Gichu v Obuya Otieno Ritzau t/a Bamburi Community High School & 3 others (Civil Suit 23 of 2017) [2023] KEELC 19222 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19222 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 23 OF 2017

LL NAIKUNI, J

JULY 27, 2023

BETWEEN

JOSEPH MUREITHI GICHU ..... PLAINTIFF

AND

OBUYA OTIENO RITZAU T/A BAMBURI COMMUNITY HIGH SCHOOL ..... 1ST DEFENDANT

ERIC OTAMBO ..... 2ND DEFENDANT

COUNTY GOVERNMENT OF MOMBASA ..... 3RD DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 4TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this honourable court pertains to a suit which is on typical environmental management, protection, impact asessment and/or degradation related issues instituted by Joseph Mureithi Gichu the Plaintiff herein. The case was brought through a Plaint dated January 30, 2017 and filed on February 2, 2017. It was against the 1st, 2nd, 3rd and 4th defendants herein. Fundamentally, the Plaintiff moved court by filing a Notice of Motion application dated the same date seeking injunctive orders against the 1st and 2nd defendants in respect to Plot. No. 9901/3/Section II MN Mtopanga, (Hereinafter refrred to as "the Suit property").

2. Upon service of the pleadings and summons to enter appearance the defendants entered appearance and filed their respective statements of Defence with the 2nd defendant filing their notice of appointment of advocate on February 20, 2017 and proceeding to file the statement of Defence of

March 31, 2017 and the 4th defendant in response filed a statement of defence dated July 4, 2018 and list of documents both filed on July 6, 2018.

3. Upon all parties having fully complied on the Provisions of Order 11 of the *Civil Procedure Rules* 2010 on the pre-trial conference, it was fixed for full trial. The matter proceeded on for hearing by way of viva vove evidence with the Plaintiff's witnesses PW - 1 and PW 2 testifying in court on February 16, 2021. On September 21, 2022, the 2nd defendant testified as DW - 1. The 1st, 3rd and 4th defendants did not call any witnesses and opted to close their case.

II. The Plaintiff's case

4. Based on the filed pleadings, the Plaintiff claimed that at all material times to this suit the Plaintiff was the registered owner of Plot no.9901/3/ Section II MN Mtopanga, Bamburi and all its developments thereon and thus entitled to quiet possession and peaceful enjoyment thereof, as the area is essentially a residential place. The 2nd defendant had at all material times to this suit been the registered owner of Plot no. 9905/ Section II/MN while the 1st defendant ran a school and allows several churches to conduct their services during the day and overnight in the said school during weekend on a storied building on the above-mentioned plot. The 3rd defendant was mandated to authorize and approve all building plans with in the County of Mombasa and while knowing that the storied building on of Plot no. 9905/ Section II/MN was not approved had taken no action thereby putting the Plaintiff on harm's way. Also, the 3rd defendant was charged with the power of licensing of the operation of churches and schools in given areas and the control and management of noise pollution and waste disposal. It also demarcated residential areas from business areas.

5. The 4th defendant under the provision of Section 9 of the Environmental Management & Coordination Act of Parliament No. 8 of 1999. (Hereinafter referred to as "EMCA, 1999") that establishes and charged with inter alia the relating to the environment and to be the principle agent of government in the procedures and safeguards for the prevention of anything which may cause environment degradation. In exercise of their functions the 3rd and 4th defendants have the statutory duty of checking on noise pollution and disposal of waste and its management. The Plaintiff herein had a right to clean and healthy environment as provided for under the provision of Article 42 of *the Constitution* of Kenya, 2010 and Section 3 of the EMCA, 1999 while the 3rd and 4th defendants have the statutory duty to ensure those rights are actualized.

6. In total disregard to the Plaintiff's aforesaid rights and the 3rd and 4th defendants obligations, the 1st and 2nd defendants themselves, their agents and servants, proxies and or tenants were throwing and or disposing waste and or garbage onto the Plaintiffs Plot no. 9901/3/ Section II MN Mtopanga, Bamburi. In so doing, they were exposing the Plaintiff to unhygienic and hazardous environment. The defendants' actions were causing a nuisance to the Plaintiff and violated his rights to a clean and healthy environment as provided for under the provision of Article 42 of *the constitution* and the right to a reasonable and quiet occupation of his property as envisaged under the provision of Article 40 of *the Constitution* of Kenya, 2010.

7. The Plaintiff relied on the following particulars of breach by the defendants:

    a. Caused or permitted the Plaintiffs plot to be littered and the environment dirtied and made unhealthy.

    b. Failed to ensure that its dirt and liter was properly disposed or put away.

    c. Failed to move the dirt and liter and ensure it was not standing on the Plaintiff's plot.

d. Failed to heed the Plaintiff's warning and demands that the liter be removed and be disposed of in an environmentally friendly, healthy and civilized way.

e. Acting in absolute breach and disregard of the laws on littering waste disposal and degradation of the environment.

f. Being a nuisance to the Plaintiff enjoyment of his proprietary rights.

8. As a result of the nuisance and negligence the Plaintiff suffered injury, loss and damage and continues to do so. The 1st and 2nd defendants were also accommodating four (4) different churches on instruments which were played all night and all day on Saturday and Sunday. The defendants' actions had caused excessive noise and vibration as to affect the Plaintiff quiet occupation and enjoyment of his premises under Article 40 of *the Constitution* of Kenya. As a result the Plaintiff quiet occupation and enjoyment of his premises had been and or nuisance of the defendants and or their servants or agents as hereinafter set out;-

a. Caused or permitted such noise and vibration to arise from their said premises and failed to take any sufficient precaution against causing such noise.

b. Failed to adopt means of teaching and worship which avoided causing noise and vibration.

c. Failed and refused to confine their actions to hours other than night hours although requested to do so by the Plaintiffs.

d. Failed to pay any sufficient heed to the complaints of the Plaintiff's about such noise and vibration.

e. Failing to install sound muffing and to move their environmentally unfriendly activities to other premises that are not residential.

9. The Plaintiff further stated that the storied building standing on the 2nd defendant's property has been constructed such that its security gate blocks the public access (path) road which is (adjacent) to the Plaintiff's property and the 2nd defendant's property. The said blockage was occasioned by the 1st defendant with the permission of the 2nd and 3rd defendant. The Particulars of the nuisance of obstruction/ access blockage were as follows:

a. Erecting a gate that blocks the plaintiff free exit and entry into his house.

b. Failing to remove the gate despite being asked to do so.

c. Erecting a gate beyond the parameters of their plot.

d. Failing to move the said gate and failing to ensure it was not standing on the plaintiff's access.

e. Violating the plaintiff's right to property as enshrined under the provision of Article 40 of *the Constitution* of Kenya.

10. The Plaintiff stated that closure of the aforesaid access (path) road denies the plaintiff's access to his property and prays for his removal. The 1st and 2nd defendants intent unless restrained by this court to continued to commit such nuisances and the 3rd and 4th defendants intend unless compelled to continue acting in complete breach of their statutory duty and responsibilities. The Plaintiff had made several pleas to the 3rd and 4th defendants to compel the 1st and 2nd defendants comply with the law pursuant to their constitutional and statutory mandate but that bore no fruits, as the defendants had not shown any Interest in performing their statutory obligations.

11. Due to the Acts of commission and or omissions of the defendants herein the hazards, lack of quiet possession and peaceful enjoyment of his property. The area which is supposed to be residential was now inhospitable due to waste and littering which degrades the environment and excessive noise. Despite several notices and promises to stop the illegal actions the defendants had refused and or neglected to take action necessitating this suit.

12. The Plaintiff prayed for judgment against the 1st, 2nd, 3rd & 4th defendants jointly and severally for:-

    a. A declaration that Plaintiff is entitled to peaceful enjoyment and quiet possession of his property subdivision Plot No.9901/3/ Section II MN Mtopanga, Bamburi and the defendants herein have through their acts of commission and omission infringed on the plaintiff's right to a clean and healthy environment as enshrined in Article 42 of *the Constitution* of Kenya and the right to property under Article 40 of the Kenyan constitution.

    b. A Permanent injunction preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from throwing and or disposing waste on subdivision Plot No.9901/3/ Section II MN Mtopanga, Bamburi.

    c. A Permanent injunction preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from continuing with acts and omissions in the suit property that constitute noise pollution within the meaning of the Environmental Management and Co - ordination Act No. 8 of 1999.

    d. A mandatory injunction that the 1st and 2nd defendants and or their agents, servants, tenants and or proxies do forthwith pull down and remove the gate so much as is erected beyond their plot boundaries and in obstruction of the plaintiff's access to his Plot No.9901/3/ Section II MN Mtopanga, Bamburi and a restraining injunction restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from erecting or continuing to erect upon the said Plaintiff's access road and or beyond their boundary line.

    e. A mandatory injunction compelling the 3rd and 4th defendant to ensure discharge of their duties by taking measures to prevent and discontinue any acts of the 1st and 2nd defendants, their agents, servants, employees and or agents that are stopping the unlawful management and disposal of waste and litter and the noise enjoyment of his property Plot No.9901/3/ Section II MN Mtopanga, Bamburi.

    f. The Plaintiff prays for damages for nuisance, breach of his constitutional right to a clean and healthy environment and to a quiet and peaceful enjoyment of his property.

    g. Cost of the suit and Interest.

    h. Any other relief that the court may deem fit.

13. On 16th February, 2021, the hearing for the Plaintiff commenced whereby he summoned two witnesses – the PW 1 and PW 2. They testified as follows:-

A. Examination is Chief of PW – 1 by Mr. Jengo Advocate

14. PW 1 was sworn and he testified that he was the Plaintiff in this case. He stayed in Mtopanga and was a retired Civil servant. He sued the 1st defendant because he was operating a school without a change of user to school use. They were neighbors his Plot No. 9903/MN and the school was in the neighboring plot. The school is run by the 1st defendant while the 2nd defendant was the owner of the Plot where the school is. The 2nd defendant had rented to a school with no change of user. The 3rd defendant was supposed to regulate the use of the plots under the Physical Planning Act. NEMA, the 4th defendant was supposed to regulate environmental matters, including littering and noise. The County Government also ensures there is no littering within the area.

15. He told the court that he recorded a witness statement found at page 45 of his bundle of documents. His complaint was that the defendants were making it uncomfortable for him to live in his property the way he should. In the year 2007 when the school started, they started littering into his compound. He contacted the owners of the school to rectify the situation but they did not comply. By a letter to the County Government, he requested the County Government to take action on the littering issue, by then it was the Mombasa Municipal Council in governance. The Council notified the school to stop but they did not stop the littering.

16. He informed the court that he wrote another letter to the Public Complaint Committee (Ombudsman) who wrote to the Municipal Council to explain to them what was happening. After a number of months, in November 2009 the Town Clerk of the Council wrote to the Ombudsman accepting that my complaint was genuine and the Town Clerk in the same letter also confirmed that the building built on plot 9905, the property of 2nd defendant was illegally built and there was no change of user from residential to school usage, which is commercial.

17. In the year 2008, the school started operating churches on weekends. The town clerk had informed the Ombudsman that they would take action on the building, but to date the school was still standing. His testimony was that he wrote to the 4th defendant because of the noise for it to take action. Unfortunately, nothing happened.

18. He told the court that all he wanted was to live in a place without noise being that it was a residential area. There should be a change of user. His other complaint was that the school mounted a gate at the entrance of their plots, denying them access to their plots. He made requests to the County Government to remove the said gate but the County Government promised him they would but they never did so. He filed all the letters and documents found at page 96 of his bundle are list of documents from 1 to 16 which he produced as Plaintiff Exhibits 1 to 16 respectively. He also filed a supplementary list dated 4th May, 2018 and filed on 7th May, 2018 with sets of photographs which he produced as Plaintiff Exhibit 17.

19. His testimony was that after he filed the case, he got interim orders which stopped the 1st and 2nd defendants from littering his property. They did not stop hence he filed an application for contempt and the 1st defendant was found in contempt and sentenced to a fine.

20. He prayed to be granted the orders in the Plaint plus cost. He told the court that Sylvester Oduor was his neighbor and was also affected by the littering.

Cross examination of PW - 1 by Ms. Naliaka Advocate

21. He confirmed that he was the 2nd defendant's neighbor. The building owned by the 2nd defendant was constructed from year 2006. It was constructed but not complete. He leased it to the school. Although

he had no knowledge if the 2nd defendant was in possession but knew that the 2nd defendant was the owner of the plot. He confirmed that the 1st defendant ran a school. There had been a contempt proceedings against 1st and 2nd defendants, but the 2nd defendant was not found culpable or in breach.

22. He told the court that the prayers he sought were in page 41 of his bundle of documents from (a) to (h). In his evidence in chief, he stated that it was the 1st defendant who was throwing waste on his plot, but not the 2nd defendant. Currently, the 1st defendant had moved out. After the 1st defendant left, the 2nd defendant was plastering and throwing dirt on his plot. Currently the premises were not occupied.

23. At page 62 was a letter from City Council of Mombasa to the Public Complaints Standing Committee. The 2nd defendant constructed a building illegally. The building is on the 2nd defendants property. He was not aware if the 2nd defendant was aware that there were investigations going on. There was a gate built by the 1st defendant. Page 12 of his bundle, the access road was where the gate is put up. This is a public road. At page 71 of the bundle, his property was Plot No. 9901 and 9903. The 2nd defendant's was Plot No. 9905. The gate was on the edge of the property owned by the 2nd defendant.

Cross examination of PW - 1 by Mr. Kinyua for the 3rd defendant

24. He testified that he delivered the letter at page 53. The letter never had an official stamp by the 3rd defendant. He could see the letter at page 65 by Mr. Njoroge Mwangi and Co. Advocates. There was no stamp acknowledging receipt of the letter by the 3rd defendant. He could see the letter at page 51, it had no stamp of the 3rd defendant, no letter had been received by the 3rd defendant.

25. He went further at page 63 which was an intimation notice issued by the Public Health Department of the 3rd defendant to the 1st Plaintiff, alleging illegal disposal of refuse into open Plot No. 9901/3/1/MN. He confirmed that this notice was issued by 3rd defendant to stop disposal of refuse. At this particular time, nobody was charged. However, he was aware that the 1st defendant was later charged but was acquitted. He was charged for littering. He was charged at the Municipal Court for disposing waste on his property.

26. At page 62 was a letter from the Town Clerk to the Ombudsman. According to the letter, the Council had investigated the matter. The letter confirmed what had been stated above. The Intimation notice was issued. The letter got to him. The last letter that he wrote to the Council was in February 2021 which he had not filed. The last letter which he wrote which was filed at page 51. It had no stamp on it acknowledging receipt. It was dated 4th May, 2011. He had written letters after May 2011 but had not filed them. The case was filed in the year 2017. He had initially filed the same in the Magistrate Court but they later had no jurisdiction, hence filing of the suit in this Honourable Court.

27. He told the court that the school was no longer in the premises. There was still too much noise from the school and in the neighboring plot and the school leases the classrooms to Churches on Sundays. He objected to the construction of the gate obstructing access to his property.

Cross examination of PW - 1 by Ms. Mwangi Advocate

28. He was referred to page 46 of his bundle, under paragraph 2, line 3. He indicated that NEMA referred him to the area Chief who convened a meeting between them and the school. At page 51 was a letter to the school and copied to NEMA. It bore no stamp by NEMA. At page 53 was a letter dated 15th April, 2011 to Town Clerk. There was no stamp to show that NEMA received the letter. At page 55, he wrote an email to the to the Director General, NEMA. He was not aware that the noise control and waste management was devolved to the County Government.

29. He informed the Court that he could see the letter at page 59 by NEMA to the school, It asked the school to comply with the requirements of environment Audit Report etc. The school never stopped.

Re - Examination of PW - 1 By Mr. Jengo Advocate:

30. In the said letters, his complaint was about the littering and noise pollution. After acknowledging the issue, NEMA never prosecuted the matter.At page 62 was a letter by the County. They did not bother to demolish the building.

31. He informed the Court that he would take the letters to the respective officers and deliver them. At page 21 of the bundle, although there was an acknowledgement of the problem by NEMA but they never went to the ground immediately. NEMA filed a report on 24th March, 2017. NEMA never indicated it had no jurisdiction on the matter. It was the County of Mombasa Government that was the successor of the Municipal Council of Mombasa. He sued the 2nd defendant because there must have been a lease document stating how the 1st defendant was to deal with the suit property. As for the Landlord, the 2nd defendant was responsible. The same building was being repaired. At page 41 of the bundle, paragraph 22, he said that he first filed the Civil Suit RMCC No. 90 of 2011 which he withdrew before filing this suit. The withdrawal was necessitated by a jurisdictional issue. It was false that he had stayed the said suit from the year 2011 without taking any action.

B. Examination in chief of PW - 2 by Mr. Jengo Advocate

32. PW - 2 was sworn and testified in the English language. He identified himself as Mr. Sylvester Oduor Oyile. He lived in Mtopanga and was a businessman. He knew the Plaintiff being his neighbor. Further, the school and the 2nd defendant were also their neighbors. Mr. Atambo was the landlord of the school.

33. He wished to adopt his witness statement dated 5th June, 2011 at page 47 as his evidence in chief in this suit.

Cross examination of PW - 2 by Ms. Nafula Advocate

34. He confirmed that the 2nd defendant was the landlord. Although the building was his, but he never ran the school. He confirmed at the moment, the school was not functional at Mr. Atambo's property. He could not recall when the school moved to another building. Mr. Atambo was neither directly involved in littering nor the noise population.

Cross examination of PW - 2 by Mr. Kinyua Advocate

35. The students also used to have litter thrown on his plot. He was cleaning and picking them himself. When there was noise, he could report them to the police.

Cross examination of PW - 2 by Mr. Mwangi Advocate

36. He confirmed what was on page 48, Paragraph 3 of his witness statement. It stated that it was to be submitted to NEMA. On page 56 was a note dated 19th October, 2010. There was no stamp showing it was received by NEMA.

Re - examination of PW - 2 by Mr. Jengo Advocate

37. The school was still there. However, it was it had moved to the neighborhood. The noise was still there.

38. The Plaintiff closed his case on 16th February, 2021

III. The defendants' case

39. From the filed Defence, the 1st, 2nd, 3rd and 4th defendants were two male adult of sound mind and understanding. They were from the County government and with authority to file the defence. The 2nd defendant filed his statement of defence dated 31st March, 2017 on the same date. He stated and denied that he was a complete stranger to the contents of Paragraphs 6, 8, 9, 10, 11 and 16 of Plaint. He admitted to the contents of Paragraphs 7 and 22 of the Plaint save that he leased out his premises to the 1st defendant to operate a school in the name of Bamburi Community High School.

40. In furtherance to the contents of paragraph 4 of the Defence, the 2nd defendant averred that the 1st defendant had refused to give vacant possession of the Plot Registration number 9905/Section II/MN. As such, the 2nd defendant herein had filed a suit against the 1st defendant for orders of vacant possession in the Civil Suit RMCC 583 of 2013 - Eric Opiyo Otambo v Obuya. He was not in control and / or management of the 1st defendants activities. He was also a stranger to the allegation contained in Paragraph 12 of the Plaint. The contents of Paragraph 13 of the Plaint were denied. The 2nd defendant was desirous of having a clean environment.

41. The 2nd defendant denied the contents of Paragraphs 14 and 15 of the Plaint. He averred that the lease touching on Plot number 9905/Section II MN was entered between himself and the 1st defendant herein. He was therefore a stranger to the four (4) different churches since the lease never allowed the 1st defendant to Sub-Lease the suit property. He denied the contents of Paragraphs 17, 18, 19, 20 and 21 of the Plaint.

42. The statement of Defence by the 3rd defendant dated 5th July, 2018 stated that it was a stranger to the contents of paragraphs 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 and made no admissions thereto. The 3rd defendant denied the contents of Paragraph 19 of the Plaint in toto. Without prejudice to the foregoing, the 3rd defendant stated that the all pleas and communication in regards to the issues raised herein were addressed to the now defunct Municipal Council of Mombasa and not once brought to the attention of the 3rd defendant. The 3rd defendant denied contents of Paragraph 21 admitting to contents of paragraph 9 to the extent that there was no other suit pending touching on the subject matter herein between the Plaintiff and the 3rd defendant. The 3rd defendant was however a stranger to the existence of any proceedings in the Civil suit - RMCC No.901 of 2011.

43. The 4th defendant in its statement of defence dated 4th July, 2018 responded to Paragraphs 6, 7 and 8 of the Plaint, the 4th defendant averred it was a stranger to the content therein. In response to Paragraphs 10, 11 and 12 of the Plaintiff's Plaint, the 4th defendant averred that although it was tasked with ensuring a clean and healthy environment, under schedule 4 of *the Constitution*, the issues of noise pollution and solid waste disposal and management were devolved functions within the ambit of the County Government. The 4th defendant averred that it was a stranger to contents of Paragraphs 13, 14, 15, 16 and 17 of the Plaint.

44. The contents of paragraph 18 of the Plaint were denied in toto. In response to the contents of Paragraph 19 of the Plaint, the 4th defendant averred that the allegations leveled against it were baseless. It further averred that in executing its general mandate of ensuring a clean and healthy environment, its officers visited the suit property for inspection on 24th March 2017 to verify the Plaintiff's complaint. In further response to Paragraph 19, the 4th defendant did recommend to the 1st defendant to allocate extra waste bins in each classroom for disposing used empty water bottles for proper disposal, to contract a NEMA licensed waste collector and submit an Environmental Audit to confirm compliance on the

said recommendations. The content of Paragraphs 20 and 21 of the Plaint were denied in toto. The 4th defendant admitted contents of paragraphs 22 and 23 of the Plaint.

The testimony by the defendant's witnesses

45. On 22nd September, 2022, the defendants called their witnesses being DW - 1 and DW 2 as follows:

Examination in chief of DW - 1 by Ms. Takah Advocate

46. DW – 1 was sworn and testified in Swahili language. He identified himself as being Mr. Opiyo Atambo. He was born on 1st April, 1949. He resided at Bamburi, with the County of Mombasa. He knew Mr. Joseph Mureithi Gichu, the Plaintiff and Mr. Obuya Otieno. He filed the document in support of his case dated 22nd November, 2021 being three (3) documents. They were admitted and produced as 2nd defendant's exhibit 1, 2 and 3. The 1st defendant was to stay at the suit property for 6 years. He was given vacant possession in year 2019. During the tenancy he was very bad. There were rental arrears and that was why he pushed for the 1st defendant to vacate. Their relationship with the Plaintiff was now cordial.

Cross examination of DW - 1 by Mr. Jengo Advocate

47. He testified that he was the owner of the suit property. He had leased it out to the 1st defendant. By the time they came to Court he had not gotten vacant possession and he got a court Decree after 2 years. Thereafter, hence they had a bad relationship. His premise was both commercial and residential area.

48. He lived slightly far from the suit property. The gate was constructed on another place. The gate interfered with access for intruders. It was a public place put up by his tenant. He had rented out the land to Mr. Obuya Otieno Ritzau for a school. But occasionally he would turn it to a worship/religious shrine. He was aware he would turn it mainly on public holidays and on Christmas day. He would be using loud speakers which were a nuisance. The noise would interfere with Mr. Joseph Mureithi Gichu's place. There would be papers blown by the wind to the neighbors - solid waste. From the tenancy agreement there was a school term, that the tenants would not interfere with the neighbors. It's a school of a large population and hence there was a likelihood of nuisance. There were no facilities for waste disposal but the papers were being blown by wind to go to the neighbors. The papers and the bottles were to be picked by the students. He was not aware that NEMA demanded for the fixing of waste disposal. Mr. Obuya Otieno came to the suit through him. It's Mr. Obuya who disobeyed and/or breached the terms of the tenancy agreement. He never took action in form of writing a demand letter or lodging complaint.

Cross examination of DW - 1 by Mr. Atancha Advocate

49. It is Mr. Obuya who constructed the gate. His plot was Section MN/9905. There was a main plot before it was sub-divided into 9901, 9902, 9903, 9904 and 9905 respectively. That is why the numbers appear in various documents.

Cross examination of DW - 1 by Mr. Mbogo Advocate

50. He purchased his plot and was leasing it out to Mr. Obuya in 22nd February, 2008. By that time, there was no County Government which came to existence with *the Constitution* of Kenya 2010. He never made any complaint to the Municipal Council and he was not aware of any prosecution by the Municipal Council.

Cross examination of DW - 1 by Ms. Mwangi Advocate

51. He told the court that he had never raised any complaint with NEMA. They had a meeting with Mr. Otieno Obuya.

IV. The Submissions

52. On 22nd September, 2022 upon the closure of the case by the Plaintiff and the defendants herein, the Honrable Court directed that parties file their submissions within stringent timeframe thereof on. Pursuant to that they all complied accordingly. The honourable court reserved a date to deliver its Judgement on notice to all the parties.

A. The Written Submissions by the Plaintiff

53. On 11th November, 2022, the Learned Counsel for the Plaintiff herein through the Law firm of Messrs. Jengo Associates Advocates filed his written submissions dated 10th November, 2022. Mr. Jengo Advocate commenced his submission by stating that the Plaintiff had proved his case on a balance of probabilities. In this case, the Plaintiff testified and called one witness. The 2nd defendant also testified. The Learned Counsel noted that the 1st, 3rd and 4th defendants never summoned any evidence. Hence as far as he was concerned, his evidence was uncontroverted.There was no agreement on issues. Thus, the Plaintiff and the 2nd defendant all filed their respective issues on 26th March 2019 and 13th April 2019 respectively.

54. On the issue of whether the Plaintiff was the registered owner of Plot No. 9901/3/Section II/ MN, and if it was in the affirmative what were his rights. Factually, the Learned Counsel submitted that all the evidence showed that the Plaintiff was the owner of parcel of land number 9901/31 Section II/MN situated in Mtopanga. This is not contested by the defendants herein at all. This being so, the Plaintiff was entitled to a quiet possession and the right to a clean environment as provided for under Articles 40 and 42 of *the Constitution* of Kenya, 2010 and the common law. He produced a Certificate of Title found at page 67 of his bundle to prove the issue of ownership.

55. On the issue of whether the developments on Plot No. 9905/Section II /MN were approved and authorized by the 3rd defendant or its predecessors, the Learned Counsel averred that the 2nd defendant (DW - 1) admitted in evidence that he was the owner of plot number 9905/Section II/MN which neighbored tothat of the Plaintiff's plot. He stated that he got proper documentation for construction of the premises but did not produce the documents to support the same. Being the custodian of any such documents then under Section 112 of the *Evidence Act*, he had the obligation of proving the issue by producing the documents. To buttress hi point, the Counsel cited the Court of Appeal of "Kenya Airfreight Handling Limited – Versus - Kenital Solar Energy Ltd & Another [2011] eKLR where it was stated:

> "Whatever happened was only within the knowledge of KAH, and it certainly had an obligation to offer an explanation as to what happened. Section 112 of the *Evidence Act* states as follows:
>
> "S. 112: In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

56. The 2nd defendant failed to do so hence the issue is deemed proved; by the court creating an inference that he did not produce the documents because they did not exist or if they existed then they would be

adverse to his case. The court of appeal emphasized this in the case of:-"Chasebank (K) Ltd v Cannon Assurance (K) Ltd (2019) eKLR where it held:

> Again, the court is at liberty to conclude from such omission, an adverse inference by weighing the evidence before it. Where the court has ordered for production of certain documents, and the party so ordered fails to produce the documents, the court can permit the leading of secondary evidence. It is further open to the court to draw adverse inference as provided under Section 119 of the *Evidence Act* which states:
>
> "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."
>
> This provision in our *Evidence Act* embodies the doctrine of spoliation or suppression of evidence. Under this doctrine, it is generally the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy. Where such material is withheld, the court may draw adverse inference. (See Woodroffe's Law of Evidence, 9th Edition at Page 811-816).

57. Additionally, the Leraned Counsel referred Court to the case of 'Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2012] eKLR, the Learned Judge rightly stated that:-

> " Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party."

58. This was reiterated in the case of:- "John Chumia Nganga – Versus - Attorney General & Another (2019) eKLR where it was held:--

> " Though the defendant filed a defence, it did not adduce any evidence in support of its claim and therefore all the averments in their defence remains just mere allegations as averments in pleadings are not evidence. In this instant therefore the Plaintiff's evidence remained uncontroverted. See the case of Shaneebal Limited v County Government of Machakos [2018]eKLR, where the Court cited the case of Janet Kaphiphe Ouma & Ano v Marie Stopes International (Kenya), Kisumu HCC No.68 of 2007, where the Court held that:-
>
> "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....Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same."

59. On the issue of whether the developments were not approved and what the 3rd defendant had done about the same or should do about it, the Learned Counsel argued that from the correspondence produced in evidence between the Plaintiff and the 3rd defendant predecessor in title, the 3rd defendant had not done anything to remedy the issue of the structure put up without following the proper procedure. In doing so, the 3rd defendant abdicated its responsibilities. The 3rd defendant abdicated its responsibility was further fortified by the fact that it did not call any evidence to counter on the

Plaintiff's evidence. So, on a balance of probability, the issue was proved. It was held as such in the case of:- "Netah Njoki Kamau & another v Eliud Mburu Mwaniki [2021] eKLR where it stated:

"

> " 8. The Respondent did not at all call evidence to prove the defence, he raised denying negligence on his part and instead lay the blame on the deceased. It follows that the respondent's defence remained mere allegation. There has, indeed been many decided cases in this vein. On such case is, North EndTradign Company Limited(Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited v City Council Of Nairobi[2019] eKLR thus:-
>
> "18. In Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the Plaintiff's evidence is to be believed, as allegations by the defence is not evidence.
>
> 19. In the case of Motex Knitwear Limited v Gopitex Knitwear Mills LimitedNairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another v Raju Govindji, HCCC No.548 of 1998 appreciated that:-
>
> 'Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.'"

60. Similarly, the Court of Appeal in the case of "Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Shulter & Another [1979] eKLR said:

> " The Respondents filed a defence in which they denied the Appellants claim and averred that the accident was caused by the Appellants own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The Respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the Appellant and his brother."
>
> 10. The trial court erred to have considered the Respondent's defence when it indeed remained unproved. The respondent's defence was not available for consideration having not been proved by evidence. This is made further clear in the case CMC Aviation Ltd v Crusair Ltd(NO.1) [1987] KLR 103 as follows:-
>
> "The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.

61. On the issue of whether the 3rd defendant was charged with registration and management of use of premises licensing of school and churches and demarcation of arears into residential and commercial, the contention by the Learned Counsel was that the 3rd defendant was indeed charged with that responsibility and it did not challenge the Plaintiff's evidence hence the issue was proved.

62. On the constitutional and statutory obligations of the defendants viz a viz solid waste management and noise pollution, the Learned Counsel argued that the 4th defendant's obligation was clearly laid out in the case of:- "Isaiah Luyara 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):

> "79. Article 69 (1) (g) of *the Constitution* obligates the State to eliminate processes and activities that are likely to endanger the environment. The Oxford Advanced Learner's Dictionary defines 'eliminate' as to remove or get rid of something. *The Constitution* behoves the Respondents to remove or get rid of all the processes and activities that cause pollution of the Nairobi and Athi Rivers, and to stop the air pollution from the toxic substances emanating from Dandora dumpsite which form the subject matter of this Petition.
>
> 80. Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment, which includes the right 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 to have obligations relating to the environment fulfilled under Article 70.
>
> 81. Section 3 of EMCA gives effect to the entitlement to a clean and healthy environment which is enshrined in Article 42 of *the Constitution*. Every person has a duty to safeguard and enhance the environment. That section empowers a person alleging that the right to a clean and healthy environment has been or is being denied, violated, infringed or threatened to apply to the Environment and Land Court (ELC) for redress."

63. The court went on to hold;·

> "83. Section 9 (1) of the EMCA makes NEMA the principal instrument of Government in the implementation of all policies relating to the environment. Consequently, NEMA has to play a primary role in the elimination of processes and activities that endanger the environment. EMCA bestows specific roles on NEMA in relation to preventing air and water pollution in the country."

64. The Learned Counsel asserted that the fact the 3rd and 4th defendants never called any evidence, it was apparent that they did not perform their obligation under issues 3 and 5 above.

65. As to the Plaintiff's rights under the provision of Article 40 of *the Constitution* of Kenya and Section 3 of the Environmental Management and Coordination and what the duties of the 3rd and 4th defendants were under the said provisions, the Learned Counsel argued that the provision of Sections 3 and 9 of the EMCA Act provided that the Plaintiffs right to a clean environment as enumerated above. This was reiterated under the provision under Article 42 of *the Constitution* of Kenya, 2010. The provision Article 40 of *the Constitution* of Kenya also gave an owner of a house like the Plaintiff a right to a quiet and peaceful occupation. They had clearly failed in their duty as held in the case of:- Isaiah

Luyara Odando & Another – v National Management Environmental Authority & 2 Others, County Government of Nairobi & 5 Others (Interested Parties) [2021] eKLR viz;-

> " 86. There is much more that the law enjoins NEMA to do pursuant to Section 9 of EMCA. It should exercise co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment is safeguarded and in this case, to ensure that the pollution of the Nairobi and Athi River is eliminated. The success and efficiency of NEMA will ultimately be seen in the realization of the right to a clean and healthy environment by every Kenyan more than the information on its website as it urged the Petitioners to acquaint themselves with. In light of the nationwide challenge posed by urban waste, NEMA must be proactive and take the lead in enforcing the law and assist NMS and the county governments to develop and implement policies and strategies for dealing with the disposal and management of urban waste in a safe manner that does not derogate from every citizen's right to a clean and healthy environment."

66. It was the Learned Counsel's submission that the 3rd and 4th defendants have done nothing to alleviate all this as evidence by their failure to call any evidence. And that the defendants have breached their obligations towards the Plaintiff as addressed above.

67. On whether the 1st and 2nd defendant are directly or through their agents, tenant's proxies and/or accomplices throwing or disposing waste on the Plaintiff's land and causing noise pollution, it was the Learned Counsel's submission that the uncontroverted evidence of PW - 1, PW - 2 and PW - 3 was that there was waste known on the Plaintiff's premises by the 1st defendant. The 1st defendant did not controvert this and in fact was committed for contempt of court for continuing with their disposal even after the court issued an injunction. This amounted to a nuisance. On the noise pollution, it's the evidence of both the Plaintiff and the defendant that the 1st defendant leases out the premises which were in a residential area to church which play loud music both during day time and night. That this noise constituted a nuisance to the Plaintiff was not disputed.

68. Nuisance was defined in the case of John Chumia Nganga v Attorney General & Another [2019] eKLR as;

> " In the case of Nakuru Industries Limited v S.S Menta & Sons [2016] eKLR, the Court defined 'Nuisance' as was defined in Clerk and Lindsell on Torts at page 1354 para 24-01 as:-
>
> "An act or omission which is an interference or with disturbance of or annoyance to a person's rights used or enjoyed in connection with land. It is caused usually when the consequences of persons actions on his land are not confined to the land, but escape to his land causing an encroachment and causing Physical damage or unduly interfering with the neighbors use and enjoyment of his land."
>
> It was the Plaintiff's evidence that he wanted to clear the bushes in his portion of land when he was prevented from doing so. Going by the definition of Nuisance and the material placed before this court, it is not in doubt th/at the defendant interfered with the Plaintiff's use and occupation of land. This Court therefore finds that there was nuisance caused by the defendant."

69. The noise by the defendants and the wanton throwing of litter amounted to a nuisance on the Plaintiff and violation of his rights.

70. On whether the rights of the Plaintiff under the provision of Articles 40 and 42 of *the Constitution* of Kenya, 2010 had been violated, the Learned Counsel averred that its apparent that the Plaintiff proved that his right to a quiet enjoyment and possession was violated by the 1st defendant who was the tenant of the 2nd defendant. The 1st defendant being a person who was on the premises at the instigation of the 2nd defendant, the 2nd defendant was thus vicariously liable for his acts of commission and omission.

71. On whether the 1st and 2nd defendants was accommodating and hosting different churches on their premises. These tenats had been causing noise pollution to the Plaintiff. The Learned Counsel submitted that from the evidence, it was apparent that the right to a peaceful and quiet occupation had been breached which never went to the root of the provision of Article 40. The noise and the litters which constituted a nuisance and pollution of the environment also on the face of them violated the Plaintiff's right to a clean and healthy environment.

72. On having made a plea to the 3rd and 4th defendants and the actions taken, the Learned Counsel averred that the issue of noise pollution and throwing of solid waste had been addressed.There was also the evidence that the defendant had obstructed roads by building a gate in a public space and or road. This was inconveniencing to the Plaintiff. The correspondence produced showed that the Plaintiff had made reports and follow ups with the 3rd and 4th defendants with no action on their part. This was fortified by their failure to call evidence.They had thus abdicated their statutory and constitutional obligation.

73. As per the Court's jurisdiction under the provision of Articles 69 and 70 of *the Constitution* of Kenya, 2010. Article 60 provided that:-

> "(1)The State shall--
>
> (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
>
> (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
>
> (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
>
> (d) encourage public participation in the management, protection and conservation of the environment;
>
> (e) protect genetic resources and biological diversity;
>
> (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
>
> (s) eliminate processes and activities that are likely to endanger the environment; and
>
> (h) utilise the environment and natural resources for the benefit of the people of Kenya.
>
> (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources."

74. Article 70 then proceeds to state as here below;-

> "(1) If a person alleges that a right to a clean and healthy environment recognized 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."

75. The court has dealt with the issue of the court's jurisdiction in such issues in Karen Neong View Estate Association (KNVEA) v National Environment Management Authority (NEMA) & Another [2021] eKLR where it was held;-

> "
>
> "14. .....from the case of Shiloah Investments Limited v National Environment Tribunal & 7 Others [2018] eKLR where the Environment and Land Court held as follows:-
>
> 'My interpretation of Section 129 of EMCA is that it provides a framework within which any person aggrieved by decisions made by NEMA may ventilate the grievance. The words used by parliament in Section 129 (1) are 'any person aggrieved by'. In my view, Parliament took cognizance of the fact that injury to the environment affects the general public and provided a forum of redress for any person who may be aggrieved by a decision of NEMA."

76. The Court went on to hold;-

> "".....17. Article 23 of *the Constitution* further provides that the High Court has jurisdiction in accordance with Article 165 of *the Constitution* to hear and determine applications for redress, of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights."

77. The Court further held;-

> "In Communication No. 155/96: the social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria the African Commission on Human and People's Rights stated as follows: -

"These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."

The right to a general satisfactory environment, as guaranteed under Article 24 of the Africa Charter or the right to a healthy environment, government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources..."

78. It further concluded:-

> "…….Article 23 of *the Constitution* clearly provides the High Court has jurisdiction to hear and demine application for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. The instant petition seeks to vindicate the Petitioner's fundamental and human rights to a clean and safe environment. I find that this is one of the fundamental rights which a party is entitled to seek form the High Court."

79. This court was thus the correct forum to ventilate the issues raised.

80. In conclusion, the Learned Counsel held that for the reasons submitted above, the Plaintiff prayed for Judgment against the defendants' jointly and severally for:-

a. A declaration that plaintiff is entitled to peaceful enjoyment and quiet possession of his property sub - division Plot No.9901/3/ Section II MN Mtopanga, Bamburi and the defendants herein have through their acts of commission and omission infringed on the plaintiff's right to a clean and healthy environment as enshrined in Article 42 of *the Constitution* of Kenya and the right to property under Article 40 of the Kenyan constitution.

b. A Permanent injunction preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from throwing and or disposing waste on subdivision Plot No.9901/3/ Section II MN Mtopanga, Bamburi.

c. A Permanent injunction preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from continuing with acts and omissions in the suit property that constitute noise pollution within the meaning of the *Environmental Management and Co-ordination Act* No.8 of 1999.

d. A mandatory injunction that the 1st and 2nd defendant and or their agents, servants, tenants and or proxies do forthwith pull down and remove the gate so much as is erected beyond their plot boundaries and in obstruction of the plaintiff's access to his Plot No.9901/3/ Section II MN Mtopanga, Bamburi and a restraining injunction restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from erecting or continuing to erect upon the said plaintiff's access road and or beyond their boundary line.

e. A mandatory injunction compelling the 3rd and 4th defendant to ensure discharge of their duties by taking measures to prevent and discontinue any acts of the 1st and 2nd defendants, their agents, servants, employees and or agents that are harmful to the environment and to ensure they do comply with the law by stopping the unlawful management and disposal of waste and

litter and the noise pollution to ensure the plaintiff can enjoy quiet possession and peaceful enjoyment of his property Plot No.9901/3/ Section II MN Mtopanga, Bamburi.

f. The Plaintiff prayed for damages for nuisance, breach of his constitutional right to a clean and healthy environment and to a quiet and peaceful enjoyment of his property. The plaintiff quantifies the same at a sum of Kenya Shillings Five Thousand (Kshs. 5,000,000/=) as general damages.

g. Cost of the suit and Interest

h. Any other relief that the court may deem fit.

B. The Written Submissions by the 2nd defendant

81. On 20th January, 2023, the Learned Counsels for the 2nd defendant through the Law firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed his written submissions dated the same day. M/s. Takah Advocate commenced by submitting that Plaintiff had failed to prove his case as against the 2nd defendant. As such, the Counsel urged the Honourable Court to dismiss the Plaintiff's suit against the 2nd defendant with costs.

82. The Learned Counsel reiterated the contents in the prayers of the Plaintiff vide the Plaint dated 30th January, 2017 where the Plaintiff sought for Judgment against the defendants jointly and severally. She stated that the defendants entered Appearance and filed their respective Statements of Defence, in particular the 2nd defendant filed the Notice of Appointment of Advocates on 20th February, 2017 and proceeded to file his Statement of Defence on 31st March, 2017.

83. The Counsel recapped that the matter proceeded for hearing by way of viva voce evidence with the Plaintiff's witnesses Mr. Joseph Mureithi Gichu and Sylvester Oduor Oyile testifying in Court on 16th February, 2021. On 22nd September, 2022, the 2nd defendant, testified while the 1st, 3rd and 4th defendants never called any witnesses and opted to close their case.

84. The Learned Counsel submitted that the Plaintiff's case was that on 16th February, 2021 when the matter proceeded for hearing of the Plaintiff's case, PW - 1 and PW - 2 respectively testified in support of the Plaintiff's claim. PW - 1 adopted his witness statement dated 8th June, 2011 as his evidence in chief and also produced documents contained in the lists and copies of documents filed on 2nd February, 2017 and the Plaintiff's supplementary list and copies of documents filed on 7th May, 2018 as the Plaintiff exhibit 1 to 17. PW - 2 also proceeded to adopt his witness statement filed on 5th February, 2020 as his evidence in chief.

85. Acording to the Learned Counsel on 22nd September,2022, when this matter came up for hearing of the defendants' case, the 2nd defendant, ERIC OTAMBO testified in Court by adopting his Witness statement dated 14th February, 2018 as his evidence in Chief. He produced the Documents listed in the 2nd defendant's List and Copies of documents filed on 3rd December, 2021 which were marked as the 2nd defendant's Exhibits 1 - 3. It was the 2nd defendants testimony that he was the registered owner of Plot No. 9905/ Section II Mainland North which property he leased out to the 1st defendant to operate a school in the name of Bamburi Community High School by a Lease dated 22nd February,2008 for a term of 6 years.

86. The 2nd defendant further testified that the 1st defendant was only to use the suit premises as a school. Therefore, he did not authorize and/or consent to the suit premises being sublet. The 2nd defendant further testified that during the tenure of the suit Lease, the 1st defendant severally and regularly breached the terms and conditions of the said Lease in the following ways: failure to regularly discharge

the rentals accruing under the Lease, failing to hand over vacant possession upon the lapse of the term of the Lease among other terms of the Lease dated 22nd February, 2008. A copy of the Lease was produced by the 2nd defendant and marked as the 2nd defendant's Exhibit No.1.

87. He further testified that the 1st defendant's conduct led to institution of a Court action against the 1st defendant in the Civil Case - RMCC No. 583 of 2013 - Eric Opiyo Otambo v Obuya Otieno Ritzau T/A Bamburi Community High School" seeking for an order of vacant possession and the payment of accrued rental arrears amounting to a sum of Kenya Shillings Four Fourty Five Thousand Seven Fifty Hundred (Kshs. 445,750/=) among other orders. The Honourable Court on 8th September, 2017 delivered its Judgment in favour of the 2nd defendant ordering for the 1st defendant to grant vacant possession of the suit premises within 30 days from the date of the Judgment and to settle the accrued rentals together with Mesne profits. A copy of the Amended Plaint for RMCC NO. 583 OF 2013 was produced by the 2nd defendant and marked as the 2nd defendant Exhibit No. 2.

88. The Learned Counsel argued that the 2nd defendant testified that to date the 1st defendant had not made any effort to ensure full satisfaction of the Decree issued on 2nd October, 2017, the 2nd defendant was only able to take over possession of the suit property sometimes in the late year of 2019. A copy of the Decree issued by the Court in RMCC No. 583 of 2013 was produced by the 2nd defendant and marked as the 2nd defendant Exhibit No.3. The 2nd defendant denied having authorized and or consented to the l" defendant erecting a gate near the parcel of land. The 2nd defendant confirmed that the suit premises was located adjacent to a parking bay which was accessible to the general public, the constructed gate was on the parking bay and not on his parcel of land. Additionally, the 2nd defendant testified that upon inquiring from the 1st defendant as to why he had erected the gate, he indicated that he done so for security purposes. However, the said gate was always open and never prevented any of the neighbors from accessing their property. The 2nd defendant further testified that upon being informed of the 1st defendant's acts which affected the adjacent land owners, the Plaintiff in particular, approached the 1st defendant who did not grant him any audience and would not allow him entry into the suit property. The 2nd defendant testified that he took over possession of the suit property in late 2019.

89. The 2nd defendant further testified that since taking over possession of the suit premises in the year 2019, there had been no complaint from the neighbors and in particular, the Plaintiff. He therefore prayed that the suit against him be dismissed with costs.

90. The Learned Counsel stated that they intend to rely on the following issues for consideration:

    a. Whether the 2nd defendant was liable for acts of commission and/or omission by the 1st defendant which could have allegedly infringed upon the Plaintiff's right to property and the right to clean and healthy environment as was enshrined under the provision of Articles 40 and 42 of *the Constitution*.

    b. What were the Orders as to costs.

91. On whether the 2nd defendant is liable for acts of commission and/or omission by the 1st defendant which could have allegedly infringed upon the Plaintiff's right to property and the right to clean and healthy environment as enshrined in Articles 40 and 42 of *the Constitution*, the Learned Counsel submitted that the Plaintiff testified to have occupied the parcel of land known as Plot No. 9901/3/ Section 11 Mainland North sometime in the year 2004. Further that the alleged infringement to his right to clean and healthy environment began sometime in January, 2007 when the 1st defendant took over possession of the suit property. It was the Plaintiff's testimony that the 1st defendant's students who occupied the suit property allegedly littered his property and that the 1st defendant would rent

out the suit property to churches for praise and worship which in turn interfered with the adjacent neighbors right to peaceful and quiet possession of their property.

92. The Learned Counsel submitted that it was the Plaintiff's testimony that the 1st defendant's students who occupied the suit property allegedly littered his property and that the 1st defendant would rent out the suit property to churches for praise and worship which in turn interfered with the adjacent neighbors' rights to peaceful and quiet possession of their properties. It was not in dispute that the 2nd defendant entered into a lease agreement with the 1st defendant for a term of six (6) years commencing from the 1st day of March, 2007.

93. In the instant case, having scrutinized the Lease, it was evident that under term 1(F) the 1st defendant was to only use the suit property as a learning institution and or school. Term I(I) had express provisions barring any transfer sublet or part any further with possession or permit any part of the premises to be used by other third parties without the prior written consent of the 2nd defendant who was the Landlord. It was therefore evident that from the said lease, the common intention of the parties was that while the suit premises were let to the 1st defendant, should there be any need to sublet, transfer, part any further, or part any use by other third parties then the written consent of the 2nd defendant, landlord, ought to be obtained. Term 1(G) of the Lease clearly indicated that the 1st defendant was not to use the suit property in any way that may interfere with the quiet enjoyment and comfort of the adjacent land owners.

94. The Learned Counsel submitted that the 2nd defendant during the term of the lease, never consented nor permitted the 1st defendant to sublet the suit premises to any third party i.e. the churches. Additionally, the 2nd defendant never consented or permitted the construction of the gate which allegedly infringed on the Plaintiff's rights to access his property. The Plaintiff never produced any evidence to show that the 2nd defendant consented or permitted the 1st defendant to sublet or construct the gate. They submitted that the 2nd defendant's could not be held liable for 1st defendant's acts which were beyond the scope of the Lease.

95. On the issue of whether the Plaintiff had met the threshold for grant of permanent and mandatory orders of injunction as against the 2nd defendant, the Learned Counsel submitted that the Plaintiff in his Plaint sought for an order of permanent injunction preventing, restraining and or stopping the 1st and 2nd defendant from throwing and/ or disposing waste on his parcel of land. The Plaintiff further sought for an order of mandatory injunction as against the 1st and 2nd defendant to pull down and remove the gate that was erected beyond the plot boundaries and for the 1st and 2nd defendant to be restrained from erecting of continuing to erect upon the said both a permanent prohibitory order of injunction and mandatory order of injunction.

96. The Learned Counsel to spport her point cited the case of "Bandari Investment & Co. Ltd v Martin Chiponda & 139 Others [2022] eKLR was of the following opinion when distinguishing between a prohibitory injunction and a mandatory injunction:-

> " 36. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the 'Locus Classicus' case of 'Giella v Cassman Brown, 1973 E.A. Page 358 and a Mandatory Injunction. The first authority on making this distinction was 'Shepard Homes v Sandham [1970] 3 WLR Pg. 356 Case' in which Megarry. J as he then was stated follows:-
>
> "Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require

the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. Fit is ultimately established that the defendant was entitled to retain the erection".

Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected.

39. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory."

97. Additionally, she cited the case of "Kenya Breweries Limited v Okeyo Keyo [2002]EA VOL 1 at page 111 the Court of Appeal made express legal pronoucements while considering whether to grant mandatory order of injunction. In the instant suit, the 2nd defendant testified that since he took over possession of the suit property in 2019, there had been no complaints from the Plaintiff and that they lived in harmony. The 2nd defendant further testified that the 1st defendant existing gate was on the adjacent parking bay which was always open. Therefore, it did not in any way prevent the adjacent neighbors from accessing their properties. In the circumstances, the Learned Counsel submitted that there was nothing to justify the grant of the permanent and mandatory order of injunction as against the 2nd defendant as the 1st defendant's actions ought not to be imputed upon the 2nd defendant in any way whatsoever.

98. On the orders as to costs the Learned Counsel concluded that the Blacks Law Dictionary defined cost to mean 'the expense of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other'. Section 27(1) of the *Civil Procedure Act* states that costs always follow the events. The Learned Counsel urged the Honourable Court to find that the Plaintiffs have failed to prove his case as against the 2nd defendant and as such the same be dismissed with costs awarded to the 2nd defendant.

C. The Written Submissions by the 4th defendant

99. The 4th defendant through the law firm of Messrs. Simon Ngara Advocate filed their written submissions dated 1st February, 2023 reiterating the contents and prayers in the Plaint filed on 2nd February, 2017. Mr. Ngara Advocate commenced his submission by reharshing that the Plaintiff filed a Plaint and Notice of Motion application against the defendants dated 2nd February 2017. In response, the 4th defendant filed a statement of Defence dated the 4th July 2018 and a list of documents both filed on 6th July2018.

100. He stated that the Plaintiff's case against the 4th defendant in the Plaint was that:

a. A mandatory injunction compelling the 3rd and 4th defendants to ensure discharge of their duties by taking measures to prevent and discontinue any acts of the 1" and 2nd defendants, their agents, servants, employees and or agents that were harmful to the environment and to ensure they did comply with the law by stopping the unlawful management and disposal of waste and litter and the noise pollution to ensure the Plaintiff could enjoy quiet possession and peacefulenjoyment of his property Plot No.9901/3/ Section II MN Mtopanga, Bamburi.

b. The Plaintiff prayed for damages for nuisance, breach of his constitutional right to a clean and healthy environment and to a quiet and peaceful enjoyment of his property.

101. The Learned Counsel undertook to submit on the following issues:

i. Had the Plaintiff proved any breach of his Constitutional Rights by the 4th defendant and whether the 4th defendant had been indolent in discharging their duties?; and

ii. Whether the Court should issue the orders sought by the Plaintiff against the 4th defendant

iii. Who should bear the costs of this Suit

102. On the issue of whether the Plaintiff proved any breach of his Constitutional Rights by the 4th defendant and whether the 4th defendant had been indolent in discharging their duties, the Learned Counsel submitted that the NEMA was the 4th defendant herein and is a statutory body established under the provision of Section 7 of the EMCA, 1999 as the principal instrument of Government mandated to exercise general supervision and co - ordination over all matters relating to the environment.

103. The 4th defendant did not dispute that it had a duty to ensure a clean and healthy environment by excising general supervision and coordination over all matters relating to environment. However, this power was limited by the EMCA, No. 8 of 1999 and *the Constitution* of Kenya, 2010. Its position was as follows:-

a. Schedule 4 of *the Constitution* of Kenya, 2010 distributed devolved functions between the National Government and the County Government.

b. County health services including refuse removal, refuse dumps and solid waste together with controlling air pollution, noise pollution and other public nuisances were functions vested on the County Government by *the Constitution* of Kenya.

c. That the 4th defendants had regulations on waste and noise being the Environmental Management and Coordination (Waste Management) Regulation, 2006 (hereinafter referred to as the 'Waste Regulation') and the EnvironmentalManagement and Coordination (Noise and Excessive Vibration Pollution)(Control)Regulations (hereinafter referred to as 'the Noise Regulation').

d. The 4th defendant further issued the National Solid Waste Management Strategy, 2015 which set the minimum requirements that County Governments should abide by and was currently working with the County Government to ensure the attainment of the aforesaid minimum requirements.

e. The 4th defendant had continued to work with County Governments through cooperation, collaboration and building capacity as required by *the Constitution* ofKenya. Therefore, it had not abdicated its responsibility as it had not been demonstrated that the County Government had no capacity to undertake the mandate bestowed to it by *the Constitution* of Kenya.

f. The 4th defendant's employees visited the site on 24th March 2017 and prepared an inspection report in which the 1st defendant was instructed to contract a NEMA licensed waste collector and to submit an environmental audit to the Authority within 14 days.

104. The Learned Counsel relied on *the Constitution* of Kenya, 2010 on the fourth Schedule of *the Constitution* of Kenya which gave the distribution of functions between the National Government and the County Government. Part 2 gave the functions and powers of the County. These included:-

a. Paragraph 2 - County health services, including in particular - (1g) refuse removal, refuse dumps and solid waste disposal.

b. Paragraph 3 - control of air pollution, noise pollution, other public nuisances and outdoor licensing.

105. Article 174 of *the Constitution* of Kenya gave the objects of devolution which included:-

i. To recognize the right of communities to manage their own affairs and to further their Development

ii. To facilitate the decentralization of State organs, their functions and services, from the Capital of Kenya; and

iii. To enhance checks and balances and the separation of powers.

106. Under Article 186 of *the Constitution*, the functions and powers of the national government and county governments respectively were as set out in the Fourth Schedule. Article 189 provides that Government at either level shall:-

a. perform its functions, and exercise its powers, in a manner that respects the functional and Institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level

b. assist, support and consult and, as appropriate, implement the legislation of the other level of government.

c. liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity, Governments at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers.

107. The Learned Counsel argued that *the Constitution* was very clear on the role of both the National and County Governments and the relationship between the two levels of government. The 4th defendant was an entity of the National Government and its implements national laws on environment and supervised the functions of the county government within the framework set by *the Constitution* of Kenya, 2010. It therefore sets the national standards and for functions of Counties under the Fourth Schedule, the County Governments were at liberty to set their own laws as long as they do not fall below the national standards set by NEMA.

108. The EMCA, 1999 and its Regulations, Section 87 of EMCA provides that no person shall discharge or dispose of any wastes in such to cause pollution to the environment or ill health to any person. No person shall transport any waste other than in accordance with a valid license to transport waste issued by NEMA and to a waste disposal site established in accordance with a license issued NEMA. No person shall operate a waste disposal site or plant without a license by NEMA.

109. It was clear from that provision that the role of NEMA was limited to licensing waste transportation vehicles and licensing of waste disposal sites upon conducting an Environmental Impact Assessment study under Section 58 of EMCA. Under the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulation, 2009 Regulation 3, no person shall make or cause to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment. The factors to be considered are stipulated under regulation 3(2) and the permissible noise levels were contained in the First Schedule to the Noise Regulations.

110. After Promulgation of *the Constitution* 2010, NEMA ceased to issue noise permits in compliance with the Fourth Schedule of *the Constitution* and transferred the function to the County Governments which had continued to issue noise permits to date and to enforce the Noise Regulations.Some Counties had also promulgated their Noise laws and this was in accordance with *the Constitution* as long as they did not fall below the national standards set by NEMA.

111. The Learned Counsel assertred that NEMA in compliance with *the Constitution* could not interfere with the mandate of the County Governments unless the County Governments were completely unable to discharge their mandate. Acording to the Counsel, devolution ought to be given a chance. In the current case, the Plaintiff had not demonstrated neither was there evidence that the County Governments were unable to discharge their role to warrant the intervention of the National Government through the 4th defendant. There was therefore no case against the 4th defendant and this Honourable court should dismiss the same. It could therefore be determined from the above law that the 4th defendant had not breached any of the rights of the Plaintiff and neither had it been indolent in discharging its duties.

112. The Court could therefore not issue a mandatory injunction against the 4th defendant, as the 4th defendant had at all times, remained conscious of the Statute and Regulations in place and had made every step necessary in ensuring that they adhered to the correct procedure outlined in *the Constitution* of Kenya and the Environmental Management and Coordination Act.

113. On whether the court should issue the orders sought by the Plaintiff against the 4th defendant, it was the Learned Counsel's contention that the Plaintiff in one of its prayers prayed that the 4th defendant ensured discharge of their duties by taking measures to prevent and discontinue any acts of the 1st and 2nd defendants. The Plaintiffs filed a list of documents which included letters allegedly sent to the 4th defendant. That during cross-examination of the Plaintiff witnesses, the issue of service of the documents came up. It was a principle of law that whoever laid a claim before the court against another had the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

> " 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existenceof facts which he asserts must prove that those facts exist.
>
> 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

114. That during the hearing, the Plaintiff's witnesses on being questioned on service of the documents on the 4th defendant, they could not prove that the documents were indeed served upon the 4th defendants as none of the documents had a receiving stamp on them. The 4th defendant was an ISO 9001:2015 certified State Agency and clearly stamped all documents (including the sender's copies) received by it with its official stamp bearing the date and time such documents were received for record purposes. In all the documents produced by the Plaintiffs that they purportedly sent or delivered to the 4th defendant, none of them bore an official stamp of the 4th defendant. The Counsel held therefore that the Plaintiff could not claim to have effected service of the produced documents on the 4th defendant

herein. He referred to the Halsbury's England of England, 4th Edition, Volume 17 at Paragraphs 13 and 14 which describes it thus:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

115. In the case of Muriungi Kanoru_Jeremiah v Stephen Ungu M'mwarabua [2015] eKLR the court held as follows with regard to the burden of proof:

> " ...As I have already stated, in law, the burden of proving the claim was the Appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial Magistrate was absolutely correct in so holding and did not shift any legal burden to the Appellant.....The Appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial Court Magistrate held that the Respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein."

116. In the case of: "Boniface S. Katana & 119 others v Director General, National Environment Management Authority (NEMA) & 2 others [2020J eKLR the Court held as follows with regard to service:

> " 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.
>
> 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.
>
> 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.
>
> The result is that I find no merit in the Petition and I dismiss the same.
>
> Each party shall bear their own costs.

117. Thus, the Learned Counsel urged Court to have the exhibits produced by the Plaintiff as against the 4th defendant and which the Plaintiff had failed to show proof of service be disregarded and thrown out. This was because the burden to prove that the documents were served upon the 4th defendant lied upon the Plaintiff. He asserted that when examined about them, he could not prove that they were

served upon the 4th defendant. Furthermore the 1st defendant was evicted from the said premises by the 2nd defendant. Besides, the prayers by the Plaintiff had been passed by time. There was no act or omission that the 4th defendant had committed as against the Plaintiff herein as analyzed above.

118. In conclusion having satisfactorily canvassed and demonstrated the lack of merit of the present Suit as against the 4th defendant the Learned Counsel submitted that the Suit as filed against the 4th defendant constituted an abuse of *the Constitution*, EMCA and the Waste and Noise Regulations. It was therefore scandalous, frivolous, vexatious, devoid of any merit and amounted to an abuse of the Court process and the same ought to be dismissed with costs.

V. Analysis and Determination

119. I have keenly assessed the filed pleadings by all the parties herein, both the written and oral evidence adduced by the summoned witnesses, the written submissions, the myriad cited authorities by the parties herein, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.

120. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has condesned the subject matter into the following three (3) issues for its determination. These are: -

a. Whether the suit instituted by the Plaintiff against the 1st, 2nd, 3rd & 4th defendants herein has any merit whatsoever.

b. Whether the parties herein are entitled to the reliefs sought in the Plaint.

c. Who will bear the costs of the suit.

IssueNo. a). Whether the suit instituted by the Plaintiff against the 1st, 2nd, 3rd & 4th defendants herein has any merit whatsoever.

121. As indicated, the substratum of this case is purely one related and/or pertains the environment management, degradation and connected issues. For that reason, therefore, this Honourable Court will extensively deliberate on the concept of environmental law and science herein. It is instructive to note that environmental law is a very unique subject which embodies science, law and policy. In Kenya, it is anchored in *the Constitution* of Kenya, 2010 and the statutes being EMCA, No. 8 of 1999 and various environmental regulations thereof. To begin with, under *the Constitution* of Kenya, 2010, there are various provisions, These are Article 42 of *the Constitution* of Kenya provides as follows:

> " 42 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 under Article 69; and
>
> b) To have obligations relating to the environment fulfilled under Article 70
>
> Article 70 of *the constitution* provides as follows:
>
> 70 (1) If a person alleges that a right to a clean and healthy environment recognized 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 compensations 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 demonstrated that any person has incurred loss or suffered injury.

122. Under EMCA, Cap. 387, with the coomencement date of 14th January, 2000, has the preamble that holds as follows:-

> "An Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environmentand for matters connected therewith and incidental thereto". It's main purpose is to provide for environmental protection through Environmental Impact assessment, Environment audit and Monitoring. The Act has established several regulations and regulatory institutions which the National Environment Management Authority; National Environment Tribunal (NET) and the NEMA nternal Enforcement Regulatroy body. The provision of Section 87 of the Act provides, 'inter alia, that no person shall discharge or dispose of any waste in such manner as to cause pollution to the environment or ill health to any person.

123. The Act, guarantees any person who has suffienct and appropriate interest "the Locus Standi' to move Court for appropriate redress. If any person is of the view that his right to a clean and healthy environment has or is being violated he has a recourse to apply to the court for redress as founded under the provision of Article 70 of the Constituition of Kenya, 2010.

124. All said and done, now applying these principles to the instant case. The suit instituted by the Plaintiff herein seeks for mandatory injunctions. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "Locus Classicus" case of "Giella v Cassman Brown, 1973 E.A. Page 358" and a Mandatory Injunction. The first authority on making this distinction was "Shepard Homes v Sandham [1970] 3 WLR Pg. 356 Case" in which Megarry .J as he then was stated follows:-

> "Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the defendant was entitled to retain the erection".

125. In the case of Kenya Breweries Ltd (Supra) the Court of Appeal had occasion to discuss and consider the principles governing grant of mandatory injunctions and held that the test was as correctly stated in Vol.24 Halsbury's Laws of England 4th Edition Paragraph 948 which reads:

> " A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiff, a mandatory Injunction will be granted on an interlocutory Application."

126. On whether the Plaintiff is entitled to be granted the Permanent injunction preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from throwing and or disposing waste on subdivision Plot No.9901/3/ Section II MN Mtopanga, Bamburi and preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from continuing with acts and omissions in the suit property that constitute noise pollution within the meaning of the *Environmental Management and Co-ordination Act* No.8 of 1999. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

127. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/ or threatened as the Court cannot just seat, wait and watch under these given circumstances.

128. This Honourable Court in the case of "Bandari Investments & Co. Ltd (Supra) held as follows:

> " It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party."

129. This Honourable Court further went to state that the ircumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "Malier Unissa Karim v Edward Oluoch Odumbe [2015] eKLR" as follows:-

> " The test for granting a Mandatory Injunction is different from that enunciated in the "Giella v Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of "Kenya Breweries Ltd v Washington Okeyo [2002] EA 109" had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

> "A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application".

130. Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of Locabail International Finance Limited v Agro Export and others [1986] All ER 906, the court held thus:-

'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedies, or if the defendant attempted to steal a march on the Plaintiff... .....a Mandatory injunction will be granted on an interlocutory application.'

131. The reason for this rule on granting of Mandatory Injunction is plain and clear. Megarry .J put is succinctly in a subsequent passage in the case of "Shepard Homes Case (Supra)" as follows:-

> " .....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trail whether the injunction should be dissolved or contained"

132. From the surrounding facts and inferences herein, all the evidence shows that the Plaintiff is the owner of parcel of land number 9901/31 Section II/MN situated in Mtopanga. This is not contested by the defendants at all. Indeed, the Plaintiff produced a certificate of title as found at page 67 of his bundle of documents to prove that he is the owner of the property. The Plaintiff submitted that the 2nd defendant (DW - 1) admitted in evidence that he is the owner of plot number 9905/Section II/MN which neighbours the Plaintiff's plot. This being the case, the Plaintiff is entitled to a quiet possession and the right to a clean environment as provided for under the provision Articles 40 and 42 of *the constitution* and the common law. He stated that he got proper documentation for construction of the premises but did not produce the documents to support the same. Being the custodian of any such documents then under Section 112 of the *Evidence Act*, he had the obligation of proving the issue by producing the documents.

133. It should be noted that under the provision of Article 70 (3) of *the Constitution* of Kenya, 2010, the Plaintiff need not prove any damage, or injury suffered. The Plaintiff in any case has accused the 1st and 2nd defendants for causing a nuisance to him and thus violating his rights to a clean and healthy environment by disposing all matter of waste on the Plaintiff's plot as well as causing noise pollution. Whereas the 2nd defendant has denied liability and stated that the 1st defendant should be held responsible for the breach. The 1st defendant has denied dumping any waste on the Plaintiff's land and further denied causing any excessive noise or vibrations. The 2nd defendant is the owner of the premises occupied by the 1st defendant. In his defence and submissions, the impression one gets from the 2nd defendant's arguments are that the acts complained of have been committed but the 1st defendant is responsible for it. In my view, this assertion supports the Plaintiff's contention that his rights have been violated, denied and threatened. The Plaintiff has shown photographs of the alleged garbage. There is abadant evidence of the liteering of waste and solid wastes onto his suit property and noise pollution from the loud spekers. This therefore calls for the Court's intervention.

134. The provision of Sections 101, 102 and 103 of the EMCA, 1999 deals on the issue of noise pollution by setting out a framework for establishing noise standards and prohibiting excessive noise. The prevention of noise and vibration pollution is now recognised as a component of a clean and healthy environment.

135. Under these regulations, "noise pollution" mean the "emission of the uncontrolled noise that is likely to cause danger to human health and damage to the environment". Indeed, under Regulation 3(2) of the EMCA (Noise and Excessive Vibration Pollution (Control)) Regulations, 2009, as read together with the provision of Articles 42 and 69 of *the Constitution* of Kenya, 2010, every person should has in mind, whenever they produce noise, to prevent it from being loud, unreasonable, unnecessary or unusual.

136. The evidence that comes to the fore in this suit is that there was failure of co-ordination between the 3rd and 4th defendants which all had the responsibility to make sure that the Plaintiff and every other citizen in the area where the premises by the 1st defendant was located enjoyed a peaceful and quiet environment.

137. The provision of Section 58 (1) (2) and (3) of theEMCA, 1999 states as follows:

> (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
>
> (2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:
>
> Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.
>
> (3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

138. If land use change is what was intended by the Affirmative Office, I consider a change of land use from a residential home to a commercial facility in form of a school to be a major land use change within the meaning of "major land use change" contained in paragraph 1 of the 2nd Schedule to the *Environmental Management and Co-ordination Act* (E.M.C.A).

139. Without compliance with the provision of Section 58 (1) and without any Environmental Impact Assessment Licence (EIA) issued by the authority under EMCA, the only conclusion is that environmental concerns have not been considered and ruled upon by the proper authority under the provision of Section 58(1) and (2) of the Act and this court is bound to consider that the Plaintiff's concerns may have merit. Moreover, even in the absence of such an EIA Licence, the plaintiffs have not done the trite thing appropriate in such circumstances for the purpose of aiding their case: no evidence

was provided by the 1st defendant or the 2nd defendant (who was the owner of the property) in their case of the presence of sanitary or garbage handling strategies or facilities to show that the location may have been prepared somehow, even though not to the fullest compliance with environmental laws for use as a school.

140. For these reasons, therefore, I find that the concerns of the Plaintiff regarding noise pollution and poor solid waste disposal and absence of proper sanitation at the present site are genuine. The conclusion of this court is therefore that the 1st defendant's operations on the 2nd defendant's property are therefore a source of nuisance to the Plaintiff and to the general public. Fundamentally, the Honorable Court finds that the suit filed by the Plaintiff against the defendants herein has merit accordingly.

IssueNo. b). Whether the paryies herein were entitled to the reliefs sought herein

141. Under this Sub – heading the Honourable Court will be making an endeavor to ascertain whether the parties are entitled to the reliefs sought. As already stated, the Plaintiff has already proved to be bearing a prima facie case against the defendants herein. From the elaborage pleadings and submissions herein, the NEMA, the 4th defendant herein does not dispute that it has a duty to ensure a clean and healthy environment by excising general supervision and co - ordination over all matters relating to environment. However, it has strongly held and rightfully so that this power is limited by the Environmental Management and Coordination Act, Cap 387 and *the Constitution* of Kenya, 2010. Its position is as follows:-

a. Schedule 4 of *the Constitution* of Kenya, 2010 distributes devolved functions between the National Government and the County Government.

b. County health services including refuse removal, refuse dumps and solid waste together with controlling air pollution, noise pollution and other public nuisances are functions vested on the County Government by *the Constitution* of Kenya.

c. That the 4th defendants had regulations on waste and noise being the Environmental Management and Coordination (Waste Management) Regulation, 2006 (hereinafter referred to as the "Waste Regulation") and the Environmental Management and Coordination (Noise and Excessive Vibration Pollution)(Control) Regulations (hereinafter referred to as "the Noise Regulation").

d. The 4th defendant further issued the National Solid Waste Management Strategy, 2015 which set the minimum requirements that County Governments should abide by and is currently working with the County Government to ensure the attainment of the aforesaid minimum requirements.

e. The 4th defendant has continued to work with County Governments through cooperation, collaboration and building capacity as required by *the Constitution* of Kenya and has therefore not abdicated its responsibility as it has not been demonstrated that the County Government has no capacity to undertake the mandate bestowed to it by *the Constitution* of Kenya.

f. The 4th defendant's employees visited the site on 24th March 2017 and prepared an inspection report in which the 1st defendant was instructed to contract a NEMA licensed waste collector and to submit an environmental audit to the Authority within 14 days.

142. The 4th defendant submitted indepth that the fourth Schedule of *the Constitution* of Kenya gives the distribution of functions between the National Government and the County Government. Part 2 gives the functions and powers of the County. These include:-

a. Paragraph 2 - County health services, including in particular - l(g) refuse removal, refuse dumps and solid waste disposal.

b. Paragraph 3 - control of air pollution, noise pollution, other public nuisances and outdoor licensing.

143. According to the Learned Counsel for the 4th defendant, in compliance with *the Constitution* the body cannot interfere with the mandate of the County Governments unless the County Governments are completely unable to discharge their mandate. Devolution must be given a chance. This Honourable Court cannot agree more on these sound legal assertions. In the current case, the Plaintiff has not demonstrated neither is there evidence that the County Governments are unable to discharge their role to warrant the intervention of the National Government through the 4th defendant. Besides, it was clearly demonstrated that the Plaintiff never served the 4th defendant with the letany of corresponces it claimed to have written to them. For nothing else, therefore, and from the very onset I find that no case against the 4th defendant has been established. It can therefore be determined from the above law that the 4th defendant has breached any of the rights of the Plaintiff and neither has it been indolent in discharging its duties. Further, I fully concur with the submissions by the Learned Counsel for the 4th defendant that the Honourable Court cannot issue a mandatory injunction against the 4th defendant. This was because the 4th defendant had at all times, remained conscious of the Statute and Regulations in place and has made every step necessary in ensuring that they adhere to the correct procedure outlined in *the Constitution* of Kenya and the Environmental Management and Coordination Act. Thus, this Honourable court should and has proceeded to dismiss the liability against the 4th defendant herein to this extent.

144. On the other hand, the Plaintiff argued that he had made several pleas to the 3rd and 4th defendants to compel the 1st and 2nd defendants comply with the law pursuant to their constitutional and statutory mandate but that bore no fruits, as the defendants have not shown any Interest in performing their statutory obligations. It was the Plaintiff's testimony and averment that the 1st and 2nd defendants have closed the access road denying him access to his property and unless restrained by this court to continue to commit such nuisances and the 3rd and 4th defendants intend unless compelled to continue acting in complete breach of their statutory duty and responsibilities.

145. Going by the testimonies of the Plaintiff's witnesses above and the documents produced by the Plaintiff I find that the 4th defendant were aware that there was pollution happening in the suit property and as much as they pass on the liability to the 3rd defendant, there are consents that needed to be obtained before a person constructed on land and assuming that the change of use of the land was made one of the consents obtained should have been from the 4th defendant.

146. PW - 1 testified that he resided in the suit property. He outlined the Plaintiff's case as outlined and summarized above. He added that he was satisfied with his neighbor changing his premises from a residential house to a commercial property were outside the scope of works authorized by the 3rd and 4th defendants. Secondly, there was no formal Change of User as required by the provisions of the law being the County Government, Physical Planning, Public health among others. Thirdly, there was no NEMA approval. They engaged relevant authorities and when they realized there was no immediate intervention by the relevant authorities, they brought this suit. The 4th defendant did not intervene. He added that the Plaintiff's property neighbors the suit property. The 2nd defendant in his testimony did not acknowledge that there was procurement of change of user and that all due processes were followed to procure it. It was the evidence of the 2nd defendant that the 1st defendant had leased out his property without his consent and that he had not informed him of his dealings in his property.

147. On the other hand, the 3rd defendant blamed the Plaintiff and argued that the Plaintiff was guilty of laches and sleeping on his rights. The 3rd defendant states that it was upon the Plaintiff to have escalated his complaints to the 3rd defendant's office of Environment, Energy and Waste Management knowing very well that the Municipal Council is now defunct and the said office having now put in the necessary structures would have acted timeously and addressed the complaints raised by the Plaintiff.

148. On the issue of change of user, the residential home was changed to a commercial building therefore there should have been construction. Under Section 2 of the repealed Physical Planning Act, "development" was defined as:

> "(a) the making of any material change in the use or density of any building or land or the subdivision of any land which for the purpose of this Act is classified as Class "A" development; and
>
> (b) the erection of such buildings or works and the carrying out of such building operations as the Minister may from time to time determine, which for the purpose of this Act is classified as class "B" development."

149. A reading of the above definition reveals that change of user of a parcel of land was a Class "A" development. Under the provision of Section 33 of the Act, it required a development permission. Secondly, change of user required a development permission granted by the relevant authority pursuant to an application presented in the prescribed form under Section 32 of the Act. Thirdly, the development permission granted under the provision of Section 33 was in a prescribed form. The application was to be in the form prescribed under the Fourth Schedule [Form PPA1] while the development approval itself was to be in the form prescribed in the Fifth Schedule [Form PP 2].

150. PW - 1 testified that he sued the 1st defendant because he was operating a school without a change of user for school use. They were neighboring his Plot No. 9903/MN and the school was in the neighboring plot. The school is run by the 1st defendant while the 2nd defendant is the owner of the Plot where the school is situated. The 2nd defendant has rented the premises to a school with no change of user. The 3rd defendant is supposed to regulate the use of the plots under the Physical Planning Act. NEMA, the 4th defendant is supposed to regulate environmental matters, including littering and noise. The County Government also ensures there is no littering within the area. He told the court that he wrote another letter to the Public Complaint Committee (Ombudsman) who wrote to the Municipal Council to explain to them what was happening. After a number of months, in November 2009 the Town Clerk of the Council wrote to the Ombudsman accepting that my complaint was genuine and the Town Clerk in the same letter also confirmed that the building built on Plot 9905, the property of 2nd defendant was illegally built. There was no change of user from residential to school usage, which is commercial.DW - 1 did not controvert the Plaintiff's testimony and evidence. What this means is that there was no change of user when this suit was initiated.

151. The other issue was whether the activities complained of were a nuisance to the Plaintiff and violated the Plaintiff's rights to a clean and healthy environment. PW - 1 testified that his complaint is that the defendants were making it uncomfortable for him to live in his property the way he should. In the year 2007 when the school started, they started littering into his compound. He contacted the owners of the school to rectify the situation but they did not comply. By a letter to the County Government, he requested the County Government to take action on the littering issue, by then it was the Mombasa Municipal Council in governance. Despite of the Council notifying the school to stop but they did not stop the littering.PW - 1 contended that the school and the different church activities taking place every week disturbed the peace and tranquility of the neighborhood,

152. On his part, the 1st defendant was unable to tell the court if he had effected the change of user and the extent of the pollution to the Plaintiff's compound, denying himself the opportunity to provide credible controverting evidence. In the given circumstances, therefore, the Honourable Court is compelled to fully accept the evidence of PW - 1 but only to the extent that there was nuisance and pollution of the environment.

153. From the surrounding facts herein, the Court now wishes to apprortion liability among the 1st, 2nd, 3rd and 4th defendants herein. Clearly, and without belabouring the point, the evidence presented to the court points the 1st defendant being entirely liable. Although the 2nd defendant leased the suit property to the 1st defendant, there was no evidence to suggest that he was privy to the school. Hence, liability herein for the 2nd defendant is only to the extent that he did not apply or make sure that the change of user had been filed. Similarly, although there appears to have been no prompt intervention by the 3rd and 4th defendants, there was no sufficient evidence to warrant an order of liability on part of the 3rd and 4th defendants. Indeed, the 4th defendant subsequently acted to forestall further damage to the environment.

154. Lastly, the Plaintiffs' sought general damages. The Plaintiff is an individual and has presented proper and empirical documentary evidence in form of the adduced exhibits to assist the Court assess general damages and direct appropriate awards to the Plaintiff. I over emphasise that it is not disputed that the 1st defendant's school and numerous church activities were a nuisance and interfered with the Plaintiff's resident's occupation of his property. Thus, he is entitled to genarla damages. In the case of "Livingstone v Rawyards Coal Co. [1880] 5 App cases 25 the court defined the measures of damages as:-

> " that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation"

155. The Plaintiff has not proposed an amount that will compensate him. In the case of Professor David M. Ndetei v Orbit Chemical Industries Ltd [2014] eKLR, Emukule J, referred to excerpts from the English case of "Rylands – Versus - Fletcher [1861 – 73] ALL ER REP 1 where it was stated in part:-

> " .....if it does escape and cause damage, he is responsible however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the Plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution but whether his acts have occasioned the damage....."

156. From this decision, Emukule J went on to award the Plaintiff a sum of Kenya Shillings Eight Hundred Thousand (Kshs.800,000/-) for general damages for the nuisance causd. I discern that the Plaintiff should also be awared along thie range taking the current and ever economic and global infalation facing the world.

Issue No. c). Who will bear the Costs of the Suit

157. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See

the cases of "Harun Mutwiri v Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

158. In the present case, the Plaintiff has been able to establish his case as pleaded from the filed pleadings. Therefore, he is entitled to be awarded costs of the suit to be borne by the 1st and 2nd defendants accordingly.

VI. Conclusion and disposition

159. In the end, having caused such an indepth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the 1and 2nd defendants herein. Thus, the Court proceeds to make the following specific orders:

a. That Judgement be and is hereby entered in favour of the Plaintiff againat the 1st and 2nd defendants herein jointly and sevarrlly with costs.

b. That a declaration is hereby made that Plaintiff is entitled to peaceful enjoyment and quiet possession of his property subdivision Plot No.9901/3/ Section II MN Mtopanga, Bamburi and the defendants herein have through their acts of commission and omission infringed on the Plaintiff's right to a clean and healthy environment as enshrined in Article 42 of *the Constitution* of Kenya and the right to property under Article 40 of *the Constitution* of Kenya, 2010.

c. That an order for a permanent injunction herein do issue preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from throwing and or disposing waste on subdivision Plot No.9901/3/ Section II MN Mtopanga, Bamburi.

d. That an order for a permanent injunction herein do issue preventing, stopping or restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from continuing with acts and omissions in the suit property that constitute noise pollution within the meaning of the *Environmental Management and Co-ordination Act* No.8 of 1999.

e. That an order for a mandatory injunction do hereby issue that the 1st and 2nd defendants and or their agents, servants, tenants and or proxies do forthwith pull down and remove the gate so much as is erected beyond their plot boundaries and in obstruction of the Plaintiff's access to his Plot No.9901/3/ Section II MN Mtopanga, Bamburi and a restraining injunction restraining the 1st and 2nd defendants by themselves, agents, servants, tenants and or proxies from erecting or continuing to erect upon the said plaintiff's access road and or beyond their boundary line.

f. That an order made that the Plaintiff be and is hereby awarded general damages of nuisance of sum of Kenya Shillings Three Fifty Thousand (Kshs 350,000/-) to be paid by the 1st defendant only.

g. That the Plaintiff shall have the costs of the suit as against the 1st and 2nd defendants.

h. That as much as the claim between the Plaintiff, the 3rd and the 4th defendants shall bear their own costs of the suit.

It Is So Ordered Accordingly.

JUDGMENT IS DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF JULY 2023.

.....

HON. JUSTICE L.L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

a. M/s. Yumna – the Court Assistant.

b. M/s. Julu Advocate holding brief for Mr. Jengo Advocates for the Plaintiff.

c. M/s. Asewe Advocate holding brief for M/s. Takah Advocates for the 2nd defendant.

d. No appearance for the 1st, & 3rd defendants.

e. M/s. Mwangi Advocate holding brief for Mr. Ngara for the 4th defendant.