



Gidoomal & another v National Environment Management Authority (NEMA) & 3 others; Vacuum Filler Limited & 6 others (Interested Parties) (Environment and Land Petition 47 of 2021) [2023] KEELC 19223 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND PETITION 47 OF 2021**

LL NAIKUNI, J

JULY 26, 2023

**IN THE MATTER OF: ARTICLE 2(1), 3(1), 10, 19, 20(1), (2),(3),
(A),(4), (A), (B), 21, 22 (1) & (2) (C);
23(1), 24, 27, 28, 42, 43, 70, 165(3)(B),
258, 259 AND 260 OF THE CONSTITUTION
OF KENYA, 2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND
VIOLATION OF ARTICLES 10, 27, 28, 42,
43 & 70**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE
AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF: PLOT NO. MSA/BLOCK/IX/49 & 50 ALONG
TOM MBOYA AVENUE MOMBASA.**

BETWEEN

CHANDAN JETHANAND GIDOOMAL 1ST PETITIONER

PREM JETHANAND GIDOOMAL 2ND PETITIONER



AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 1ST
RESPONDENT

MOMBASA COUNTY GOVERNMENT 2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY (KURA) 3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER MOMBASA THRO' THE
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 4TH RESPONDENT

AND

VACUUM FILLER LIMITED INTERESTED PARTY

CHARLES KIOKO T/A MAIZE LOGISTICS INTERESTED PARTY

BEBETO CHALO T/A ELLY CAR WASH INTERESTED PARTY

KENNEDY MWANIA T/A SHALOM TUDOR KIOSK INTERESTED PARTY

BRENDA KILOI T/A TUKO LIVE INTERESTED PARTY

FATMA OMAR T/A MASHALLA CAR WASH INTERESTED PARTY

MAHMUD AHMED MOHAMED INTERESTED PARTY

Necessity of NEMA's proactivity in enforcing the law and assisting county governments in developing and implementing policies on the disposal and management of urban waste

The suit revolved around the right to a clean and healthy environment and an allegation of encroachment of land. The court highlighted the roles of the National Environment Management Authority (NEMA) and citizens in the protection and conservation of the environment. The court stated that NEMA must be proactive in enforcing the law and assisting county governments in developing and implementing policies on the disposal and management of urban waste.

Reported by Kakai Toili

Environmental Law - National Environment Management Authority (NEMA) - role of NEMA in the protection and conservation of the environment - role of citizens in the protection and conservation of the environment - how would the success and efficiency of NEMA be exhibited in the realization of the right to a clean and healthy environment – Constitution of Kenya, 2010, articles 42, 61, 69(1)(g) and 70; Environmental Management and Co-ordination Act, Cap 387, sections 3 and 9.

Civil Practice and Procedure – suits – institution of suits – institution of suits regarding the entitlement to a clean and healthy environment – requirements - whether a person bringing a suit regarding the entitlement to a clean and healthy environment had to show personal injury or loss - Constitution of Kenya, 2010, article 70.

Words and Phrases – eliminate – definition of eliminate - to remove or get rid of something - Oxford Advanced Learner's Dictionary.

Brief facts

The petitioners were the owners of the suit property which lay within Mombasa County Development area and had regularly been paying the rates for the same. However, there was ongoing construction of unplanned structures and shelters that were cropping up in the suit property contrary to the county government building by laws and the Physical Planning Act. Moreover, the haphazard nature in which the structures were being



set up had led to the accumulation of increasing amounts of garbage and waste which not only continued to endanger the health of the public and the environment but posed a security threat in that the area was proving to be a habitat for other nefarious activities such as drug dealing and peddling.

The continued dumping of garbage and development of unplanned, unhygienic and unlicensed eateries (*bandas*) continued to pose a serious health and security risk to the members of the public. Their rights and those of members of the public specifically under article 42 of the Constitution had been violated and were in danger of continued violation. The petitioners contended that it was the respondents' duty to establish and maintain proper sanitary services and provision of disposal of refuse so as to maintain a clean and healthy environment.

The petitioners sought for among other orders; a declaration that the respondents act of abdicating their responsibility contravened the provisions of article 42 of the Constitution of Kenya, 2010 (the Constitution); and a declaration that the violation of article 42 by the respondent had resulted in a denial of the right to a clean and healthy environment to the petitioners and to the residents of Mombasa County.

Issues

- i. What was the role of the National Environment Management Authority in the protection and conservation of the environment?
- ii. How would the success and efficiency of the National Environment Authority be exhibited in the realization of the right to a clean and healthy environment.
- iii. What was the role of citizens in the protection and conservation of the environment?
- iv. Whether a person bringing a suit regarding the entitlement to a clean and healthy environment had to show personal injury or loss.

Held

1. Article 2(1) and (4) of the Constitution defined the Constitution as being the supreme law of the Republic and it bound all persons and all State organs at all levels. Any law, including customary law that was inconsistent with the Constitution was void to the extent of the inconsistency and any act or omission in in contravention of the Constitution was invalid.
2. The court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there was no ambiguity attempt to depart from the straight texts of the Constitution must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
3. The petitioners had dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting the petition against the respondents and pleading for the prayers sought.
4. Under article 40 of the Constitution, the petitioner had the right to property, which right included the use of the suit property. From the definition of environment under the Environmental Management and Co-ordination Act, the environment went beyond the physical settings to include issues such as social, economic and cultural conditions that influenced the life of an individual or a community. People formed part of the environment which was why it was critical to eliminate processes that posed danger to human health.
5. Article 69(1)(g) of the Constitution obligated the State to eliminate processes and activities that were likely to endanger the environment. The Constitution behooved the respondents to remove or get rid of all the processes and activities that caused pollution. The Constitution under article 42 of the Constitution guaranteed every person the right to a clean and healthy environment, which included 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.
6. Section 3 of the Environmental Management and Co-ordination Act gave effect to the entitlement to a clean and healthy environment which was enshrined in article 42 of the Constitution. Every person



- had a duty to safeguard and enhance the environment. That section empowered a person alleging that the right to a clean and healthy environment had been or was being denied, violated, infringed or threatened to apply to the Environment and Land Court (ELC) for redress.
7. Section 9(1) of the Environmental Management and Co-ordination Act established and made the 1st respondent, the National Environment Management Authority (NEMA) the principal instrument of Government in the implementation of all policies relating to the environment. Consequently, NEMA had to play a primary role in the elimination of processes and activities that endangered the environment. The Environmental Management and Co-ordination Act bestowed specific roles on NEMA in relation to preventing air and water pollution in Kenya. There was much more that the law enjoined NEMA to do pursuant to section 9.
 8. The success and efficiency of NEMA would 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. In light of the nationwide challenge posed by urban waste, NEMA must be proactive and take the lead in enforcing the law and assist 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 did not derogate from every citizen's right to a clean and healthy environment.
 9. Under article 61 of the Constitution, land had been classified into three (3) categories. They were public, community or private land. From the time of attaining independence of Kenya, there had been very clear methods and procedures of the acquisition of land to public, individual and community categories. Section 7 of the Land Act no 6 of 2012 provided for those methods. None of the respondents nor the interested parties were able to demonstrate under which of those ways that they acquired the ownership to the suit land and hence justified the bases upon which they were in occupation and possession of it.
 10. The respondents had failed to eliminate the process and activities that caused pollution in the suit property due to the dumping of waste and the unplanned structures on the suit property. The petitioners had shown by way of photographs, that the suit property had become a dumpsite that was increasingly posing a health and security threat to members of the public. That evidence had not been rebutted by the respondents. Furthermore, the court also conducted a site visit on the suit premises on October 6, 2022 and indeed saw the extent of dumping and waste on the premises. In the circumstances, the petitioner's right to a clean and healthy environment had been violated.
 11. Article 69(1)(a) to (h) of the Constitution gave the broad obligations of the State in relation to the environment. It was only article 69(1)(d) which brought citizens into the picture by requiring the State to encourage public participation in the management, protection and conservation of the environment. A reading of article 69(1) confirmed that the State carried a bigger burden in relation to the management and protection of the environment. Article 69(2) provided that every person had a duty to cooperate with State organs to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The role of citizens under the Constitution was to cooperate with State organs, such as the respondents, for the protection and conservation of the environment. The duty to eliminate processes and activities that polluted the environment fell on the State and its agencies.
 12. Section 3(1) of the Environmental Management and Co-ordination Act provided that every person in Kenya was entitled to a clean and healthy environment in accordance with the Constitution and relevant laws, and was required to safeguard and enhance the environment. Section 3(2A) of the Environmental Management and Co-ordination Act provided that every person shall cooperate with State organs to protect and conserve the environment and ensure the ecological sustainable development of natural resources. The Fourth Schedule to the Constitution placed the control of air pollution as well as refuse removal, refuse dumps and solid waste disposal in the hands of county governments.



13. The Fourth Schedule to the Constitution made the protection of the environment and natural resources and water protection the work of the National Government, which was performed by the respondents. The onus of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they were discharged into the sewerage system and making recommendations for the monitoring and control of water pollution fell within the docket of the Cabinet Secretary responsible for environmental matters on NEMA's recommendations under section 71 of the Environmental Management and Co-ordination Act.
14. Alongside the statutory responsibility, Kenyans owed future generations a duty to sustain the environment for their benefit, as highlighted in the preamble to the Constitution. The court was required by section 3 of the Environmental Management and Co-ordination Act to be guided by principles of intergenerational and intragenerational equity when exercising its jurisdiction in claims where a person alleged that the right to a clean and healthy environment had been denied or violated. Intergenerational equity enjoined the present generation while exercising its rights to the beneficial use of the suit property.
15. The court was empowered by the Constitution and the Environmental Management and Co-ordination Act to make appropriate orders to prevent, stop or discontinue the pollution attributable to any piece of land or part of Kenya. Granting a statutory interdict or continuing orders would give effect to article 70(2) which gave the ELC the discretion to make orders or give directions which it considered appropriate to prevent, stop or discontinue any act or omission that was harmful to the environment.
16. An applicant seeking redress for breach or threat of breach of the right to a clean and healthy environment did not have to demonstrate that any person had incurred loss or suffered injury under article 70 of the Constitution. The court could only order that compensation be paid to specific persons whose details were supplied in the suit, which in that case was the two petitioners. Nonetheless, there should be need to provide orders for the preservation of the suit property and the restoration of to its original and better environmental state.

Amended petition allowed.

Orders

- i. *Judgement entered in favour of the petitioners in its entirety.*
- ii. *A declaration was issued that the respondents act of abdicating their responsibility contravened the provisions of article 42 of the Constitution.*
- iii. *A declaration was issued that the violation of article 42 of the Constitution by the respondent had resulted in a denial of the right to a clean and healthy environment to the petitioners and to the residents of County of Mombasa.*
- iv. *An order for compensation was issued to the petitioners as was provided for under article 70(1), (2)(c) as read with article 3 as well as article 23(3) (a) and (e) of the Constitution.*
- v. *A declaration was issued that in breach of the above the petitioners had a right for redress for orders of injunction and compensation amounting to a sum of Kenya Shillings ten million (Ksh 10,000,000/-) pursuant to the provision of article 23(3)(b) and (e) of the Constitution as read with section 13(7) of the Environmental Management and Co-ordination Act of 1999 which the 1st and 2nd respondents should be compelled to pay jointly and severally.*
- vi. *A mandatory injunction was issued compelling the 1st and 2nd respondents to restore the degraded dumpsite and to stop any further dumping from taking place on the suit property.*
- vii. *An order pursuant to section 152E of the Land Act, No 6 of 2012 was issued directing the 3rd respondent, the Kenya Urban Roads Authority (KURA) to and all the interested parties to remove all the containers illegally placed on the petitioners boundary wall encroaching the pedestrian pathway within the next ninety (90) days from the date of the delivery of the ruling.*



- viii. *Failure to adhere with the order, the petitioner to proceed on causing peaceful eviction but at the costs of the 1st and 2nd respondents and the interested parties.*
- ix. *The County Commander of Mombasa and the officer in charge of the Central Police Station Mombasa to ensure full compliance and strict adherence of the court order.*
- x. *Each party to bear their costs.*

Citations

Cases

Kenya

1. *African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha* Petition 50 of 2012; [2017] KEELC 2781 (KLR) - (Explained)
2. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Followed)
3. *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Credit; Reference Bureau Africa Ltd* Civil Case 17 of 2014; [2016] KEHC 7064 (KLR) - (Explained)
4. *KM & 9 others v Attorney General & 7 others* Petition 1 of 2016; [2020] KEELC 1680 (KLR) - (Explained)
5. *Matemu, Mumo v Trusted Society of Human Rights Alliance & another* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
6. *Rabera, Martin Osano & another v Municipal Council of Nakuru & 2 others* Petition 53 of 2012; [2018] KEELC 4040 (KLR) - (Explained)
7. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Explained)
8. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Explained)

United Kingdom

Myres v Defries Myres v Defries (1880) 5 Ex D 180 - (Explained)

India

Reids Hewett & Company v Joseph AIR 1918 cal 717 - (Explained)

Texts

Hornby, AS., (Ed) (2013), *Oxford Advanced Learners Dictionary* Oxford: Oxford University Press

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 27(1)- (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 18; rule 11- (Interpreted)
3. Constitution of Kenya articles 2(1); 2(4); 3; 3(1); 10; 10(1); 10(2)(b)(d); 19; 20; 20(1); 20(2); 20(3)(a); 20(4)(a); 20(4)(b); 21; 22(1); 22(2)(c); 23(1); 23(3)(a); 23(3)(b); 23(3)(e); 24; 24(1); 27; 28; 40; 42; 43; 61; 69; 69(1); 69(1)(a)(h); 69(1)(d); 69(1)(g); 69(2); 70; 70(1); 70(2); 70(2)(c); 70(3); 165(3)(b); 258; 259; 259(1); 260; Schedule 4; paragraph 3(g)- (Interpreted)
4. Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) (Constitution of Kenya Sub Leg) rule 26(1)(2)- (Interpreted)
5. Environment Management and Co-ordination Act (cap 387) sections 3, 3(1); 3(2A); 9; 9 (1); 13(7); 71; 87; 88; 108(1)- (Interpreted)
6. Land Act (cap 280) sections 7, 152E - (Interpreted)
7. Physical Planning Act (Repealed) (Act No 6 of 1996) In general - (Cited)

Advocates

Mr. Borona for petitioners

M/s. Mwangi Advocate for the 1st respondent



JUDGMENT

I. Preliminaries

1. The judgment of this honorable court is a culmination of the filed Amended Petition dated November 10, 2022 by the 1st and 2nd petitioners herein Chandan Jethanand Gidoomal and Prem Jethanand Gidoomal herein. It was against the 1st, 2nd, 3rd & 4th respondents. In the course of time the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th interested parties herein sought leave of this court and were joined as parties to the suit accordingly. From the very onset, the honorable court holds that the suit is on typical environmental management, protection, impact assessment and/or degradation based on a right to a clean and healthy environment related issues and on allegation of encroachment of land.
2. From the records, it will be noted that although the respondents were all served with the pleadings as evidenced from the affidavit of Service, none of the respondents and subsequently the interested parties filed their responses to the main Amended Petition. Nonetheless, the honorable court with the consensus of the parties provided direction that the Amended Petition be disposed off by way of written submissions thereof. It is instructive to note that, on October 6, 2022 the honorable court upon the request by parties herein conducted an elaborate site visit "*locus in quo*" and prepared a report to that effect. The said report forms part of this judgement for ease of reference.

II. The 1st & 2nd Petitioners' Case

3. The Constitution Petition was brought under the dint of the provisions of articles 2(1), 3(1), 10, 19, 20 (1), (2), (3), (a), (4), (a), (b), 21, 22(1) & (2) (c); 23 (1), 24, 27, 28, 42, 43, 70, 165(3)(b), 258, 259 and 260 of the Constitution of Kenya 2010. The petitioners sought for the following orders:-
 - a. A declaration that the respondents act of abdicating their responsibility contravenes the provisions of article 42 of the Constitution of Kenya, 2010.
 - b. A declaration that the violation of article 42 of the Constitution of Kenya 2010 by the respondent has resulted in a denial of the right to a clean and healthy environment to the petitioners and to the residents of Mombasa County.
 - c. A declaration that in breach of the above the petitioners have a right for redress for orders of injunction and compensation pursuant to article 23(3)(b) and (e) of the Constitution of Kenya as read with section 13(7) of the Environment Management and Co-ordination Act of 1999;
 - d. A mandatory injunction to compel the 1st and 2nd respondents to restore the degraded dumpsite.
 - e. A mandatory injunction to compel the 1st and 2nd respondents to restore the degraded dumpsite and to stop any further dumping from taking place on Plot Nos Msa/block/IX/49 and 50.
 - f. A mandatory injunction to compel the 1st and 2nd respondents to restore the degraded dumpsite.
 - g. An order directing the 3rd respondent (KURA) herein to remove the containers illegally placed on the petitioners boundary wall encroaching the pedestrian pathway.
 - h. An order for compensation to the petitioners as is provided for under article 70(1), (2)(c) as read with article 3 as well as article 23(3)(a) and (e) of the Constitution of Kenya, 2010.



- i. Any other relief this court may deem fit to grant.

III. The Legal Foundation of the Petition

4. The petition was founded on the following legal provisions:
 - a. Articles 23(1) and 70 of the *Constitution of Kenya* empowers this honorable court to deal with the question whether a right to a clean and healthy environment has been violated or threatened with violation in contravention with this Constitution.
 - b. Article 2(1) of the *Constitution* provides that, this constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of government.
 - c. Article 3(1) provides that every person has an obligation to respect, uphold and defend this *Constitution*.
 - d. Article 10(1) provides that the national values and principles of governance in this article bind all state organs, state officers, public officers, and all persons.
 - e. Article 10(2)(b)(d) provides that that the national values and principles of governance include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized and sustainable development.
 - f. Article 19 provides for Rights and Fundamental Freedoms.
 - g. Article 20 provides for the Application of Bill of Rights and its that: The bill of rights applies to all law and binds all state organs and all persons Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. In interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and the spirit, purport and objects of the Bill of Rights.
 - h. Article 21 speaks to the Implementation of rights and Fundamental Freedoms.
 - i. Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed or is threatened.
 - j. Article 24(1) provides that a right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.
 - k. Article 27 of the *Constitution of Kenya, 2010* provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - l. Article 28 of the *Constitution of Kenya* provides that every person has inherent dignity and the right to have that dignity protected and respected.
 - m. Article 42 states that every person has 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.



- n. Article 69 of the [Constitution of Kenya 2010](#) places obligations on state organs and every person in respect of the environment. Article 69(1) provides that the State Shall: Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits. Work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya. Protect and enhance intellectual property in and indigenous knowledge of biodiversity and the genetic resources of the communities. Encourage public participation in the management, protection, and conservation of the environment. Protect genetic resources and biological diversity. Establish systems of environmental impact assessment, environmental audit and monitoring of the environment. Eliminate processes and activities that are likely to endanger the environment. Utilize the environment and natural resources for the benefit of the people of Kenya.
- o. Article 70 of the [Constitution of Kenya, 2010](#) provides for the Enforcement of environmental rights. Specifically, article 70(1) states if a person alleges that a right to a clean and healthy environment recognized and protected under article 43 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.
- p. Article 70(2) states that on application under clause (1), the court may make any order, or give any directions, it considers appropriate- To prevent, stop or discontinue any act or omission that is harmful to the environment. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. To provide compensation for any victim of a violation of the right to a clean and healthy environment.
- q. The provision of article 42 of the [Constitution of Kenya, 2020](#) and section 3 of the [Environment & Management Coordination Act](#), No 8 of 1999 (hereinafter referred to as “The [EMCA](#)”) provides for entitlement to a clean and healthy environment, section 87 of [EMCA](#) prohibits dangerous handling and disposal of waste; Section 88 provides for application of waste license so as to operate a waste disposal site.
- r. In Recognition that refuse removal and solid waste disposal was devolved functions reserved for the County Government (2nd Respondent herein) under Paragraph 3 (g) of the Fourth Schedule of the [Constitution](#).
- s. That there was ongoing construction of unplanned structures that were cropping up in the above-mentioned premises contrary to the *County Government Building by Laws Regulations* 252(1) and [Physical Planning Act](#).
- t. That the haphazard nature in which these structures were being set up had brought rise to huge amounts of garbage and waste including attracting drug dealers and peddlers in the suit premises creating what was emerging as an environmental and security crisis to the security resident’s contrary to the [EMCA](#).
- u. That the unlicensed cooking enterprises were not bringing any income to the County Government (2nd Respondent) in payment of Single Business Permit or Rates to the current land owners and they were not observing public health as per the County Government Health Act hence posing a real danger to the safety of city residents.



IV. Brief Facts

5. The brief facts of the case were that the 1st and 2nd petitioners were the owners of the Plot No MSA/Block/IX/49 & 50 which lies within Mombasa County Development area and had regularly been paying the attendant country rates for the same. However, there was ongoing construction of unplanned structures and shelters that were cropping up in the above-mentioned premises contrary to the *County Government Building By Laws Regulations 22(1)* and the *Physical Planning Act*.
6. Moreover, the haphazard nature in which the structures were being set up had led to the accumulation of increasing amounts of garbage and waste which not only continued to endanger the health of the public and the environment but posed a security threat in that the area was proving to be a habitat for other nefarious activities such as drug dealing and peddling.
7. The continued dumping of garbage and development of unplanned, unhygienic, and unlicensed eateries (bandas) continued to pose a serious health and security risk to the members of the public especially with diseases such as cholera which were known to break out in unsanitary conditions. Their rights and those of members of the public specifically under the provision of article 42 of the *Constitution of Kenya, 2010* had been violated and were in danger of continued violation. That it was the respondents duty to establish and maintain proper sanitary services and provision of disposal of refuse so as to maintain a clean and healthy environment in line with article 42 of the *Constitution*.
8. The respondents had failed in this constitutional duty placed on them which had resulted in accumulated toxins and refuse in the petitioners property which was increasingly posing a health and security threat to the members of the public and which was also degrading the value of the petitioners property. In the premises this honourable court should issue mandatory orders to the respondents to ensure discontinuance of any activity that would lead to further damage to the property and the environment which it was located and to ensure that all illegal structures set up in the premises were permanently brought down.
9. The Petition was premised on the testimonial facts, grounds and the averments made out in the 5 Paragraphed affidavit of Prem Jethanand Gidoomal, 2nd petitioner who averred that:
 - a. He was a male adult of sound mind.
 - b. He was one of the Petitioners hereinduly authorized by the 1st petitioner to make this affidavit and therefore competent to swear this affidavit.
 - c. He had read and understood the contents of the Amended Petition.
 - d. He verified the correctness of the averments stated herein.
 - e. What is deponed was true to the best knowledge and belief except where otherwise stated.

V. The Response to the Petition by the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th Interested Parties

10. The 1st, 2nd, 3rd, 4th, 5th, 6th & 7th interested parties on November 21, 2022 responded to the amended petition by way of a 16 paragraphed affidavit sworn by Antony Murithi Nkatha together with annexures marked as “AMK” annexed hereto. The contents of the affidavit, he in verbatim averred:-
 - a. He was the Director of the 1st interested party with the authority to depone herein.(Annexed and marked “AMN - 1” was a copy of resolution.)
 - b. He had the authority from the other Interested Parties to represent and depone on their behalf. (Annexed and marked “AMN - 2” was a copy of the Authority.)



- c. He swore the affidavit in response to the amended petition on behalf of the interested parties who ought to have been included therein as interested parties as per the ruling of the court delivered on October 17, 2022.
- d. In response to paragraph 5 of the amended petition the interested parties deny that the 1st & 2nd petitioners were the legal owners of plot Msa/block/IX/49 and 50 (Hereinafter referred to as “The Suit Properties”) and state that the issue of ownership of the suit properties was the subject of several court cases between the petitioners and third parties, for instance the Miscellaneous Civil Application No 332 of 2019.
- e. The interested parties deny that the 1st & 2nd petitioners were instituting this petition on behalf of members of the public and states that they had no capacity to represent them.
- f. In response to the contents of paragraphs 6 - 12 of the amended petition the interested parties deny that the articles of the Constitution stated therein apply herein and that there was breach of the Constitution of Kenya, 2010.
- g. In response to the contents of paragraphs 13 - 19 of the amended petition the interested parties deny that the articles of the Constitution stated therein apply herein and that there was breach of Constitution.
- h. In response to the contents of paragraphs No 24 - 31 of the amended petition the interested parties deny the averments therein.
- i. Interested parties stated that the 1st & 2nd petitioners were using this Petition to maliciously evict them from their place of business which was not and did not form part of the suit properties.
- j. The interested parties operated legitimate and/or legal business outside the suit properties and which the 1st and 2nd respondents gave licenses and relevant approvals to. (Annexed and marked “AMN - 3” was a copy of the license).
- k. The businesses did not affect the 1st & 2nd petitioners in any way neither do their businesses amount to any breach of the Constitution.
- l. The interested parties had not constructed any unplanned structures on the petitioners property and only had containers which had been converted to businesses with fixtures, fittings and stocks for business and had not contravened any laws. (Annexed and marked “AMN - 4” was a copy of photographs).
- m. The interested parties deny that their businesses after the 1st and 2nd petitioners in any way whatsoever.
- n. It was thus in the interest of justice that the amended petition be dismissed with costs.

VI. Submissions

11. On February 1, 2023 upon the close of the cases, in the presence of all the parties court directed that the petition be disposed off by way of written submissions. Thus, all parties prepared and filed their written submissions. Accordingly, upon full compliance the honorable court reserved a date for the delivery of Judgment on notice accordingly.



A. The written Submissions by the 1st & 2nd Petitioners

12. On November 21, 2022, the learned counsel for the 1st & 2nd petitioners through the Law firm of Messrs. Borona & Associates Advocates filed their written submissions dated November 18, 2022. Mr Borona Advocate for the 1st & 2nd petitioners commenced his submissions by providing court with a detailed background of the suit. He stated that in the Petitioners sought the following orders:
- a. A declaration that the respondents act of abdicating their responsibility contravenes the provisions of article 42 of the *Constitution of Kenya, 2010*.
 - b. A declaration that the violation of article 42 of the *Constitution of Kenya 2010* by the respondent has resulted in a denial of the right to a clean and healthy environment to the petitioners and to the residents of Mombasa County.
 - c. A declaration that in breach of the above the petitioners have a right for redress for orders of injunction and compensation pursuant to article 23(3)(b) and (e) of the *Constitution of Kenya* as read with section 13(7) of the *Environment Management and Co-ordination Act of 1999*.
 - d. A mandatory injunction to compel the 1st and 2nd respondents to restore the degraded dumpsite and to stop any further dumping from taking place on Plot Nos Msa/block/IX/49 and 50.
 - e. A mandatory injunction to compel the 1st and 2nd respondents to restore the degraded dumpsite.
 - f. An order directing the 3rd respondent (KURA) herein to remove the containers illegally placed on the 1st & 2nd petitioners boundary wall encroaching the pedestrian pathway.
 - g. An order for compensation to the petitioners against the 1st respondent as is provided under article 70(1)(2) (c) as read with article 3 as well as article 23(3) (a) and (e) of the *Constitution of Kenya, 2010*.
 - h. Any other relief this court may deem fit to grant.
13. The learned counsel informed court that the respondents were yet to file and serve responses to the Amended Petition. Be that as it may, the learned counsel indicated that he would be submitting on the following two (2) issues to be determined by the court:-
- a. Whether the petitioners rights to a clean and healthy environment under the provision of article 42 of the *Constitution of the Kenya, 2010* had been breached or were in danger of breach by the respondents;
 - b. Whether the petitioners were entitled to the reliefs sought in the amended petition.
14. Firstly, on whether the petitioners rights to a clean and healthy environment under the provision of article 42 of the *Constitution of Kenya, 2010* had been breached. On this issue, the Learned Counsel cited the case of:- "*Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others* [2018] eKLR where the court noted the following:

“After promulgation of *Constitution of Kenya 2010* and establishment of County Governments, the functions of refuse removal, refuse dumps and solid waste disposal were devolved to county governments pursuant to section 2 (g) of Part 2 of the Fourth Schedule of the *Constitution*. There is in fact no dispute that the 3rd respondent took over the operation of Gioto from the 1st respondent and continues to do so up to now. Gioto mainly receives



waste from Nakuru Town. The Petitioners case and evidence is that Goto is a dangerous place to reside nearby since it has become a heaven for street boys and criminals who pose a threat to unsuspecting members of the public, that it harbors stray dogs that feed on refuse and may bite passers by and turn off to tourists; that the dumpsite emits offensive gas which is toxic and pose risk of causing respiratory ailments; that during rainy seasons, needles, nails and stones spread to the nearby road thus causing tire busts and punctures which in turn expose motorists to risk of being attacked by marauding street boys and other criminals; that since the refuse normally consists of non-compacted materials, it rolls over to the lowlands; that the dumpsite is a breeding ground for mosquitoes which cause malaria; and that of these contentions the Petitioners annexed several photographs which depict aspects of Goto. The 1st and 3rd respondents have acknowledged at paragraphs 16 of Mr Wilson M Maroas replying affidavit that Goto garbage site presents a real environmental hazard to motorists and residents of the area. He further concedes that the 1st respondents has faced sanctions from the 2nd respondents as regards the way they have operated Goto... The 1st and 3rd respondents have not offered any evidence to show specific steps taken to address the issues that were raised by the petitioners and the 2nd respondents in its restoration order dated September 30, 2011. The matters companied of affect not only the petitioners but the residents of Nakuru at large. Though the 1st and 3rd respondents have argued that they have faced financial difficulties that alone cannot be an excuse. Clearly, the 1st and 3rd respondents have operated and continue to operate the Goto..... dumpsite in a manner that violates article 42 of the Constitution.....In view of and 3rd respondents actions violated and threaten to violate the Petitioners right to a clean and healthy environment. “In the instant case, the Petitioners have shown by way of photographs, that the suit property has become a dumpsite that is increasingly posing a health and security threat to members of the public. This evidence has not been rebutted by the respondents. Furthermore, this honorable court also conducted a site visit on the suit premises on October 6, 2022 and indeed saw the extent of dumping and waste on the premises. In the circumstances, it is our humble submission that the petitioner's right to a clean and healthy environment has been violated.”

15. On whether the 1st & 2nd petitioners were entitled to the reliefs sought in the Amended Petition. The learned counsel held that the court also had a similar finding in the case of: “*African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] eKLR where the Court held:-

“I have mentioned that there are plastic papers everywhere around the site. That was clearly visible. The bigger danger is however i what the eyes cannot see, the possible contamination of the aquifer underneath and of Lake Naivasha; the health risk to humans posed by pollution of the air and the soil, and the risk to the health of animals which ingest waste dumped at the site. Even without tangible evidence, this is a case that speaks for itself, a res ipsa loquitor situation. The Dumpsite is clearly and environmental hazard. I have no doubt in my mind that the facility in issue is a threat to a clean and healthy environment. Its operations are indeed illegal. The operation of the facility by the Respondent and its successor, the County Government of Nakuru, violates the rights of the Petitioners and indeed the rights of the residents of Naivasha, and of all person's resident in Kenya, to clean and healthy environments as provided for in article 42 of the Constitution. I do find that there has been a violation of this right by the Respondent and now the County Government of Nakuru.... This case has brought forth an important element touching on



the management and conservation of our environment. I honestly do not know whether NEMA has conducted an audit of the way all county governments manage solid waste. I however, doubt if NEMA has done so given what has revealed itself in this suit. I believe it is time that NEMA considered a countrywide audit and proceeded to embark on measures to ensure that only licensed facilities operate as required by law. NEMA also needs to introduce rules and regulations on the operation of such facilities and have mechanism to ensure that these rules are followed. The aspect of licensing of transporters of waste and has to be involved and work together with County Governments and NEMA so that solid wastes are properly managed. Funding will always be an issue, and this should be looked at by both County and National Governments. We cannot continue risking the health and lives of Kenyans by failing to have properly managed solid waste management systems. The time to act is now if we must safeguard a good future for this and future generations. I therefore order that this judgement be served upon NEMA so that they can proceed to ensure compliance with the orders issued herein, and report to this court as directed." In the instant case, NEMA the 1st respondent has not denied the presence of dumpsite and garbage in the petitioners property and has also confirmed that "...it is prepared and willing to implement the orders that would result from these honorable courts proceedings".

16. Therefore, the learned counsel urged this honorable court do grant the prayers sought in the amended petition. Specifically, it should direct the 1st and 2nd respondents to restore the degraded dumpsite and stop any further dumping from taking place on plot Nos. Msa/blocl/IX/49 & 50. This would be in line with the provision of section 108(1) of the [EMCA, 1999](#).
17. He cited the case of "[KM & 9 others v Attorney General & 7 others](#) [2020] eKLR the court had the following to say on the issue of proof of violation of a fundamental right or freedom:-

"To protect the right to a clean environment guaranteed under article 42 of the [Constitution](#), article 70 states that any person who alleges that this right is being or is likely to be denied or violated, infringed or threatened; the person may apply to the court for redress. The [Constitution](#) gives Kenyans access to courts even where there are only threats of violation." In the instant case it is our submission that the petitioners have without a doubt demonstrated that the suit premises has a growing dumpsite that is a public health concern for all those in and around the suit premises."

In the same case (*supra*) the court found that:-

"The RIO Declaration imposes an obligation on the state actors to develop law regarding liability and compensation for the victims of pollution . The principle states, "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall cooperate in an expeditious and more determined manner to develop further international law regarding liability and activities within their jurisdiction or control to areas beyond their jurisdiction. The petitioners would not have moved the court had the state actors performed their roles immediately the adverse effects of the 7th respondent were established."

18. In conclusion, the learned counsel asserted that having shown that the 1st & 2nd petitioners right to a clean and healthy environment had been violated, it was their humble submission that this amended petition should be allowed as prayed.



VII. Analysis and Determination

19. I have carefully considered all the filed pleadings pertaining to the amended petition dated November 10, 2022, the affidavits by both the petitioners and the Interested parties, the articulate written submissions, the cited authorities, the appropriate provisions of the *Constitution of Kenya, 2010* and the statutes.
20. For the honorable court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following three (3) salient issues for its determination. These are:-
 - a. Whether the amended petition by the 1st & 2nd petitioners meets the threshold for *Constitution* Petitions.
 - b. Whether the *Constitution* Petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?
 - c. Who will bear the cost of the suit.

Issue No a). Whether the Amended Petition by the 1st & 2nd Petitioners Meets the Threshold for Constitution Petitions.

21. Under this Sub heading, for the court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of article 2(1) & (4) of *Constitution of Kenya* defines the *Constitution* as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this *Constitution* is void to the extent of the inconsistency and any act or omission in in contravention of this *Constitution* is invalid.
22. Additionally, I dare say that a *Constitution* is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, the *Constitution of Kenya* under article 259(1) provides a guide on how it should be interpreted as such:-

This *Constitution* shall be interpreted in a manner that:-

 - a. Promotes its purposes, values and principles;
 - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. Permits the development of the law; and
 - d. Contributes to good governance.....”
23. This court must give a liberal interpretation and consideration to any provision of the *Constitution* and have regard to the language and wording of the *Constitution* and where there is no ambiguity attempt to depart from the straight texts of the *Constitution* must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
24. Based on the principles set out in the edit of the Court of appeal case of “the *Mumo Matemu v Trusted Society of Human Rights Alliance & another* [2013] eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of *Anarita Karimi Njeru v Republic* [1980] KLR 154



where the court is satisfied that the petitioner's claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the *“Thorp v Holdsworth (1886) 3 Ch D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:*

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.

25. In this amended petition, the 1st and 2nd petitioners are seeking for a declaration that the respondents act of abdicating their responsibility contravenes the provisions of article 42 of the [Constitution of Kenya, 2010](#), a declaration that the violation of article 42 of the [Constitution of Kenya 2010](#) by the respondent has resulted in a denial of the right to a clean and healthy environment to the petitioners and to the residents of Mombasa County, that in breach of the above the petitioners have a right for redress for orders of injunction and compensation pursuant to article 23(3)(b) and (e) of the [Constitution of Kenya](#) as read with section 13(7) of the [EMCA Act](#) of 1999, a mandatory injunction to compel the 1st and 2nd respondent to restore the degraded dumpsite and finally a mandatory injunction to compel the 1st and 2nd respondent to restore the degraded dumpsite and to stop any further dumping from taking place on Plot Nos Msa/block/IX/49 and 50.
26. This honorable court must establish the constitutional basis of the petition which is founded under paragraph 7 to 11 which include:-
 - a. Article 42 of the [Constitution of Kenya 2010](#), which provides that every person has 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.
 - b. Article 69 of the [Constitution](#), which places obligations on state organs and every person in respect of the environment. Article 69(1) provides that the State shall:
 - i. Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.
 - ii. Work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya.
 - iii. Protect and enhance intellectual property in and indigenous knowledge of biodiversity and the genetic resources of the communities.
 - iv. Encourage public participation in the management, protection, and conservation of the environment.
 - v. Protect genetic resources and biological diversity.
 - vi. Establish systems of environmental impact assessment, environmental audit and monitoring of the environment.



- vii. Eliminate processes and activities that are likely to endanger the environment.
 - viii. Utilize the environment and natural resources for the benefit of the people of Kenya.
- c. Article 70 of the [Constitution of Kenya](#) provides for the Enforcement of environmental rights. Specifically, article 70(1) states if a person alleges that a right to a clean and healthy environment recognized and protected under article 43 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.
- d. Article 70(2) states that on application under clause (1), the court may make any order, or give any directions, it considers appropriate-
- i. To prevent, stop or discontinue any act or omission that is harmful to the environment
 - ii. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment
 - iii. To provide compensation for any victim of a violation of the right to a clean and healthy environment.
27. Thus, in application of these set out legal principles for filing a constitutional petition, the honorable court is fully satisfied that the petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the respondents herein and pleading for the prayers sought.

ISSUE No b). Whether the Constitution Amended petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?

28. Before embarking on the issues under this Sub title herein, as indicated from the beginning, on October 6, 2022 based on the consensus of the parties, the honorable court conducted a successful Site Visit (*locus in quo*) on the suit property. Below is it's the site visit report re – produced verbatim:-

A report on the site visit held at tudor mwisho wa Magari area Mombasa Held On October 6, 2022 at 3.15 PM

I. Court

- a. Hon Justice LL Naikuni - ELC No 3
- b. M/s Yumnah Court Assistant
- c. Mr Omar Court Assistant

II. The petitioners:

- a. Mr Borona – Advocate
- b. Mr Daniel Mwangi – Legal Association
- c. No petitioner Present

III. The 1st respondent – National Land Commission

- a. M/s Opio – State Counsel for the 3rd and 4th respondent



- b. Mr Victor Obiko – KURA Surveyor
- c. Deputy OCS Central Police
- d. Mr T Mutugi holding brief for Mr Daniel Kihiko for the 2nd respondent.
- e. Mr Ian Njoroge – Legal

IV. Intended Interested Parties

- a. M/s Kyalo Advocate.
- b. Mr Antony Mureithi – Director Vacuum Cleaner Limited.
- c. Mr Babeto Kyalo – Car Wash.
- d. M/s Fatuma Omar – Car Wash.
- e. Mrs Brenda Kohoi – Tuko Life Investment – Car Wash.
- f. Mr Kennedy Mwanja – Shallom Shop.
- g. Mr Charles Kioko – Maze Logistics.

II. The Purpose of the Visit

The purpose of the site visit was explained to all the parties present. It was stated that pursuant to a court directive made on September 29, 2022 and in view of the numerous activities reported to be taking place on the suit property founded along the Makupa road round about and the Tudor bus Terminus, also known as Tom Mboya street. It was twelve metres tarmac and a busy road. It became imperative to conduct the site visit.

The team was informed that the court was empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, court invoked the provisions of order 18 rule 11 of *Civil Procedure Rules*, to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

Ideally the site visit – the *Locus in quo* was with a view of gathering further evidence on the above stated arising two (2) issues – of the alleged containers being on the road reserve and the conducting of various businesses onto the suit land by the Intended Interested Parties to assist it in its decision making functions and/or process.

Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has



endeavoured to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

II. The Procedure

We all agreed the KURA surveyor provide leadership for the team and hence be as a guide for purposes of this site visit. Each party to be at liberty to engage their own Private surveyor in future who will prepare reports to be filed in court for consideration. It was explained that the team would commence by fully guided by the maps available – and under the guidance of the Land Surveyor by Kenya Urban Roads Authority. The KURA Surveyor had a Map, Co – ordinates and the Real time GPS. We all agreed the KURA surveyor as a guide for purposes of this site visit. Each party to be at liberty to engage their own Private surveyor in future who will prepare reports to be filed in court for consideration. The team then move from one spot to the other within the suit land in sequential manner accompanied by the Security operatives. The said sketch maps are attached hereof for ease of reference.

iii. The Process, the Inspection and the Findings

The team conducted an intense physical inspection of the suit land. They moved from one plot to the other plot. The team conducted spot check and inspection of these plots. Eventually, these were the findings:-

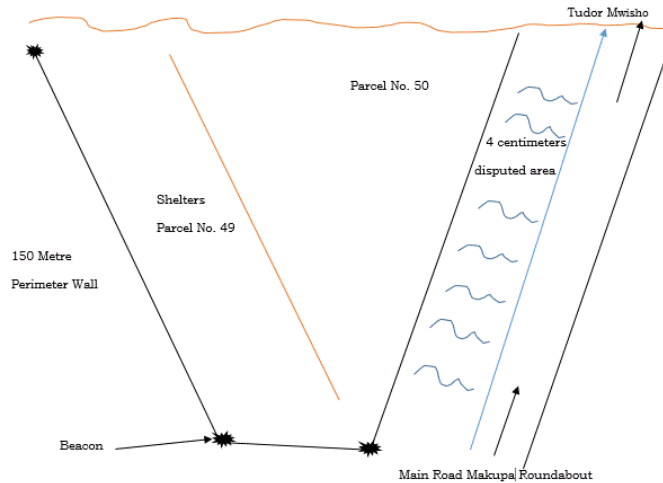
VII. The Observations

Led by the KURA Surveyor, the team was taken round the two (2) parcels Number MN/Block IX/49 & 50, the following features were observed from the Site. These were: -

- a. The intended parties were mainly licenses carrying our several businesses on the suit land
- b. There was in existent two (2) parcels of land. They are surrounded by a 150 Meters by 100 Meters hexagon 5 feet high concrete perimeter wall surrounding the parcels.
- c. In the middle of the surrounded area are:-Around 50 Semi permanent Swahili/Makuti – Iron sheet built shelters and over 200 squatters. There were a few scattered plantation of bananas, Pawpaw, swampy and marshy plantation, stagnant (storm water way) waters prone to mosquito breeding area/ nests; huge heaps of dumping grounds, full of liquid and solid waste disposals from the inhabitants and the business in the from side of the suit land. The dumping site was such an eye sore and also dangerous to pollution, contamination and other related health and environmental degradation. It was in the middle of human habitations. There was no evidence of the disposal or removal of the waste. There were a few beacons at each corner. There was a huge Boabab Tree next to the main Makupa round about and Tudor bus terminus



road known as Tom Mboya street. The content is available



at

- d. There were close to 50 concrete electricity poles along the road.
- e. There were four (4) large metallic containers fixed on next to the main tarmac road and the pedestrian foot path. These containers were converted to be inconformity and accommodate the following business premises: -
 - i. A Saloon Barber Shop;
 - ii. A Cafeteria;
 - iii. A Wine/Beer shop.
 - iv. Several Car Wash stands.
 - v. A Shoe shop.
 - vi. A furniture shop.
 - vii. An Mpesa shop.
 - viii. An Electric Shop.
 - ix. A heap of firewood stand.

The team estimated that there were close to fifty (50) people who were dependent on these businesses as owners or employees. It was alleged the containers were on what was described as the road reserve. This claim was made by KURA. This is subject to proof with empirical evidence.

- f. The KURA road measures 12 Metres – intended to be 24 Metres.
- g. There was a 100 metres long narrow pedestrian walk/pathway.



The suit land consisted of close to a 500 Metres stretch – between the main Makupa road about and Tudor bus stop. It's in the middle. The other portion was for the County Government of Mombasa. We learnt that there had been a protracted land court case being ELC No 332 of 2009 over the legal ownership of the above two (2) parcels of land. The suit was pending hearing and determination.

VII. Conclusion

There being no other business the site visit ended at 4.30 PM. The matter shall be mentioned on October 12, 2022 when court will be delivering its Ruling.

Signed and dated at Mombasa on October 6, 2022

.....

Hon. Justice (Mr) LI Naikuni (Judge),

Environment & Land Court At

Mombasa

29. Now turning to the issues under this Sub heading. Notwithstanding the pending suit – ELC No 339 of 2009, at least from these proceedings, which is purely on environmental discourse, it is not disputed that the 1st and 2nd Petitioners are the registered owners of the suit property. Fundamentally, the petitioners claim is that there was an ongoing construction of unplanned structures and shelters that were cropping up in the above-mentioned premises contrary to the *County Government Building By Laws Regulations 22(1)* and the *Physical Planning Act*.
30. Moreover, the haphazard nature in which the structures were being set up had led to the accumulation of increasing amounts of garbage and waste which not only continued to endanger the health of the public and the environment but posed a security threat in that the area is proving to be a habitat for other nefarious activities such as drug dealing and peddling. The continued dumping of garbage and development of unplanned, unhygienic, and unlicensed eateries (bandas) continue to pose a serious health and security risk to the members of the public especially with diseases such as cholera which are known to break out in unsanitary conditions.
31. The respondents have failed in this constitutional duty placed on them which has resulted in accumulated toxins and refuse in the Petitioners property which is increasingly posing a health and security threat to the members of the public and which is also degrading the value of the Petitioners property.
32. It is trite that under the provision of article 40 of the *Constitution*, the petitioner has the right to property, which right includes the use of the suit property. Article 40 of the *Constitution* provides as follows:

“ 40.

- (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.



- (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this *Constitution* and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”

33. *EMCA* defines the environment to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics. It includes both the natural and the built environment. From this definition, it is clear that the environment goes beyond the physical settings to include issues such as social, economic and cultural conditions that influence the life of an individual or a community. People form part of the environment which is why it is critical to eliminate processes that pose danger to human health.

34. The provision of 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.



35. The Constitution of Kenya under the provision of 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.
36. The provision of 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.
37. The provision of section 9(1) of the EMCA establishes and 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.
38. In the case of Martin Osano Rabera & another (supra), the court stated that NEMA was not just an investigator and prosecutor whose success is measured in terms of successful investigations and prosecutions, rather that as the principal instrument of government it had a bigger mandate towards the people of Kenya in the implementation of all policies relating to the environment.
39. 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. 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 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.
40. Under the provision of article 61 of the Constitution of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of section 7 of the Land Act No 6 of 2012 provides the said methods as follows:

S. Title to land may be acquired through:-

7

- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;



- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or
- ix. Any other manner prescribed in the Act of Parliament.

41. None of the respondents nor the Interested parties were able to demonstrate under which of these ways that they acquired the ownership to the suit land and hence justify the bases upon which they were in occupation and possession of it. In deed, from a ruling delivered by this court over the subject matter and whether to interested parties should be joined in the proceedings, the honorable court challenged KURA, the 3rd respondent herein to file within stipulated timeframe any empirical evidence of ownership of the land and any strategic development plan it had on the utility of this space. Unfortunately, that was never accomplished for no apparent nor justifiable cause whatsoever. Having cited the provisions of article 40 of the Constitution, and having shown how they have been deprived the clean and healthy use of the suit property by the respondents, the petitioners have particularized the provisions of the Constitution which have been allegedly contravened by the respondents.
42. In the case of “ Trusted Society of Human Rights Alliance v Attorney General & 2 others Civil Appeal No 290 of [2012] eKLR, the Court of Appeal held as follows:-
- “ However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing Constitutional Petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against respondents in a Constitutional Petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.”
43. The petition clearly brings out the complaint that the 1st & 2nd petitioners have as against the respondents, that is the breach of the petitioners’ right to a clean and healthy environment, but also to use the property. Consequently, the petition is validly before this court.
44. The court finds that the respondents have failed to eliminate the process and activities that cause pollution in the suit property due to the dumping of waste and the unplanned structures on the suit property. The petitioners have shown by way of photographs, that the suit property has become a dumpsite that is increasingly posing a health and security threat to members of the public. This evidence has not been rebutted by the respondents. Furthermore, this honorable court also conducted a site visit on the suit premises on October 6, 2022 and indeed saw the extent of dumping and waste on the premises. In the circumstances, it is our humble submission that the petitioner’s right to a clean and healthy environment has been violated.
45. I take note that NEMA the 1st respondent has not denied the presence of dumpsite and garbage in the petitioners property and has also confirmed that:- “.....it is prepared and willing to implement the orders that would result from these honorable courts proceedings”. It is therefore the petitioners’ submission that this honorable court do grant the prayers sought in the amended petition and



specifically direct the 1st and 2nd respondent to restore the degraded dumpsite and stop any further dumping from taking place on plot Nos. MSA/Blolcl/IX/49 & 50. This would be in line with provision section 108 (1) of the [EMCA, 1999](#).

46. It is helpful to analyse the role citizens' play and that of State organs in environmental protection. The provision article 69(1)(a) to (h) of the [Constitution](#) gives the broad obligations of the State in relation to the environment. It is only article 69(1)(d) which brings citizens into the picture by requiring the State to encourage public participation in the management, protection and conservation of the environment. A reading of article 69(1) confirms that the State carries a bigger burden in relation to the management and protection of the environment. Article 69(2) provides that every person has a duty to cooperate with State organs to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The role of citizens under the [Constitution](#) is to cooperate with State organs, such as the respondents, for the protection and conservation of the environment. The duty to eliminate processes and activities that pollute the environment falls on the State and its agencies.
47. The provision of section 3(1) of [EMCA](#) provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws, and is required to safeguard and enhance the environment. Section 3(2A) of [EMCA](#) provides that every person shall cooperate with State organs to protect and conserve the environment and ensure the ecological sustainable development of natural resources. The Fourth Schedule of the [Constitution](#) places the control of air pollution as well as refuse removal, refuse dumps and solid waste disposal in the hands of County Governments.
48. The Fourth Schedule specifically makes the protection of the environment and natural resources and water protection the work of the National Government, which in this case is performed by the respondents. The onus of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they are discharged into the sewerage system and making recommendations for the monitoring and control of water pollution falls within the docket of the Cabinet Secretary responsible for environmental matters on NEMA's recommendations under section 71 of [EMCA](#).
49. Alongside the statutory responsibility, Kenyans owe future generations a duty to sustain the environment for their benefit, as highlighted in the preamble to the [Constitution](#). The court is required by section 3 of [EMCA](#) to be guided by principles of intergenerational and intragenerational equity when exercising its jurisdiction in claims where a person alleges that the right to a clean and healthy environment has been denied or violated. Intergenerational equity enjoins the present generation while exercising its rights to the beneficial use of the suit property.
50. The ELC is mandated by section 3 of [EMCA](#) to make orders, issue such writs or give directions it may deem appropriate to prevent, stop or discontinue any act deleterious to the environment. The court may also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible for the environmental degradation to restore the environment to the position it was in before the damage, and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulates that a person bringing a suit regarding the entitlement to a clean and healthy environment does not need to show that the defendant's act or omission caused him personal injury or loss. All the person needs to show is that his suit is not frivolous, vexatious or an abuse of the court process. Contrary to what the AG contended, [EMCA](#) does not require a person who claims that their right to



a clean and healthy environment has been violated to establish a prima facie case with probability of success and show the harm they stood to suffer if the orders were not granted.

51. The provision of article 70 of the Constitution stipulates that where a person alleges that their right to a clean and healthy environment protected under article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to the court for redress in addition to any other legal remedies that are available in respect to the same matter. On such an application the court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment. The court may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.
52. Under article 70(3) of the Constitution, an applicant bringing a claim relating to contravention or threat of violation of his right to a clean and healthy environment does not have to demonstrate that any person has incurred loss or suffered injury. The court is empowered by the Constitution and EMCA to make appropriate orders to prevent, stop or discontinue the pollution attributable to any piece of land or part of Kenya. Granting a statutory interdict or continuing orders would give effect to article 70(2) of the Constitution which gives the ELC the discretion to make orders or give directions which it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment.
53. An applicant seeking redress for breach or threat of breach of the right to a clean and healthy environment does not have to demonstrate that any person has incurred loss or suffered injury under article 70 of the Constitution. The court can only order that compensation be paid to specific persons whose details were supplied in the suit, which in this case is the two Petitioners. Nonetheless, there should be need to provide orders for the preservation of the suit land and the restoration of to its original and better environmental state.

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

54. It is now well established that the issue of Costs is the discretion of courts. According to the Black Law Dictionary, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of section 27(1) of the Civil Procedure Act, cap 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before court being a Constitutional Petition, rule 26(1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

“26

- (1) The award of costs is at the discretion of the court.
- (2) In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.”

55. In the case of “*Reids Hewett & Company v Joseph* AIR 1918 cal 717 and *Myres v Defries* (1880) 5 Ex D 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action,



the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

56. Further, these legal principles were upheld in the Supreme Court case of “[Jasbir Rai Singh v Tarchalans Singh](#), [2014] eKLR and the Court of Appeal cases of [Cecilia Karuru Ngayu v Barclays Bank of Kenya & another](#) [2016] eKLR the courts held:-

“.....the basic rule on attribution of costs is that costs follow the event....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

57. Therefore, the events in the instant case is that the 1st and 2nd petitioners herein have succeeded in establishing their case on preponderance of probabilities. For that very fundamental reason, therefore, the costs of this suit will be made to the petitioners to be borne by the by the 1st & 2nd respondents and the interested parties herein jointly and severally.

VIII. Conclusion and Disposition

58. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this honorable court arrives at the finding that the 1st and 2nd petitioners herein have succeeded in all the prayers sought from their filed Petition. For avoidance of doubt, I allow the amended petition dated May 9, 2022 specifically under the following terms:-

- a. That judgement be and is hereby entered in favour of the petitioners in its entirety.
- b. That a declaration that the respondents act of abdicating their responsibility contravenes the provisions of article 42 of the [Constitution of Kenya, 2010](#).
- c. That a declaration that the violation of article 42 of the [Constitution of Kenya 2010](#) by the respondent has resulted in a denial of the right to a clean and healthy environment to the 1st & 2nd petitioners and to the residents of County of Mombasa.
- d. That order for compensation to the Petitioners as is provided for under article 70(1),(2)(c) as read with article 3 as well as article 23(3)(a) and (e) of the [Constitution of Kenya, 2010](#) .
- e. That a declaration that in breach of the above the Petitioners have a right for redress for orders of injunction and compensation amounting to a sum of Kenya Shillings Ten Million (ksh 10,000,000) pursuant to the provision of article 23(3)(b) and (e) of the [Constitution of Kenya, 2010](#) as read with section 13(7) of the [Environment Management and Co-ordination Act](#) of 1999 which the 1st and 2nd respondents herein should be compelled to pay jointly and severally.
- f. That a mandatory injunction do hereby issue compelling the 1st and 2nd respondents to restore the degraded dumpsite and to stop any further dumping from taking place on Plot Nos Msa/block/IX/49 and 50.
- g. That an order pursuant to the provision of section 152E of the [Land Act](#), No 6 of 2012 directing the 3rd respondent (KURA) herein to and all the interested parties to remove all the containers illegally placed on the petitioners boundary wall encroaching the pedestrian pathway within the next Ninety (90) days from the date of the delivery of this ruling hereof.



- h. That failure to adhere with this order, the petitioner to proceed on causing peaceful eviction but at the costs of the 1st , 2nd respondents and the interested parties.
- i. That the County Commander of Mombasa and the Officer in Charge of the Central Police Station Mombasa to ensure full compliance and strict adherence of this court order.
- j. That each party to bear their costs.

It is so ordered accordingly.

JUDGMENT IS DELIEVERED THROUGH MICROSOFT TEAMS VRITUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF JULY 2023.

.....

HON. JUSTICE L.L NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgement delivered the presence of:-

- a. M/s. Yumna – the Court Assistant.
- b. Mr. Borona Advocate for the Petitioners.
- c. M/s. Mwangi Advocate for the 1st
- d. Mr. Gathu Advocate holding brief for Mr. D. Kihiko Advocate for the 2nd Respondent.
- e. No appearance for the 3rd, 4th and 5th respondents.
- f. No appearance for the Interested Parties

