



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

PETITION NO. 4 OF 2020

(PREVIOUSLY NAIROBI PETITION NO. 216 OF 2020)

IN THE MATTER OF ENFORCEMENT OF THE CONSTITUTION OF KENYA 2010;

AND

**IN THE MATTER OF; ARTICLES 1, 2, 3, 22, 23, 40, 42,
69 & 159 OF THE CONSTITUTION OF KENYA 2010;**

AND

**IN THE MATTER OF; SECTION 3, 5, 87 AND 102 OF COUNTY
GOVERNMENT ACT NO. 17 OF 2017 LAWS OF KENYA**

AND

**IN THE MATTER OF; SECTION 3.13. AND PART VI OF
ENVIRONMENT MANAGEMENT & COORDINATION ACT;**

BETWEEN

AHMED BASHIR ABDI.....1ST PETITIONER

ABDINOOR AHMED MAGAN.....2ND PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF WAJIR.....1ST RESPONDENT

THE CECM ENVIRONMENT, ENERGY & NATURAL RESOURCES WAJIR COUNTY.....2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD RESPONDENT

ABDI ALI BASHIR.....1ST INTERESTED PARTY

HAMDI BARRE ABDI.....2ND INTERESTED PARTY

MOHAMMED ALI ABDI.....3RD INTERESTED PARTY

SALAT ABDI HAT.....4TH INTERESTED PARTY

RULING

1. The petitioner instituted its claim on 26th June 2020 seeking the following prayers;

- a. **A declaration that the 1st and 2nd Respondents acts are in contravention of Article 40 and 42 of the Constitution, 2010.**
- b. **A declaration that the violation of Article 40 and 42 of the Constitution 2010, by the 1st and 2nd Respondent has resulted in a denial of the right to a clean and healthy environment to the petitioners and residents of Hodhan Location Wajir County.**
- c. **A declaration that in breach of (a) above the petitioners have a right of redress for an order of injunction, pursuant to Article 23 (3) (b) of the Constitution of Kenya, 2010 as read with the Environment and Land Court Act, No. 19 of 2011 and Environment Management and Coordination Act, 1999.**
- d. **A mandatory injunction compelling the 1st and 2nd Respondents to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste and construction of incinerators in accordance to the Environment Management and Coordination Act, 1999.**
- e. **A mandatory injunction to compel the respondent and/or its employers and/or agents and assigns and/or anybody whosoever to restore the degraded dumpsite within Hodhan location Wajir County as far as practicable to its immediate condition prior to the damage.**
- f. **A prohibitory injunction to the Respondent and/or its employees and/or agents/ or assigns and/or anybody whosoever to permanently restrain them and/or permanently prevent. Stop or permanently discontinue dumping refuse at Hodhan Location Wajir County and/or from doing any act or omission deleterious to the environment.**
- g. **Any other relief that this Honourable Court deems fit in the interest of justice to grant.**

2. The petition was supported by the sworn affidavit of **Ahmed Bashir Abdi** who averred that the petitioners are owners of the un-surveyed land Hodhan location Wajir County. That the 1st and 2nd Respondent have moved and relocated the dump site un-procedurally to the parcel of land without following due process. That the 1st and 2nd Respondents have started constructing incinerators to the property without even compulsory acquisition of the land as per the law.

3. That the said parcel of land is privately owned and near the community. That the petitioners and the people of Hodhan Location Wajir County have made all efforts and/or complaints to the 1st Respondent to stop with no avail.

4. That the decision to relocate the dump site goes contrary to the spirit of the constitution and it causes a health risk to the community. That the incinerators are major air pollutants, emitting toxic metals and organic chemicals into the environment. That the emissions vary with the material incinerated, emitted chemicals include persistent organic pollutants, hormone disrupters and carcinogens. In addition the ash, he averred produced large quantities of highly toxic fine fly ash which pose long term health risks to the neighbouring homes.

5. He further averred that the 1st and 2nd Respondent have not carried out any impact assessment on the community, have not applied for a Dump site license from the 3rd Respondent herein and never involved the public and/or accord them an opportunity for the construction of the incinerators.

6. In support of the petition he annexed the following documents i.e. **ABA-1 rent receipt payment, ABA-2 photos of the ongoing construction of the incinerators, ABA-3 confirmation letter for proof of ownership of Plot No. R6311 measuring 700x400ft Wajir Township, ABA 4 Complaint letter to County Government of Wajir.)**

7. The 1st Respondent responded to the application vide Replying Affidavit dated 22nd March 2021 sworn by **Abdullahi Maalim the County Secretary of the 1st Respondent**. It was his averment that it was the Responsibility of the 1st Respondent to establish and maintain proper sanitary services and provision for disposal of refuse so as to maintain a clean and healthy environment pursuant to Section 43 of the Constitution.

8. That pursuant to the constitutional and statutory responsibility the 1st Respondent undertook to install an incinerator for disposal of health related waste.

9. That the subject suit property does not belong to the petitioner and the receipt dated 2016 is not proof of ownership and did not originate from the 1st Respondent. That the plot R6311 is actually located in Hodham opposite Analina TB Manyatta measures 100ft x 100ft as per records of the Municipal Manager County Government of Wajir.

10. That the installation of the incinerator is at the premises of Wajir Manyatta TB Health centre which is duly designated as level 3 A in Wajir county and not Plot No. 6311. He averred that this can be confirmed by the pleadings filed in **Wajir Principal Magistrate's court Civil Suit No. 8 of 2020 Abdi Ali Bashir & 3 Others versus County Government of Wajir & Anor.**

11. That before the installation of the incinerator the 1st and 2nd Respondent engaged the services of Core Africode (K) Ltd, *the contractor*, to conduct an Environment Impact Assessment of which the Environment Impact Assessment was received and approved by the 3rd

Respondent. That they were subsequently issued with an EIA License. The contractor was also issued a certificate of compliance by the National Construction Authority for construction of the incinerator.

12. He further averred that they have not received any complaint from the petitioner concerning the building of the incinerator and therefore disputed the petitioner Exhibit 4. That community members of Hodhan location Wajir County were actively involved in public participation and their views and opinions formed integral part of the Environment Impact Assessment project report.

13. That since Orders were issued stopping the installation of the subject incinerator the Manyatta TB hospital continue to suffer immense loss in disposal of waste incurring huge expenses and the contractor is counting losses.

15. In support of his averment the 1st Respondent annexed the following documents i.e. **AM-1 Gazette Notice No. 786 Vol. CXXII-No.24 dated 4TH February 2020, AM -2 Nema Environmental Impact assessment license dated 4TH January 2020, AM-3 Complaint in Civil CASE No. 8 of 2020, AM5 certificate of compliance by National Construction Authority, AM6 Environmental Impact Assessment Report.**

15. Abdi Ali Bashir swore an affidavit on behalf of the *interested parties*. He first associated himself with the averments made by the petitioner. He further averred that the interested parties have residential homes adjacent to where the incinerator is being constructed. That the project is situated in a densely populated area at the heart of Wajir County and is adjacent to Hodhan Primary School and residential properties. That the interested party's rights to property and clean environment will be violated if the project is implemented.

16. That through their advocates they wrote to the 3rd Respondent on 5th July 2021 enquiring whether the Environment and Impact Assessment was done but they did not receive any response. That Nema Wajir Office has provided an alleged EIA report but when requested about the report the officials could not comment on whether the report was genuine.

17. In support of their averment the 1st Interested party annexed the following documents **AAB1 copy of National Identity card, AAB2 photo of project site vis a vis residential homes and Hodhan primary school, AAB3 copy of receipts showing ownership of the 1st respondents plot dated 7th august 1991, AAB4 letter of offer and receipts showing payment to Wajir County Council for the respective plots, AAB5 letter and email exchanges to Nema.)**

18. On 26th July 2021 this Court directed the parties to file their respective submissions. All the parties have since filed their respective submissions.

19. The **Petitioner** on his part submitted on *five issues* for determination. First, *does this Court have jurisdiction to hear the petition brought before it by the petitioner?* On this he answered in the affirmative citing **Anarita Karimi Njeru vs Republic (No.1) 1979 KLR 154 & Samuel Kamau Macharia vs Kenya Commercial Bank Limited & 2 Others [2012] e K.L.R.**

20. The second issue was *whether the petition before this Honourable Court was frivolous and an abuse of the court process?* The petitioner argued that the same was not an abuse of the court process as it raises factual issues on the health rights of the petitioner. That the evidence of the interested parties and the conduct of the Respondents buttressed this assertion. He cited the case of **Dr. Kiama Wangai versus John Mugambi & Another e K.L.R 2012 & Trinidad and Tobago's Court of Appeal decision in Damina Belfonte v The Attorney General of Trinidad and Tobago C.A. 84 of 2004.**

21. The third issue was *whether the Respondents violated the Constitutional Health Rights and property rights of the petitioners and the people of the Hodhan Community?* The petitioner submitted that Article 42 of the Constitution and Section 3 of the Environmental Management and Coordination Act No. 8 of 1998 (EMCA) provides for the right to a clean and healthy environment, Section 87 of EMCA prohibits dangerous handling and disposal of wastes. Section 88 of EMCA enjoins a party to apply for a licence to operate a waste disposal site. That the licence issued to the 1st and 2nd Respondent could only be granted after public participation. That this threshold is also made higher owing to the functions and duties of the 1st Respondent enshrined in Schedule 4 of the Constitution and Section 2 of the County Government Act. That owing to Article 70 of the Constitution, it is not a requirement for the petitioner to show they were personally or that the presence of the dumpsite and/or incinerator has directly caused them any direct harm. It is sufficient for the petitioner to point out that there is an ongoing, or imminent threat of harm to the environment. In this regard he cited the case of **Africa Centre for Rights and Governance (ACRAG) & 3 Others v Municipal Council of Naivasha [2017] e KLR.**

22. The petitioner also made a comparative study. In **Tanzania** he cited the case of **Festo Balenge & 794 Others vs Dar Es salaam City Council, High Court of Tanzania at Dar es Salaam, Misc Civil Cause No. 90 of 1991** where the court issued prohibitory Orders for the further use of a dump site in a place called Kunduchi. The court did not agree with the argument that the same was temporary. In **India** the petitioner cited the case of **Almitra H. Patel Vs Union of India (1998) 2SCC 416** where the court issued directions for treatment of wastes and **Tapesh Bhardwaj Vs Up state Pollution Control Board & others** there was no boundary wall for a dumpsite 100 metres away from River Yamuna. The tribunal held that the waste was being burnt openly hence leading to air pollution. There was also no proper disposal methods that led to disposal of river Yamuna. In New York the US Supreme Court In **New Jersey Vs City of New York. 283 US 473 (1931)** issued an injunction but allowed reasonable time to the City of New York to effect proper disposal plan. The concern was the dumping of waste by the city of New York into the Atlantic Ocean, which garbage would then float into New Jersey water and pollute the same.

23. The Fourth issue was *Whether Public participation was conducted from the People of Hodhan Location Wajir County.* The petitioner submitted that there was no stakeholder forums for public participation and civic education in conformity with the Ministry of Devolution Planning and Council of Governors- County Public Participation Guidelines 2016. That the report by the 3rd Respondent was a manifestation that there was no site visit to appreciate the actual and true account of the locality. That the report did not comply with the provisions of Article 10, 184,232 of the Constitution. The County Government Act Section 91,94,95,96, 100, 101 and the Public Procurement and Disposal Act 2015 Section 68 (3), 125 (5), 138 and 179.

24. The fifth issue was *whether this Court should grant the petitioners the Conservatory Orders?* The petitioner cited the provisions of Article 23 and 22 of the Constitution on the powers of the court to grant the reliefs sought. He further cited the cases of **Gitaru Peter Munya Vs Dickson Mwenda Kithinji & 2 Others 2014 e KLR**, **Centre for Human Rights and Democracy & Others Vs the Judges and Magistrates' Vetting Board & 2 Others Eldoret No. 11 of 2012, Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education High Court Petition No. 399 of 2015 e KLR** on the ingredients to be met for the grant of conservatory orders and the case of **Suleiman v Amboseli Resort Limited [2004] 2 KLR 589 where Ojwang J.** held that in responding to prayers the court should always opt for the lower rather than the higher risk of injustice.

25. The sixth issue was *whether the court should award the petitioner costs of the petition?* The petitioner submitted that he has expended time and resources in the petition and ought to be granted costs of the suit. He cited the case of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] e K.L.R.**

26. The **Interested Parties** submissions cited almost similar issues as the petitioner. On *whether there was sufficient public participation on the project/community sensitization*, they cited the **Principle 10 of the Rio Declaration on Environment and Development (1992)** and the case of **Mui Local Basin Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others Constitutional Petition No. 305 of 2012 [2015] e K.L.R.** The court stated that effective community sensitization is vital to projects that will have environmental hazards.

27. On *whether NEMA EIA was irregular, flawed and inadequate?* They cited the case of **Nairobi High Court of Kenya Misc Civil Application No. 400 of 2006 Sam Odera & 3 Others v The national Environment and Management Authority [2006] e KLR** where the court opined that projects that endanger the lives of people should not be located near densely populated residents. They also submitted that neither the report enshrined in **Section 58 of the EMC & Anor the EIA enshrined in Regulation 4 of the Environment (Impact Assessment and Audit) Regulations, 2003** was not conducted by the Respondents.

28. On *whether the proposed project is likely to pose environmental harm to the interested parties and the petitioner* the interested party cited the provisions of **Principle 15 of the Rio Declaration** where it states that a preventive action ought to be taken where there is uncertainty as to the extent of the environmental harm a proposed project would occasion. He also cited contravention of **Article 12 of the International Convention on Economic, Social and Cultural Rights and Article 24 of the African Charter on Human and People's Rights** on entitlement to a general satisfactory environment.

29. The **1st and 2nd Respondent** filed joint submissions. They submitted that the incinerator is constructed at Manyatta TB health centre which is a duly gazetted property as opposed to un-surveyed plot No. R6311 as alleged by the petitioners. That public participation was conducted and EIA report issued and approved by NEMA. They also submitted that the **3rd Respondent** was not granted an opportunity to respond to the petition and the same was a violation of **Article 50 of the Constitution**. It relied upon the case of **Egal Mohammed Osman v Inspector General of Police & 3 Others [2015] e KLR** on the cardinal rule of natural justice.

30. The **1st and 2nd Respondents** also took issue with *the affidavit sworn by the interested party*. They submitted that the same does not meet the threshold of the **Oaths and Statutory Declaration Rules at Rule No. 9**, annexures AAB2 being a photo of the site premises is not admissible as **Section 78 of the Evidence Act** demands production of a certificate when producing photographic evidence. Further that the letter issued to NEMA AAB5 does not show the mode of service to prove whether the same was received or not. They submitted that the Documents attached to the Interested parties Replying affidavit ought to be rendered inadmissible and expunged from the Courts records. In this regard he cited the case of **Francis A. Mbalanya v Cecilia W. Waema [2017] e K.L.R.**

31. On *whether the construction of the incinerator at Manyatta TB Health Centre violates Article 42 of the Constitution* they cited the provisions of **Article 69 of the Constitution** where the state is mandated to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. They reiterated that a report was filed with the **3rd Respondent** and the same was in line with **Regulation 4 of the Environmental (Impact Assessment and Audit) Regulations 2003**. That whereas **Section 87 of the EMCA** forbids any person to discharge or dispose of any wastes in such manner as to cause pollution to the environment or ill health to any person **Section 91 of the Act** puts standards and classification of toxic and hazardous wastes. **Regulation 26** provides that any person who produces hazardous waste shall cause the same to be treated using classes of incinerators provided in the Third Schedule. The third Schedule includes medical wastes as a hazardous waste. **The National Guidelines for Safety Management of Health 2011 has also recommended that health care wastes should be disposed of at incinerators within the hospital.**

32. On *public participation*, the Respondents submit that the petitioner and interested party have not disputed the EIA report. That the EIA report was approved by Nema which shows that public participation on the project was conducted in consonance with **Regulation 17 of the Environmental (Impact Assessment and Audit Regulations) 2003**. That public participation for the purposes of environmental impact assessment is not conducted in line with the Ministry of Devolution planning and Council of Governors- County Public participation Guidelines 2016 but according to the stipulated laws and the constitution.

Analysis and Determination

33. From the evidence of the parties and the submissions filed I do discern the following as the issues for determination;

a. **Whether this Court has jurisdiction to hear the petition before it?**

b. **Whether the affidavit sworn by the 1st interested party is defective and whether the documents so attached ought to be expunged from the record.**

c. **Whether the Respondents have violated the petitioner's and interested parties' Constitutional right to health and right to property?**

d. Whether this Court should grant the Orders Sought?

e. Who shall bear the resultant cost of the petition, if any?

a. Whether this Court has jurisdiction to hear and determine the petition before it?

34. Article 162(2)(b) of the Constitution states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, Section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes —

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.”

[Emphasis Mine]

35. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & amp; 5 others [2013] e KLR provided the standard of proof in Constitutional Petitions. The Court of Appeal judges stated:-

“...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

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

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

36. In this case the petitioner has clearly cited the provisions of the Constitution that were violated the ways in which the violation was done by the Respondents and the remedies sought for such violation. I discern therefore that the petition as filed is properly on record and this Court has jurisdiction to determine the same.

37. Another preliminary issue raised by the Respondents submissions was the fact that the 3rd Respondent was not served hence did not have a right to defend itself in this proceedings. I have looked at the record and perused Affidavit of Service dated 14th September 2021 sworn by Abdirizak Ibrahim Abdile. At paragraph 3 he confirms service of the petition to the 3rd Respondent. The 3rd Respondent therefore did not seek to respond to the petition despite being served with the same.

(b) Whether the Affidavit sworn by the Interested Party is defective and whether the documents so attached ought to be expunged from the record?

38. The 1st and 2nd Respondent have made averments that the Photos attached as annexures in support of the 1st Interested parties affidavit ought to be expunged from the record. This averment has been made at the submissions stage and the Respondent has not been granted leave to reply to the same. Dealing with it at this stage would not grant a chance to the interested party to be heard. I have also looked at the record and though marked as annexed the photos are not attached to the affidavit.

39. I therefore don't also see any prejudice occasioned to the Respondent by the aforesaid photos. The Respondent has not disputed their authenticity.

(c) Whether the Respondent has violated the Petitioner's and Interested Parties Constitutional right to Health and Right to Property?

40. From the Onset the Respondents have been categorical that the setting up of the incinerator is within Wajir Manyatta TB Health centre as opposed to un-surveyed land known as R6311 which ostensibly belongs to the petitioner. In the petition the petitioner had averred that the incinerator is being constructed on this land. This has since been dissuaded by the Respondent and the interested party. As such the petitioner's declaration that his right to property has been violated fails and the same is hereby dismissed.

41. On the Right to Health the same has been argued on the following grounds i.e. (a) *Failure of the 3rd Respondent to issue an Environmental Impact Assessment Report* (b) *Public Participation* (c) *Whether the setting up of the incinerator posing potential harm to the residents of Hodhan Community.*

42. On failure of the 3rd Respondent to Issue an Environmental Impact Assessment Report. Section 58(1) of the EMCA provides for application for an Environmental Impact Assessment Licence. This section stipulates:

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

43. The 1st Respondent herein issued to the 3rd Respondent an Environmental Impact Assessment Project Report on 4th December 2019 titled *Proposed Installation Commission and Testing of an incinerator at TB Manyatta- Wajir Twonship Sub-County Wajir County.* The same was approved and the 3rd Respondent issued an Environmental Impact Assessment License on 4th January 2021. This is the procedure that is contemplated under **Regulation 10 of the Environmental (Impact Assessment and Audit) regulations, 2003.** The same provides as follows;

(2) Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule to these Regulations.

(3) If the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with these Regulations.

(4) A proponent who is dissatisfied with the Authority's decision

44. It can therefore be discerned that the 3rd Respondent was satisfied that the project shall have no significant impact on the environment and/or the project report discloses sufficient mitigation measures for them to approve the same and issue a licence.

45. Further to this the issuance of the license to the 1st Respondent at the first instance confirms that they were satisfied with the report bearing significant mitigation measures and as such the same did not require the proponent to undertake an Environmental Impact Assessment.

46. On Public Participation the report at Paragraph 5 states that the 1st Respondent conducted public participation on 20th November 2019 by issuance of pre-designed questionnaires and by interviewing neighbours surrounding the proposed project site. That the total number of persons interviewed were 27 with the largest number (46%) being in the 21 to 30 age group. No persons over the age of 50 were included in the sample.

47. In **Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] e KLR** the court while acknowledging that public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth held as follows ;

“A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most

affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

48. By the Respondents admitting that a certain age set were not considered in the Public participation process the same raises doubts as to the authenticity of the Public Participation. The same also mentions only one form of enquiry i.e. the use of questionnaires. There is no record to show that the 1st Respondent engaged with the local authorities or conducted *barazas* to sensitise the citizens of the effects of the setting up of the incinerators. Also the Respondent have stated that they collected views from 27 individuals and this is against a total population of 852,968 within Wajir County. Further to this, the questionnaires attached to the report and the 1st and 2nd Respondents response are only for eight (8) respondents. The aforesaid number cannot by any form of innovation be considered to be measureable to adequate public participation.

49. I therefore agree with the Petitioner that by any measure the Respondent did not conduct proper public participation.

50. The next issue is **whether the setting up of the incinerator posing potential harm to the residents of Hodhan Community.** The Responsibility of the 1st Respondent to conduct the function of waste management and the modalities thereof has been properly outlined in the case of **Boniface S. Katana & 119 others v Director General, National Environment Management Authority (NEMA) & 2 others [2020] e KLR** where the court held as follows:

“Under Section 2(g) of Part 2 of the Fourth Schedule of the Constitution, the functions of refuse removal, refuse dumps and solid waste disposal have been devolved to County Governments such as the 2nd Respondent herein.

As it were, Section 86 of the Environmental Management and Coordination Act (EMCA), 1999 requires the Cabinet Secretary on the recommendation of the National Environment Management Authority (NEMA) to identify materials that are dangerous to human health and the environment.

Section 86 of EMCA further requires the Minister to issue guidelines and prescribe measures for the management of the materials and processes identified as dangerous to human health and environment; prescribe standards for waste, advise on standards of disposal methods or issue regulations for the handling, storage, transportation, segregation and destruction thereof. Section 87 of EMCA on the other hand prohibits the discharge of any waste in such a manner as to cause pollution to the environment. It prohibits the transportation of waste without a licence and further prohibits the operation of a waste disposal site or plant without a licence.

Section 87 further provides that every person whose activities generate waste shall employ measures essential to minimize the waste.

51. I have looked at the Report filed by the 1st Respondent. The same opines as follows on the Potential Impact associated with the Proposed project;

“Medical waste incinerators are a leading source of dioxins and mercury in the environment. Ash remaining at the bottom of an incinerator after burn down often contains heavy metals that may leach out. Dioxins and furans may also be found in the bottom ash

Sometimes low level radioactive waste in incinerators; the ash residue may also contain traces of radioactive isotopes. The ash may be treated as hazardous waste.....”

52. The report provides for mitigating factors especially in the handling emissions, ashes, odour gases and smells when it notes;

“Emissions from the chamber will be passed through a dual filtration system comprised of an activated carbon filter and high-efficiency particulate air (HEPA) filter to remove odour and bacteria. Although the waste retains much of its physical appearance the waste will be sealed and disposed on the processed container.

53. The report cites other alternatives to the incinerators it states that autoclaving with shredding and compaction is a technologically and financially feasible alternative to incineration. That the same will achieve the same volume reduction and sterilization as incineration without the adverse impacts of hazardous emissions.

54. This Court however notes that there are mitigating measures in place to counter the adverse effects brought by the setting up of the incinerators including but not limited to segregation, Waste Storage, Source Reduction and Waste generation data.

55. With the alternatives cited and the adverse effects that incineration bears to the residents of Hodhan Community, it is hard to see why the EIA project report was approved and license issued without the recommendation that an EIA study be conducted in line with Regulation 10. The court takes notice of the value of the project and the benefits that the same would have to the 1st Respondents function of waste management but the adverse effects cited in the report clearly outweighs the benefits to be gained.

56. From the above analysis it is this court's finding that the setting up of the incinerator possess a potential harm to the residents of Hodhan Community if proper measures are not put in place prior to its implementation.

57. Having made the above determination I Find that the Order that commends are;

i. A declaration be and is hereby issued that the 1st and 2nd Respondents acts are in contravention of Article 42 of the Constitution, 2010.

ii. A declaration is hereby issued that the violation of Article 42 of the Constitution 2010, by the 1st and 2nd Respondent has resulted in a denial of the right to a clean and healthy environment to the petitioners and residents of Hodhan Location Wajir County.

iii. An Independent Environmental Impact Assessment study by an expert appointed by the 3rd Respondent be done on the feasibility of the project against other alternatives within three (3) months of today's Judgement.

iv. That public participation of the study in (iii) above be undertaken and the residents of Hodhan community be involves in every stage of the process.

v. That the Environmental Assessment License issued on 4th January 2019 by the 3rd Respondent be and is hereby revoked.

vi. The 1st Respondent to pay the costs of this petition.

i. The 1st Respondent to pay the costs of this petition.

RULING DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 30TH DAY OF SEPTEMBER, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Aranda for the 1st & 2nd Respondents

2. Mr. Kimanzi for the Petitioners

3. Fardowsa; Court Assistant.