



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

ELC. PETITION NO. 19 OF 2020

(Formerly High Court Constitutional Petition No. 6 of 2020)

IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23, 70, 165 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: VIOLATION OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 40, 42, 43, 47, 60, 64, 69, 70, 72, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA AS WELL AS THE FOURTH SCHEDULE THERETO

AND

IN THE MATTER OF: SECTIONS 3, 9, 58, 59, 87, 88, 90, 108, 111, 140, 142, 144, AND 145 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, CAP 387

AND

IN THE MATTER OF: SECTIONS 116 AND 117 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF: SECTIONS 116, 117 AND 118 OF THE PUBLIC HEALTH ACT, 2012

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF: REGULATIONS 4, AND 11 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION (WASTE MANAGEMENT) REGULATIONS, 2016

AND

IN THE MATTER OF: REGULATIONS 4 OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

BETWEEN

HALAI CONCRETE QUARRIES.....1ST PETITIONER

BLUESTONE LTD.....2ND PETITIONER

KAY CONSTRUCTION CO. LTD.....3RD PETITIONER

KENYA BUILDERS & CONCRETE CO. LTD.....4TH PETITIONER

ORBIT ENTERPRISES LTD.....5TH PETITIONER

AND

COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

COLNET LIMITED KENYA.....2ND RESPONDENT

PAULSA BINS LIMITED.....3RD RESPONDENT

NEATWORLD SERVICES LIMITED.....4TH RESPONDENT

GLEE CLEANING SERVICES LIMITED.....5TH RESPONDENT

AND

KENYA POWER & LIGHTING CO.....1ST INTERESTED PARTY

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....2ND INTERESTED PARTY

JUDGMENT

1. The Petitioners are limited liability companies registered under the Companies Act, and licensed under the Mining Act, 2016 to carry out quarrying activities in Machakos County. The Petitioners have filed this Petition on their own behalf and in the public interest.
2. The Petitioners averred that Article 69 of the Constitution requires the State, including the National and County Governments, to ensure sustainable exploitation, utilization, management and conservation of the environment and that Article 69 (2) of the Constitution requires everyone to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
3. The Petitioner's gravamen is that the Respondents' actions of transporting to, dumping and or disposing refuse and or waste on an unlicensed and ungazetted dumpsite on a public road known as Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto (*hereinafter referred to as the "endangered property"*) is unlawful.
4. It was averred by the Petitioners that the said persistent illegal dumping has led to the complete inaccessibility of/to their quarry sites owing to the blockage of the endangered property; that the said access road is the main road serving all quarry businesses in the area and that the illegal dumping of the waste on the suit property has posed insurmountable impediment to the quarry business.
5. The Petitioners averred that dumping of the solid waste on the "*endangered property*" poses a real and imminent threat to the electricity posts erected by the 1st Interest Party on the endangered property and consequently the power supply to the businesses of the Petitioners, which the Respondents have disregarded.
6. It was averred that the said dumping has further hampered access to the power station by the 1st Interested Party, thereby posing an imminent danger of interference with the power supply in the area with the effect of crippling the functioning of the Petitioners' businesses as well as every other commercial and residential building in the area.
7. According to the Petitioners, the existence of the illegal dumpsite has caused a surge in the rate of crime in the area providing a haven for unidentified criminals who have and continue to cause real danger as against the Petitioners and the area occupants.
8. It is the Petitioners' case that the "*endangered property*" has not been designated and or gazetted as a dumpsite or waste receptacle; that the 1st Respondent has neither applied for a license to operate the "*endangered property*" as a disposal site nor conducted and or submitted to the 2nd Interested Party an Environmental Impact Assessment Report to legitimize its operations in the "*endangered property*" and that the 1st Respondent has continued to abdicate its constitutional duty to ensure responsible, sustainable and environmentally-sound solid waste management and instead has continued to participate in the gross contravention of the Constitution and the statute at the detriment of the Petitioners.
9. The Petitioners averred that the illegal disposal of waste by the Respondents poses a real and imminent health hazard to the Petitioners and the public at large and amounts to nuisance as categorized under Section 118 as read with Section 117 of the Public Health Act, 2012.
10. It was averred by the Petitioners that the 1st Respondent is in violation of Section 116 of the Public Health Act by failing to take lawful, necessary and reasonably practical measures for maintaining its areas at all times in clean and sanitary condition.
11. According to the Petitioners, the Respondents are in violation of Articles 28, 40(1), 42, 43, 69 and 70 of the Constitution by transporting

to, dumping and or disposing refuse and or waste on an unlicensed and ungazetted dumpsite being the public road-Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto (“*the endangered property*”) thus violating the Petitioners right to a clean and healthy environment.

12. The Petitioners have sought for the following orders:

(i) A declaration that the Petitioners’ right to a clean and healthy environment as guaranteed by Article 42 and 43 of the Constitution of Kenya has been violated by the acts and or omissions of the Respondents.

(ii) A prohibitory injunction be and is hereby issued permanently restraining the Respondents and or their employees, agents, assigns or anybody whosoever from transporting to, dumping and or disposing refuse or waste on Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto and or from doing any other act or omission deleterious to the environment.

(iii) A mandatory injunction be and is hereby issued compelling the 1st Respondent to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance to the Environmental Management and Coordination Act, 1999 within 30 days hereof.

(iv) An environmental restoration order be and is hereby issued against the Respondents compelling them through themselves, their employees, agents and or assigns to restore the degraded dumpsite on Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone as far as practicable to its immediate condition prior to the damage with immediate effect.

(v) A mandatory injunction be and is hereby issued compelling the 1st Respondent to ensure that there be no further or continued transportation to, storage or disposal of any wastes on Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto by the Petitioners or any other persons.

(vi) The 2nd Interested Party with the assistance of the OCS Mlolongo Police Station ensure enforcement and compliance with the above orders failure to which the appropriate statutory sanctions and penalties to be applied to the perpetrators including by not limited to de-licensing of the 2nd, 3rd, 4th and 5th Respondents.

(vii) An order be and is hereby granted for the Respondents to compensate the Petitioners for the violation of their rights to a clean and healthy environment pursuant to Article 70(2)(c) of the Constitution of Kenya 2010 and for the costs and expenses incurred in clearing and maintenance of the Quarry road to date.

(viii) Costs of this Petition be borne by the Respondents;

(ix) Any other or further order or relief that this Honorable Court deems fit to grant.

13. On record are responses by the 2nd, 3rd, 4th and 5th Respondents and the 2nd Interested Party. There is no response by the 1st Respondent and the 1st Interested Party.

14. The 2nd Respondent’s Director denied the averments in the Petition as against the 2nd Respondent. It was deponed by the 2nd Respondent’s Director that the 2nd Respondent has been carrying on the business of garbage collection, transportation and disposal within Mavoko Sub-County in Machakos County and that it is duly licensed to carry on the said business.

15. The 2nd Respondent’s Director deponed that the 2nd Respondent has been disposing all the solid waste in accordance with the law and the terms of its licence; that the Petitioners’ and the 1st Interested Party’s right to access their properties has not been hampered in any way by the dumping of the solid waste by the 2nd Respondent; that the dump site has been designated by the 1st Respondent and that the 2nd Respondent has been paying the required rates to the 1st Respondent.

16. The 3rd, 4th and 5th Respondents’ Directors denied the averments in the Petition as against the 3rd, 4th and 4th Respondents. The depositions of the said Directors are similar to the depositions of the 2nd Respondent’s Director, which I have summarized above.

17. The 2nd Interested Party, vide a Replying Affidavit sworn by the Machakos County Director of Environment, supported the Petition. The 2nd Interested Party’s County Director of Environment deponed that a ground inspection conducted by NEMA on 17th July, 2015 revealed that the 1st Respondent was operating a waste management facility where there was massive dumping of mixed solid waste-household, industrial and excavated soils.

18. The 2nd Interested Party’s County Director of Environment deponed that the dumpsite at Mulinge Scheme area within Athi River locality, was not licensed by the 1st Interested Party; that the said dumpsite did not meet the ‘10 minimum points’ for licensing of dump sites and that after the said ground report, the 1st Interested Party issued to the 1st Respondent an improvement Order.

19. It was deponed by the 2nd Interested Party’s County Director of Environment that that on 5th August, 2019, the 1st Interested Party conducted another visit on the site; that it was discovered that the 1st Respondent was dumping waste in four (4) different sites and without an Environmental Impact Assessment licence from NEMA and that the Respondents’ vehicles were not licensed to ferry waste as per the law.

20. According to the deponent, the instant dispute was the subject of protracted negotiations between the Petitioners and the Respondents and mediated by the County Commissioner and that the 1st Respondent indicated vide a letter dated 10th February, 2020 that they were in the process of acquiring land for another dumpsite.

Submissions:

21. The Petition was canvassed vide written submissions. The Petitioners' counsel submitted that every person, whether in their natural or artificial/judicial capacity, has the right and is entitled to a clean and healthy environment; that this legal right is well founded under Article 42 of the Constitution and that the right has been enunciated in judicial precedence as a fundamental right bestowed on every person. Counsel relied on the case of *Adrian Kamotho Njenga vs Council of Governors & 3 others [2020] eKLR*.

22. It was submitted that Article 69 of the Constitution obligates all persons, including the Respondents, to protect and ensure a clean and healthy environment, which include but is not limited to elimination of processes and activities that are likely to endanger the environment as well as establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

23. The Petitioners' advocate submitted that Regulation 4 of the Environmental Management and Coordination (*Waste Management*) Regulations, 2006 provides the manner in which disposal of solid waste should be done; that Section 88 of the Environmental Management and Co-ordination Act provides that any person intending to transport wastes within Kenya shall prior to transporting the wastes, commencing with the operation of a wastes disposal site or plant or generating hazardous wastes, as the case may be, must apply to NEMA in writing for the grant of an appropriate license.

24. It was submitted that one of the mandatory prerequisites before issuance of a license for operation of a waste disposal site is an Environmental Impact Assessment, and that the illegal disposal of waste amounts to nuisance as categorized under Section 118 as read with Section 117 of the Public Health Act, 2012 which poses a real and imminent health hazard to the Petitioners and the public at large. Counsel relied on the case of *County Government of Kitui vs. Sonata Kenya Limited & 2 others [2018] eKLR* wherein the Court highlighted the importance of the Environmental Impact Assessment as follows:

“35. Section 58 of the Environmental Management and Co-ordination Act stipulates the procedure to be followed when applying for an Environmental Impact Assessment license...

36. An Environmental Impact Assessment license can only be issued after a successful Environmental Impact Assessment process, which envisages two modes of processes: that is, an Environmental Impact Assessment Project Report or an Environmental Impact Assessment Study Report.

37. According to the second schedule of the Environmental Management and Co-ordination Act, as amended vide Legal Notice No. 150 of 16th June, 2016, all projects pertaining to waste disposal; including hazardous wastes treatment or disposal facilities and commercial asbestos disposal sites, require the proponent to submit Environmental Impact Assessment Reports under Section 58(2) of the Act.”

25. Counsel submitted that the 1st Respondent has not produced any Environmental Impact Assessment Report to show that an Environmental Impact Assessment was conducted prior to operation of the *endangered property* as a dumpsite and that the requirement of an Environmental Impact Assessment should not be undermined especially in such a project that would have dire ramifications to the rights of the Petitioners.

26. It was submitted that the 1st Respondent, in contravention of Sections 87 and 88 of the Environmental Management and Co-ordination Act and Regulation 10, and while holding no license to operate the dumpsite, proceeded and issued licenses to the 2nd and 4th Respondents directing them to dispose off waste *“at the only legal sub-county Disposal site next to Kay Construction Quarry”* knowing very well that it did not have the required clearance to operate the said area as a waste receptacle.

27. The Petitioners' counsel submitted that the continued operation of the suit property as a dumpsite constitutes a criminal offence as was observed by Ngugi J. in *African Centre for Rights and Governance (ACRAG) & 3 others vs. Municipal Council of Naivasha [2017] eKLR*;

“There can be no question that the law requires a waste disposal site to be licenced. In other words, waste ought to be disposed of only in a site which is properly licenced... Since the named respondent, and now the County Government of Nakuru, has no license to operate this site, it follows that the same is an unlicensed facility and an illegal dumpsite. The continued operation of the suit land as a dumpsite constitutes a criminal offence as set out in Section 87 (5) of Environmental Management and Co-ordination Act.”

28. Counsel for the Petitioners submitted that the 2nd, 3rd, 4th, and 5th Respondents have admittedly been engaging in the unlawful disposal and dumping of refuse and or waste on the public road between Kay Group Quarries and the Kenya Power Substation and the buffer zone adjacent thereto which poses a real and imminent threat to the environment crippling the business operation of the Petitioners therein.

29. It was submitted that the 1st Respondent has perpetuated the violation of the Petitioners' right to a clean and healthy environment contrary to the Public Health Act by neglecting to take reasonably practicable measures to maintain its areas at all times in a clean and sanitary condition by allowing the persistent dumping of waste at an undesignated waste receptacle by the 2nd, 3rd, 4th and 5th Respondents.

30. It was submitted that the unlicensed dumpsite is not only a health hazard but also a threat to the Petitioners' right to a clean and healthy environment and to the public at large with a spill-over effect that directly infringes on their right to property enshrined under Article 40 of the Constitution.

31. It was submitted that the Respondents are in blatant breach of Articles 40, 42, 43 and 70 of the constitution as read with Section 3, 58, and 87 of the Environmental Management and Co-ordination Act and that the Respondents are in violation of the Petitioners' right to a clean and healthy environment, their socio-economic rights and their right to property.

32. It was submitted by the Petitioners' advocate that costs should not be awarded to the Respondents even in the unlikely event that the Petitioners are not successful by virtue of the *Biowatch* principle enunciated by Justice Sachs in the South African case of *Biowatch Trust vs. Registrar Genetic Resources and others (CCT 80/2008) [2009] ZACC* and that unsuccessful litigants should be shielded from the obligation of paying costs to the State in order to prevent the chilling effect that adverse orders for payment of costs might have on litigants seeking to assert constitutional rights.

33. The counsel for the 2nd to 4th Respondents submitted that the collection and disposal of solid waste by the Respondents has been legal; that the 2nd - 5th Respondents obtained business permits from the County Government of Machakos with the intention of carrying out the business of garbage collection and disposal and that they were duly licensed to collect and dispose waste within Machakos County as per Section 88 of the Environmental Management and Co-ordination Act (EMCA). Reliance was placed on Section 87 of the said Act which provides as follows:

“(1) Any person intending to transport wastes within Kenya, operate a wastes disposal site or plant or to generate hazardous waste, shall prior to transporting the wastes, commencing with the operation of a wastes disposal site or plant or generating hazardous wastes, as the case may be, apply to the Authority in writing for the grant of an appropriate licence.

“(2) A licence to operate a waste disposal site or plant may only be granted subject to the payment of the appropriate fee and any other licence that may be required by the relevant Local Authority.”

34. It was submitted by the 2nd - 5th Respondents' counsel that the allegations that the disposal of solid waste would pose a health hazard to the individuals around the suit property remains mere allegations as the Petitioners have failed to substantiate their claims and that the Petitioners ought to have caused to be commissioned an Environmental Impact Assessment Test (EIA) in accordance with the law to enable this Court arrive at a sound decision. Reliance was placed on the Court of Appeal decision in *West Kenya Sugar Co. Ltd vs. Kenya Sugar Board and Another (2014) eKLR* where the Court of Appeal held that:

“The High Court was ill equipped to decide whether or not the conditions for granting a licence had been met, some of the information provided in the application for licence was of a technical nature. Condition stipulated in Section 15 (i) (b) of the Act refers to technical experience and capacity. These factors could only have been properly evaluated by persons well versed in matters pertaining to sugar industry and the application of the policy of the Act.”

35. It was also submitted that no evidence had been placed before court to show that the legal dumping of waste at the designated site poses an environmental risk as alleged by the Petitioners; that disposal of the solid waste is in line with promoting a clean and healthy environment and that the Petitioners failed to demonstrate how their rights have been infringed as their claims lack particulars of such infringement, the manner of infringement and or the jurisdictional basis of the action before this Court.

Analysis and findings:

36. This suit was commenced by way of a Petition dated 17th June, 2020. In the Petition, the Petitioners have averred that the 1st, 2nd, 3rd 4th and 5th Respondents are engaged in the unlawful disposal and dumping of refuse and solid waste on the public road known as Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto (*hereinafter referred to as the “endangered property”*).

37. According to the Petitioners, the persistent illegal dumping of waste on the “*endangered property*” has led to the complete inaccessibility to their quarry sites owing to the blockage of the *endangered property*; that the said access road is the main road serving all quarry businesses in the area and that the continued illegal dumping of the solid waste has posed an insurmountable impediment to the quarry businesses.

38. It is the Petitioners' case that despite the precise provisions of the Environmental Management and Coordination Act (EMCA), and the subsidiary legislation thereto, the Respondents have persistently continued to dump waste on the *endangered property* in full knowledge and in disregard that the said property has not been designated and or gazetted as a dumpsite or waste receptacle.

39. It was averred by the Petitioners that the 1st Respondent has neither applied for a license to operate the *endangered property* as a disposal site neither has it conducted and or submitted to the 2nd Interested Party (NEMA) an Environmental Impact Assessment Report to legitimize its operations in the *endangered property*, which actions directly contravene the law.

40. The Petitioners are seeking for the following orders of the court:

(i) A declaration that the Petitioners' right to a clean and healthy environment as guaranteed by Article 42 and 43 of the Constitution of Kenya has been violated by the acts and or omissions of the Respondents.

(ii) A prohibitory injunction be and is hereby issued permanently restraining the 1st, 3rd, 4th, 5th and 6th Respondents and or its employees, agents, assigns or anybody whosoever from transporting to, dumping and or disposing refuse or waste on Prison Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto and or from doing any other act or omission deleterious to the environment.

(iii) A mandatory injunction be and is hereby issued compelling the 1st Respondent to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance to the Environmental Management and Coordination Act, 1999.

(iv) An environmental restoration order be and is hereby issued against the 1st, 3rd, 4th, 5th and 6th Respondents compelling them through themselves, their employees, agents and or assigns to restore the degraded dumpsite on Prison Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone as far as practicable to its immediate condition prior to the damage.

(v) A mandatory injunction be and is hereby issued compelling the 2nd Respondent to ensure that there be no further or continued transportation to, storage or disposal of any wastes on Prison Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto by the Petitioners or any other persons failure to which the appropriate statutory sanctions and penalties to be applied including by not limited to de-licensing of the 3rd, 4th, 5th and 6th Respondents.

(vi) An order be and is hereby granted for the 1st, 3rd, 4th, 5th and 6th Respondents to compensate the Petitioners for the violation of their rights to a clean and healthy environment pursuant to Article 70(2)(c) of the Constitution of Kenya 2010.

(vii) Costs of this Petition be borne by the Respondents;

41. From the pleadings and the submissions, the issues that arise for determination are as follows:

(i) What are the constitutional and Statutory Provisions for a clean and healthy environment and waste management?

(ii) Whether the 1st Respondent violated the provisions relating to the right to clean and healthy environment and waste management.

(iii) Whether the 2nd - 5th Respondents violated the provisions of the law relating to the right to a clean and healthy environment and waste management.

(iv) Whether the Respondents' actions amounted to infringement of the Petitioners' constitutional rights.

(v) Whether the Petitioners are entitled to the reliefs sought.

The Constitutional and Statutory Provisions for a Clean and Healthy Environment

42. Article 42 of the Constitution of Kenya, 2010 provides that every person has the right and is entitled to a clean and healthy environment, which right includes the right to have the environment protected for the benefit of the present and future generations.

43. The right to a clean and healthy environment is bestowed on every person, and has been considered by the courts and eminent authors to be essential for the existence of mankind. In *Adrian Kamotho Njenga vs. Council of Governors & 3 others [2020] eKLR*, it was held that:

“18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.”

44. Further to the foregoing, the Constitution under Article 69 obligates all persons to protect and ensure a clean and healthy environment, which include but is not limited to elimination of processes and activities that are likely to endanger the environment as well as establish systems of environmental impact assessment and environmental audit and monitoring of the environment.

45. This position was elaborately considered in the case of *Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 others [2018] eKLR* where the court adopted the decision in *Communication No.155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria* where the African Commission on Human and People's Rights stated as follows:

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

The right to general satisfactory environment, as guaranteed under article 24 of the Africa Charter or the right to healthy environment, as it is widely known therefore imposes clear obligations upon a government. It requires the state to take reasonable

measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”

46. Article 70 (1) of the Constitution empowers any person who alleges that a right to a clean and healthy environment has been infringed or is threatened to apply for redress from the court in addition to any other legal remedies available in respect of the matter. An applicant alleging that a right to a clean and healthy environment need not demonstrate that any person has incurred loss or suffered injury.

47. Article 70 (2) of the Constitution provides that on Application for enforcement of the right to a clean and healthy environment, the court may make any order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment, and may compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment.

48. Section 3 of the Environmental Management and Co-ordination Act complements the provision of Article 70 of the Constitution. The said Section allows any person who alleges that the right to a clean and healthy environment has been, or is being infringed or violated to bring an action notwithstanding that such a person cannot show that the defendant’s act or omission has caused or is likely to cause him any personal loss or injury provided that such an action is not frivolous or vexatious; or is not an abuse of the court process.

49. Consequently, and in view of the provisions of Article 70 of the Constitution and Section 3 (4) of the Environmental Management and Co-ordination Act, the Petitioners in this case did not have to demonstrate that any person or themselves, have suffered injury due to the alleged dumping of solid waste on the *endangered property*.

50. Section 87 of the Environmental Management and Co-ordination Act, (*hereinafter known as ‘EMCA’*) prescribes how waste should be handled and disposed. The said Section provides as follows:

“87. Prohibition against dangerous handling and disposal of wastes

(a) 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.

(b) No person shall transport any waste other than—

i. in accordance with a valid license to transport wastes issued by the Authority; and

ii. to a waste’s disposal site established in accordance with a license issued by the Authority.

(c) No person shall operate a wastes disposal site or plant without a license issued by the Authority.

(d) Every person whose activities generate wastes shall employ measures essential to minimize wastes through treatment, reclamation and recycling.

(e) 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.”

51. In further emphasis of the above provisions on disposal of solid waste, Regulation 4 of the Environmental Management and Coordination (*Waste Management*) Regulations, 2006 provides inter alia that;

“4. (1) No person shall dispose off any waste on a public highway, street, road, recreational area or in any public place except in a designated waste receptacle.

(2) Any person whose activities generate waste shall collect, segregate and dispose or cause to be disposed off such waste in the manner provided for under these Regulations.

(3) Without prejudice to the foregoing, any person whose activities generates waste has an obligation to ensure that such waste is transferred to a person who is licensed to transport and dispose off such waste in a designated waste disposal facility.”

52. Furthermore, Section 88 of the Environmental Management and Co-ordination Act provides that:

“(1) Any person intending to transport wastes within Kenya, operate a wastes disposal site or plant or to generate hazardous waste, shall prior to transporting the wastes, commencing with the operation of a wastes disposal site or plant or generating hazardous wastes, as the case may be, apply to the Authority in writing for the grant of an appropriate license.”

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 Environmental Management and Co-ordination Act. Before the disposal of any waste, the County Governments are required to:

- *Ensure there is a designated site(s) for waste disposal.*
- *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.*
- *Ensure all incoming waste is weighed or estimated and the quantities recorded in tonnes.*
- *Develop and maintain motorable roads inside the site to ensure ease of access during disposal.*
- *Ensure the waste is spread, covered and compacted at regular intervals.*
- *Put in place appropriate control measures for the management of dumpsite fires.*
- *Enhance security and control of the disposal sites so that illegal activities are curbed.*

55. One of the mandatory prerequisites before issuance of a license for operation of a waste disposal site is an Environmental Impact Assessment, which must be done and submitted to the 2nd Interested Party for assessment, failing which a license cannot be issued. This requirement is provided for under Sections 58 and 59 of the Environmental Management and Co-ordination Act as read with Regulation 4 of the Environmental (*Impact Assessment and Audit*) Regulations, 2003.

56. In the case of *County Government of Kitui vs. Sonata Kenya Limited & 2 others [2018] eKLR*, this Court highlighted the importance of the Environmental Impact Assessment in respect to waste management as follows:

“35. Section 58 of the Environmental Management and Co-ordination Act stipulates the procedure to be followed when applying for an Environmental Impact Assessment license...”

36. An Environmental Impact Assessment license can only be issued after a successful Environmental Impact Assessment process, which envisages two modes of processes: that is, an Environmental Impact Assessment Project Report or an Environmental Impact Assessment Study Report.

37. According to the second schedule of the Environmental Management and Co-ordination Act, as amended vide Legal Notice No. 150 of 16th June, 2016, all projects pertaining to waste disposal; including hazardous wastes treatment or disposal facilities and commercial asbestos disposal sites, require the proponent to submit Environmental Impact Assessment Reports under Section 58(2) of the Act.”

57. Additionally, Section 116 of the Public Health Act further mandates County Governments with the duty to take all lawful, necessary and reasonably practicable measures for maintaining its areas at all times in a clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health.

58. By dint of Section 90 of the Environmental Management and Co-ordination Act, the 2nd Interested Party has the legal mandate to halt any activities carried out in contravention of the foregoing provisions by applying to a court of competent jurisdiction for orders compelling any person to immediately stop the generation, handling, transportation, storage or disposal of any wastes where such generation, handling, transportation, storage and disposal present imminent or substantial danger to public health, the environment and natural resources.

Whether the Respondents violated the above provisions of the law

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 licenses 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 prior to designating the *endangered property* as a dumpsite. 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 Co-ordination Act provides that no person shall operate a waste disposal site or plant without a license 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 license.

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 license to operate a dumpsite, proceeded and issued licenses 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 license whatsoever to the 1st Respondent, or to any person, for the operation of the *endangered property* as a dumpsite.

66. In fact, the 2nd Interested Party conducted a ground inspection on 17th July 2015 at Mulinge Scheme Area within 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 license 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 license 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 unlicensed disposal site on the *endangered property*, which activity constitutes a criminal offence under Section 87(5) of the Environmental Management and Co-ordination 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.

70. The 2nd-5th Respondents have admittedly been engaging in the unlawful disposal and dumping of refuse and or waste on the public road between Kay Group Quarries and the Kenya Power Substation and the buffer zone adjacent thereto which poses a real and imminent threat to the environment crippling the business operation of the Petitioners therein.

71. I say so because under Section 87 as read with Regulation 4 of the Environmental Management and Coordination (*Waste Management*) Regulations, 2006, no person is allowed to transport any waste other than in accordance with a valid license to transport waste issued by the 2nd Interested Party; and to a waste disposal site established in accordance with a license issued by the 2nd Interested Party.

72. The impugned site has not been licensed as a dumpsite as required by law, making the activities of the Respondents in their own capacity or through their agents illegal and unlawful. Furthermore, before any license can be issued to dump waste at a designated site, the said site must first be licensed as a waste dump site. A license cannot be issued for the dumping of garbage to a site unless and until the said site is licensed as a dumpsite by the 2nd Interested Party.

73. As such, the licenses produced by the 2nd to 5th Respondents purporting to allow them to dump solid waste on the *endangered property* are illegal and invalid.

Whether the violation of the law amounted to infringement of the Petitioners’ constitutional rights

74. The significance of a person’s right to a clean and healthy environment was aptly captured by the African Commission on Human and People’s Rights in *Communication No.155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria (Supra)* as follows;

“As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”

75. By failing to abide by the mandatory provisions of the Environmental Management and Co-ordination Act, which I have enumerated above, the 1st Respondent failed to protect and ensure a clean and healthy environment, a right which includes but is not limited to elimination of processes and activities that are likely to endanger the environment, as well as establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

76. From the 2nd Interested Party’s Affidavit, the 1st Respondent did acknowledge that it was operating illegal dumpsites, and was in the process of acquiring a public utility parcel of land to set up a proper dumpsite.

77. In *Martin Wanyonyi C.E.O Centre for Human Rights Organization & Another vs. County Government of Bungoma & 2 others [2019] eKLR*, the Court found that the constitutional right to a clean and healthy environment under Article 42 of the Constitution had been breached by the establishment of a dumpsite by the County Government of Bungoma. The court held as follows:

“Among the annexures to this Petition are photographs of the dump site at Lumoro village. To refer to the dump site as an eye sore is clearly an understatement and I have not heard the Respondents refer to it in any other flattering terms. It is no doubt a violation of the right to a clean and healthy environment which the residents of Lumoro village are entitled to by law. The Respondents cannot really deny that.”

78. Further, in *Moffat Kamau & 9 Others vs. Actors Kenya Ltd & 9 Others [2016] eKLR* the Court held that;

“[90]...where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. I cannot put it any better than I did in the case of Ken Kasinga vs Daniel Kiplangat Kirui & 5 Others, (Supra)... at paragraph 73 of the Judgment:

I am prepared to hold that where a procedure for the protection of the environment, is provided by law and is not followed then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project has been given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment.”

79. I am in agreement with the above pronouncements. The 1st Respondent having not conducted an Environmental Impact Assessment, and having not obtained a licence allowing it to use the impugned site as a dumping zone, and the 2nd - 5th Respondents having transported solid waste to the impugned site without the requisite licenses from the 2nd Interested Party, an assumption ought to be drawn that the said dump site is an infringement of the Petitioners’ right to a clean and healthy environment.

80. Although the 2nd - 5th Respondents deponed that there is no evidence that was adduced by the Petitioners of how the dumpsite has affected their health, or the health of the people living in the vicinity of the impugned dump site, they did not inform this court why an Environmental Impact Assessment was never conducted by themselves or the 1st Respondent to ascertain the side effects, if any, that the dumped waste is likely to have on the Petitioners.

81. It is trite that the main reason for conducting an Environmental Impact Assessment is to ascertain the location of the project, including the physical area that may be affected by the project’s activities; the potential environmental impacts of the project; a plan to ensure the health and safety of the workers and neighboring communities is observed; and the economic and socio-cultural impacts to the local community and the Nation in general.

82. Therefore, it is not for the Petitioners to show the side effects that the impugned project is to have on them in the absence of an Environmental Impact Assessment Report. It is the constitutional and statutory obligation of the proponents of a project to prepare an Environmental Impact Assessment Report and if approved by NEMA, be issued with a license.

83. Furthermore, one of the principles that guide this court in the exercise of its jurisdiction is the *precautionary principle* (See Section 18 of the *Environment and Land Court Act and Section 3(5) of the Environmental Management and Co-ordination Act*). The *precautionary principle* is one of the most popular and commonly applied principles of sustainable development.

84. The principle is based on Principle 15 of the Rio Declaration on Environment and Development, which Kenya is a signatory to, which states as follows:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” (Rio Declaration on Environment and Development, 1992).”

85. Central to the *precautionary principle* is the element of anticipation, reflecting a need for effective environmental measures to be based upon actions which take a longer-term approach. The principle evolved to meet the evidentiary difficulty caused by the fact that information required to prove a proposition may be in the hands of the party causing or threatening the damage to the environment.

86. Waiting for scientific proof regarding the impact of the pollutants discharged into the soil, water and air from the impugned dump site could result in irreversible damage to the environment and in human suffering. This court cannot therefore wait until there is evidence of the effects of the dump on the Petitioners and the residents of the area to order for its closure when the people who are mandated to ensure that the law is complied with to protect the environment and the health of people do not do so.

Conclusion and final orders:

87. The Constitution provides in the preamble that the environment is our heritage which should be sustained for the benefit of future generations. The protection of the environment is therefore a matter of utmost national priority because the environment plays an integral role in the foundation of sustainable national growth and development.

88. Additionally, the right to a clean and healthy environment is at the heart of every citizen's socio-economic rights as well as their right to life. As such, the violation and or infringement thereof is a matter of utmost concern that must be dealt with urgency and austerity.

89. It is clear that the Respondents are in blatant breach of Articles 40, 42, and 70 of the Constitution as read with Sections 3, 58, and 87 of the Environmental Management and Co-ordination Act and in violation of the Petitioners' right to a clean and healthy environment, their socio-economic rights and their right to property.

90. Having demonstrated how the Respondents have continued to violate the Petitioners' right to a clean and healthy environment, it is my finding that the Petitioners are entitled to the reliefs sought in the Petition. Consequently, the court makes the following orders:

a) A declaration be and is hereby issued that the Petitioners' right to a clean and healthy environment as guaranteed by Article 42 of the Constitution has been violated by the acts and or omissions of the Respondents.

b) A prohibitory injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th and 5th Respondents and or its employees, agents, assigns or anybody whosoever from transporting to, dumping and or disposing refuse or waste on Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto and or from doing any other act or omission deleterious to the environment.

c) A mandatory injunction be and is hereby issued compelling the 1st Respondent to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance with the Environmental Management and Coordination Act, 1999.

d) An environmental restoration order be and is hereby issued against the 1st Respondent compelling it through itself, its employees, agents and or assigns to restore the degraded dumpsite on Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone as far as practicable to its immediate condition prior to the damage.

e) A mandatory injunction be and is hereby issued compelling the 2nd Interested Party to ensure that there should be no further or continued transportation to, storage or disposal of any wastes on Quarry Road between Kay Group Quarries and Kenya Power Syokimau Substation and the buffer-zone adjacent thereto by the Petitioners or any other persons failure to which the appropriate statutory sanctions and penalties to be applied including but not limited to de-licensing of the Respondents.

f) The Respondents to comply with the above orders within 120 days from the date of this Judgment.

g) Costs of this Petition to be borne by the 1st Respondent.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF NOVEMBER, 2020.

O.A. ANGOTE

JUDGE