

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

E.L.C APPEAL NO. 1 OF 2024

**THE COUNTY GOVERNMENT OF WAJIR.....
APPELLANT**

VERSUS

ABDIRAHMAN MAOW SALAT.....1ST

RESPONDENT

**ABDI ALI MOHAMED.....2ND
RESPONDENT**

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

JUDGMENT

1. The instant Appeal is against the Judgment delivered by the National Environmental Tribunal (hereinafter referred to as **“the Tribunal”**) on 26th April 2024 in Tribunal Appeal No. 19 of 2019 where the Respondent herein was the Appellant, and NEMA and the County Government of Wajir (the Appellant) in the present Appeal were the Respondents. The Tribunal vide its Judgment ordered as follows:-

- (a) An order is hereby issued directing the 2nd Respondent to close the waste disposal site located at Alimaow Location, Wajir County and relocate the same to an alternative site away from human settlement within 120 days.**
- (b) An order is hereby issued directing the 2nd Respondent to remove all the waste domestic, human and chemical wastes dumped at the waste disposal site located at Alimaow location, Wajir County and thereafter rehabilitate the site by planting trees.**
- (c) The 1st Respondent is ordered to ensure compliance with the orders(a) and (b) above.**
- (d) The Appellants shall have the costs of this Appeal to be borne by the Respondents.**

2. The County Government of Wajir who were the 2nd Respondents in the Appeal before the Tribunal being dissatisfied and aggrieved by the decision of the Tribunal have appealed to this Court and vide their Memorandum of Appeal dated 6th May 2024 have set out 16 grounds of Appeal. The Appeal was canvassed by the parties by way of written submissions. In the Appellant's Written submissions dated 17th March 2025, the Appellant

condensed the grounds of Appeal to five grounds as follows:-

a) The Tribunal lacked jurisdiction under Section 129 of EMCA.

b) The parties before the Tribunal lacked locus standi.

c) The closure order was in contravention of several environmental law principles enshrined in EMCA and the Constitution of Kenya, 2010.

d) That the Tribunal failed to appreciate the extensive compliance by the Appellant with lawful directives, and

e) That the decision would result in grave environmental and public health consequences.

3. The parties, briefly, orally highlighted their submissions on 26th June 2025. Mr. Mohamed Advocate appeared for the Appellant while Mr. Kanjama SC and Musyoka appeared for the Respondent. On the jurisdiction of the Tribunal, the Appellant submitted that the NET acted ultra vires its statutory powers under **Section 129 (1) of EMCA** which restricts its jurisdiction to the review of decisions made by

the National Environment Management Authority (NEMA), the 1st Respondent before the Tribunal. The Appellant argued that the NET was only empowered to hear appeals emanating from specific environmental enforcement actions such as the issuance of an environmental restoration order, refusal to grant an Environmental Impact Assessment (EIA) License, revocation or suspension of a license or other administrative actions by NEMA directed at a party.

4. The Appellant contended what was before the Tribunal was not an Appeal from a decision made by NEMA but rather that the Respondents approached the Tribunal alleging lack of action by NEMA in that NEMA had failed to respond to or act on their complaint that NEMA had failed to enforce the Notice of Improvement it had issued to the Appellant. In the Appellant's view that could not constitute **"a decision"** appellable to NET as envisaged under **Section 129 EMCA**. The Appellant thus argued, the Tribunal conferred itself jurisdiction that it never possessed under **Section 129 of EMCA** and therefore contended the decision the Tribunal made without

jurisdiction was a nullity. In support of that proposition the Appellant relied on the often cited case of **Owners of Motor Vessel “Lilian S” -vs- Caltex Oil (Kenya) Ltd (1989) KLRJ** where Nyarangi, JA famously stated:-

“----- jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for continuing proceeding pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

5. The Appellant further placed reliance on the Supreme Court decision in the case of **Samuel Macharia Kamau - vs- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR** where the Court stated thus:-

“A Courts jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction

exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondents in his submission that the issues as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter; for without jurisdiction, the Court cannot entertain any proceedings ---“.

6. The Appellant thus submitted the Tribunal lacked jurisdiction to entertain the matter that gave rise to the impugned judgment and urged the Court to set aside the Judgment as it was a nullity.

7. The Appellant further submitted the Respondents did not have the requisite locus standi to institute the suit as they did not demonstrate they had sufficient interest in the subject matter of the dispute to entitle them to invoke the jurisdiction on the Court or tribunal. The Appellant placed reliance on the case of **Law Society of Kenya -vs- Commissioner of Lands & Others (2001) KEHC 831 (KLR)**. The Appellant submitted that the Respondents did not demonstrate the interest, if any, that they had in the

land the subject matter of the dispute and in what manner their interest were affected. The Appellant suggested the Respondents were mere busy bodies intermeddling with matters that did not concern or affect them.

8. On the question whether the Appellant had complied with the environmental orders which the Tribunal in its decision giving rise to the instant Appeal found not to have been complied with, submitted that the Tribunal's findings of noncompliance were erroneous. The Appellant argued that it had in good faith made extensive and verifiable efforts to comply both with the Tribunal's Ruling dated 15th September 2020 and the Environmental Order of the 1st Respondent (NEMA) dated 20th November 2020 as detailed in the comprehensive compliance report filed by NEMA before the Tribunal. The Appellant submitted it took deliberate steps and actions to improve the management of the waste disposal and the dumpsite. The Appellant argued that the Tribunal erred in failing to consider the compliance report by NEMA and the positive and verifiable

compliance efforts by the Appellant with the Tribunal's Ruling and the Environmental order of NEMA.

9. On the relocation of dumpsite as ordered by the Tribunal the Appellant argued the relocation of the Wajir County Waste Disposal site was not only unimplementable but also fatally flawed both in principle and in practice. The Appellant argued the order for relocation failed to consider various factors including geographical, infrastructural and population dynamics. The Appellant stated the current site was designated in 1982 when Wajir county was largely uninhabited, underdeveloped and sparsely populated and that the site was identified after long planning due to environmental considerations. The Appellant stated there has since been unprecedented urban growth and increased population density particularly within the township.

10. The Appellant submitted the relocation of the dump site would require massive capital outlay for acquisition of land and development of suitable infrastructure at the

identified location. Besides relocation would entail temporary or permanent closure of the existing site in which the Appellant had invested very heavily in improving so that it meets the requisite standards. A closure and relocation of the dumpsite would require resources that the Appellant would hardly be able to raise and would take a long time to achieve. The Appellant contended the order to shutdown and relocate the dumpsite was unreasonable, unsustainable and would pose enforceability challenges.

11. The Appellant further submitted that the impugned decision of the Tribunal contravened environmental principles under EMCA and the Constitution and was against International best practices. The Appellant argued the decision to close the Wajir County Waste Disposal site which served all the residents of Wajir Town was neither rational nor sustainable and its implementation would violate the guiding environment principles set out in law and policy. The Appellant argued while under **Section 3 of EMCA and Article 42 of the Constitution** every

person has the right to a clean and healthy environment, the closure of the Wajir designated waste management facility would expose the Wajir Residents to unregulated and indiscriminate waste dumping, which would pose a health hazard. The Appellant thus submitted in ordering closure of the dump site and its relocation, the Tribunal failed to consider the implications in terms of practicability and the health concerns in the intervening period.

12. The Appellant finally submitted that the Tribunal failed to consider the viability of closure of the dump site that was established in 1982 when there was no alternative dump site. The Appellant argued relocating the waste disposal site would require identification of hundreds of acres of land that were:-

(a) Far enough from human settlement.

(b) Accessible via road and other infrastructure, and

(c) Environmentally suitable for waste containment.

13. The Appellant contended the Tribunal erred in not appreciating that environmental suitability was not merely about geographic space but also about hydrology, soil composition, wind patterns, and proximity to water sources and residential settlements. The Appellant argued that the current site despite being old met their criteria and that relocation would not meet such criteria in the short or medium term. The Appellant urged the Court to find that the Tribunal's decision was given the circumstances, unreasonable, unsustainable and unenforceable and to set the same aside and sustain the use and regulated enhancement of the current waste disposal site in public interest.

14. The 1st Respondent in his response submissions rehashed the facts giving rise to the Appeal before the Tribunal. The 1st Respondent who was one of the two Appellants before the Tribunal submitted that the 3rd Respondent (NEMA) issued an Improvement Notice dated 7th June 2019 to the Appellant ordering the Appellant to undertake the following:-

- 1. Clean up of waste disposal outside disposal site within 48 hours from date of this notice.**
- 2. Listen to project affected persons with a view to reach an amicable solution and properly manage the site within 48 hours.**
- 3. Prepare and submit an Environmental Audit for the facility within 14 days from date of this notice.**
- 4. Apply for waste transportation license for all waste transport vehicles/trucks and effluent discharge license for exhausters.**
- 5. Put in place measures to ensure the designated waste disposal site adheres to the 10(ten) minimum points (herein attached) for environment sustainability.**
- 6. Provide information on the management of hazardous waste generated from your facility (town) indicating how environmental concerns are incorporated in the handling and disposal of the same (attach relevant documentation if any).**

7. Take full control of the disposal site because it falls under your jurisdiction.

15. The 1st Respondent stated that in spite of being issued with the Improvement Notice, the Appellant continued to manage the waste disposal site in defiance of the Notice which prompted the 1st Respondent to seek NEMA's enforcement of the Notice and the 1st Respondent wrote to NEMA on 10th June 2019, 23rd July 2019 and 30th July 2019 but NEMA neither responded and/ took any action which prompted them to file the Appeal before the Tribunal. The 1st Respondent submitted that the refusal and/or failure by NEMA to take any action constituted a decision under **Section 129(2) of EMCA** and could be appealed by an aggrieved party before the Tribunal.

16. The 1st Respondent relied on the case of **Mathu, Chairman & 2 Others -vs- NEMA & Another; Director General, Nairobi Metro Services (Interested Party) (2024) KEELC 4360 (KLR) and Republic -vs- KRA; Proto Energy Ltd (Exparte) JR (2022) KEHC 5 (KLR).**

17. On whether the 1st Respondent should have approached the Court by way of Judicial Review, the 1st Respondent argued the Court was not seized of jurisdiction since there was an alternative remedy. The 1st Respondent argued, it was the Tribunal that was seized with jurisdiction under **Section 129 EMCA**. The 1st Respondent placed reliance on the case of **Director of Planning & Architecture, County Government Mombasa -vs- Makupa Transit Shade Ltd (2019) eKLR** and **Savraj Singh Chana -vs- Diamond Trust Bank(k) Ltd & Another (2020) eKLR** and **Adegal & 2 Others -vs- Kibos Distillers Ltd & 5 Others (2020) KESC 36 (KLR)**. The 1st Respondent submitted the Tribunal's jurisdiction could only have been ousted if there were special circumstances and none were demonstrated.

18. On locus standi, the 1st Respondent submitted the Respondent had locus standi to appeal the decision by NEMA refusing to act before the Tribunal. The 1st Respondent argued **Section 3, 4 and 129 of EMCA**

encompass an expanded locus standi which permits any person to approach the Court in environmental matters. The 1st Respondent in support of this submission relied on the Court of Appeal decision in **National Environmental Tribunal -vs- Overlook Management Ltd & 5 Others (2019) KECA 1005 (KLR)** and in the case of **Republic -vs- Net & 2 Others (2013) eKLR**.

19. The 1st Respondent submitted that where any person was aggrieved by the events stipulated under **Section 129(1)(a)-(e) of EMCA**, such a person may as of right Appeal to the Tribunal. Such a person must have been a party to the events under the said Section. However, where an aggrieved person does not qualify under the provision of **Subsection (1)**, but is aggrieved by a decision made by the Authority, then such a person may lodge an Appeal pursuant to **Subsection (2) of Section 129** and that such person does not need to demonstrate that he/she has a right or interest in the property, environment or land alleged to have been or likely to be harmed.

20. On the evidence, the 1st Respondent submitted that even though the Appellant never filed any evidence to challenge the Respondents evidence before the Tribunal, the Respondents evidence on record sufficiently proved there were violations and that the Tribunal upon evaluation of the evidence was justified to reach the decision that it did. He argued the Tribunal soundly and properly arrived at the finding that the Respondent's right to a clean and healthy environment was violated by the Appellants illegal Management of waste at the Disposal site. The Respondents tendered as evidence before the Tribunal, the Environmental Impact Assessment Report for Wajir Dumpsite for March, 2022 to support their allegations of violation of their right to a clean and healthy environment. The report indicated there was poor waste management on the environment due to failure by the Appellant to follow and observe the provisions of the Act on waste disposal at the disposal site.

21. The 1st Respondent in concluding his submissions asserted that the Appellant's submissions were not supported by any evidence and could not take the place of evidence as submissions cannot constitute evidence. The 1st Respondent urged the Court to uphold the Tribunal's Judgment. He contended there was un rebutted evidence of violation of right to a clean and healthy environment arising from the poor waste management by the Appellant at the Wajir Waste Disposal Site.

22. I have reviewed and considered the Record of Appeal and the submissions filed on behalf of the parties. The issues that stand out for determination in this Appeal are as follows:-

(i) Whether the National Environment Tribunal (NET) had jurisdiction to deal with the dispute?

(ii) Whether the Appellants before the Tribunal had locus standi to institute the Appeal before the Tribunal?

(iii) Whether the Respondents had proved violation of rights to a clean and healthy environment?

(iv) Whether the Tribunal order for the relocation of the dumpsite was justified?

23. The justification of NET is derived from **Section 129 of EMCA. Section 129 of the Act** provides as follows:-

129(1) Any person who is aggrieved by—

(a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

(b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

(c) the revocation, suspension or variation of the person's licence under this Act or its regulations;

(d) the amount of money required to paid as a fee under this Act or its regulations;

(e) the imposition against the person of an environmental restoration order or environmental improvement order by the

Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

24. **Section 129(1) of the Act** poses no difficult as it is clear under the subsection the Appeal is against a decision made under the Act or the regulations. In essence therefore, there has to be a decision under the parameters (a) to (e) that provokes the Appeal to the Tribunal. **Subsection (2)** further provides where under the Act, the Director General, the Authority, or Committees or Agents of the Authority, make decisions, such decisions maybe appealed to the Tribunal. The issue in the instant Appeal is whether there was a decision made by the Director General, the Authority or any Committee/agent of the

Authority that would have been subject to Appeal. The Appellant contended there was no such a decision to warrant an Appeal by the Respondents to the Tribunal and hence the Tribunal had no jurisdiction to entertain the Appeal. The Respondent argued the refusal by the Authority (NEMA) to enforce compliance with the Improvement Notice dated 7th June, 2019 constituted an Appealable decision.

25. It is on record that following complaints concerning the Wajir Waste Disposal site by the Respondents, NEMA made a site inspection of the Dumpsite which culminated with them issuing to the Appellant the “**Improvement Notice of Wajir Disposal site**” that ordered the Appellant to undertake several improvement measures as set out in the Notice. It was expected that NEMA would supervise and ensure compliance with the Notice as the same required various actions to be undertaken within set timelines. The Respondents stated that following the issue of the Notice, they wrote various correspondences to NEMA concerning the Appellant’s failure to comply but

NEMA took no action to enforce the Notice. In my view NEMA after issuing the Notice of Improvement of the Waste Disposal Site that required specific actions to be undertaken, NEMA had an obligation to supervise and if there was failure to take the actions as required to enforce the taking of the required actions. Failure to ensure compliance of the Notice of Improvement of the Waste Disposal Site by NEMA in my view constituted a decision that could be categorised as refusal by NEMA to carry out a mandate they are authorised to do under the law. The Respondents rightfully sought the intervention of the Tribunal who were the adjudicative body empowered to investigate and determine whether indeed the Appellant and NEMA had acted on the improvement Notice that NEMA had issued to the Appellant dated 7th June, 2019.

26. NEMA as the decision maker in this instant, abused its discretion in failing to follow through and ensure compliance with the Notice of Improvement that it had issued and/or to keep the Respondents who were the complainants advised of the actions that were being

taken. In making of this determination, I am fortified by the decision in the case of **Republic -vs- KRA; Pronto Energy Ltd (Exparte) (2022) KEHC5 (KLR)** where Mativo, J (as he then was) inter alia held:-

31. A decision maker abuses its discretion if it exercises a power that it does not legally possess or declines to exercise a power or discretion vested to it by law when circumstances require that the power be exercised. A decision maker may also abuse its discretion if it purports to exercise its discretion without sufficient information upon which a rational decision may be made or if it exercises its power of discretion by making an erroneous choice as a matter of law by making a choice that is not within the range of choice permitted by law or by arriving at its choice in violation of an applicable legal rule, principle, or criterion or by making a choice that is legally unreasonable in the factual legal context in which it is made.”

27. It is my determination therefore that the Tribunal had jurisdiction to entertain the Appeal filed before them by the Respondents.
28. On the issue whether the Appellants before the Tribunal had the locus standi to institute the Appeal, the Tribunal held that they had. I agree with the 1st Respondent's submission that **Section 3 and 129 of EMCA** read together with **Articles 42, 69 and 70 of the Constitution** expand the scope in regard to who may approach the Court for redress in regard to violations that relate to environmental protection.

Section 3(1) EMCA provides as follows:-

3(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment."

29. **Section 3(3) EMCA** provides that where the right to a clean and healthy environment has been, or is being or

threatened to be denied, violated or infringed, a person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest apply to court for redress.

Article 42 of the Constitution of Kenya provides as follows:-

42. 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.

30. **Article 70(1) of the Constitution of Kenya** permits any person who alleges the right to a clean and healthy environment protected under **Article 42** has been violated, denied or threatened with Violation to apply to court for redress. It provides as follows:-

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

31. From a reading of the above provisions there is no requirement that a person seeking the intervention of the Court need to establish that he/she is directly affected and/or has suffered any harm. In the present case the Appellants before the Tribunal claimed to be residents of Alimaow Location, Wajir where the Waste dumpsite was located. The allegation was that the Waste disposal site was illegally managed by the Wajir County Government and that they had failed to comply with NEMA's Restoration Order issued on 7th June, 2019 and that NEMA had failed to enforce the Restoration Order. It is my view that the Respondents were entitled to approach the Tribunal by way of Appeal when NEMA, in their opinion

failed to enforce the Restoration Order that it had issued to the Appellant. The Court of Appeal in the case of **National Environmental Tribunal -vs- Overlook Management Ltd & 5 Others (2019) eKLR** considered the issue of locus standi in the context of **Section 3, 111 and 129 of EMCA** where the Superior Court (ELC) had interpreted the provisions restrictively and held the Appellant lacked locus standi. The Court of Appeal inter alia stated:-

“In the Circumstances, it was imprudent to find and hold that they lacked locus standi to pursue an Appeal before the Appellant. The Judge therefore erred in his finding that the 4th and 5th Respondents were strangers or busy bodies in lodging the Appeal. It would also set back the advances made in expanding the strict requirements of the capacity to sue especially in environmental matters envisaged by the Act.”

32. The Court of Appeal further stated:-

“As already explained, the Act expanded locus standi to enable any person, group or association whether acting on its behalf or in public interest to raise environmental concerns geared at environmental conservation. And this still holds while recognizing the requirements that existed under the former Constitution to the effect that only a party aggrieved and whose interests were directly affected could institute proceedings before Courts. Indeed, Courts have been inclined in environmental matters to increase access rather than place hurdles to such access but such decision is always hinged on the circumstances of each case.”

33. On the issue whether the Respondents had proved violation of the right to a clean and healthy environment by the Appellant, the Tribunal found that there was violation. The Tribunal noted that the Appellant had made no response to the Appeal and therefore offered no evidence to rebut the evidence proffered by the

Respondents who were the Appellants before the Tribunal. The Appeal before the Tribunal was provoked by the Improvement Notice dated 7th June 2019 directed to the Appellant herein, which the Respondents claimed the Appellant had not complied with and NEMA had failed to enforce the same. At the hearing of the Appeal, the Respondents adduced evidence that the Appellant had not complied with the Improvement Notice and had not complied with the orders made by the Tribunal vide its Ruling dated 15th September 2020 which among other orders directed the Appellant to comply with the Improvement Notice dated 7th June 2019 within 30 days of the date of the Ruling. Although the Appellant in the submissions filed in support of the present Appeal argued they had substantially, complied with the Notice of Improvement and made references to actions that they averred indicated compliance, it is trite that submissions do not constitute evidence and cannot be relied upon as evidence.

34. On the basis of the evidence that was before the Tribunal it is my determination that they were justified to find and

hold that the Appellant was in violation of the right to a clean and healthy environment in so far as its management of the waste disposal dumpsite was concerned. Before issuing the Improvement Notice of the Disposal Site NEMA had established the Appellant was not managing the Waste Disposal Site in accordance with the Law thereby precipitating the issuance of the Improvement Notice. The Tribunal in reaching its determination further considered the Environmental Impact Assessment Report annexed to the Appellant's further Affidavit dated 19th April 2023 which indicated that there was gross violation of the law and regulations and that the operation of the dumpsite posed risk to the community of contracting diseases. The report recommended that the site be closed and relocated. The Court has to be cautious, however, that the report was prepared at the instance of the Respondents and that the Appellant had no opportunity to challenge the same having not made any response to the Appeal before the Tribunal. The Tribunal having made the finding that the Appellant had violated the right to a healthy and clean

environment went ahead to order for the closure and relocation of the Waste Disposal Dumpsite within a period of 120 days from the date of its Judgment.

35. The Appellant faulted the order for the closure and the relocation of the waste disposal dumpsite arguing the order was not rational and was unreasonable and that the Tribunal failed to consider the implications relating to the implementation of the same. The Appellant contended the Waste Disposal dumpsite was the only waste disposal site in Wajir and that it served thousands of the people and its closure would leave the residents with no alternative dumpsite and would result in having uncontrolled and unregulated waste disposal which would compromise public health, sanitation and environmental safety. The Appellant further argued the relocation order was not implementable for the reasons that suitable land would require to be identified, procured and planned and would need to be accessible through appropriate road network and other infrastructure and further would require to be developed in an environmentally sustainable manner. The Appellant contended the closure of the

current dumpsite would pose serious environmental challenges considering there was presently no alternative dumpsite. They argued heavy investment had been made to improve waste management at the current site and that it would be unrealistic and wasteful considering the resources that have been employed to improve the current site to relocate the site.

36. Whereas the Tribunal was entitled to make the order for relocation of the Waste Disposal dumpsite as they did, the issue does arise whether their exercise of discretion to order the relocation given the attendant circumstances was justified. I am conscious that an Appellate Court ought not to interfere with the Lower Court's exercise of discretion unless in the exercise of its discretion, the Lower Court acted on wrong principles or that there was no evidence upon which the exercise of discretion was founded. In the instant matter there was clearly evidence of violation of the right to a clean and healthy environment, but was the order for closure and relocation the most feasible given the circumstances.

37. Under the **Sustainable Waste Management Act, 2022** the **County Governments** are required to have a sustainable waste Management legislation to provide for Management of waste. **Section 18 of the Sustainable Waste Management Act**, County Governments are required to have Waste Management Plans. It provides as follows:-

18(1) Each County Government shall prepare and submit to the County Assembly for approval an integrated County Waste Management Plan once every five years.

(2) Each County Government shall include the approved integrated County Waste Management Plan in the integrated County Development Plan.

38. Under the County Governments Act, 2012 County Planning for the County Governments must in all cases provide for public participation and hence the integrated County Waste Management Plan must also be subjected to public participation. **Section 106(A) of the County Governments Act** provides that the County Planning shall provide for citizen participation while **Section**

107(2) of the Act provides that the County Plans shall be the basis for all budgeting and spending in a County.

39. The relocation of the County Waste disposal site of necessity would require planning and budgeting for the same in addition to identifying and purchasing land suitable for the purpose.
40. Under **Article 62(2) of the Constitution Public Land** within a County is held by the County Government in trust for the people resident in the County and is administered on their behalf by the National Land Commission. Under **Article 63(3) of the Constitution** any unregistered Community land is held in trust by the County Governments on behalf of the communities for which it is held. The County therefore in the instant matter never had any land of its own to which it would have relocated the Waste Disposal Site and would have needed to engage in lengthy procedures to identify any land; obtain approval of the National Land Commission; and get funding to finance the developments of the infrastructure that would be required to be put in place and further obtain the requisite

license by NEMA to operate and manage a Waste Disposal Site. It is not clear and/or apparent that the Tribunal gave consideration to all these factors that required to be taken into account. I am satisfied that if they had, they would not have made the order for relocation of the Waste Disposal Site as they did and/or in the terms that they did. The order in the circumstances was unrealistic, unreasonable and incapable of being performed.

41. As is evident from the record, NEMA in issuing the Notice to Improve the Waste Disposal Site on 7th June 2019 was of the view that with proper and appropriate management the Waste Disposal Site could be rehabilitated to meet the requisite environmental standards for sustainable Waste Management. The Tribunal may be should have considered issuing structured edicts to the parties to ensure compliance with the Improvement Notice of the Dump site.

42. The Supreme Court of Kenya in the Case of **Mitu - Bell Welfare Society -vs- Kenya Airports Authority & 2 Others (2021) KESC 3A(KLR)** held that **Article 23(3)**

of the Constitution permitted a Court to issue interim reliefs including structural interdicts where there had been a violation or threatened violation of a fundamental right under the Bill of Rights. The Supreme Court at Paragraph 121 of its Judgment stated:-

We are however, in agreement with the submissions of the Appellant and amicus curiae, to the effect that Article 23(3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this Court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the fuctus officio doctrine retains its validity even vitality, in the majority of cases, both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case by the case basis. To subject Article 23 of the Constitution to the Limitations of Order 21 of the Civil Procedure Rules, would stifle development of Court sanctioned enforcement of human rights as envisaged in the Bill of Rights. Where a Court of law issues an order, whose objective is to enforce a right,

or redress the violation of such a right, or redress the violation of such a right, it cannot be said to have abdicated its Judicial function as long as the said orders are carefully and judicially crafted.”

43. In the instant matter the objective was to redress a violation of the right to a clean and healthy environment which is a fundamental right under the Bill of Rights. As I have observed, the Tribunal failed to give consideration to pertinent issues/matters before making an order for the relocation of the Waste Disposal Dump site rendering the order to be unrealistic and unreasonable such that its enforceability was problematic. The Tribunal in my view ought to have considered issuing a structured edict where it reserved supervision to monitor and ensure compliance with the Improvement Notice issued by NEMA to the Appellant. NEMA as the agency charged with the responsibility of ensuring conservation and protection of the environment ought to have been required to play a key role in ensuring compliance and not abdicate its responsibility.

44. From my analysis and evaluation of the Record of Appeal and the applicable law, I find merit in the Appeal. I allow the Appeal, set aside the orders of the Tribunal issued on 26th April 2024 and in place thereof issue the following orders:-

- 1. The Appellant, County Government of Wajir, is hereby ordered to fully comply with the Improvement Notice of Wajir Disposal Site dated 7th June, 2019 within 30 days from the date of this Judgment.**
- 2. The National Environment Management Authority (NEMA) is directed to inspect the facility after 30 days from the date of this Judgment and to file a report in Court detailing the status of the Waste Disposal Site and the level of compliance on or before 20th January, 2026.**
- 3. The matter shall be mentioned in Court on 29th January, 2026 to confirm compliance and for further orders/directions.**
- 4. The Costs before the Tribunal and of the Appeal shall be borne by the parties with each party bearing their own costs.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY
AT KERUGOYA 13TH DAY OF NOVEMBER 2025.**

J. M. MUTUNGI

ELC-JUDGE

ORIGINAL