



THE SUPREME COURT OF KENYA

**EXPORT PROCESSING ZONE AUTHORITY & 11 OTHERS VS. NATIONAL
ENVIRONMENT MANAGEMENT AUTHORITY & 6 OTHERS**

**SC PETITION NO. E019 OF 2023 (AS CONSOLIDATED WITH PETITION E021 OF
2023)**

DATE OF JUDGMENT: 6TH DECEMBER 2024

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: The Court Allows the appeal in this matter.

Background

The 2nd to 11th appellants are residents of Owino-Uhuru Village within Changamwe Division, Mikindani Area of Mombasa County. They claim that they have been living in the densely populated village situate on Plot No. 148/V/MN in Mikindani which measures about 13.5 acres of land and that in the year 2006 Penguin Paper and Book Company Limited leased a neighbouring plot to Metal Refinery (EPZ) Limited (hereinafter Metal Refinery) which set up a lead acid battery recycling factory.

The lead acid recycling activity produced toxic waste which seeped into the village causing the area residents various illness and ailments as a direct consequence of lead poisoning with more than 20 deaths attributed to it. Upon seeing the adverse effects of the existence of the factory, the 2nd – 11th Appellants campaigned for its permanent closure and urged the concerned authorities to investigate the environmental degradation caused as well as the negative impacts suffered.

This led to several intermittent closures and re-openings of the factory until it permanently closed in 2014. Even so, they posited that the responsible State agencies licensed and sanctioned the activities of Metal Refinery contrary to their mandate, thus violating their constitutional rights.

The Environment & Land Court (ELC) found the 1st appellant and the respondents liable and apportioned liability as the ratio: EPZA, Cabinet Secretary (CS), Ministry of Environment Water and Natural Resources and CS, Ministry of Health - 10% each; NEMA - 40%; the Metal Refinery (EPZ) Limited - 25%; and Penguin Paper and Book Company Ltd - 5%.

The trial court accordingly issued a declaration that the 2nd - 11th appellants' rights to a clean and healthy environment; rights to the highest attainable standard of health and right to clean and safe water; and rights to life were violated by the actions and omissions of the 1st appellant and the respondents.

An award of Kshs. 1.3 Billion to the 2nd – 11th appellants was thus made for personal injury and loss of life payable within ninety (90) days from the date of judgment by the 1st appellant and the respondents in accordance with the apportionment of liability set out above.

The court also directed the 1st appellant and the respondents to clean up the soil, water and to remove any waste deposited within Owino-Uhuru village by the 6th Respondent within four (4) months of the judgment, in default the sum of Kshs. 700 Million would be due and payable by them to the 11th appellant to coordinate the soil and environmental clean-up exercise.

An order of *mandamus* was in addition issued against the 2nd, 3rd, and 4th respondents directing them to develop and implement regulations to be adopted from best practices with regard to lead and lead alloys manufacturing plants; costs of the petition was equally granted to the 2nd – 11th appellants.

Dissatisfied by this outcome, EPZA and NEMA moved the Court of Appeal by filing two separate appeals that were subsequently consolidated. The Court of Appeal first addressed a preliminary issue regarding the trial court's jurisdiction and found that Section 129 (3) of EMCA cannot be used to arrogate the National Environment Tribunal (NET) specific powers given to the courts under the Constitution. That Section 13 (3) of the ELC Act in this respect specifically grants the ELC jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat of violation of the fundamental freedom relating to a clean and healthy environment under Articles 42, 69, and 70 of the Constitution.

To the substantive issues the Court of Appeal, having analysed the evidence afresh, found that NEMA bore a greater responsibility because once evidence of the adverse effects of the project by Metal Refinery on the environment became apparent it ought to have applied a wide range of enforcement mechanisms at its disposal.

The appellate court also proceeded to revise and review the trial court's allocation and apportionment of liability and determined the same as follows: NEMA at 30%; EPZA at 10%; the CS Ministry of Environment Water and Natural Resources and CS Ministry of Health at 5% each; Metal Refinery (EPZ) Limited at 40%; and Penguin Paper and Book Company Limited at 10%.

On the issue of quantum, the appellate court highlighted that the decisions relied on by the trial court were not relatable to the case at hand; and that the award of Kshs. 1.3 Billion as compensation for the 2nd – 11th appellants and persons claiming through them was erroneous as the specific persons to benefit save the said appellants were not identified.

As far as the award of restoration was concerned, the appellate judges found that the award of Kshs. 700 Million to the 11th appellant had not been specifically pleaded or proved; given that restoration of contaminated land is a very technical exercise, the 2nd - 11th appellant had not demonstrated scientific methodologies and techniques to be applied to justify the order and award; and that the legal and institutional framework for restoration of contaminated land resides in NEMA under EMCA.

The appellate court for these reasons decided to set aside the award of compensation and referred the matter for rehearing before a Judge at the ELC at Mombasa other than *A. Omollo J*, including the taking of additional evidence limited to the said issue and assessment of damages payable to the 2nd - 11th appellants.

The court further directed NEMA, within 12 months from the date of the judgment, and in consultation with all the relevant agencies and private actors and in the appropriate exercise of its functions and powers to:

- (a) *identify the extent of contamination and pollution caused by the operations of the Metal Refinery at the Owino- Uhuru Settlement;*
- (b) *remove any contamination and pollution in the affected areas of Owino-Uhuru Settlement;*
- (c) *restore the environment of Owino-Uhuru Settlement and its eco-system;*
- (d) *periodically report every 3 months to the ELC at Mombasa on the progress made in this regard, and for any consequent directions, until the satisfactory completion of the restoration.*

Aggrieved by the aforementioned judgment, the appellants filed an appeal to the Supreme Court under Article 163 (4) (a) of the Constitution. In that appeal the Court framed the following issues for determination:

- a. *Whether the Court of Appeal misinterpreted and misapplied the provisions of Article 69 of the Constitution as read with Article 70 (2) of the Constitution.*
- b. *Whether the Court of Appeal erred in its assessment of liability.*
- c. *Whether the Court of Appeal erred in its interpretation of Article 23 of the Constitution specifically the available remedies once a Court has determined that there were violations of rights.*
- d. *Whether the Court of Appeal erred in reversing the ELC Court's award on damages.*
- e. *Whether the Court of Appeal erred in remitting the matter back to the ELC for re-assessment of the award of damages.*
- f. *Whether the appellants are entitled to the reliefs sought.*
- g. *Who shall bear the costs of the Appeal?*

Upon consideration, the Supreme Court determined the appeal as follows:

Issue 1: The Court held that the infringement in this case was not static but a continuous violation and that the provisions of the Constitution were therefore applicable to the circumstances of the case.

The Constitution and the law therefore directly impose an obligation on all State organs to ensure the protection of the environment. Section 23 (c) of the EPZ Act imposes a specific and clear obligation to EPZA in ensuring there is protection to the environment.

The Court has dismissed EPZA's argument that it is only the 1st, 2nd and 3rd respondents who are obligated to ensure sustainable management and conservation of the environment. The court also determined that ELC Court & the Court of Appeal had correctly applied the provisions of the EPZ Act.

Issue 2: The Court has considered the rival arguments of the 1st appellant and the respondents on liability as well as mitigation of loss and arrived at a finding that there is no justifiable reason to disturb the Court of Appeal's finding on liability.

Issue 3: The Court has found that, under the provisions of Article 70 (3) of the Constitution, an applicant does not have to demonstrate that he/she has incurred loss or suffered injury. Even in the absence of clear evidence to quantify the damage caused by the breach, courts may still award remedies based on the principle that the violation of constitutional rights itself warrants redress.

These remedies can include a declaratory relief, nominal damages, or compensatory damages assessed on a more general basis, particularly in cases where the nature of the harm is difficult to quantify precisely. This ensures that the breach does not go unaddressed, upholding the integrity of the constitutional rights framework and providing some measure of justice to the aggrieved party.

The Court also found that there was clear evidence for the trial court to make a finding on compensation. The Court of Appeal however erred in its interpretation of Article 23 of the Constitution specifically the available remedies once a court has determined that there were violations of rights.

Issue 4: The Court found that the 11th appellant's petition was in line with the provisions of Article 22 (2) (b) of the Constitution and that the 11th appellant was well within its right to bring the suit on behalf of the residents of Owino-Uhuru Village.

FURTHERMORE;

On award of Damages for loss of life and personal injury, the Court found that, while reliefs cannot be granted "at large," the persons represented by the 11th appellant were residents of Owino-Uhuru Village consisting of a class of 3000 persons clustered in 450 households within 13.5 acres. The persons were therefore identifiable.

The Court also found that, in this case the harm was in the soil, air, water and the same also affected the health of humans. There was also a direct effect as shown from the medical reports and the effects on humans and the environment was therefore not a one-off event but a continuous violation that persisted for more than seven years when Metal Refinery was operating and subsequently thereafter.

The ELC also arrived at the correct amount in terms of compensation for personal injury and loss of life; and the amount was neither excessive nor did the court consider an irrelevant factor.

For avoidance of doubt the court affirmed that the sum of Kshs. 1.3 billion awarded by the trial court on account of general damages for loss of life and personal injury and held that the amount is not only for the benefit of the 2nd to 11th appellants but for the 450 households and residents of Owino Uhuru Village which encompasses an approximate 13.5 acres.

On Restorative Damages, the Court found that the claim for restorative orders was specifically pleaded and the various reports filed in court presented step to step measures of what ought to be done to restore the contaminated land.

The court also found that the duty to protect the environment is not the sole preserve of the State; if there is failure on their part, individuals and other legal persons would share liability.

The court therefore found that the Court of Appeal erred in dismissing the restorative orders issued by the ELC and the award of Kshs. 700 million in default.

The court was however alive to the fact that considerable time had passed since the orders of the ELC were issued and within that frame time, the 1st appellant and the respondents may have taken restorative measures which ought to have been accounted for before the default clause comes into place.

In the circumstances, the court found it fit to direct the respondents to file at the ELC in Mombasa, their respective reports, within three (3) months of this decision, on the various restorative measures they have undertaken in line with the judgement of the ELC and the directions issued by the Court of Appeal or on their own initiative.

The default clause should thereafter take effect if no restorative measures have been undertaken by the 1st appellant and the respondents and the ELC court would ascertain whether there is need for further directions to restore the damage caused based on the reports filed.

Issue 5: The Court of Appeal has jurisdiction to order a re-trial. The Court of Appeal in issuing the orders remitting the matter back to the ELC was therefore acting within its discretion and the court saw no reason to interfere with that discretion.

Issue 6: The 2nd -11th appellants are the successful parties in these proceedings and the court found no difficulty in affirming the decision of the ELC, save for the directions issued in relation to the orders of restoration of the contaminated land.

The court also directed the 1st, 2nd and 3rd respondents to implement the recommendations made in *The Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal; The Bamako convention on the Ban of the Importation into Africa and the Control of Transboundary Movement and Management of Hazardous* and the technical guidelines in the Bamako Convention including but not limited to *The Basel Convention Technical Guidelines on the Environmentally Sound Management of Waste lead*.

Following the above findings and holdings, the court made the following consequential Orders:

- i. ***The 1st appellant's appeal dated 1st August 2023 and filed on 24th August 2023 was dismissed.***
 - ii. ***The 1st respondent's cross-appeal dated 17th April 2024 and filed on 17th April 2023 was dismissed.***
 - iii. ***The 2nd -11th appellants' Petition of Appeal dated 5th August 2023 and filed on 7th August 2023 was allowed only to the extent of the court finding that the Court of Appeal's determination on the award of damages for loss of life and personal injury was reversed with an order affirming the ELC's findings.***
 - iv. ***The matter has been remitted back to the ELC in Mombasa to deal with the question of compliance with the restoration orders by the 1st appellant and the respondents herein and in line with the court's determination above.***
 - v. ***Parties shall bear their respective costs before the ELC, Court of Appeal and the Supreme Court.***
 - vi. ***The court directed that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of the appeal be refunded to the appellants.***
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