Appellants and the 2nd Respondent held a series of meetings on the Waste Disposal Site issue which culminated in the execution of an Environmental Preservation and Rehabilitation Agreement on 13th June 2019 in which the 2nd Respondent agreed to begin preparations for relocation of Waste Disposal site.

5. The Appellants further state that on 15th July 2019, the 2nd Respondents proceeded to breach the said agreement by secretly awarding the tender to GAALS Agencies Limited. According to the Appellants this was a clear indication that the 2nd Respondent had no intention of relocating the Waste Disposal site or otherwise complying with the agreement.
6. It is the Appellant's case that through their advocates, they wrote several letters to the Respondents dated 10th June 2019, 23rd July 2019 and 30th July 2019 regarding the 2nd Respondent's failure to comply with the Improvement Notice, the Environmental Preservation and Rehabilitation Agreement and various environmental laws but received no responses from either of the Respondents.
7. The Appellants aver that by failing to respond to their complaints, the 1st Respondent is in breach of Article 47 of [*the Constitution*](#) which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
8. Lastly the Appellants states that the continued use of the Waste Disposal Site, including the dumping of human and medical waste has resulted in the loss of human and animal life and outbreak of diseases including Cholera and skin diseases and violates the Appellant's constitutional rights including the right to a clean and healthy environment as provided under Article 42 of [*the Constitution*](#).
9. In Summary, the Appellants argue that the 1st Respondent's failure to enforce its Improvement Notice and respond to the Appellant's complaints coupled with continued illegal use of the Waste Disposal Site by the 2nd Respondent:
 - i. Amounts to administrative action which is unlawful, unreasonable and unfair, contrary to Article 47(1) of [*the Constitution*](#) of Kenya.
 - ii. Deprives the Appellants and the residents of Alimaow of their right to a clean and healthy environment, in violation of Article 42 of [*the Constitution*](#).
 - iii. Has exposed the residents of Alimaow location to devastating environmental damage in violation of Article 69 of [*the Constitution*](#).
 - iv. Has exposed the residents of Alimaow to inhumane living conditions contrary to Article 28 of [*the Constitution*](#).
10. On account of the foregoing, the Appellants are seeking the following orders:
 - a. Spent
 - b. a prohibitory injunction restraining the 2nd Respondent by itself, its servants or agents or any other person acting for and on their behalf from dumping or transporting any waste including domestic, human and, medical wastes to the Waste Disposal Site located at Alimaow location, Wajir County,
 - c. A mandatory injunction compelling the 2nd Respondent to represent any information including reports or any other documents relating to any Environmental Audit conducted on the Waste Disposal Site located at Alimaow location, Wajir County,



- d. A mandatory injunction compelling the 2nd Respondent to remove all the waste domestic, human and chemical wastes dumped at the Waste Disposal Site located at Alimaow location, Wajir County and thereafter rehabilitate the site by planting trees.
 - e. a prohibitory injunction restraining the 2nd Respondent by itself, its servants or agents or any other person acting for and on their behalf from transporting any waste including domestic, human and, medical wastes using vehicles that do not have a waste transportation license issued by the 1st Respondent
 - f. a prohibitory injunction restraining the 2nd Respondent by itself, its servants or agents or any other person acting for and on their behalf from depositing building materials or erecting any structures with the intention of building a permanent wall around the Waste Diposal Site Site located at Alimaow location, Wajir County.
 - g. a prohibitory injunction restraining the 2nd Respondent by itself, its servants or agents or any other person acting for and on their behalf from further dunping of waste at the Waste Diposal Site Site located at Alimaow location, Wajir County.
 - h. A mandatory injunction compelling the 1st Respondent to wholly enforce the Improvement Notice dated 7th June 2019 issued by the County Director of Environment-Wajir County
 - i. Costs of the Appeal
 - j. Any other just and equitable remedy as this Honorable Tribunal may deem appropriate.
11. In response to the appeal, the 1st Respondent filed undated Grounds of opposition challenging the jurisdiction of the Honorable Tribunal to hear and determine this appeal on the grounds there is no decision of the 1st Respondent being challenged and that the Tribunal does not have jurisdiction in view of the provisions of Section 27 of the [National Construction Authority Act](#).
 12. Further to the Grounds of Opposition, the 1st Respondent also filled its 'Reply and Statement'. The same is undated and not signed. In a nutshell, the 1st Respondent states that it has enforced its improvement notice and responded to the complaints of the persons affected promptly and fairly.
 13. Despite being granted several chances, the 2nd Respondent did not file any response to the appeal.
 14. The appeal was canvassed by way of oral hearing. The Appellants called the 1st Appellants as their only witness. The witness adopted his supporting affidavit and further affidavit and the affidavits of the Appellants' other five witness as the Appellants' evidence. The Tribunal notes that there was no objection from the Respondents.
 15. The Respondents did not call any witnesses. At this juncture it would be paramount to point out the effect of the Respondents' failure to call any witnesses. It is trite law that if no evidence is tendered to support an averment in a pleading, such averment stands as such, a mere statement. Further, if there is no rebuttal of evidence by a party, the evidence presented remains uncontroverted. This was the finding of Chepkwony J. in the case of Kenya Power & Lighting Co Ltd v Rassul Nzembe Mwadzaya [2020] eKLR, where the Learned Judge stated as follows:



‘Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of *Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schuler*, Civil Appeal No.23 of 1997, where the Court of Appeal stated: -

“ In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the [Evidence Act](#) are clear that he who asserts or pleads must support the same by way of evidence”.

16. Further, the Court of Appeal in the case of *John Wainaina Kagwe..Vs..Hussein Dairy Ltd* [2013] eKLR was of the same opinion. The Appellate Court held as follows:

‘The Respondent never called any witness (es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent’s defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”

17. In view of the foregoing and in light of the fact that the Respondents did not adduce any evidence to support the averments in their pleadings, it follows that the Appellant’s evidence is uncontroverted.
18. The Tribunal also notes that in their submissions the Appellants and the 2nd Respondent have submitted on whether the Tribunal has jurisdiction to hear and determine this appeal. We have perused the court record, and we note that the issue of jurisdiction was settled by the ruling of the Tribunal dated 28th April 2022. Vide the said ruling, the Tribunal held that it has jurisdiction to hear and determine this appeal and dismissed the 2nd Respondent’s Notice of Preliminary Objection.
19. To the best of our knowledge, the said ruling has never been set aside through either review, appeal or any other lawful means. We will therefore not consider the issue of jurisdiction as the same would amount to the Tribunal sitting on appeal of its own decision.

ANALYSIS AND DETERMINATION

20. The Tribunal has carefully considered the appeal, the grounds in support thereof, the Appellant’s evidence, the 1st Respondents’ reply (though not supported by any evidence), the parties’ respective submissions and distilled the following as the issues for determination:

- i. Whether the Appellants have the requisite locus standi to institute this appeal
- ii. Whether the current state and management of the Wajir Waste Disposal Site at Alimaow location violates the Appellant’s right to a clean and healthy environment.
- iii. Whether the Tribunal should order for the relocation of the dumpsite



Whether the Appellants have the requisite locus standi to institute this appeal

21. In its submissions, the 2nd Respondent submit that the Appellants do not have the requisite locus standi to move the Tribunal as they are not residents of Alimaow location. The issue of locus standi was not raised by the Respondents in their pleadings and therefore, the same is new issue being raised in the submissions.
22. It is well established that new issues cannot be raised in submissions and any issues so raised, are best ignored. We associate ourselves with the holding of the High Court in the case of *In re Estate of Godfrey Alati Olukoye (Deceased)* [2022] eKLR, where the Learned Judge held as follows:
- ‘...This is a new issue raised in submissions and is not supported by evidence. It is well established that new issues cannot be raised in submissions and any issues so raised, are best ignored. This was well articulated by Korir, J. in *Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another* [2014] eKLR where he stated:
- The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.’
23. It is therefore our finding that the claim that the Appellants do not have the requisite locus standi is new issue which has been raised in the submissions. Accordingly, we hereby ignore the same.
24. Without prejudice to our above finding, we note that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. The High Court in the case of *Law Society of Kenya Vs Commissioner of Lands* held that Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law.
25. The Tribunal notes that the Appellants in their pleadings and testimony state that they are residents of Alimaow location and their right to clean and healthy environment has been affected by the 2nd Respondent’s actions of dumping waste at the Waste Disposal Site in the said without following proper waste management practices.
26. As stated above, the Appellants’ evidence is uncontroverted, and therefore, their claim that they are residents of Alimaow location has not been rebutted. Article 70(1) of [the Constitution](#) of Kenya grants any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment. Accordingly, we hold the view that the Appellants have the requisite locus standi to file this appeal. Our finding is in line with the holding of the Court in the case of *Joseph Leboo & 2 others vs. Director Kenya Forest Services & another* [2013] eKLR, where it was held as follows:

‘A reading of Articles 42 and 70 of [the Constitution](#), above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

This position was in fact the applicable position, and still is the position, under the Environmental Coordination and Management Act (EMCA), 1999, which preceded [the Constitution](#) of Kenya, 2010.... It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the locus standi rule, both under [the Constitution](#) and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at



protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no locus standi in this suit.’

Whether the current state and management of the Wajir Waste Disposal Site at Alimaow location violates the Appellants’ right to a clean and healthy environment.

27. It is the Appellant’s case that the current state and management of the Wajir Waste Disposal Site at Alimaow location violates their right to a clean and healthy environment. They allege that the Site has gradually been expanded beyond the designated area to the point where it has now encroached into a settlement area inhabited by hundreds of Alimaow residents. They further allege that the continued use of the Waste Disposal Site has resulted in the loss of human life, death of livestock and outbreak of diseases including cholera and a number of skin infections.
28. The Environmental Impact Assessment Report annexed to the Appellants’ further affidavit dated 19th April 2023 concludes that the proponents of the waste dumpsite did not follow the due procedure for acquiring the land and use as a dumpsite. The report further states that a number of laws and regulations have grossly been violated in the management and operations of the waste dumpsite putting the community at the risk of contracting diseases. The report recommends that the site be relocated since Wajir area has expansive uninhabited and undeveloped land that can serve as an alternative site.
29. The right to a clean and healthy environment is bestowed on every person and has been considered by the courts and eminent authors to be essential for the existence of mankind. In *Adrian Kamotho Njenga vs. Council of Governors & 3 others* [2020] eKLR, it was held that:

‘Article 42 of [the Constitution](#) guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.”
30. From the evidence on record, it is clear that the 2nd Respondent has been polluting the environment by failing to observe the provisions of EMCA in waste disposal. The effects of poor waste management on the environment are dire and can obviously cause harm to human beings, animals and the environment generally. It is therefore our finding that the current state and management of the waste Disposal site violates the Appellant’s right to a clean and a healthy environment contrary to Article 42 of [the Constitution](#). Further, Section 87(1) of EMCA provides that no person shall discharge or dispose of any wastes, whether generated within or outside Kenya, in such manner as to cause pollution to the



environment or ill health to any person. Therefore, the 2nd Respondent is also in violation of this provision.

Whether the Tribunal should order for the relocation of the dumpsite

31. Having found that the current state and management of the Waste Disposal Site violates the Appellants' right to a clean and healthy environment and other the provisions of EMCA, what are the appropriate orders to issue?
32. We note that vide its ruling dated 15th September 2020, the Tribunal issued the following orders:
 - a. The 2nd Respondent does comply with the Improvement Notice dated 7th June 2019 within the next 30 days.
 - b. The 1st Respondent to ensure that the 2nd Respondent does comply fully with the improvement Notice dated 7th June 2019 as well as the Environmental Management and Co-ordination (Waste Management) Regulations, 2006
 - c. All parties to obtain the relevant maps from the responsible government agencies identifying the exact acreage of the Alimaow Waste Disposal Site
 - d. Failure to comply with orders (a) and (b) above within 30 days of today, the Waste Disposal Site shall stand closed.
 - e. The 1st Respondent shall enforce order(d) and ensure full compliance.
 - f. Each party shall meet its own costs.
33. From the Appellant's further affidavit, it is clear that the above orders have not been complied with. According to the averments in the said affidavit, the situation has worsened since issuance of the above orders.
34. Article 70 of [the Constitution](#) provides as follows;
Enforcement of environmental rights

1. If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
 - (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
 - (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.



35. Whereas the above provision refers to Courts, we note that under Article 169 of *the Constitution* tribunals are classified as Court. We therefore find that, under Article 70(2)(a) of *the Constitution* we are empowered to prevent, stop or discontinue any act or omission that is harmful to the environment. Further, Section 129(3) (b) & (c) of EMCA empower the Tribunal to exercise any of the powers which could have been exercised by the 1st Respondent and to make such orders as are necessary to enhance the principles of sustainable development.
36. In view of the foregoing, we hold that in exercising our powers under Article 70(2)(a) of *the Constitution* and Section 129(3) (b) & (c) of EMCA we should order for the relocation of the Waste Disposal Site.

FINAL DISPOSITION

37. Deriving from the foregoing findings, the conclusion becomes irresistible that the Appellants' appeal is merited. Accordingly, we hereby allow the same in the following terms:
- a. An order is hereby issued directing the 2nd Respondent to close the Waste Disposal Site located at Alimaow location, Wajir County and relocate the same to an alternative site away from human settlement within 120 days.
 - b. An order is hereby issued directing the 2nd Respondent to remove all the waste domestic, human and chemical wastes dumped at the Waste Disposal Site located at Alimaow location, Wajir County and thereafter rehabilitate the site by planting trees.
 - c. The 1st Respondent is ordered to ensure compliance with orders (a) and (b) above.
 - d. The Appellants shall have the costs of this appeal to be borne by the Respondents.

DATED AND DELIVERED AT NAIROBI, THIS 26th DAY OF APRIL 2024

EMMANUEL MUMIA.....CHAIRMAN

WINNIE TSUMA.....VICE-CHAIR

DUNCAN KURIA.....MEMBER

RONALD ALLAMANO.....MEMBER

Page 8 of 8

