Abdalla & 2 others v County Government of Kilifi & 2 others (Land Case 283 of 2016) [2023] KEELC 19898 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19898 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

LAND CASE 283 OF 2016

EK MAKORI, J

SEPTEMBER 22, 2023

BETWEEN

AMINA SAID ABDALLA .... 1ST PLAINTIFF

OMAR SAID SWALEH .... 2ND PLAINTIFF

AHMED SAID SWALEH .... 3RD PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KILIFI .... 1ST DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND DEFENDANT

THE HON ATTORNEY GENERAL .... 3RD DEFENDANT

JUDGMENT

1. By a plaint dated 13th September 2016, the plaintiffs filed a claim based on the tort of trespass and violation of the rights guaranteed under Articles 22, 23, 40, 42, and 70 of *the Constitution* and sought the following prayers:

    a. A declaration that the defendants' trespass upon the plaintiffs' land by way of a dumping site in Casaurina village Malindi in Kilifi county is wrongful and actionable, illegal, and a violation of the plaintiffs' environmental rights, as well as applicable environmental laws, and must stop and discontinued forthwith;

    b. An order of injunction or judicial review as may be appropriate under Article 23 of *the Constitution* issued to forthwith compel the defendants to cease/discontinue acts of pollution and environmental degradation of Plot No 5143 Malindi and the general area of Casaurina village, Malindi, and the defendants ordered to restore the land to its original state before the

establishment of the dumping site; aggravated damages for trespass, violation of property rights and diminution of value of Plot No 5143 Malindi and the subdivisions created therefrom and aggravated damages for blatant violation of the plaintiffs' fundamental rights to property, a clean and healthy and pollution free environment and underground aquifers;

c. An order to put the plaintiffs in possession of Plot No 5143 Malindi and sub-divisions created therefrom do issue forthwith;

d. Costs of this action to be borne by the defendants.

2. The plaintiffs asserted that the 1st defendant, in collusion with, and active participation (or inaction) of the 2nd and 3rd defendants, has trespassed upon the land known as plot number 5143 Malindi measuring 14.569 hectares and established without the plaintiffs' concurrence an illegal dumping site, which is neither authorized nor designated under the law. The trespass is continuing in that the defendants have established a permanent site where they indiscriminately dispose of waste of all manner emanating from all over the County of Kilifi.

3. The particulars of the trespass and nuisance are that the defendants have over a long period and without the authority of the landowners used the plaintiffs' said land to dump solid in addition, to other wastes from the entire County of Kilifi. This has all along happened despite protests from the plaintiffs. Moreover, neither the plaintiff nor NEMA has given authority to the first defendant to establish a dumping site in this area, which is near a 'Coastal Zone' as defined under Section 55 of the Environmental Management and Coordination Act (EMCA). Because of these acts of trespass and nuisance, the plaintiffs have been unable to freely deal with their land, or dispose of it, and have thereby suffered loss and damage hence the current suit.

4. The suit was contested and a full trial was conducted. At the close of the case on both sides, the court directed parties to file written submissions. The plaintiff and the second defendants did comply. The first and third defendants did not. The inaction by the first and third defendants in the conduct of these proceedings is quite evident as will be seen later in this judgment.

5. In support of the cause of action, the plaintiffs called three (3) witnesses. PW 1 Robert Kariuki Wang'ombe testified as an expert for the plaintiffs and produced his Report on the environmental impact arising from the dumping on the endangered site. The Report was marked as Plaintiff Exhibit. 1. PW2 Amina Abdalla, the court-authorized holder of Power of Attorney representing all the other plaintiffs testified and produced Plaintiff Exhibits. 1-8, being the documents in support of their case. She explained how the land in question had been rendered valueless by the stench, rubbish piles, smoke, and smog emanating from the dumping site. She also produced Plaintiff. Exhibit. 9, a survey report prepared by Edward M. Kiguru, a licenced land surveyor showing the complete encroachment of the land by the dumping site. PW 3 Mr. Edward Kiguru testified, identified, and re-produced his report dated October 2019 and filed in court as a Plaintiff. Exhibit 9. In support of the plaintiffs' allegations and complaints. He also explained that he had previously done the survey work subdividing the land.

6. The first defendant, the County Government of Kilifi, entered an Appearance and filed a Statement of Defence on 14th August 2017. In paragraphs 2, 3, 4, 5, and 6 the first defendant denied the alleged trespass and further said that if indeed it has been dumping rubbish and waste on the suit land, the dumping site has existed from time immemorial as pleaded by the second defendant. All the particulars of the alleged trespass were denied, and the plaintiffs put to the strict proof thereof.

7. The first defendant conceded that it saw the notices pleaded in the plaint addressed to the defunct Municipal Council of Malindi but for fear of discovering the genuineness or otherwise of the plaintiffs'

title, the first defendant was unable to act on the said demand letters. It also averred that negotiations to settle the matter amicably were ongoing.

8. A defence hearing was scheduled on 18th March 2021, 6th October 2021, 10th November 2021, and 25th October 2022, in all those dates the first defendant never called for any evidence - no reasons were provided to this court. Mr. Bwire for the first defendant informed the court that he had his witnesses in attendance but elected not to have them take the witness stand, without offering any reasons or at all.

9. The second defendant called one witness who testified as DW1 - Samuel Lopokoiyet. He stated that he was stationed in Kilifi before transferring to Mombasa as a County Director of Environment for the second defendant. He knew issues about this matter and he was aware of the existence of the dumpsite, which was domiciled on the land in question for a long time. He was not aware whether the land was private or public. The second defendant had not approved the site as a dumping ground and did not designate it as such since no application for approval had been sought. The authority had also not been requested to conduct an Environmental Impact Assessment (EIA) as required by law. He concluded that it was the work of the County Government to provide for refuse dumping, removal, and waste management being a devolved function under the 4th Schedule of *the Constitution*. He produced two documents as defence exhibits 1 and 2. These were letters exchanged with the County Government of Kilifi [CGK]. The first one dated 20th March 2015 was a letter communicating observations made on the NEMA visits to the dumping site. It noted that the CGK was operating an undesignated waste disposal site without a licence. Additionally, the waste trucks were not licenced as required by law. A threat of court action if the recommendations were not adhered to was captured in the letter. In cross-examination on his statement and the first letter, he conceded that the dumping site has continued even after NEMA was served with an injunction order by this court – Olola J. During his tenure at Kilifi, NEMA had not acted in this and other cases as the AG had instructed NEMA officials not to act or effect arrests and prosecutions. He contended that the CGK could be able to explain why it was dumping waste so near the coastline in contravention of Section 55 of EMCA. According to the witness, the dumping site at Mayungu Bay ought to be relocated. He admitted that NEMA had the power to issue stoppage orders. However, the duty to close the dumping site is on the CGK. In re-examination, the witness admitted that the dumping site was not a designated one. The third defendant had issued orders or directives that NEMA should not arrest public officers in breach of the law to avoid collision within Government Agencies.

10. The second letter dated 23rd April 2015 was an acknowledgment where the CGK offered half-hearted explanations to some of the issues raised in the earlier letter. The Chief Officer of CGK had nothing to say against the allegations and/or observations that they were operating an unlicenced and undesignated dumping site, and that the trucks for ferrying solid waste were unlicenced. He concluded that the prayers sought against the second defendant were not available and were directed to the wrong entity.

11. The plaintiff submitted that trespass is a direct injury to land and is actionable without proof of damage. Where a party throws any material or rubbish on the land of another, this is trespass for which he will be responsible without any proof of damage (paragraphs 904 & 905, Clerk and Lindsell on Torts, 11th Edition, at p. 520). Actual damage need not be proved. The trifling nature of the trespass is not a defence. The law recognizes the absolute necessity of preventing breaches of the peace, and allows a right of action in such cases, to prevent those, the sanctity of whose person has been violated, from taking the law into their own hands.

12. The plaintiff stated that where a party has filed a statement of defence but fails to call any evidence in support thereof, the same is deemed unproven. The burden of proof was on the first defendant to show that its action to dump rubbish, solid, and other waste on the suit land was authorized by law and that

the suit land was a designated dumping site. Short of this proof, the first defendant is deemed to have admitted the claim; or rather, no defence was raised to the plaintiffs' claim. In its 'pre-trial list of issues' filed on 21st September 2019, the first defendant stated that the '[D]umping on the suit property is not in dispute'. This is a clear admission that the first defendant's act of trespass by way of dumping waste on the suit land is not in dispute.

13. The plaintiff further stated that the second defendant filed a statement of defence on 24th February 2017, admitting paragraph 3 of the plaint and denying and inviting plaintiffs' proof concerning averments in paragraphs 4, and 5. The second defendant averred that the dumping site had existed for a long time and was used as the primary dumping site for the County of Kilifi. It was further contended that the dumping site was illegal and unlicenced.

14. The plaintiff further submitted that the upshot of the pleadings and the analysis of the evidence is that the plaintiffs' case based on the tort of trespass is admitted. It was appalling and contemptuous that even after this court issued an order of injunction on 6th March 2017, and the second defendant's admission that it was served during the tenure of Mr. Samuel Lokopoiyiet (DW1), the dumping site on the plaintiffs' land has continued to operate. This is a wanton disregard for court orders and the plaintiffs' right to property and privacy. This is also a clear breach of the constitutional right to environmental health, not to mention the risk posed to humans and marine life in the Mayungu Bay area. It is also admitted that the land cannot be restored to its original state and that is why CGK initially wanted to settle the matter amicably. Why the first defendant has not purchased the suit land to use as it pleases now that NEMA cannot arrest its officers is anyone's guess. However, the persons suffering are the plaintiffs whose land has been rendered valueless. The trespass is a continuing wrong and must be ended by an order of ejectment of the trespasser coupled with a permanent injunction. These are the prayers the plaintiffs seek in this case. If for any reason the court is not able to injunct the CGK from continuing with the degradation of the land and endangering of marine life which may be a permanent problem, then the court can order a relocation of the dumping site within a reasonable time not exceeding three months from the date of the decree. This will give effect to the Constitutional provisions and imprimatur of the court to the provisions of EMCA.

15. The plaintiff contended that both defences stand unproven and unsubstantiated, and the statement of the only defence witness did not displace the plaintiffs' case. If anything, the first and second defendants admitted the fact of trespass complained of and the illegality of the dumping site on the plaintiffs' land. They also admitted that the trespass is a continuing wrong giving rise to a new cause of action every day.

16. The third defendant was a nominal defendant in this case. It neither participated in the proceedings nor filed pleadings or called evidence. This deprived the plaintiffs and the court of an opportunity to enquire why the office of the Hon. Attorney General had sanctioned NEMA not to enforce the law of the land.

17. Plaintiff submitted that In addition to any other remedy, the measure of damages for this kind of trespass is the amount by which the value of the land has been diminished (paragraph 939 of Clerk & Lindsell on Torts). See also Nakuru Industries Ltd v SS Mehta & Sons [2016] eKLR, cited with approval in the Green Power Generation case (infra). The plaintiff further stated that the defendants have behaved with a wanton disregard for the plaintiffs' privacy and right to property, and have thereby violated *the Constitution* of the land. There is also a grave risk of adulterations of underground aquifers and the Coastal Malindi – Ugwana Bay Fishery Zone, which is 500 metres from the suit land. Moreover, since the issuance of an injunction against the first and second defendants on 6th March 2017, the defendants have continued to use the dumping site in complete disregard of the court order. For these reasons, the court should in addition to an award of general damages based on the proposed value of Khs. 20,000,000 per acre, order payment of exemplary damages to the tune of Kshs.

50,000,000 for matters of aggravation to hit the defendants hard so that they can learn that trespassing upon and continuing to use an illegal dumping site without the requisite licence s to the prejudice of the general citizenry and the environment, even after a court order restraining such action, does not pay.

18. The plaintiff cited the case of Green Power Generation Co. Limited v. KPLC & Another [2020]eKLR, where the court observed that the measure of damages in the case of trespass to land where damage has been occasioned to it, is the amount of diminution in value or the costs of reinstatement of the land. The overriding objective is to put the plaintiff in the position he was in before the infliction of the harm. As the land was sub-divided for development or disposal, which is no longer practicable given the degradation of the same, and the risk to the health of the plaintiffs and other residents of the neighbouring plots, the land has been rendered almost valueless, and the defendants jointly and severally should be ordered to compensate the plaintiffs or purchase the land at the conservative value of Kshs. 20,000,000/ per acre, as indicated by the plaintiff in her testimony in chief. The defendants then may have the freedom to deal with the land as they please. This would work as follows: - 14.569 ha. x 2.47105 acres x Kshs.20,000,000 =Kshs. 720, 014,549. This would be a sufficient award by way of General Damages to expiate for the lost land.

19. The plaintiff submitted that in the Green Power Generation Co. Ltd Case (supra), the Mpeketoni Electricity Project [MEP], a self-help project that offered KPLC the first option to purchase the land and facilities, was using the land measuring about 5 acres for diesel power generation. When they failed to respond, MEP sold the land to a third party (Green Power Generation Co. Limited) seeking to recover the land and stop its degradation by sludge and oil spillage, after retiring the diesel power generation. Upon a hearing, judgment was entered for the plaintiff by way of general damages in the sum of Kshs. 10,000,000. The court applied Lord Devlin's principle in Loudon v. Ryder [1953] 2 QB 202 where it was observed that 'punitive damages could be awarded based on a 'fine which has to hit the defendant hard if he has disregarded the rights of others and to show that that sort of conduct does not pay'. On appeal, the Court of Appeal refused to interfere with the award by the jury of BP 5,500, for trespass, BP 1,500 for assault, and exemplary damages of BP 4,000.

20. The plaintiff submitted that applying the same principle, the land rendered worthless in this case is over 36 acres within Malindi Municipality, in the up-market area of Casaurina. The plaintiffs are merely beneficiaries of the land. The original owner is since deceased. The CGK has been sufficiently warned to establish a designated dumping site. The court injuncted further dumping on the suit land since 2017 but the trespass and nuisance complained of has continued unabated. Trespass in this case is a continuing wrong as pleaded in paragraph 9 of the plaint. The plaintiff proposed then that an award of Kshs. 720, 014,549 by way of general damages and a further sum of Kshs. 50,000,000 under exemplary damages as elucidated would sufficiently redress for the aggravation of the defendants' actions in this matter.

21. On costs, the plaintiff submitted that the defendants have disobeyed a court order for over seven years. There is no evidence of any action to compensate for the trespass and continuing nuisance of pollution and degradation of the suit land and the general area of Casuarina, Malindi. The defendants did not call any evidence to challenge the cause action pleaded by the plaintiff. Instead, they said the dumpsite has a long history. This is not an excuse for disobeying a court injunction or disregarding the law of the land. This is a case where the court should exercise its discretion in favour of the plaintiffs, whose only wrong is to own the suit land. The costs in this suit sought by the plaintiffs should be on a higher scale.

22. The second defendant submitted that it is not in doubt that it is an institution at the National Government level. All the waste disposal sites in the County of Kilifi are managed, acquired, operated, leased, and owned by or at the behest of the first defendant. This is the situation countrywide concerning all other Counties concerning the modus operandi of dumpsites.

23. The second defendant was only dragged into the lawsuit by its assumed (not true) role in the circumstances, according to the plaintiffs, who claimed that the defendants were running a dumpsite on their private property without consent. In its statement of defense, the second defendant averred as much about its part as did its witness, DW1 Samuel Lopokoiyet. The second defendant, who took action to reprimand the first defendant and even threatened legal action, but was barred, by the third defendant, could not be held responsible for any actual trespass.

24. The second defendant cited the case of Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties) [2020] eKLR to show that the first defendant is responsible for the management of waste as a devolved unit under the 4th Schedule of *the Constitution*.

25. In dumpsites management, the second defendant averred that under the umbrella of the Environmental Management and Coordination Act, 1999 (EMCA) is not entirely saved from responsibility when it comes to the management of dumping sites. Its defined role is that of designating and approving sites for dumping solid waste. In cases where dumping is going on without its approval (and which usually happens out of perhaps necessity), then the second defendant is behooved to take certain measures.

26. That EMCA requires that a proponent of a dumping site should take out an Environmental Impact Assessment (EIA) Licence upon having presented an EIA Report to be assessed and reviewed by the second defendant- Section 58 of EMCA.

27. Noting that dumping sites in our country are largely public as opposed to privately owned, it follows that the proponents of the dumpsites are the County Governments. The case of Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties) [2020] eKLR (supra) is cited enunciating the position that a waste disposal site cannot be operationalised without application for EIA first and thereafter for issuance of a licence as a mandatory prerequisite. (Section 55 of EMCA), failing which the same cannot be issued.

28. The second defendant stated that in their defence and through witness testimony at the trial. The first defendant was not licenced to operate the waste site. It did not even apply for the same. Further, the second defendant conducted a ground inspection and confirmed the same whereupon it wrote to the first defendant by way of an Improvement Order urging it to comply with the law. The first defendant never complied.

29. The second defendant submitted that it has not been negligent in its mandate. In the Harai Concrete Quarries Case (Supra), the judge stated as much that the first defendant was statutorily bound to apply for an Environmental Impact Assessment (EIA) before being licenced to operate a waste disposal site.

30. The second defendant submitted further that the scenario, in this case, is identical and gives little room for departure from that thinking. In the present suit, the first defendant was running a dumpsite that was not designated or licenced by the second defendant. No EIA Report had been submitted nor a licence issued to the first defendant. The second defendant is also on record writing to the first defendant on the matter and giving Improvement Orders- Defence Exhibits 1 and 2 bearing the letter dated 20th March 2015.

31. It is further noted from the evidence on record that the 2nd defendant was prevented from acting further when this suit was filed and interim orders requiring status quo issued. Further, the current Government as well as the previous one issued several circulars to Government Agencies prohibiting any one of them from suing the other. It was thus not possible to take the next enforcement action

of prosecuting county officials for non-adherence with the second defendant or EMCA dictates. In the Halai Concrete Quarries Case (supra), the learned judge found that NEMA- the second defendant herein was not culpable.

32. The second defendant contended that the plaintiffs imputed trespass on the defendants. It could not be possible for the second defendant to have committed trespass. The second defendant has never entered or caused entry into the plaintiffs' premises of any persons or things (read waste). Therefore not culpable.

33. The second defendant pushes culpability on damages to the first defendant having shown that the second defendant bears no culpability for the alleged torts as pleaded by the plaintiffs. There was no negligence or trespass committed by the second defendant. Consequently, no award of damages or costs of this suit should be made against it. The tabulations for damages proposed by the plaintiffs are sketchy and purely ambitious but the second defendant left that to the discretion of the court. it was urged that this suit be dismissed entirely as against the second defendant and the first defendant be compelled by an Order of this Court to apply for an EIA licence and waste disposal licence on a site that has no ownership wrangles and which can be used ideally for waste disposal.

34. Further, the court was urged by the second defendant to be mindful of the daily and inevitable generation of waste in our dumpsites and instead of an instant closure of the same, to apply the graduated approach employed by other ELC Judges in dealing with closure or decommissioning waste disposal sites. for example, as reiterated in Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR and African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR.

35. I have considered and reviewed the evidence, the material, and the submissions placed before me in this suit. The issues for determination are whether the plaintiffs have proved a claim against the defendants jointly or severally based on the tort of trespass and violation of the rights guaranteed under Articles 22, 23, 40, 42, and 70 of *the Constitution*. In addition, the appropriate measures of damages to award, and who should bear the costs of this suit?

36. From the onset, I should state that the first defendant's approach to this matter during the entire trial was unhelpful to this court. The issues raised in this lawsuit were of public importance to the residents of the County of Kilifi concerning waste disposal sites and the management of waste within the CGK and its reflection on the entire Country. I think the CGK ought to have done better. Whereas an appearance was entered and a defence filed, the first defendant never took active steps to defend the suit nor offered any assistance to this court on the issues at hand. This is so because a look at the record shows that from the interlocutory stage, the first defendant elected not to actively participate in this litigation. I reckon, for instance, there was no reply to the application for an injunction. At the hearing, the first defendant muzzled and gagged witnesses (I can see there was an intention to call one Lennox Mwangolo and one Maurice Tsumma - if filed statements of defence are anything to go by). Perhaps they could have informed this court about the actions being undertaken by the CGK as a devolved unit in the establishment of licenced waste management sites within the County of Kilifi. It never happened. The first defendant did not tender any submissions to this court despite several requests. The only key statement from the first defendant was that there were negotiations to offer alternative land to the plaintiff and retain the site. Nothing was forthcoming on the serious allegations levelled against the first defendant on the issue of violation of the right to a clean and healthy environment and degradation on the endangered site together with its implication within the Malindi –Ungwana Bay fishery Zone, and the surrounding Habitations and Beach Resorts.

37. On whether the land in dispute is private property, evidence was led that the land in question comprised several plots curved from title No 11571 Parcel No. 5143 measuring approximately 14.569 hectares registered under the ownership of one Ms. Amina Said Abdalla who testified as PW2. One Edward Kaguru testified as PW3 and produced a survey report pointing out that the land belonged to the plaintiffs and had been subdivided into several other plots for purposes of sale. In the first Defendants defence, there is an averment in paragraph 4 of its defence that the land was a public utility before the issuance of the current title and that the National Land Commission was to do an inquiry as to its allocation and acquisition. No such evidence was led to disapprove the ownership of the land as claimed by the plaintiffs. It, therefore, remains and it is my conclusion that the land in question is private land owned by the plaintiffs. The title held by the plaintiffs unless the contrary is shown ought to be accorded protection under Article 40 of *the Constitution*:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

(a) of any description; and (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) The State shall support, promote, and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

38. The indefeasibility of title is further fortified under section 26 of the *Land Registration Act*. A certificate of title will be held as conclusive evidence of proprietorship, the section provides as follows:

" SUBPARA "(1)

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the

proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme."

39. The first defendant intended to come and say to this court that the title held by the plaintiffs was "grabbed" or illegally obtained. As stated, the first defendant never led such evidence so the title remains unimpeached.

40. The next question is whether the defendants have jointly and severally trespassed onto the suit land without the consent of the plaintiffs now that it is private land.

41. According to Clerk and Lindsell on Torts 15th Edition page 1096-97 - trespass consists of :

> " any unjustifiable intrusion by one person upon the land in possession of another................. it is also trespass to place anything on or in land in the possession of another, as driving a nail into his wall, placing rubbish against his wall, growing creepers up his wall. Propping a ladder against his wall, while dumping rubbish on another's land is trespass..."

42. Evidence was led by the plaintiffs that the defendants in this matter have allowed the dumping of all manner of refuse on the suit land for a prolonged time. The defendants did not dispute the dumping and admitted that the suit land has been a dumping site, and in use since the defunct Municipal Council of Kilifi. No evidence was led to controvert the dumping as stated by the plaintiff. As narrated, earlier the first defendant elected not to adduce any evidence. The second defendant admitted the dumping and pointed a finger at the first defendant through the evidence adduced by one DW1 Samuel Lopokoiyet and stated that the Constitutional and Statutory mandate to operate and manage waste sites at the County level was a devolved function as envisaged in the 4th Schedule to *the Constitution* and EMCA on devolved functions. The second defendant said the dumpsite was undesignated and unapproved and was operating contrary to the EMCA and its advice. The third defendant called for no evidence.

43. An unfavourable inference is usually drawn against a party that elects not to call available witnesses. It is presumed those witnesses would ordinarily give adverse evidence against the caller. In this case, as alluded to the first defendant had lined two witnesses to testify at the defence hearing, but they

were withdrawn without explanation. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, on a similar issue Odunga J. held as follows:

> " Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
>
> > " "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
> >
> > > " 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs.- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

44. The exact position resides here. The first defendant manages the disposal site in question and has all the documentation on its legitimacy or otherwise. Two witnesses were lined up to testify. They did not; it is presumed that the evidence they could have tendered would have been negative because the second defendant whose mandate is supervising and coordinating environmental activities and serving as the main national body to implement environmental policies in all sectors within the country, already stated - the waste site is both illegitimate and illegal having been established without not only an EIA Report but also a licence for its operation. Further still, there is evidence on record that negotiations were on to offer alternative land to the plaintiffs.

45. Given that scenario, it is my conclusion that the plaintiffs have established trespass in this matter by dumping refuse on the plaintiffs' land without authority.

46. What is the nature and extent of the trespass? The Expert Report prepared by Robert Kariuki Wangombe who testified as PW1 - a NEMA Associate christened as - "The Rapid Environment Assessment Report" indicated that the sole waste disposal facility in Malindi town is private land owned by one Ms. Amina said Abdalla - PW2. This land was not designated as a waste site as required by law since no approvals were sought and obtained from NEMA. No EIA Report had been prepared concerning the suitability of the site as a waste site. The inappropriateness of the site as a dumpsite had attracted negative press and protests from the residents living near the site.

47. The site location comprised several plots including those of the Plaintiffs. It is used as the only sole dumpsite for Malindi town and is located within the Mayungu area, Casuriana Street. Surrounding the dumpsite are high-class Residences, Beach Resorts, and Hotels. On one side of the site are low-income Residential Neighbourhoods with residences made of temporary structures including makuti and waste papers. Also bordering the site are farmers cultivating crops such as brinjal, and capsicum, and rearing cows, goats, and other livestock.

48. According to the Report, the historical significance of Malindi cannot be overstated; with records of Malindi dating back to the 13th century. Tourism is a major industry of Malindi town, many hotels including; Leopard Point Beach Resort and Smeraldo Beach Club border the site. Lion on the Sand, Billionaire. Marine Holiday House and many others. The population of the town was growing spontaneously standing at 111,270 as of the 2017 National Census.

49. The Report further stated that Mayungu is the southmost location of the Malindi – Ungwana Bay fishery. The Malindi – Ugwana Bay fishery is recognized as one of the richest zones of the Kenyan coast. The main species landed from the fishery include demersal species such as shrimps (panaeidea) scravengers (including Lethrinidae, Lutjanidae, and Haemulidae), lobsters (Palinuridae), parrot fish (Scaridae) and rabbitfish (Canidae). The pelagic species caught in the bay include kingfish (Scombridae), Cavilla Jacks (Carangidae), and Tuna (Scomnbridae) as well as sharks and rays. Considerable export earnings are derived from the export of various fishery products, including shrimps, lobsters, sea cucumbers, live ornamental fish and invertebrates, crabs, squids, and octopus.

50. The Report further stated that the dumpsite is 500m from the beach area, and it is close to the renowned Malindi Marine National Park. The park harbours prolific marine life including crabs, corals, sea urchins, jellyfish, sea stars, and sea cucumbers. Different varieties of coral species comprise Acropora, Turbinaria, and Porites. Mayungu is also a fish-landing site for the local fishing community.

51. In terms of the type of waste dumped at the site, the Report observed that it ranges from - domestic, industrial, office, and hospital wastes. These waste substances originate from residential and industrial neighbourhoods within Malindi town and its environs. The sources of solid waste substances include hospitals, hotels, residential houses, and demolition wastes from construction sites

52. The Report captured the impact of waste on the environment for example plastics are polymers, meaning they are composed of repeating subunits called 'monomers'. Some of the major plastics (for example PVC and polystyrene) have been found to release toxic monomers linked to cancer and reproductive problems. Polymers can be broken up into monomers by heat, UV radiation, mechanical action, and other chemicals. A study indicates that PVC contains carcinogenic monomers. Plastics contain additives, which are of importance to ecology and human health. On wildlife, UNEP (2006) states that plastic waste causes the death of up to a million seabirds, 100,00 marine mammals, and countless fish through various impacts. Studies have shown that plastics find their way into the stomachs of seabirds, turtles, and other marine animals. This causes death due to starvation, blockage of the digestive tract, and serious internal injuries. Commercial species of fish that ingest plastics could have implications for human health, particularly in terms of chemicals moving from the plastic to the fish.

53. The Report also enumerated other hazardous waste materials like waste tyres – which are said to have toxic additives used in the manufacture and said to contain zinc, chromium, lead, copper, cadmium, and sulphur. When burnt, the emissions from the fires affect not only the atmosphere but also the land and groundwater due to the liquefaction of the rubber during the combustion process. In addition, water on the fires often increases the production of pyloric oil and provides a mode of transportation to carry the oils off-site and speed up contamination of the soils and water. Waste tyres are also good for harbouring mosquitoes and other disease vectors.

54. The Report further enlightened on the effect of industrial waste, (hazardous waste - Asbestos). Asbestos is considered hazardous in the Fourth Schedule of the Environmental Management and Coordination (Waste Management) Regulations, 2006. According to the United States Agency for Toxic Substance and Disease Registry (ATSDR) when asbestos is released into the environment it contaminates the air (where it can be inhaled), water (where it can be ingested), and soil. The small asbestos fibres remain intact in the air, water, and soil. It does not break down or biodegrade, the fibres do not absorb into the soil and instead sit on top of the soil, where they can easily be disturbed and redistributed into the air. Asbestos is linked with three types of lung cancer – asbestosis which leads to the scarring of the lungs from asbestos fibres, which makes breathing difficult, lung cancer and mesothelioma- rare cancer that affects the lungs, chest, abdomen, and heart and is found exclusively in

people exposed to asbestos. Asbestos exposure has also been linked to gastrointestinal disease. It can take a long time, sometimes up to 30 years before the effects of asbestos poisoning are manifested in a person.

55. The Report stated the effects of Hospital Waste and Biomedical Waste. Particularly dangerous because of the potential to carry and incubate very hazardous pathogens. The residents around the endangered area are at risk of contracting infectious diseases like Hepatitis and HIV. The Fourth Schedule of the Environment Management and Coordination (Waste Management) Regulations) Regulations, 2006, classified as hazardous all waste generated from medical examination hospitals, clinics elderly medical care centres and maternity wards and in medical care centres and wastes from medical examination in medical examination laboratories. Further, the Regulations specify that no person shall be issued with a licence to operate a biomedical waste disposal site or plant unless such site or plant complies with the requirements set out in the Third and Tenth Schedules of the Regulations. These set out guidelines for incinerating or autoclaving such waste.

56. The Report documented the presence of used batteries and other E-Waste. The primary batteries commonly known as alkaline batteries contain zinc and manganese. Secondary batteries or rechargeable are usually nickel cadmium, nickel metal hydride, or lithium-ion. Some of these chemicals, such as nickel and cadmium, are extremely toxic and can cause damage to humans and the environment, particularly soil and water pollution, and endanger wildlife. For example, cadmium can cause damage to soil microorganisms and affect the breakdown of organic matter. It can also bio-accumulate in fish, which reduces their numbers and makes them unfit for human consumption. Cadmium can easily be taken up by plant roots and accumulates in fruits, vegetables, and grass. Animals and human beings, who then fall prey to hosts of ill effects, in turn, consume the plants. Studies indicate that nausea, excessive salivation, abdominal pain, liver and kidney damage, skin irritation, headaches, asthma, nervousness, decreased IQ in children and sometimes cancer can result from such exposure to such metals for a sufficient period. Potassium, if it leaks, can cause severe chemical burns thereby affecting the eyes and skin.

57. The Report caught a pictorial impression of how the site looks with photographs showing all manner of waste dumped at the site ranging from demolition waste, used syringes, casts, bandages, and other hospital wastes.

58. The Report concluded and recommended that the location and operation of the dumpsite is a source of various social and environmental impacts on the landowner and the neighbouring land uses and neighbouring communities. The landowner is unable to enjoy the returns on her property because it has been unprocedurally turned into a solid waste site by the Municipal Authorities (read County Government of Kilifi). Other than the loss of use, the landowner is also faced with the prospect of depreciation in the value of her land due to its use as a solid waste dumping site. The same applies to the neighbourhood. This is so because tourists and visitors will be uncomfortable residing in a property with a choking stench from rotting garbage. There will be continued loss on investment if the land continues to be used as a waste site. With the continued use of the site as a dumpsite and due to the deposit of various waste, the communities around will continue to suffer from health impacts due to the nature of the waste dumped at the endangered site. It is the conclusion of the Report that this site is a time bomb whose impact will reach everywhere due to its location within the Indian Ocean, which is an environmentally sensitive area. There is a need to have Stakeholder Engagement to find a lasting solution to waste management in Malindi town.

59. It is recommended that the CGK find an alternative site for waste management within the County. The process should be preceded by an extensive Environmental Impact Assessment (EIA) as stipulated under Section 58(1) and (2) of the Environmental Management and Coordination Act (EMCA) 1999.

60. It is also recommended that hazardous waste including medical waste and asbestos should never be disposed of together with non-hazardous wastes. This waste should be disposed of as per the provisions of the legal regime governing Waste Management.

61. The Report elasticities a grim picture of the endangered land, which has been adulterated, thanks to the continuous dumping of waste.

62. The extent of the trespass in the nature of dumping from the report is quite grim to the landowner and the neighbourhood particularly since the area is next to Malindi – Ungwana Bay fishery an ecologically sensitive site and also tenanted and home to many renowned tourists hotels.

63. The next question is who should be held liable for the trespass? The third defendant is a Principal Legal Advisor to the Government and cannot be said to be culpable. Perhaps the only off-beam by it is to advise the second defendant not to prosecute the officials of the first defendant in the wake of a flagrant violation of the law – and particularly the right to a clean and healthy environment.

64. At the onset, it has been stated in this judgment that the first Defendant elected not to call any evidence to controvert the allegations levelled against it by the plaintiff. The second defendant called one witness who distanced it from liability and cited the provisions of the law as to who amongst themselves is legally mandated to manage waste within the County of Kilifi. The second defendant also cited various cases to show that the mandate squarely rests with the first defendant.

65. I have reviewed the law and judicial pronouncements placed before me. In Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties) [2020] eKLR Angote J. held as follows :

> " 53. Part 2 of the Fourth Schedule of *the Constitution* of Kenya at Section 2 (g) provides that County Governments shall be responsible for refuse removal, refuse dumps, and solid waste disposal. For this reason, the 1st Respondent has the constitutional and statutory duty to identify and operate waste disposal sites within the County.
>
> 54. Vide the 2nd Interested Party's National Solid Waste Management Strategy Paper, the 2nd Interested Party has set out the guidelines for the licensing of waste disposal, in addition to the requirement for approval licensing as provided under Section 87(4) of the *Environmental Management and Co-ordination Act*. Before the disposal of any waste, the County Governments are required to:
>
> i. Ensure there is a designated site(s) for waste disposal.
>
> ii. Ensure that the disposal site is secured with a fence and a gate manned by a county government official to control dumping and spread of waste outside the disposal site.
>
> iii. Ensure all incoming waste is weighed or estimated and the quantities recorded in tonnes.
>
> iv. Develop and maintain motorable roads inside the site to ensure ease of access during disposal.
>
> v. Ensure the waste is spread, covered, and compacted at regular intervals.

vi. Put in place appropriate control measures for the management of dumpsite fires.

vii. Enhance security and control of the disposal sites so that illegal activities are curbed."

66. I agree with the judicial decisions quoted by the second defendant that it's the first defendant who should establish and manage waste sites within its County and that before founding a waste site an Environmental Impact Assessment Report (EIA)has to be applied for and approval granted by the second defendant as elaborately held in the Halai Concrete Quarries case as follows:

"59. As already stated above, the 1st Respondent has the constitutional responsibility for refuse removal, refuse dumps, and solid waste disposal in the County, which mandate includes identifying and operating waste disposal sites within the County on application to the 2nd Interested Party. This was the position that was taken by the court in Castle Rock Gardens Management Limited vs. Attorney General & 4 others [2018] eKLR where the Court held as follows:

> " "The function of dealing with county health services including refuse removal, refuse dumps and solid waste disposal was devolved to the county under *the Constitution*."

60. Consequently, it is the County Governments that are vested with the authority to issue business licences to parties that wish to carry out the business of waste collection and disposal within their boundaries after complying with the provisions of the *Environmental Management and Co-ordination Act* and the National Solid Waste Management Strategy Paper.

61. The 1st Respondent has not produced any Environmental Impact Assessment Report to show that an Environmental Impact Assessment was conducted before designating the endangered property as a dump site. The failure by the 1st Respondent to prepare an Environmental Impact Assessment Report left the following crucial areas unaddressed as mandated under Regulations 7 and 18 of the Environmental (Impact Assessment and Audit) Regulations, 2003;

a) The nature of the project;

b) The location of the project including the physical area that may be affected by the project's activities;

c) The potential environmental impacts of the project;

d) A plan to ensure the health and safety of the workers and neighboring communities; and

e) The economic and socio-cultural impacts to the local community and the nation in general;

62. Having not conducted an Environmental Impact Assessment in respect of the dumpsite in question, the 1st Respondent ran afoul the law when it purported to licence the 2nd - 5th Respondents to dump solid waste on the suit property.

63. Section 87 of the Environmental Management and Coordination Act provides that no person shall operate a waste disposal site or plant without a licence issued by the 2nd Interested Party. Further, Section 88 of the *Environmental Management and Co-ordination Act* provides that any person intending to operate a waste disposal site or plant shall prior to commencing with the operation of a waste disposal site or plant apply to the Authority (the 2nd Interested Party) in writing for the grant of an appropriate licence.

64. The 1st Respondent, in contravention of Sections 87 and 88 of the *Environmental Management and Co-ordination Act* and Regulation 10 of the Environmental Management and Co-ordination (Waste Management) Regulations, 2006, and aware that it does not hold a licence to operate a dumpsite, proceeded and issued licence s to the 2nd to the 5th Respondents directing them to dispose waste "at the only legal sub-county Disposal site next to Kay Construction Quarry."

65. As evinced from the Affidavit filed by the 2nd Interested Party, the 2nd Interested Party has not issued any licence whatsoever to the 1st Respondent or any person for the operation of the endangered property as a dump site.

66. In fact, the 2nd Interested Party conducted a ground inspection on 17th July 2015 at Mulinge Scheme Area within the Athi River locality, which revealed that the 1st Respondent was operating a waste management facility where there was massive dumping of mixed solid waste-household, industrial and excavated soil without the requisite licence and without meeting the '10 minimum points' for licensing of dumpsites as provided in the National Solid Waste Management Strategy, 2014.

67. Consequently, the 2nd Interested Party issued an improvement Order and an Environmental Restoration Order due to the continued dumping of waste by the 1st Respondent in four (4) different sites without an Environmental Impact Assessment licence which were not acted upon by the 1st Respondent.

68. Furthermore, from the admission of the 2nd to 5th Respondents, the said Respondents have, with the direction and authority of the 1st Respondent, been disposing refuse on the endangered property.

69. It is the finding of this court that the 1st Responding is operating an unlicenced disposal site on the endangered property, which activity constitutes a criminal offence under Section 87(5) of the Environmental Management and Coordination Act. That being so, it is the finding of this court that the establishment of a dumpsite at the impugned location by the 1st Respondent constitutes an infringement of the right to a clean and healthy environment of the Petitioners and the other residents of the area."

67. The recently enacted Sustainable Waste Management Act, of 2022 has further clarified the legal and institutional framework for the sustainable management of waste; to ensure the realisation of the

constitutional provision on the right to a clean and healthy environment and for connected purposes. The Act provides under Section 9 (1) as follows:

> " 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."

68. The Constitution, EMCA, the Sustainable Waste Management Act, of 2022, and the authorities cited envisage that it is the responsibility of the County Governments to establish and manage disposal sites and landfills within their respective jurisdictions. The Act futuristically expects Counties to enact laws and regulations, budget and plan for and provide for funds in their annual budgets for that purpose to sustain a clean and healthy environment within their jurisdictions in a manner that recognizes and protects the right to a clean and healthy environment as echoed in Article 42 of *the Constitution*:

> " 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."

69. Section 14 of the Act enacts for the establishment of materials recovery facilities in the Counties:

> " (1) Each county government shall establish a materials recovery facility.
>
> (2) A materials recovery facility shall be used for final sorting, segregation, composting, and recycling of waste generated or transported to the county

and transport the residual waste to a long-term storage or disposal facility or landfill.

(3) A materials recovery facility shall be licence d by the Authority.

(4) The Cabinet Secretary shall, in consultation with the Authority and county governments, make regulations for the establishment and proper management of materials recovery facilities."

70. As a result, the first defendant, the CGK, is required by *the Constitution* and the law to establish, manage, and regulate waste sites, or what is now known as Materials Recovery Facilities under the new Act. The first defendant is required to apply for an environmental impact assessment from the second defendant to determine the viability of the waste site – whether it meets the threshold of an environmentally sound site - before obtaining a licence from the second defendant to operate the same.

71. The first defendant, in this case, disregarded all of the elaborate legal procedures listed above. The dumpsite is unlawful as it is located on the plaintiffs' property and in a vicinity next to a Coastal Zone, this offends the provisions of Section 55(5) of EMCA :

5) Any person who releases or causes to be released into the coastal zone any polluting or hazardous substances contrary to the provisions of this Act shall be guilty of an offence and liable upon conviction to a fine of not less than one million shillings or to imprisonment for a period not exceeding two years or to both such fine and imprisonment. (

72. This court further finds that the first defendant is running an illegal dumping site on the land that is at risk, which activity is illegal under Section 87 of the Environmental Management Act:

(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 waste disposal site established in accordance with a licence issued by the Authority.

(3) No person shall operate a waste disposal site or plant without a licence issued by the Authority.

(4) Every person whose activities generate waste shall employ measures essential to minimize waste 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.

73. In light of the foregoing, this court finds that the first defendant's establishment of a dumpsite on the plaintiffs' land amounts to both a trespass on their property and a violation of their right to property under Article 40 of *the Constitution*, as well as a violation of their right and the rights of

other neighbouring residents to a clean and healthy environment provided under Article 42 of *the Constitution*. As a result, the first defendant will be held accountable for the plaintiffs' damages and compensation, which will be covered below.

74. In the matters ruled by the ELC on a similar topic which I have studied,(see Angote J. in Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties) [2020] eKLR, Munyao J. in African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR, Ohungo J. in Martin Osano Rabera & Another v Municipal Council of Nakuru & 2 others [2018] eKLR and Bor J. in Odando & another (Suing on their Own Behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) (Constitutional Petition 43 of 2019) [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment),creating waste sites and managing garbage within their borders appears to be a challenge for Counties. A glance through the aforementioned authorities tends to indicate that this is likely the result of either dereliction of duty on their part or outright pushing the mandate to the back burner. An exploration and tour of our Counties exposes it all.

75. On general damages the plaintiffs proposed an award of Kshs 720,014,549/= based on the acreage of the land being a proposed buy-off of the land since the Environmental Impact Report reveals - it has been rendered useless and cannot be sold. The plaintiff applied 20,000,000 per acre for the whole acreage of land and calculated the same as follows - 14.569 ha. x 2.47105 acres x Kshs.20,000,000 Kshs. 720,014,549. The plaintiff cited the case of Green Power Generation Co. Limited v. KPLC & Another [2020]eKLR, where the court observed that the measure of damages in trespass, is the amount of diminution in value or the costs of reinstatement of the land. The overriding objective is to put the plaintiff in the position he was in before the infliction of the harm. The land was subdivided for development or disposal by way of sale. It is no longer practicable given the degradation of the same and the risk to the health of the plaintiffs and other residents of the neighbouring plots. The land has been rendered almost valueless, and the first defendants should be ordered to compensate the plaintiffs or purchase the land at the conservative value as proposed above by the plaintiff.

76. I agree with the submissions by the plaintiff on the principles applicable in the calculation of general damages as enunciated in the quoted authority where Olola J. held as follows:

> " Halburys Laws of England 4th Edition Vol. 45 at Paragraph 16, 1503 provides as follows on computation of damages in an action for trespass:-
>
> a. If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
>
> b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
>
> c. Where the defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
>
> d. Where there is an oppressive, arbitrary, or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the Plaintiff in the land with the object of making gain by his unlawful conduct, exemplary damages may be awarded.

e. If the trespass is accompanied by aggravating circumstances that do not allow an award of exemplary damages, the general damages may be increased.

62. In Nakuru Industries Ltd v SS Melita & Sons (2016)eKLR, the Court held that:-

> ""The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principles is to put the Claimant in the position he was prior to the infliction of the harm."

77. In this suit, the plaintiff has proved that the land in question has been rendered useless and cannot reasonably be sold due to degradation and dumping of waste on it which act has continued for many years since the defunct Municipal Council of Kilifi. Even if an order for closure was made, it is unknown how soon the land restoration may take to make it available for sale. The proposal to have it bought by the first defendant stands as the most appropriate remedy under the circumstances. However, the claim by the plaintiff that an acre will fetch Kshs 20,000,000, unfortunately, went without a Valuation Report of the current market value of the land at that locality, neither the Surveyor's Report nor the Environmental Impact Report captured the current market value of the land. The figure by the plaintiff was at best speculative. I have looked at the prayers sought by the plaintiff and noticed that there is no prayer for an award of alternative land. I have also considered the proposal by the plaintiff – it is astronomically high and does not systematically base its calculation on the empirical diminished value of the land. The figure quoted as the value of the land is not based on the current market price as I have said. The plaintiff ought to have adduced evidence in the form of a Valuation Report from a Land Valuer to show the degradation over time and loss of use of the land over that period the first defendant has been in the use of the land to the detriment of the plaintiffs. That never happened. Faced with such a scenario and considering the manner the land has been adulterated for a long time, the proximity of the land to a major neighbourhood - Casuarina Road populated with tourist hotels, and upmarket residences, and the acreage being over 36 acres, besides, plaintiffs have never benefitted from the use of the land since its acquisition in 1989 as can be seen from the certificate of title, which is approximately over 34 years and guided further by the decision in Willesden Investments Limited v Kenya Hotel Properties Limited [2006] eKLR where the court stated that:

> " There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages".

I would think an award of Kshs 50,000,000 would be germane to award in General Damages for the diminution in the value of the land and loss of use.

78. The next head is whether this court should order exemplary damages or aggravated damages for the continued trespass given the total disrespect of the orders issued by this court in 2017, which gave injunctive relief in the interim, and that the first defendant was to desist from further dumping waste at the suit land until the current suit was heard and determined. In addition, the first defendant has failed to follow the procedure for the establishment of a dumpsite as provided by law – by seeking an EIA Report from the second defendant and obtaining the necessary licence thereto. The first defendant has been in flagrant disrespect of the law of the land to the detriment of the plaintiffs who have all along brought their grievances to the attention of the first defendant. Lord Devlin's principle in Loudon v.

Ryder [1953] 2 QB 202, has been cited by the plaintiff as a persuasive authority to be applied in this case where it was observed that 'punitive damages could be awarded based on a 'fine which has to hit the defendant hard if he has disregarded the rights of others and to show that that sort of conduct does not pay'. That could be germane, in this case, but from the prayers sought there is no plea for exemplary or punitive damages.

79. The first defendant has all along even after the issuance of injunctive orders by this court on 6th of March 2017 – Olola J. and given that the second defendant issued Improvement Orders in 2015 directing the first defendant to desist from further dumping waste at the suit land before complying with the NEMA guidelines on the operationalization of a dumpsite, continued and has continued to use the site as a dumping ground without approval from the second defendant, the consent of the plaintiffs or at all and also taking into account that the area is also proximate to an ecologically sensitive site Coastal Zone - the Malindi – Ungwana Bay fishery.

80. The correct approach will be to make an award for over and above the General Damages awarded for continued trespass, which persists to date. Continuous trespass has been elucidated by Ochieng J. in the case Eunice Nkirote Ringera v Kenya Power & Lighting Company [2020] eKLR as follows:

> "In the case of Eliud Njoroge Gachiri v Stephen Kamau Nganga elc no. 121 of 2017 "However in a case of continuing trespass, a trespass consists of a series of acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm."

81. The acts by the first defendant as already stated are continuing in nature and offend the provisions of Section 87(5) of the Environmental Management and Coordination Act. Taking into account the longevity of the breach by the first defendant – who has deprived the plaintiffs of the use of the land, and persists with impunity on the deprivation of the same to date, I will think an award of Kshs 5,000,000 as an additional award to the General Damages is appropriate under the circumstances for continued trespass.

82. The plaintiffs cannot take possession of the land as it is. The Environmental Report on the impact of the dumping depicts land that has been degraded and defiled to a near useless state. A clean-up and restoration has to be undertaken before the same is handed over to the plaintiffs and to be restored to as near a manner as it was as if no dumping had been undertaken. The polluter pays doctrine comes into action. In Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA & 2 others [2019] eKLR the court held as follows:

> "The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 that national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter."

83. It will be the responsibility of the first defendant to ensure that the pollution that it has caused on the plaintiffs' land and that on the adjoining neighbourhood is remedied and the land restored at its costs. This will be done under the supervision of the second defendant who will file a Compliance Report as will be outlined in the final orders of this court.

84. This court has severally discussed the difficulties encountered in the relocation, decommissioning, or shut down of dumpsites in this Country for instance in Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR Ohungo J held as follows-

> "76. However I have found that the petitioners' right to a clean and healthy environment under Article 42 has been breached and though the petitioners have sought a mandatory injunction compelling relocation of the Gioto dump site as well as an order restraining further dumping of waste at the site, the solution to the problem at hand requires a delicate balancing act. The site currently receives waste from the whole of Nakuru Town. This waste is being generated daily and it has to be deposited somewhere. I am not aware of any alternative waste disposal site for Nakuru Town. An immediate relocation order or an order stopping delivery of waste at the site may sound enticing but will in reality be impractical. A cautious graduated approach would be more appropriate."

85. A similar situation arose in the case of the African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR where Munyao J. held as follows:

> "On my part, I think this is the best path to take. It would be easy, as was done in the Tanzanian case of Festo Balegele & 794 Others vs. Dar es Salaam City Council (supra), to issue orders stopping any further dumping on the site; neither is it hard to order that the dumpsite should be closed forthwith, but then I have to ask myself, where is the garbage that is going to be generated today be disposed of? I am alive to the fact that garbage is generated on a daily basis. 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."

86. In Odando & another (Suing on Their Own Behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) (Constitutional Petition 43 of 2019) [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment), Bor J. held as follows while ordering decommissioning of Dandora dumpsite:

> "The ELC is mandated by Section 3 of EMCA to make orders, issue such writs, or give directions it may deem appropriate to prevent, stop, or discontinue any act deleterious to the environment. The court may also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible for the environmental degradation to restore the environment to the position it was in before the damage and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulates that a person bringing a suit regarding the entitlement to a clean and healthy environment does not need to show that the defendant's act or omission caused him personal injury or loss.

> All the person needs to show is that his suit is not frivolous, vexatious, or an abuse of the court process. Contrary to what the AG contended, EMCA does not require a person who claims that their right to a clean and healthy environment has been violated to establish a prima facie case with probability of success and show the harm they stood to suffer if the orders were not granted."

87. The following shall be the court's last orders, based on the entirety of the judicial authorities referenced and those I have considered about these matters:

    a. A declaration be and is hereby issued that the plaintiffs' right to own property as guaranteed under Article 40 of *the Constitution* has been violated by the acts and omissions of the first Defendant.

    b. A declaration be and is hereby issued that the plaintiffs' right to a clean and healthy environment and those of the adjoining Plot No 5143 Malindi and the general area of Casaurina village, Malindi as guaranteed by Article 42 of *the Constitution* has been violated by the acts and or omissions of the first defendant.

    c. A prohibitory injunction be and is hereby issued restraining the first defendant and or its employees, agents, assigns, or anybody whosoever from transporting to, dumping, and or disposing of refuse or waste on Plot No 5143 Malindi and the general area of Casaurina village, Malindi and or from doing any other act or omission deleterious to the environment.

    d. A mandatory injunction be and is hereby issued compelling the first defendant to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance with the Sustainable Waste Management Act, of 2022 and the Environmental Management and Coordination Act, 1999.

    e. An Environmental Restoration Order be and is hereby issued against the first defendant compelling it through itself, its employees, agents, and or assigns to restore the degraded dumpsite as established within Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi as far as practicable to its immediate condition prior to the damage.

    f. A mandatory injunction be and is hereby issued compelling the second defendant to ensure that there should be no further or continued transportation to, storage, or disposal of any wastes on Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi by the first defendant or any other person failure to which the appropriate statutory sanctions and penalties to be applied including but not limited to citing the first defendant's officials for contempt.

    g. The first defendant to give vacant possession of Plot No 5143 Malindi to the plaintiffs after restoration. The restoration process will be supervised by the second defendant.

    h. The plaintiffs are hereby awarded Kshs. 50,000,000 in compensatory damages to be borne by the first defendant.

    i. The plaintiffs are hereby awarded Kshs. 5,000,000 for continuing trespass to be borne by the first defendant.

    j. The first and second defendants are to comply with the above orders within 120 days from the date of this Judgment. The second defendant is to file a Compliance Report to this court after the lapse of the said 120 days.

    g) Costs of this suit are to be borne by the first defendant.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 22ND DAY OF SEPTEMBER, 2023.

E.K. MAKORI

JUDGE

In the presence of:

Mr. M/s Lugo holding brief for Mr. Bwire for the 1st Defendant

Court Clerk: Happy

In the absence of:

M/s Kimani for Plaintiffs

Mr. Gitonga for the 2nd Defendant