



**Kogo v County Government of Kericho (Environment & Land Petition
E001 of 2022) [2023] KEELC 20272 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND PETITION E001 OF 2022**

MC OUNDO, J

SEPTEMBER 28, 2023

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 20(1), 20 (3), 20(4), 21(1), 21(2), 22, 23, 27, 40,
42, 43, 69(1), 69(2), 70(2), 73(1), 176, 186 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF PART 2 OF SECTION 2(G) OF THE
FOURTH SCHEDULE TO THE CONSTITUTION OF KENYA**

**IN THE MATTER OF SECTIONS 3(1), 3(3), 3(4), 42(1)(E), 63, 72, 97(1), 87(4), 88, 89
AND 111 OF THE ENVIRONMENT AND CO-ORDINATION ACT NO. 8 OF 1999**

**IN THE MATTER OF SCHEDULE 2 OF THE ENVIRONMENTAL
MANAGEMENT AND CO-ORDINATION ACT NO. 8 OF 1999**

**IN THE MATTER OF THE ENVIRONMENTAL (IMPACT
ASSESSMENT AND AUDIT) REGULATIONS, 2003**

**IN THE MATTER OF THE ENVIRONMENT AND
MANAGEMENT (WASTE MANAGEMENT REGULATIONS, 2006**

BETWEEN

JOSEAH KIPLANG'AT KOGO PETITIONER

AND

COUNTY GOVERNMENT OF KERICHO RESPONDENT

JUDGMENT

1. Vide a Petition dated the 15th May 2022, the Petitioner herein sought from court the following orders;
 - i. A declaration be and is hereby issued that the fundamental right and freedoms of the Petitioner to the suit properties has been infringed by the Respondent's actions of omissions subject of this Petition, in contravention of Article 40 *the Constitution* of Kenya, 2010.



- ii. A declaration be and is hereby issued that the fundamental right and freedoms of the Petitioner to a clean and healthy environment has been infringed by the Respondent's actions or omissions subject of this Petition, in contravention of Article 42 *the Constitution* of Kenya, 2010.
- iii. A declaration be and is hereby issued that the fundamental right and freedoms of the Petitioner to the highest attainable standard of health, reasonable standards of sanitation and clean and safe water has been infringed by the Respondent's actions or omissions subject of this Petition, in contravention of Article 43 *the Constitution* of Kenya, 2010.
- iv. A declaration be and is hereby issued that the Respondent's actions or omissions subject of this Petition are in contravention of Article 69 (1) *the Constitution* of Kenya, 2010 that lists its obligation as regards the environment to, inter alia, include:
 - a. ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources,
 - b. encouraging public participation in the management, protection and conservation of environment, protecting biological diversity,
 - c. Establishing systems of environmental impact assessment, environmental audit and monitoring of environment,
 - d. eliminating processes and activities that are likely to endanger the environment.
- v. A declaration be and is hereby issued that the Respondent's actions or omissions subject of this Petition are in contravention of Article 69 (2) *the Constitution* of Kenya, 2010 that requires every person to cooperate with state organs and other person; to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
- vi. A declaration be and is hereby issued that the Respondent's actions or omissions subject of this Petition are in contravention of Section 42 (1) (e) of the Environmental Management and Coordination Act no. 8 of 1999 that protects rivers and wetlands and prohibits any person, without any approval from the National Environmental Management Authority, given after an Environmental Impact Assessment in relation to the river or wetland from depositing any substance in the river or wetland that is likely to have adverse environmental effects on the river or wetland.
- vii. A declaration be and is hereby issued that the Respondent's actions or omissions subject of this Petition are in contravention of Section 63 of the Environmental Management and Coordination Act No. 8 of 1999 for failing, neglecting, refusing and or declining to procure an Environmental Impact Assessment License from the National Environmental Management Authority in relation to the suit properties.
- viii. A declaration be and is hereby issued that the Respondent's actions or omissions subject of this Petition are in contravention of Section 72 of the Environmental Management and Coordination Act No. 8 of 1999 that prohibits the dumping or discharging pollutants or such matter in aquatic environment.
- ix. A declaration be and is hereby issued that the Respondent's actions or omissions subject of this Petition are in contravention of Section 87 (1) of the Environmental Management and Coordination Act no. 8 of 1999 that prohibits any person from discharging or disposing of any wastes in such a manner as to cause pollution to the environment or ill health to any person.



- x. A declaration be and is hereby issued that the Respondent's actions or omissions Subject of this Petition are in contravention of Section 87 (4) of the Environmental Management and Coordination Act no. 8 of 1999 that prohibits any person from operating a Waste Disposal Site without a license.
- xi. A declaration be and is hereby issued that the Respondent's actions or omission subject of this Petition are in contravention of Section 88 and 89 of the Environmental Management and Coordination Act No. 8 of 1999 for failing, neglecting, refusing and/or declining to procure a Waste License from the National Environmental management Authority in relation to the suit properties for the transport of wastes, operating a waste disposal Sites or Plants on operating an existing waste disposal Sites or Plants.
- xii. An order of permanent injunction be and is hereby issued immediately restraining the Respondent from trespassing and or in any other way illegally unlawfully and or without any reasonable excuse entering unto the suit properties known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 and continuing to so do and or permitting the same.
- xiii. An order of Permanent Injunction be and is hereby issued immediately restraining the Respondent from dumping and or incinerating solid wastes and other forms of wastes on the suit properties known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 or in any other way willfully destroying and damaging the said suit properties and continuing to so do without the Petitioner's knowledge and or consent and or permitting the same.
- xiv. An order of Permanent Injunction be and is hereby issued immediately restraining the Respondent from diminishing the value of the suit properties known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 by dumping and or incinerating solid wastes and other forms of wastes thereon and continuing to so do and or permitting the same.
- xv. An order of permanent injunction to be and is hereby issued immediately restraining the Respondent from operating a waste disposal site on the suit properties known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 without an Environmental Impact Assessment license from the National Environmental Management Authority and/or permitting the same.
- xvi. An order of Permanent Injunction be and is hereby issued immediately restraining the Respondent from operating a waste disposal site on the suit properties known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block



1/404 and Kericho Municipality Block 1/405 and continuing to do so without a waste License from the National Environmental Management Authority and or permitting the same.

- xvii. An order of Permanent Injunction be and is hereby issued immediately restraining the Respondent from blatantly depositing solid wastes and other substances that are likely to have adverse environmental effects on the river and or wetland neighboring the suit properties known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 of otherwise so doing, without any approval from NEMA, given after an Environmental Impact Assessment in relation to the said river or wetland or at all and or permitting the same.
 - xviii. An order of Permanent Injunction be and is hereby issued immediately restraining the Respondent from arbitrarily depriving or limiting or in other way restricting the Petitioner of the enjoyment of his right to the suit properties known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 or of his interest thereon and or permitting the same.
 - xix. An Environmental Restoration Order compelling the Respondent to carry out an environmental restoration process of the suit properties to the satisfaction of this court and the Petitioner.
 - xx. General Damages.
 - xxi. Special Damages.
 - xxii. Exemplary Damages.
 - xxiii. Costs of this Petition to be awarded to the Petitioner.
 - xxiv. Interest at court rates
 - xxv. Any other or further relief that this court may deem fit and just to grant
2. The Respondent then filed their Response to the Petition through a Notice of Preliminary Objection dated 16th December 2022 stating that the Petition was hopelessly misconceived, frivolous, devoid of merit, mala fide, incurably defective, lacked ground to stand on and should be dismissed with costs for the reason that the same had not been supported with any document and therefore offended the provisions of Rule 11 of *the Constitution*, of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
 3. In its Replying Affidavit of 7th December 2022, Sylvia Inziani the Respondent's Chief Physical Planner had deponed that the Respondent never allocated the Petitioner the alleged land/titles mentioned therein. That the Respondent had been using the dumpsite since the year 1957, as per a letter annexed and marked as "KCG-2" dated 24th May, 1957, with strict adherence to the required standards and the law. That the Respondent was utilizing land parcel Kericho Municipality Block 1/286 as part of sewer treatment plant and not as a dumpsite and had therefore not trespassed into the Petitioner's parcels of land as alleged.
 4. She further deponed that the Respondent had erected a fence around the dumpsite to prevent spillage and for ease of control of waste within Kericho County, to the best of its ability.



5. That indeed the National Environment Management Authority in conjunction with the Respondent had directed all hospitals operating within the County of Kericho to destroy medical waste strictly as per Environment Management and Coordination Act, 1999 (EMCA 1999) regulations which prescribed incineration as the best disposal method for medical wastes, wherein the County referral hospital falling under the Respondent had an incinerator within the facility.
6. That the dumpsite, which was previously referred to as quarry was set aside in the 1950(s) by the then Nyanza County Council, which Kericho was under and the same had been in continuous use and management of the previous Governments and currently by the Respondent.
7. That in the Annual Development Plan for the year 2022/2023, the Respondent and various stakeholders had identified another piece of land for use as dumpsite and the Respondent had set out its plan on solid waste management and all other kind of wastes, which plan was still under implementation. That the Respondent was currently managing the dumpsite to avert any damage and/or harm to the public and the claims made by the Petitioner.
8. That the Respondent through the Department of Land, Housing and Physical Planning had published a Notice in the National Newspaper dated 27th August, 2019 and 1st September, 2022 over all those properties whose ownership was questionable wherein the suit properties herein being Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 and also Kericho/ Municipality Block 1/291 had been amongst titles that had been irregularly obtained. A report had been generated and forwarded to the County Assembly for adoption.
9. That vide a Kericho Development Plan R.22/80/11 approved on 15th October, 1981, the Petitioner's alleged properties had never been available for allocation to any individual and even some of them were within a road reserve. That the Petitioner with full knowledge that the section claimed was used as a dumpsite, had fraudulently obtained the titles without first obtaining an allotment letter. That he could not therefore plead an infringement of his right to property as is enshrined under Article 40 of [the Constitution](#).
10. That the Respondent in conjunction with the National Government over a period of time had continued to work towards attaining the highest attainable standard of health and to ensure that reasonable standard of sanitation was maintained within the County. That the use of the dumpsite by the Respondent was lawful and in full compliance of the law and approved by National Environment Management Authority under reference number NEMA/EA/KRC/5/2/19. That indeed there was sunk a septic tank and a fence erected around the dumpsite to avoid any overflow outside the dumpsite section wherein all the requisite license and approvals for use of the dumpsite had been obtained by the Respondent who, in conjunction with National Environment Management Authority, Kericho office issued license to various waste transporters, who operated as per conditions attached to their respective licenses.
11. That the Petitioner had come to court with unclean hands wherein he had intentionally failed to disclose that he had previously filed a suit against the defunct Municipal Council of Kericho vide HCC NO. 12 of 2009 citing an alleged use of his property, Kericho/Municipality Block 1/291 measuring 2.9 HA, as a damp site. (see annexure "KCG-11") That the Petitioner was on a mission of grabbing public land and the court should curtail the use of the justice system to sanitize such illegally acquired properties as per titles to land parcels Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393,



Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 and also Kericho Municipality Block 1/291, respectively, being some of the properties illegally acquired by the Petitioner and alleged to be within the dumpsite amongst other titles. That the Petition was devoid of merit, did not meet the threshold set for a Constitutional Petition and as such ought to be dismissed.

12. In a rejoinder to the said Replying Affidavit, the Petitioner had filed a further Supporting Affidavit sworn on the 17th December 2022 in which he had annexed the sale agreement to land parcel No. Kericho Municipality Block 1/291 dated the 20th August 2008, its lease from the Government of Kenya, the transfer of lease dated the 22nd October 2008, certificate of lease in his name, an exchange of correspondences with the Kericho Municipal Council, the Director of Surveys and Commissioner of Lands wherein he had sought an approval to subdivide the land into smaller portions, the approvals thereafter dated the 19th July 2011, 8th March 2012 and 20th September 2012 and the subsequent issuance of titles to the resultant parcels of land being the suit lands herein as well as others that he had disposed of to third parties.
13. The Respondent in its further Supporting Affidavit of 23rd February 2023, had deponed that the allegations made by the Petitioner that he had caused the sub-division to results into the suit parcel was not true as it was evident from both the white card annexed as KCG-12J that land parcel Kericho Municipality Block 1/291 had never been closed on sub-division or at all which was also noted on the Petitioner's annexure marked as "JKK-6."
14. That the Physical Planning Act contained mandatory conditions that a local authority must comply with when a scheme of sub-division of land-within an area was done. That under Section 15 of the Act, recreation facilities where required were to be reserved at no cost to the local authority. The Court then should not entertain the Petitioner's assertion that the property was allocated to the then allottee for recreation at her own request, wherein she had then made an application for change of user. That the alleged bundles of documents for application of change of user marked as annexure JKK-2 did not relate to land parcel Kericho Municipality Block 1/291. That Section 41(3) of the Physical Planning Act required that an application for change of user be published in the Kenya Gazette and notice be issued to adjacent land owners. None was issued.
15. The Respondent further deponed that the transfer document marked as JKK-4 could only be registered upon consent having been obtained wherein in this case, there had been no consent obtained.
16. That the issue surrounding the alleged subdivision of plot No Kericho Municipality Block 1/291 was done in cahoots with some corrupt Government official wherein in an attempt to sanctify the illegally procured parcel, the Petitioner had purported that the subdivision was done on the mother title and suit parcel registered of which the documents of the claimed sub-division were not in the Respondent's custody and therefor its authentication was wanting.
17. The Respondent's conclusion therefore was that the alleged approval of subdivision and issuance of the title to the Petitioner were fraudulently obtained in collusion with corrupt individuals and in violation of the due procedure for reasons that they had been obtained without firstly being allotted to the Petitioner and secondly without the consent of the Respondent and as such the said titles ought to be quashed as recommended in their annexure KCG6.
18. On the 8th December 2022, by consent, parties took directions to dispose of the Petition by way of written submissions, which submissions I shall summarize as herein under.



Petitioner's submissions

19. The Petitioner summed up the brief facts of his Petition to the effect that he was the registered owner of all those suit properties comprising the land parcels known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405 (hereinafter jointly known as the suit properties) situate in Kericho Town, having been issued with their leases and certificate thereof for ninety nine years (99) w.e.f 1st December 2011 and that the same were a resultant sub division of Kericho Municipality Block 1/291, land which he had purchased from one Cecelia Ruto after having conducted due diligence.
20. That he had provided all the documentation confirming the same in his further Supporting Affidavit sworn on 17th December 2022 and in response to the Respondent's Replying Affidavit. That the suit properties were hence private property though adjacent to the land parcel known as Kericho Municipality Block 1/286 where the Respondent operated its designated sewage treatment site, a dump site and an abattoir.
21. The Petitioner then framed his issues for determination as follows:
 - i. Whether the Court has jurisdiction to determine this Petition.
 - ii. Whether the Petitioner has locus standi to file the Petition.
 - iii. Whether the Respondent's actions or omissions subject of this Petition are in contravention of the fundamental rights and freedoms, generally, of the Residents of Kericho Town and, specifically, of the Petitioner and or are in contravention of the various provisions of *the Constitution*, the Environmental Management and Coordination Act, the Environmental (Impact Assessment and Audit) Regulations, the Environmental Management (Waste Management) Regulations, the *Trespass Act*, and the Penal Code.
 - iv. Whether the Petitioner is a legal owner of the suit properties.
 - v. Whether the Respondent and/or its servants and or agents has trespassed and or in any other way illegally, unlawfully and or without any reasonable excuse entered unto the suit properties and has hitherto continued to so do and or permitted the same and whether the Petitioner is entitled to an injunction.
 - vi. Whether the Petitioner is entitled to compensation.
22. On the first issue for determination, as to whether the Court had jurisdiction to determine this Petition, the Petitioner relied on the provisions of Article 23 of *the Constitution* to submit that the court was vested with powers to grant a declaration of rights, injunctions, conservatory orders, orders for judicial review and declarations on invalidity of any laws that denied, violated, infringed, threatened a right or fundamental freedom in the Bill of Rights that was not justified under Article 24.
23. The Petitioner also relied on the provisions of under Article 70(1) (2) of *the Constitution*, Section 13 (3) and Section 111(1) of the *Environment and Land Court Act* to submit that the court was also clothed with powers to make orders and/or directions to prevent, stop or discontinue any act or omission that was harmful to the environment, and/or compel any public officer to take measures to prevent or discontinue any act or omission that was harmful to the environment, and or to provide compensation to any victim of violation of the right to a clean and healthy environment and further that by dint of Section 111(1) of the *Environmental Management and Co-ordination Act* (EMCA), it was not be



- necessary for the Petitioner herein to show that he had a right or interest in the environment or land parcels that had been or were likely to be harmed.
24. On the second issue for determination as to whether the Petitioner had the locus standi to file the Petition, the Petitioner relied on the provisions of Article 22 and 258 of *the Constitution* as well as the provisions of Section 3 (1)(3) (4) and Section 111(1) of the *Environmental Management and Co-ordination Act* (EMCA) to submit that the locus standi for the implementation of the Bill of Rights was vested in among others, him and every person claiming a breach of fundamental freedom in the Bill of Rights and/or any person whose right to a clean and healthy environment had been, was being or was likely to be denied, violated, infringed or threatened. Reliance was placed on the decision in Kenya Bankers Association & Others vs. Minister for Finance [2002] 1KLR 61 (The Donde Bill Case) and the case in Adrian Kamotho Njenga vs. Council of Governors & 3 Others [2020] eKLR and Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 Others 2018 eKLR.
 25. On the third issue for determination, the Petitioner's submission was hinged on the provisions of Articles 1, 3, 2, 6, 10, 20, 21, 27, 40, 42, 43, 69, 73, 176, 186, of *the Constitution* of Kenya which is the supreme law of the land and the case in Adrian Kamotho N'en: a vs Council of Governors & 3 others [2020] eKLR to submit that the rights and importance of a clean, healthy and safe environment were closely linked to economic and social rights in so far as the environment affected the quality of life and safety of an individual. That the Government was obligated to take reasonable and other measures to prevent pollution and ecological degradation, so as to promote conserve, and secure an ecologically sustainable development which development related to the basic elements that sustain life, the conservation of environment being the first component. That the respective powers and functions of County Governments included refuse removal, defuse dumps and solid waste disposal.
 26. The Petitioner further relied on the Sections 2, 3, 42, 63, 72, 87, 88 and 89 of the *Environmental Management and Co-ordination Act* No. 8 of 1999 (EMCA) to define "waste" and to submit that it was prohibited for anyone to deposit any substance in the river or wetland that could cause pollution to the environment or ill health to any person and/or have an adverse environmental impact. That further, no one was to operate a waste disposal site without a license from the National Environmental Management Authority (NEMA). That every person was entitled to a clean and healthy environment and where this right was threatened to be infringed or was infringed, any person could on his behalf or on behalf of a group or class of persons, members of an association or in the public interest, apply to court and the court was obliged make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as was practicable to its immediate condition prior to the damage; and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses. Reference was also made to the decision in Martin Osano Rabera & Another vs Municipal Council of Nakuru & 2 Others [2018] eKLR.
 27. That Sections 175, 191, 192 and 219 of the Penal Code created an offence of common nuisance and made it an offence for people who voluntarily vitiated the atmosphere to make it noxious, or corrupted/ fouled water of any public spring so as to render it less fit for purpose for which it was ordinarily used and thus affected the health of people in general, dwelling or carrying on business in the neighborhood or passing along a public way. Hence it was the duty of persons in charge of harmful things to use reasonable care and take reasonable precautions to avoid the danger imposed by the said harmful things.
 28. That as evidenced by annexure JKK-3, the Valuation Survey Report, the suit properties, being private property by virtue of their registration to the Petitioner, were at adjacent to the land parcel known as



Kericho Municipality Block 1/286 where the Respondent operated its designated dump site, its sewage plant and an abattoir and therefore it was trite law that the Respondent's responsibility was to collect, handle, transport, store, dispose, dump and or incinerate solid wastes in Kericho County to ensure a clean and healthy environment for the residents of Kericho Town.

29. That since the year 2016 or thereabouts, the Respondent and/or its servants and/or agents had trespassed and illegally, unlawfully and without any reasonable excuse began dumping solid wastes and other forms of waste on the dumping site which comprised the suit properties thereby rendering the same worthless and thus there was need for rehabilitation.
30. That the dump site was open and overloaded, had odour from waste decay and water stagnation. That it also emitted toxic smoke and obnoxious smell from the incineration of the waste, which odious smell had adversely affected the lives of the neighbors who could no longer have access to clean air. That as if that was not all, the seepage from the dump site had also contaminated the adjacent river and water source rendering it unfit for domestic and animal use. That there was deterioration of the site which occasionally also spilled unto other adjoining private property and passageways evidenced by the large number of polythene bags blown thereto by wind. That the dump site also harbored scavenging birds and stray dogs, was a breeding ground for flies, mosquitos and other disease causing agents as well as a home for street families and criminals who were a cause of insecurity.
31. That the Respondent had abdicated its responsibility to the Kericho Town residents to establish and maintain proper sanitary services and provide for proper disposal of refuse as a consequence wherein the Petitioner, on the 19th April 2022 had filed a complaint to the Kericho police station against the Respondent and/or its servants and/or its agents, and had been issued with an OB No. 28/19/4/22.
32. The Petitioner complained that the Respondent had neither engaged stakeholders to public participation with a view of addressing the emerging concerns and challenges, or the move to use the suit properties as a dump site and neither had there been the involvement of any publicized Environmental Impact Study or compliance with the NEMA regulations. That there had been no Environmental Audit of the site as well as the Environmental impact Assessment undertaken. The disposal site was a time bomb due to its close proximity to the Kericho Town Central Business District, residential buildings, schools, abattoir, a river source and was located between Siloam Hospital and Kericho County Referral Hospital which neighboring facilities continued to suffer serious environmental damage.
33. The Petitioner also relied on the Respondent's own Executive Summary of the Environmental Audit Report annexed as "KCG 4" to confirm his assertions and to further submit: that he had suffered pecuniary loss and/or damages due to the Respondent's actions or omissions which actions or omissions subject of this Petition were in contravention of the fundamental rights and freedoms, generally of the Residents of Kericho Town and, specifically, of the Petitioner and/or were in contravention of the various provisions of *the Constitution*, the Environmental Management and Coordination Act, the Environmental (Impact Assessment and Audit) Regulations, the Environmental Management (Waste Management) Regulations, the *Trespass Act*, and the Penal Code.
34. On the fourth the issue for determination as to whether the Petitioner was a real owner of the suit properties herein, the Petitioner relied on the provisions of Section 24 (a) (b) and Section 25 of the *Land Registration Act* to submit that vide his bundles of documents herein containing the respective suit properties' Leases and Certificates of Leases marked as "JKK1", "JKK3", "JKK4", "JKK5" "JKK 6" and "JKK25", and the Respondent's documents herein marked as annexures "KCG 12 A-J", he had established that he was the registered proprietor of the suit parcels of land situate in Kericho



- Town, having been issued with their Leases and Certificates thereof for ninety-nine years (99) w.e.f 1st December 2011. That the said suit parcels of land were a resultant sub division of LR No 631/7766 or Kericho Municipality Block 1/291, land which he had purchased from one Cecelia Ruto as per the sale agreement of 20th August 2008 herein annexed as “JKK 1-2”.
35. That he had also annexed a Lease, various correspondence prior to its issuance, a Letter of Allotment, 1930 and 1996 Part Development Maps where ownership of Kericho Municipality Block 1/291 had been transferred to him wherein he had subsequently subdivided it into smaller land parcels. That he had complied with all legal requirements for completion of the said transactions. That although the Respondent had alluded to fraud on how the Petitioner had obtained titles to subject suit lands whereas they were Government land, yet no particulars of fraud had been provided, and no claim vide a Cross Petition or otherwise has been made to the court or to any other forum.
 36. That the Respondent’s assertions and its annexures “KCG 5”, “KCG 6” and “KCG 3” are grossly contradictory and could not be said to have been issued pursuant to the Provisions of the Kericho County Regularization of Unauthorized Development Act, 2021, as alleged but were a desperate means by the Respondent to usurp the powers of the National Lands Commission.
 37. That no evidence had been tendered that the Kericho County Regularization of Unauthorized Development Act, 2021 had come into operation as prescribed by dint of Section 1 of the said Act. The Respondent’s annexure KCG 5 which was a Daily Nation newspaper public Notice done by the Respondent’s then Chief Officer Department of Lands, Housing and Physical Planning was done on 27th August 2019 a month before the Act was even Gazetted on the 29th September 2021. That Section 6(1) of the Act required the Notice be done within a period of 6 months from its commencement. The Notice herein was for 21 days and not a period of one month as required by the said Section 6(1) of the Act. That annexure KCG 6 which had listed the suit properties as having been illegally or irregularly allocated did not disclose its author, whether there had been any response or whether those who responded had been given a hearing. That it had been against the rules of natural justice not to give the Petitioner an opportunity to be heard in response to any allegations concerning the suit properties. That it was settled law that fraudulent conduct must be distinctly alleged and distinctively proved, and should not be allowed to be inferred from facts. Reliance was placed on the decision in *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000]eKLR. That the burden of proof on fraud and or dishonesty on the part of the Petitioner lay on the Respondent who had failed to discharge the same.
 38. The Petitioner also relied on the provisions in the *National Land Commission Act* No. 5 of 2012 being Sections 1, 6 and 14 to submit on the mandate of the Commission stating that had the Respondent found that the suit properties herein, were public land and had been acquired unlawfully, it ought to have raised a complaint with the Commission who in turn would have conducted investigations into the complaint and made a determination after hearing out the Petitioner. That thereafter, it had the mandate to either direct the Land Registrar to revoke the titles, correct the irregularity and/or make other consequential orders if it had been satisfied that the said titles had been acquired in an unlawful manner. No such complaint had been made by the Respondent. That secondly, despite the Respondent having accused the Petitioner of grabbing public land, no complaint had been made to the Ethics and Anti-Corruption Commission against the Petitioner over his allegedly illegal and un-procedural acquisition of the suit parcels of land. The Petitioner urged the court to find that he was the legal proprietor of the said suit parcels of land.
 39. On the issue as to whether the Respondent and/or its servants and/or agents had trespassed and/or in any other way illegally, unlawfully and/or without any reasonable excuse entered unto the suit properties and had hitherto continued to so do and/or permitted the same and whether the Petitioner was entitled to an injunction, the Petitioner had submitted in the affirmative quoting the provisions



- of Section 2 and 3 of the Trespass Act as well as the Valuation Survey Report, to submit that indeed the Respondent had trespassed on his said suit properties and therefore he was entitled to an injunctive order restraining the Respondent from continuing to trespass on the said properties.
40. Lastly, the Petitioner submitted that he was entitled to compensation based on Dr. S. ole Keriasek's report herein annexed as JKK-3 which had determined that the cost of removing and clearing the waste on the suit land parcels, and which waste was between 7 and 15 meters high, was Kshs. 30,000,000/=. That the total variance in the value of the said properties at an average depreciation rate of 47.2% was Kshs. 59,623,227/= of an aggregate actual market value of Kshs. 127,651,612/= and the total current value occasioned by the depreciation was Kshs. 68,028,390/=.
 41. That the issue of general damages had been discussed in Phillip Ayaya Aluchio vs Chrispinus Ngayo [2014] eKLR case and that as per their annexure JKK3, the cost of removing and clearing the waste on the suit land had been established at Ksh. 30,000,000/= which figure he sought to be awarded as damages for trespass.
 42. In relation to the issue on special damages, again the Petitioner relied on the report annexed as JKK3 to seek for the actual market value of the suit properties which had been placed at Kshs. 127,651,612/= if it would not be possible for the Respondents to be stopped from trespassing on the suit land and dumping waste. That in the alternative if the injunction could not be issued to the Respondent then it be ordered to meet the cost of depreciation valued at Kshs. 68,028,390/=.
 43. In conclusion, the Petitioner had confirmed that indeed he had filed a suit at the Kericho High Court being Kericho High Court Civil Suit No.12 of 2009 which, by consent of the Respondent, the then Municipal Council of Kericho the suit had been withdrawn pursuant to the provisions of Order 25 Rule 1 of the Civil Procedure Rules.

Respondent's Submissions.

44. The Respondent's submission was to the effect that indeed the Petitioner had alleged that he had purchased the mother suit being Kericho Municipality Block 1/291 from Cecilia Ruto and that upon transfer of the parcel, he had caused the sub division thereof which resulted into the suit parcels of land for which he lay a claim of ownership. That he had proceeded to complain that the Respondent had trespassed therein and had continued to use the land as a dumpsite thereby diminishing its value. That the trespass had been without his consent, without conducting an environmental impact assessment, and without a waste license from National Environmental Management Authority and that the said operation thus presented danger to the public and was also likely to have an adverse effect to the river and the wetland neighboring the suit properties. That the said allegations were not supported by any single document, and as such, remained as speculations and nothing more.
45. That although the Petitioner in his further Supporting Affidavit had deponed that one Cecilia Ruto had been allotted the original land on 21st May 1996 wherein she had been issued with a lease for a term of 99 years, with effect from 1st May 1996, yet the allotment letter herein annexed had showed that the property had been reserved for recreational for Kericho Municipality. That further, the lease had also indicted that it had been for a term of 99 years with effect from 1st December 2000 which term was contrary to term indicated in the allotment letter annexed as JKK-2.
46. The Respondent's further submission in line with its Replying Affidavit to the application dated 15th May 2022, which was later deemed as a response to the Petition, upon the Petitioner abandoning the application, was that they had been in continuous use and management of the dumpsite which was set aside in 1950(s) by then Nyanza County Council as per annexure KCG-2. That due to the ever growing population, they had planned to improve the solid waste management within the County as



shown in annexure KCG-3(page 236-237) That they had continually complied with the all the legal requirements laid out by the National Environmental Management Authority under the reference number NEMA/EA/KRC/5/2/19 as seen in annexure KCG-4.

47. That the suit parcels of land claimed by the Petitioner had questionable titles for which notice had been published in the dailies and a committee established wherein they had made a report that the Petitioner's alleged land parcels should be directed for cancellation and the Respondent puts the same for public use. (See annexure KCG-6). That this decision was never disputed, appealed and/or sought to be set aside. That the Petitioner never sought to regularize the titles in accordance with the Kericho County Regularization of Un-authorized Developments Act, 2021.
48. That the Petitioner's alleged suit parcels of land had never been made available for allocation. According to the annexure KCG-10 some of the titles fell squarely on a road reserve and part of Kericho Referral Hospital (previously referred as Kericho District Hospital). That indeed in a previous case between the Petitioner and the Respondent, being Kericho HCC No. 12 of 2009 over the same suit parcel Kericho Municipality Block 1/291, the Petitioner in his response had confirmed that he had caused the sub division of the said parcel of land and now he had filed a fresh suit over the alleged new titles, whilst trying to use the court to sanctify his land grabbing mission of public properties. That the documents annexed by the Petitioner on his claim did not relate to the suit parcel and/or were obtained fraudulently.
49. The Respondent framed their issues for determination as follows;
 - i. Whether the suit herein is sub-judice by virtue of Kericho High Court Civil Suit No.12 of 2009; Joseah Kiplangat Kogo vs. Municipal Council of Kericho.
 - ii. Whether the Petition is incurably defective and therefore offends the provisions of Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 for want of a Supporting Affidavit.
 - iii. Whether the Petitioner has satisfied the requirements for the grant of injunctive reliefs sought.
 - iv. Who should bear the costs?
50. On the first issue for determination, the Respondent submitted that the Petitioner had failed to disclose full material facts pertaining this matter, in that he had earlier filed another case at the Kericho High Court being Civil Suit No.12 of 2009; Joseah Kiplangat Kogo vs. Municipal Council of Kericho to which vide the pleadings herein marked as annexure KCG 1, he had described himself as the registered proprietor of a leasehold interest comprised in the land parcel known as Kericho Municipality Block 1/291 which he had acquired on or about 20th November, 2008. That the Petitioner had further alleged that the Defendant (Respondent) had trespassed into his (Plaintiff) parcel of land and had caused to be dumped garbage, refuse and other types of waste. The cause of action was similar to the present Petition. That the Petitioner had repeated the averments made in the Complaint of 2009 wherein he had disguised it in the form of a Constitutional Petition. The present suit was therefore sub-judice and contrary to the provisions of Section 6 of the *Civil Procedure Act* as was held in David Ndi & Others vs. Attorney General & Others [2021] eKLR. That the filing of two suits involving the same parties over the same subject was bound to waste precious judicial time, resources and amounted to an abuse of the court process thus becoming frivolous as was held in Republic vs. Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR. That the Petitioner should not be allowed to circumvent the doctrine of sub-judice by clothing the previous suit herein as a Constitutional Petition. That in considering the application of the doctrine of sub-judice, the court need not look at the merits of the present case, but the presence of a previous suit would suffice and



the determination of a previous suit would lead to the doctrine of res judicata and therefore divest the jurisdiction of the court. That the Petition had reached an end.

51. On the second issue for determination as to whether the Petition was incurably defective and offended the provisions of Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Respondent submitted that even though the Petition needed not be supported by an Affidavit, however the nature of the current Petition ought to have been supported by an Affidavit or documents in accordance to Rule 11(2) of the said Rules, in default to which rendered the same incurably defective, the wording in Rule 11(2) being mandatory. That Article 159(2)(b) of *the Constitution* was not a panacea for obvious violation of procedural rules. Reliance was placed on the decision in the case of Justus Achinga Kebari & 25 others vs, The Attorney General [2018] eKLR to submit that without a Supporting Affidavit, the Petition remained a hollow shell without evidence to support it.
52. That the provisions of Rule 11 were to the effect that a party who wished to rely on documents should annex them to the Supporting Affidavit or the Petition itself. The current Petition had neither a Supporting Affidavit nor documents annexed to it. That the only documents annexed had been those that had been annexed to the application which application had been abandoned and therefore spent.
53. The Respondent's submission was that like any other litigant, the Petitioner bore the evidential burden of proof to demonstrate the existence of the allegation made in the Petition as per the established cardinal principle in Sections 107, 108 and 109 of the *Evidence Act*. That failure to produce documents in support of the Petition therefore meant that the Petitioner had not discharged its burden of proof. Reliance was placed on the holding in Maureen Nyambura Ngigi Warui vs. Board of Directors, Kenya Power & Lighting Company Limited & 2 others [2020] eKLR.
54. On the third issue for determination as to whether the Petitioner was entitled to the remedies sought, the Respondent submitted that although the Petitioner had sought for a declaration that the Respondent had violated the provisions of *the Constitution* in Articles 40, 42, 43, 69(1)& (2), and the provisions of Sections 42(1)(e), 63, 72, 87(1), 47(4). 88 and 89 of EMCA, which he had clearly enumerated however, he had omitted to demonstrate how the violations and/or omissions had been committed by the Respondent. Reliance was placed on the decision in the case of Anarita Karimi Njeru vs Republic [1979] eKLR.
55. That the Petitioner had largely relied on the provisions of Articles 10, 22, 23, and 40 of *the Constitution* but had concentrated on the right to clean and healthy environment and right to property yet he had also mentioned numerous Articles of *the Constitution* that he claimed to have been violated. The mere mention of the Articles without substantiation was not enough because he was under a duty to link up the articles with the actual and specific violations with proof. That his claim that the Respondent had violated EMCA had not been substantiated or proven either and therefore the failure to discharge his duty ought to result in the dismissal of his Petition.
56. That the principles of granting an order of injunction were well settled in *Giella vs Cassman Brown* [1973] E.A 358 which case was often cited as a watershed authority in injunctive applications where the Court of Appeal had set down the three conditions that must be met by a party and which three conditions enumerated in this case were to be applied sequentially. That the Petitioner herein sought for a grant of permanent injunction against the Respondent yet the issue surrounding his registration as the proprietor of the suit subject parcels of land were wanting, hence he had not established the first condition of a prima facie case.
57. In regard to the second condition where the Petitioner ought to have shown that he would suffer irreparable injury, which would not adequately be compensated by an award of damages, the



Respondent submitted that the fact that the Petitioner had sought for damages; both special and general was prove that he could adequately be compensated.

58. On the third condition that involved the decision based on a balance of convenience, the Respondent submitted that despite knowledge by the Petitioner that they had been using the dumpsite since 1950(s), and had continued to use it to date, he had proceeded to obtain titles over the said land. That the dumpsite was a public utility and the only one in Kericho Town and therefore the court ought to balance between the Public good and a private good. That were the injunction allowed, there was likelihood of greater harm to the Kericho town residents and by extension to the entire County of Kericho and therefore the balance of convenience fell in favour of not allowing the injunction sought. That the Petition was bereft of merit and should be dismissed with costs.

Determination.

59. I have considered the contents of the Petitioner's Petition, the annexures thereto as well as the Valuation Survey Report dated the 4th May 2022. I have also considered the Respondent's response to the Petition, its Executive Summary of the Environmental Audit Report, the Notice of Preliminary Objection, and both the parties' arguments in the submissions and the authorities herein cited.
60. I find the issues that stand out for determination are being:
- i. Whether this Petition is sub-judice Kericho High Court Civil Case No. 12 of 2009 in Joseah Kiplangat Kogo vs. Muncitpal Council of Kericho.
 - ii. Whether the Petition is incurably defective and therefore offends the provisions of Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 for want of a Supporting Affidavit.
 - iii. Whether the Respondent's operation of the dumpsite was in contravention of the Environmental Management (Waste Management) Regulations.
 - iv. Whether any of the Petitioners' Constitutional rights had been infringed.
 - v. Whether the Petition discloses a legal interest capable of protection under the law.
 - vi. Whether the Petitioner is entitled to the orders of injunction, rehabilitation and damages as sought in the Petition.
61. On the first issue for determination, it is clear from the Respondent's response and submission to the Petition that the Petitioner herein had previously filed suit against the defunct Municipal Council of Kericho at the Kericho High Court in Civil Case No. 12 of 2009 between Joseah Kiplangat Kogo vs. Municipal Council of Kericho over the suit parcel Kericho Municipality Block 1/291 in which the pleadings and cause of action were similar. That indeed the said suit land had been confirmed to have been subdivided resulting to the current suit parcels of land and therefore the suit property was also similar in the previous suit and the Petition. That the Petitioner had now filed a fresh suit over the alleged new titles, to which he had disguised in the form of a Constitutional Petition which was thus contrary to the provisions of Section 6 of the *Civil Procedure Act*.
62. Section 6 of the *Civil Procedure Act* which provides as follows:
- 'No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under



the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.’

63. The provisions of Section 6 of the *Civil Procedure Act* bar the court from presiding over a matter which has similar or substantially similar issues pending before a court of competent jurisdiction. It does not matter whether or not all the parties in the former suit are parties in the current suit. I have referred to the Respondent’s annexure marked as KCG11 which are pleadings to the said suit which had been filed on the 18th February 2009 and amended on the 9th March 2009. I have also noted the similarity between the parties, the suit parcels of land, the cause of action and the prayers sought therein with the current Petition. The Petitioner however had confirmed that indeed he had filed the said suit which by consent of the Respondent, the then Municipal Council of Kericho, the suit had been withdrawn pursuant to the provisions of Order 25 Rule 1 of the Civil Procedure Rules which provides as follows:

“At anytime before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim; and such discontinuance or withdrawal shall not be a defence in any subsequent action.”

64. In the case of *ASL Credit Limited vs Abdi Basid Sheikh Ali & Another* (2019) eKLR the Court had observed that:-

“Therefore the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previous instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigation under the same title; and such suit or proceedings must be pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed...”

65. From the foregoing, the question whether the Petition herein is sub-judice answers in the negative, there being no evidence provided that a similar suit is pending.

66. On the second issue for determination as to whether the Petition was incurably defective and therefore offended the provisions of Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 for want of a Supporting Affidavit. I have looked at the said provision of the law which provide as follows:

“Documents to be annexed to Affidavit or Petition.

11 The Petition filed under these rules may be supported by an Affidavit.

(1)
(2) If a party wishes to rely on any document, the document shall be annexed to the Supporting Affidavit or the Petition where there is no Supporting Affidavit.”

67. As it can be discerned from the above captioned provisions of the law, it is clear that the requirement for filing an Affidavit to support the Petition is not mandatory. The provision in Rule 11(1) uses the permissive “may.” Rule 11(2), with respect to documents to be attached in the process, provides that such documents should be attached to the Affidavit, and where the Petition is not supported by an Affidavit, to the Petition itself. Clearly, the filing of an Affidavit to support the Petition is not mandatory, and where there is no Supporting Affidavit, the Petition would still stand. In the present Petition, the Petitioner sought to rely on various documents and although the Respondent submitted that the Petition was not accompanied with a Supporting Affidavit, I have considered the Affidavit



herein sworn by the Petitioner on the 16th May 2022 at which at paragraph 3 of the same, he had deponed as follows:

“I have read the notice of motion application and Petition filed here with and swear this Affidavit in support thereof”.

68. At paragraph 40 of the same, the Petitioner had again deponed as follows;

“That it is in the interest of justice and public interest that this application and Petition is expeditiously determined.”

69. At paragraph 22 of the further Supporting Affidavit sworn on 17th December 2022, the Petitioner had deponed as follows;

“That I swear this Affidavit in further support of the Petition and in response to the Respondents Replying Affidavit aforesaid.”

70. It is thus clear that the Petitioner in this matter chose to swear a single Affidavit in support of both his application (which he chose to abandon in favour of having the Petition expeditiously heard) and the Petition wherein he had annexed the documents he sought to rely on which in my view notified the Respondent of the case that was facing them and therefore his approach/style of filing of his Petition was not contrary provisions of Rule 11 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. This line of the Respondent’s argument must fail.

71. Now to the crux of the Petition as to whether the Respondent’s operation of the dumpsite was in contravention of the Environmental Management (Waste Management) Regulations.

72. The provisions of Article 70(3) of *the Constitution*, Section 3 (3) and Section 111(2) of the *Environmental Management and Co-ordination Act* (EMCA) is clear to the effect that any person whose right to a clean and healthy environment has been, was being or was likely to be denied, violated, infringed or threatened had a right to seek redress from court on his behalf or on the behalf of a group or class of persons, members of an association or in the public interest and that it shall not be necessary for such person(s) to show a right or interest in the property, environment or land alleged to have been or is likely to be harmed.

73. The Petitioner was thus right in bringing this Petition alleging violation of his Constitutional rights to freedom to a clean and healthy environment in terms of Article 42, right to the highest attainable standard of health reasonable standards of sanitation and clean and safe water in terms of Article 43 of *the Constitution*. The Petitioner submitted that in contravening this right, the Respondent was also in contravention of provisions of Articles 69 (1) & (2) of *the Constitution*, Sections 42 (1) (e), 63, 72, 87(1) (4), 88 and 89 of the Environmental Management and Coordination Act No. 8 of 1999.

74. Briefly, the Petitioner’s case is that he was the proprietor of parcels of land Kericho Municipality Block 1/390, Kericho Municipality Block 1/391, Kericho Municipality Block 1/392, Kericho Municipality Block 1/393, Kericho Municipality Block 1/394, Kericho Municipality Block 1/402, Kericho Municipality Block 1/403, Kericho Municipality Block 1/404 and Kericho Municipality Block 1/405, having been issued with their leases and certificates thereof for a period of ninety nine years (99) w.e.f 1st December 2011. That the said parcels of land were resultant sub-divisions of the mother title being Kericho/Municipality Block 1/291 which he had purchased from one Cecilia Ruto. That their registration to him therefore constituted them as private properties. That adjacent to his portions of



land was parcel No. Kericho/Municipality Block 1/286 where the Respondent operated its designated sewage treatment site, a dump site and an abattoir.

75. The Petitioner's complaint was that since the year 2016 or thereabouts, the Respondent and/or its servants and/or agents had trespassed onto his suit properties wherein they had begun dumping and incinerating solid wastes and other forms of waste thereon. That the dump site was open and overloaded, had odour from waste decay and water stagnation. That it also emitted toxic smoke and obnoxious smell from the incineration of the waste, which odious smell had adversely affected the lives of the neighbors who could no longer have access to clean air. That as if that was not all, the seepage from the dump site had also contaminated the adjacent river and water source rendering it unfit for domestic and animal use. That there was deterioration of the site which occasionally also spilled unto other adjoining private property and passageways evidenced by the large number of polythene bags blown thereto by wind. That the dump site also harbored scavenging birds and stray dogs, was a breeding ground for flies, mosquitos and other disease causing agents as well as a home for street families and criminals who were a cause of insecurity. That there was therefore a clear hazard keeping in mind of its proximity to the Kericho Town Central Business District, residential buildings, schools, abattoir, a river source and two hospitals namely Siloam Hospital and Kericho County Referral Hospital which neighboring facilities continued to suffer serious environmental damage.
76. Sections 175, 191, 192 and 219 of the Penal Code created the offence of common nuisance and made it an offence for people who voluntarily vitiated the atmosphere to make it noxious or corrupted/fouled water of any public spring so as to render it less fit for purpose for which it was ordinarily used and thus affected the health of people in general, dwelling or carrying on business in the neighborhood or passing along a public way.
77. That although it was a requirement by virtue of Section 88 of the Environmental Management and Coordination Act (EMCA) for the Respondent to apply for a licence to operate a waste disposal site, there had been no evidence that they had obtained such a license and/or all the requisite licenses including an Environmental Impact Assessment License or approvals by National Environment Management Authority.(NEMA) That the Respondent's operations at the dumpsite were therefore illegal and ought to cease immediately and the dumpsite be rehabilitated. That it was the responsibility of the Respondent to establish and maintain proper sanitary services and provision for disposal of refuse so as to maintain a clean and healthy environment in line with Article 42 of *the Constitution*.
78. That the Respondent had neither engaged the stakeholders to public participation with a view of addressing the emerging concerns and challenges, or the move to use the suit properties as a dump site. That there had neither been an involvement of any publicized Environmental Impact Study or compliance with the National Environmental Management Authority regulations. No Environmental Audit of the site or an Environmental impact Assessment had been undertaken.
79. That the Respondent's acts of omission and commission had diminished the value of the suit properties which parcels of land had now been rendered worthless and of no meaningful use unless adequately rehabilitated.
80. He thus sought that there be an order of permanent injunction issued immediately restraining the Respondent from trespassing and/or in any other way illegally unlawfully and/or without any reasonable excuse entering unto the suit properties to operate as a waste disposal site, continuing to so do and/or permitting to dump and/or incinerate solid wastes and other forms of substances that were likely to have adverse environmental effects on the river and/or wetland neighboring the suit properties, without his knowledge and/or consent, without an Environmental Impact Assessment license, a waste



License and approvals from the National Environmental Management Authority which would also be in relation to the said river or wetland.

81. The Petitioner also sought for a permanent injunction restraining the Respondent from arbitrarily depriving or limiting or in other way restricting him of the enjoyment of his right to the suit properties and an Environmental Restoration Order compelling the Respondent to carry out an environmental restoration process of the suit properties to the satisfaction of the court and the Petitioner. Coupled with these prayers the Petitioner also sought for General Damages, Special Damages, Exemplary Damages, Costs of the Petition, interest at court rates and any other or further relief that the court may deem fit and just to grant.
82. In response and in opposition to the Petition, the Respondent had filed its Notice of Preliminary Objection stating that the Petition was hopelessly misconceived, frivolous, devoid of merit, mala fides, incurably defective and lacked ground to stand on and should be dismissed with costs for the reason that the same had not been supported with a Replying Affidavit and any document and therefore offended the provisions of Rule 11 of *the Constitution*, of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
83. The Respondent had also submitted in support of its Replying Affidavit to the Petition sworn by its Chief Physical Planner, that the suit parcels of land had never been allocated the Petitioner. That vide a Kericho Development Plan R.22/80/11 approved on 15th October 1981, the Petitioner's alleged properties had never been available for allocation to any individual, as some of the properties were within a road reserve and part of Kericho Referral Hospital (previously referred as Kericho District Hospital). That the Petitioner with full knowledge that the section claimed was used as a dumpsite had fraudulently obtained the titles without first obtaining an allotment letter and therefore could not plead an infringement of his right to property as is enshrined under Article 40 of *the Constitution*.
84. That further, a finding had been made that the suit properties herein had been amongst other titles that had been irregularly obtained. That a Notice had been circulated in the Nation Newspaper dated 27th August, 2019 and 1st September 2022, after a report had been generated and forwarded to the County Assembly for adoption wherein it had sought that the Petitioner's alleged land parcels be cancelled and put to public use. The decision was never disputed, appealed and/or sought to be set aside.
85. That the Respondent had been using its dumpsite since the year 1957 with strict adherence to the required standards and the law. That the Respondent utilized land parcel Kericho/Municipality Block 1/286 as part of sewer treatment plant and not as a dumpsite and had thus not trespassed into the Petitioner's parcels of land as alleged. That the Respondent had erected a fence around the dumpsite to prevent spillage and for ease of control of waste within Kericho to the best of its ability.
86. That indeed the National Environment Management Authority, herein referred to as NEMA, in conjunction with the Respondent had directed all hospitals operating within the County of Kericho to destroy medical waste strictly as per Environment Management and Co-ordination Act, 1999 (EMCA, 1999 regulations).
87. That in its annual development plan for the year 2022/2023, the Respondent and various stakeholders had identified another piece of land for use as dumpsite and the Respondent had set out its plan on solid waste management and all other kind of wastes, which plan was still under implementation. That the Respondent was currently managing and the dumpsite to avert any damage and or harm to the public and the claims made by the Petitioner.
88. That the Respondent, in conjunction with the National Government over period of time had continued to work towards attaining highest attainable standard of health and to ensure reasonable



standard of sanitation was maintained within the County. That the use of the dumpsite by the Respondent was lawful and in full compliance of the law and approved by National Environment Management Authority under reference number NEMA/EA/KRC/5/2/19. That indeed there was sunk a septic tank and a fence erected around the dumpsite to avoid any overflow outside the dumpsite section wherein all the requisite license and approvals for use of the dumpsite had been obtained by the Respondent who, in conjunction with National Environment Management Authority, Kericho office issued license to various waste transporters, who operated as per conditions attached to their respective licenses.

89. Article 42 of *the Constitution* provides as follows:

“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 in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70”.

90. Article 70 of *the Constitution* on the Enforcement of environmental rights then provides that:

“1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
- (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
- (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

91. Section 3 of the *Environmental Management and Co-ordination Act*, 1999 in relation to entitlement to a clean and healthy environment further provides as follows:

“1) Every person in Kenya is entitled to a clean and healthy environment in accordance with *the Constitution* and relevant laws and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.



- (2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.
- (3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—
- (a) prevent, stop or discontinue any act or omission deleterious to the environment;
 - (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
 - (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
 - (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
 - (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.
- (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—
- (a) is not frivolous or vexatious; or
 - (b) is not an abuse of the court process.
- (5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development—
- (a) the principle of public participation in the development of policies, plans and processes for the management of the environment;
 - (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;



- (c) the principle of international co-operation in the management of environmental resources shared by two or more states;
- (d) the principles of intergenerational and intragenerational equity;
- (e) the polluter-pays principle; and
- (f) the pre-cautionary principle.”

92. From the above captioned provisions of the law, it is clear that every person in Kenya is entitled to a clean and healthy environment and further that the Petitioner did not need to show that he had personally suffered or that the presence of the dumpsite had directly caused him any harm. What was required was for him to just point out as he had done, that there was an ongoing, or imminent threat of harm, to the environment.

93. Section 2(g) of Part 2 of the Fourth Schedule of *the Constitution* established County Governments whose functions and powers included the refuse removal, refuse dumps and solid waste disposal.

94. “Waste” is defined at Section 2 of the Environment Management and Coordination Act (EMCA) as:

“any matter prescribed to be waste and any matter whether liquid, solid, gaseous or radioactive, which is discharged, emitted or deposited in the environment in such volume, composition or manner likely to cause an alteration of the environment.”

95. Under Section 87 of EMCA the dangerous handling and disposal of waste is prohibited and the manner in which solid waste is to be disposed of and/or managed provided as follows:

- “(1) No person shall discharge or dispose of any wastes, whether generated within or outside Kenya, in such manner as to cause pollution to the environment or ill health to any person.
- (2) No person shall transport any waste other than—
 - (a) in accordance with a valid licence to transport wastes issued by the Authority; and
 - (b) to a wastes disposal site established in accordance with a licence issued by the Authority.
- (3) No person shall operate a wastes disposal site or plant without a licence issued by the Authority.
- (4) Every person whose activities generate wastes shall employ measures essential to minimize wastes through treatment, reclamation and recycling.
- (5) Any person who contravenes any provisions of this section shall be guilty of an offence and liable to imprisonment for a term of not more than two years or to a fine of not more than one million shillings or to both such imprisonment and fine.”

96. Section 88 of the same Act (EMCA) provides as follows;

“(1) Any person intending to transport wastes within Kenya, operate a wastes disposal site or plant or to generate hazardous waste, shall prior to transporting the wastes, commencing with the operation of



a wastes disposal site or plant or generating hazardous wastes, as the case may be, apply to the Authority in writing for the grant of an appropriate licence.

- (2) A licence to operate a waste disposal site or plant may only be granted subject to the payment of the appropriate fee and any other licence that may be required by the relevant Local Authority.
- (3) Where the Authority rejects an application made under this section, it shall within twenty one days of its decision, notify the applicant of the decision specifying the reasons therefor.”

97. Whereas Section 89 (EMCA) provides that.

“Any person who, at the commencement of this Act, owns or operates a waste disposal site or plant or generated hazardous waste, shall apply to the Authority for a licence under this part, within six months after the commencement of this Act.”

98. Sections 87, 88 and 89 of the Act provide for the manner/process, upon which waste should be collected to its disposal. It also provides for the application for issuance of waste license from NEMA for any person seeking to transport waste, operate a waste disposal site or plant or to generate hazardous waste, and this applies also to an existing waste disposal site or plant or generated hazardous waste. As has been established herein and confirmed by the Respondent, the subject suit dumpsite had been in use since 1957 and had been in operation for a long period of time. It thus pre-dated the Environment Management and Co-ordination Act (EMCA) which was assented on the 6th January 2000 and commenced on the 14th January, 2000. The Respondent was therefore required to apply for a waste disposal site license from NEMA by 14th July 2000 in terms of terms of Section 89 of EMCA. No such a license has been exhibited by the Respondent as having been applied for or issued to operate the dump site in issue and neither was there any proof provided that the Respondent and/or NEMA had issued licenses to operate the dump site or that there had been licenses issued to various waste transporters.

99. Since there were no licenses issued to the Respondent herein to operate the impugned dumpsite, it follows therefore that the same is an unlicensed facility and an illegal dumpsite and therefore the continued use and/or operation of the suit land as a dumpsite constitutes a criminal offence as set out in Section 87(5) of EMCA.

100. Indeed I have also seen the deplorable state of the dumpsite from the photographs herein annexed as JKK-3 in the Petitioner’s Valuation Survey Report, I have also perused the Respondent’s Annual Audit Report for Kericho Waste Disposal Sites 2019 herein annexed as KCG 4 and taken note of the summary of the findings and recommendations at page x.

101. At page 1 of the report, it is clear that there are several streams within the vicinity of the dumpsite which flow to join Kipchorian River and therefore mitigation has to be put in place to safeguard these River from pollution.

102. Page 18, of Respondent’s Annual Audit Report for Kericho Waste Disposal Sites 2019 reads as follows;

“From the survey, the disposal method at Kericho waste disposal facility is open dumping which contravenes the internationally recognized principle of integrated solid waste management of: waste minimization, re use, recycle, composting and land filling. Furthermore, open dumping is limiting considering the complex nature of solid wastes. Besides, the facility is almost filling up. Waste is also disposed of indiscriminately whereby dumping is unrestricted i.e industrial, agricultural, domestic, and sometimes medical wastes end up in the same site yet it is not fenced off. The quality and availability of data on the



facility is also very scanty, a factor that impedes the development programs that promote the efficient use of solid waste.

4. Access road and drainage systems

2 Access road to the Kericho waste disposal site is in poor condition and impassable during the rainy season. Poor management of disposal of solid wastes over time has led to the collapse of the drainage system. Stagnant water containing organic matter may increase transmission of diseases as they provide breeding ground for disease causing vectors. They also emit bad odour.”

103. At page 25 of the same report, it is clear that an environmental impact assessment had been carried out by an expert who had assessed the dumpsite and had come up with a summary of the collected view and recommendations as follows;

“-Secure the facility to prevent animals from straying into and outside the facility

-Provide storm water drainage

-Stop dumping along the road

-Enhance workforce for solid waste management

-Provide new machinery for collection and disposal of waste

-Relocate the dumpsite away from residential areas

-Provide a perimeter wall to secure the facility

-Relocate the slaughter house away from the dumpsite.”

104. At page 29 of the report, there had been further recommendations made to the Respondent which included that:

“-The County Government should embark on an intensive sensitization on the 3R’s

-They need to separate ways during production and other best practices in waste disposal.

-The County Government must fully comply with the Environmental Management and Coordination Act (EMCA) regulations and other related regulations like health and safety ones.

-develop and implement an environmental health and safety policy.

-construct a permanent Perimeter fence round to adequately secure the facility.

-continue to provide workers with adequate PPEs and ensure strict adherence to safety procedures.

-Annual environmental audits should be conducted for the waste disposal site to check compliance with environmental regulations.

Make plans to relocate the site to appropriate site

-Adequate allocation of resources to improve the dumpsite.

-Train personnel handling wastes to ensure safety when handling dangerous wastes.”



105. I find that indeed the Respondent had not exhibited compliance with any of these recommendations herein above floated as no evidence of any attempt to so do had been provided. Notably the above observations were made way back in 2019 when the Audit Report was purportedly done and which report had envisaged the very dangers complained of by the Petitioner.
106. On the issue as to whether the Petition disclosed a legal interest capable of protection under the law and whether the Petitioner was entitled to the orders sought in the Petition, being an order of permanent injunction and orders for damages, I shall address myself as follows:
107. The Petitioner has laid claim of ownership to land parcels Known as Kericho Municipality Block 1/390, Kericho Municipality Block 1/391-394 and Kericho Municipality Block 1/402-405 which were resultant sub divisions of Kericho Municipality Block 1/291 land which he had purchased from one Cecelia Ruto wherein he had been issued with their leases and certificate thereof for ninety nine years (99) w.e.f 1st December 2011 and was therefore entitled to protection accorded to title holders to land under Article 40 of *the Constitution* and the Respondent enjoined from interfering with the said land. The Petition had also sought for damages for infringement of his rights over the said parcels of land.
108. The Respondent on the other hand had raised an objection to the legitimacy of the ownership to the said parcels of land stating that they had been obtained fraudulently since the same had never been available for allocation to any individual and some of them were within a road reserve.
109. The fact that the Respondent has questioned the manner in which the Petitioner acquired the suit lands herein, in my humble view, is a question whose resolution requires a full hearing at a trial and the interpretation of a statute rather than through a Constitutional Petition because a Constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute.
110. Indeed in the case of *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited* [2013] eKLR the court had made the following observation:-
- “it is an established practice that where a matter can be disposed of without recourse to *the Constitution, the Constitution* should not be involved at all.....the courts will not normally consider a Constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights”..
111. So as not to deny the Petitioner an opportunity to ventilate his issues on the proprietorship of the suit properties in an appropriate forum, I decline to make a finding as to the proprietorship of the suit parcels of land, whether or not there had been trespass therein, as well as to issue an order of injunction and damages herein sought because the issues surrounding his registration as the proprietor of the suit subject parcels of land are yet to be ventilated, which then affects the issue on the first condition of whether or not a prima facie case had been established. (Reference is made on the conditions established in the grant of injunctive orders based on the *Giella Case* (supra))
112. The Sustainable Waste Management Act, 2022 which was assented on the 6th July 2022 and commenced on the 26th July 2022 is an act of Parliament which established the legal and institutional framework for the sustainable management of waste so as to ensure the realization of the Constitutional provision on the right to a clean and healthy environment.



113. Section 9 of the Sustainable Waste Management Act, 2022. enumerates the functions of County Governments in as far as waste management is concerned to the effect that;

- “(1) County Governments shall be responsible for implementing the devolved function of waste management and establishing the financial and operational conditions for the effective performance of this function.
- (2) County Governments shall ensure that County waste management legislation is in conformity with this Act within a period of one year of the coming into operation of this Act.
- (3) County Governments shall ensure that the disposal of waste generated within the County is done within the County’s boundaries except where there is an agreed framework for inter-County transportation and disposal of waste.
- (4) County Governments shall provide central collection centres for materials that can be recycled.
- (5) County Governments shall establish waste management infrastructure to promote source segregation, collection, reuse, and set up for materials recovery.
- (6) County Governments shall maintain data on waste management activities and share the information with the Authority.
- (7) County Governments shall mainstream waste management into County planning and budgeting.
- (8) County Governments shall develop, manage and maintain designated disposal sites and landfills.
- (9) County Governments shall maintain a register of all waste service providers operating within their boundaries.”

114. I am alive to the fact that management of urban waste and waste disposal sites are a challenge across the country and indeed globally and also to the fact that the said present dumpsite might be or is the only prevailing dumpsite in Kericho County and even though I have found that the Petitioner’s right to a clean and healthy environment under Article 42 of *the Constitution* has been infringed wherein he has sought a mandatory injunction to be issued immediately restraining the Respondent from operating the waste disposal site on the suit properties without the requisite licenses for the relevant authorities, the solution to the problem at hand requires a delicate balancing act.

115. I thus seek to borrow the wisdom and/or words of my brother Justice S. Munyao in his decision in African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR where he had held that ;

“There is no other alternative site, and if this is closed, then there will be nowhere to dump waste. I would not want to make an already bad situation worse. I think it is the role of the courts, especially, the Environment and Land Court, to be a part of the solution and not part of the problem, in so far as tackling environmental challenges is concerned. Ordering the dumpsite to be closed forthwith will not be helping matters.’

116. Open dumping and improper incineration of solid waste causes problems of pollution and jeopardizing public health and the quality of life. The high rates of resource consumption patterns



have also had an unintended and negative impact on the urban environment-generation of wastes far beyond their handling capacities of urban Governments and agencies whereby we are now grappling with the problems of high volumes of waste, the costs involved, the disposal technologies and methodologies, and the impact of wastes on the local and global environment.

117. The Constitutional Court of South Africa in *Fose vs. Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

‘Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.’

118. In this regard therefore and keeping in mind that there is in force the Sustainable Waste Management Act, 2022 that specifically outlines County Governments in as far as waste management is concerned, as well as the fact that there had been recommendations made to the Respondent in its Environmental Audit Report of May 2019 in regard to its waste product, I make the following orders;

- i. A declaration is hereby made that the Respondent has violated the Petitioner’s right to a clean and healthy environment under Article 42 of *the Constitution* of Kenya, 2010 in regard to the manner in which they have operated the dumpsite.
- ii. The Respondent shall with immediate effect, if it intends to continue using the dumpsite, apply to NEMA for a waste disposal site licence in respect of the dumpsite as provided for under Sections 87, 88 and 89 of EMCA or other relevant legal provisions within 14 (fourteen) days from the date of delivery of this judgment.
- iii. NEMA shall then consider such application and process it pursuant to the relevant legal provisions within forty-five (45) days of receipt and report to this court. Depending on the report, this court reserves the discretion to issue any further orders that may be deemed necessary in order to properly safeguard the Petitioner’s rights to a clean and healthy environment.
- iv. If no application for a waste disposal site licence is made as ordered above or if the terms of any licence granted by NEMA are not complied with, NEMA shall make an application to this court under section 90 of EMCA.
- v. I further direct NEMA, to ensure that a thorough Environmental Impact Assessment is done on the dumpsite within 45 days with a consideration of among other things relocating the dumpsite away from its current location and/or residential area.
- vi. The County Government of Kericho shall with immediate effect issue licence to all the transporters of waste.
- vii. In the meantime, the facility shall be secured with a perimeter wall with a provision of storm water drainage
- viii. NEMA shall monitor compliance with these orders and cause this matter to be mentioned periodically as necessary to update the court on compliance by the Respondent and compliance by NEMA itself.



- ix. I therefore order that this judgment be served upon NEMA so that they can proceed to ensure compliance with the orders issued herein, and to report to this court as earlier directed.
- x. Finally on costs, I do award costs of this Petition to the Petitioner to be payable by the County Government of Kericho.

It is ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 28TH DAY OF
SEPTEMBER 2023**

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

