

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO. 47 OF 2021**

**IN THE MATTER OF: ARTICLE 2(1), 3(1), 10, 19, 20(1), (2),(3), (a),(4), (a), (b), 21, 22 (1) & (2) (c); 23(1), 24, 27, 28, 42, 43, 70, 165(3)(b), 258, 259 and 260 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 10, 27, 28, 42, 43 & 70**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: PLOT NO. MSA/BLOCK/IX/49 & 50 ALONG TOM MBOYA AVENUE MOMBASA.**

**BETWEEN**

**CHANDAN JETHANAND GIDOOMAL.....1<sup>ST</sup>  
PETITIONER  
PREM JETHANAND GIDOOMAL.....2<sup>ND</sup>  
PETITIONER**

**-VERSUS-**

**NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY(NEMA).....1<sup>ST</sup>  
RESPONDENT  
MOMBASA COUNTY GOVERNMENT.....2<sup>ND</sup>  
RESPONDENT  
KENYA URBAN ROADS AUTHORITY (KURA).....3<sup>RD</sup>  
RESPONDENT  
DEPUTY COUNTY COMMISSIONER MOMBASA thro'  
THE MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL  
GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**AND**

- 1. VACUUM FILLER LIMITED**
- 2. CHARLES KIOKO T/A MAIZE LOGISTICS**
- 3. BEBETO CHALO T/A ELLY CAR WASH**
- 4. KENNEDY MWANIA T/A SHALOM TUDOR KIOSK**
- 5. BRENDA KILOI T/A TUKO LIVE**
- 6. FATMA OMAR T/A MASHALLA CAR WASH**
- 7. MAHMUD AHMED MOHAMED.....INTERESTED  
PARTIES**

## **JUDGMENT**

### **I. Preliminaries**

1. The Judgment of this Honorable Court is a further and/or reviewed one following an application for leave of Court filed by the 2<sup>nd</sup> Respondent herein. For clarity sake, it is imperative that the Honourable Court commences by providing a brief background of this matter. From the records, this Honourable Court delivered its Judgement on 26<sup>th</sup> July, 2023 in favour of the Petitioner herein whereby the 1<sup>st</sup> & 2<sup>nd</sup> Respondents were condemned to jointly pay a sum of Kenya Shillings Ten Million (Kshs. 10, 000, 000/) as damages among other reliefs.

2. Being aggrieved by the said decision, the 2<sup>nd</sup> Respondent filed an application for to set aside the said Judgement. It brought the application under the provision of Order 9 Rule 9 ( a ) & 10; and Order 12 Rule 7 of the Civil Procedure Rules, 2010. Specifically, the 2<sup>nd</sup> Respondent sought for the following orders:-

**a) Spent.**

**b) That this Honourable Court be pleased to grant leave to the firm of Messrs. Soni & Associates Advocates LLP to come in and act for the 2<sup>nd</sup> Respondent/Applicant herein.**

**c) That this Honourable Court be pleased to grant a stay of execution of the Judgment delivered on 26<sup>th</sup> July 2023 and Decree issued thereon and/or any further proceedings or any subsequent Orders therefrom pending the hearing and final determination of this Application.**

**d) That the Honourable Court be pleased to lift any warrants of attachment and sale that may have been issued pursuant to the extracted decree in this matter and set aside all execution proceedings pending hearing and determination of this Review Application.**

**e) That this Honourable Court be pleased to set aside its judgment entered in its entirety on 26<sup>th</sup> July, 2023 in favor of the Petitioners against the 2<sup>nd</sup> Respondent/Applicant together with any consequential Decree and Orders.**

**f) That this Honourable Court be pleased to grant the 2<sup>nd</sup> Respondent/Applicant herein leave to defend the suit.**

**g) That this Honourable Court enlarges time to allow the 2<sup>nd</sup> Respondent/Applicant file their Response to the Petition and any other supporting documents thereof.**

***h) That the 2<sup>nd</sup> Respondent/Applicant's case be re-opened and the 2<sup>nd</sup> Respondent/Applicant be allowed to call witnesses to testify and adduce evidence.***

***i) THAT costs of this Application be provided for.***

***j) Any other orders that the Court may deem fit and just to grant.***

3. Basically, although the 2<sup>nd</sup> Respondent admitted having been served with Summons, but indicated that there emerged some confusion emanating from the split of their Advocates' firm into two. As a result, it led to their matter being undefended to their chagrin whatsoever. By and large, therefore, the 2<sup>nd</sup> Respondent vehemently asserted that by the matter proceeding without their participation denied them a right to be heard contrary to the principles of fair hearing and natural Justice. On 25<sup>th</sup> April, 2024 following intense consideration, in its Ruling the Honourable Court allowed the application. As a soft remedy, the 2<sup>nd</sup> Respondent was ordered to pay the Petitioner a thrown away costs of a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000.00/=). They obliged and thus the matter was directed to be re - opened through hearing of it a fresh but only as far as the 2<sup>nd</sup> Respondent was concerned. Parties were directed to file and serve written submissions and hence the Court proceeds now to deliver this Judgement.

4. Fundamentally, this is a classic and potent case in relation to the Management, Protection. Preservation and Conservation of Environment. It touches on the pith and substance of the degradation, violations, denial and threats of the Environmental rights clearly stipulated in the provisions of the Constitution of Kenya, 2010. The culmination of the filed Amended Petition dated Petitioners have established violation of their constitutional right to a clean and healthy environment. The Respondents, being custodians of environmental management, cannot abdicate their duties. by the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein *Chandan Jethanand Gidoomal and Prem Jethanand Gidoomal* herein. It was against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents. In the course of time the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> & 7<sup>th</sup> Interested Parties herein sought leave of this Court and were joined as parties to the suit accordingly. From the very onset, the Honorable Court holds that the suit is on typical environmental management, protection, impact assessment and/or degradation based on a right to a clean and healthy environment related issues and on allegation of encroachment of land.

5. From the records, it will be noted that although the Respondents were all served with the pleadings as evidenced from the Affidavit

of Service, the 2<sup>nd</sup> Respondent after leave of Court filed their written submissions and subsequently the Interested Parties filed their responses to the main Amended Petition. Nonetheless, the Honorable Court with the consensus of the parties provided direction that the Amended Petition be disposed off by way of written submissions thereof. It is instructive to note that, on 6<sup>th</sup> October, 2022 the Honorable Court upon the request by parties herein conducted an elaborate a site visit "*Locus in Quo*" and prepared a report to that effect. The said report forms part of this Judgement for ease of reference.

## **II. The 1<sup>st</sup> & 2<sup>nd</sup> Petitioners' Case**

6. The Constitution Petition was brought under the dint of the provisions of Articles 2 (1), 3 (1), 10, 19, 20 (1), (2), (3), (a), (4), (a), (b), 21, 22 (1) & (2) (c); 23 (1), 24, 27, 28, 42, 43, 70, 165 (3) (b), 258, 259 and 260 of the Constitution of Kenya 2010. The Petitioners sought for the following orders:-

**(a) A declaration that the Respondents act of abdicating their responsibility contravenes the provisions of Article 42 of the Constitution of Kenya, 2010.**

**(b) A declaration that the violation of Article 42 of the Constitution of Kenya 2010 by the Respondent has resulted in a denial of the right to a clean and healthy environment to the Petitioners and to the residents of Mombasa County.**

- (c) A declaration that in breach of the above the Petitioners have a right for redress for orders of injunction and compensation pursuant to Article 23 (3) (b) and (e) of the Constitution of Kenya as read with Section 13 (7) of the Environment Management and Co-ordination Act of 1999;**
- (d) A mandatory injunction-to compel-the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite.**
- (e) A Mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite and to stop any further dumping from taking place on Plot nos. MSA/BLOCK/IX/49 and 50.**
- (f) A mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite.**
- (g) An order directing the 3<sup>rd</sup> Respondent (KURA) herein to remove the containers illegally placed on the Petitioners boundary wall encroaching the pedestrian pathway.**
- (h) An order for compensation to the Petitioners as is provided for under Article 70 (1), (2)(c) as read with Article 3 as well as Article 23 (3) (a) and (e) of the Constitution of Kenya, 2010.**
- (i) Any other relief this court may deem fit to grant.**

### **III. The legal foundation of the Petition**

7. The Petition was founded on the following legal provisions:

- a. Articles 23 (1) and 70 of the Constitution of Kenya empowers this Honorable Court to deal with the question whether a right to a clean and healthy environment has been violated or threatened with violation in contravention with this Constitution.

- b. Article 2(1) of the Constitution provides that, this constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of government.
- c. Article 3 (1) provides that every person has an obligation to respect, uphold and defend this Constitution.
- d. Article 10 (1) provides that the national values and principles of governance in this article bind all state organs, state officers, public officers, and all persons.
- e. Article 10 (2) (b)(d) provides that that the national values and principles of governance include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized and sustainable development.
- f. Article 19 provides for Rights and Fundamental Freedoms.
- g. Article 20 provides for the Application of Bill of Rights and its that:
- The bill of rights applies to all law and binds all state organs and all persons
  - Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
  - In interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and the spirit, purport and objects of the Bill of Rights.

- h. Article 21 speaks to the Implementation of rights and Fundamental Freedoms.
- i. Article 22 (1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed or is threatened.
- j. Article 24 (1) provides that a right or fundamental freedom in the Bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.
- k. Article 27 of the Constitution of Kenya, 2010 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.
- l. Article 28 of the Constitution of Kenya provides that every person has inherent dignity and the right to have that dignity protected and respected.
- m. Article 42 states that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures.
- n. Article 69 of the Constitution of Kenya 2010 places obligations on state organs and every person in respect of the environment. Article 69(1) provides that the State SHALL:
- Ensure sustainable exploitation, utilization, management and conservation of the environment and natural

resources and ensure equitable sharing of the accruing benefits.

- Work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya.
- Protect and enhance intellectual property in and indigenous knowledge of biodiversity and the genetic resources of the communities.
- Encourage public participation in the management, protection, and conservation of the environment.
- Protect genetic resources and biological diversity.
- Establish systems of environmental impact assessment, environmental audit and monitoring of the environment
- Eliminate processes and activities that are likely to endanger the environment.
- Utilize the environment and natural resources for the benefit of the people of Kenya.

o. Article 70 of the Constitution of Kenya, 2010 provides for the Enforcement of environmental rights. Specifically, Article 70 (1) states if a person alleges that a right to a clean and healthy environment recognized and protected under Article 43 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.

p. Article 70 (2) states that on application under clause (1), 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.
- To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment

- To provide compensation for any victim of a violation of the right to a clean and healthy environment.
- q. The provision of Article 42 of the Constitution of Kenya, 2020 and Section 3 of the Environment & Management Coordination Act, No. 8 of 1999 (hereinafter referred to as “The EMCA”) provides for entitlement to a clean and healthy environment, Section 87 of EMCA prohibits dangerous handling and disposal of waste; Section 88 provides for application of waste license so as to operate a waste disposal site.
- r. In Recognition that refuse removal and solid waste disposal was devolved functions reserved for the County Government (2<sup>nd</sup> Respondent herein) under Paragraph 3 (g) of the Fourth Schedule of the Constitution.
- s. That there was ongoing construction of unplanned structures that were cropping up in the above-mentioned premises contrary to the County Government Building by Laws Regulations 252 (1) and Physical Planning Act.
- t. That the haphazard nature in which these structures were being set up had brought rise to huge amounts of garbage and waste including attracting drug dealers and peddlers in the suit premises creating what was emerging as an environmental and security crisis to the security resident’s contrary to the EMCA.
- u. That the unlicensed cooking enterprises were not bringing any income to the County Government (2<sup>nd</sup> Respondent) in payment of Single Business Permit or Rates to the current land owners and they were not observing public health as per

the County Government Health Act hence posing a real danger to the safety of city residents.

#### **IV. Brief facts**

8. The brief facts of the case were that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were the owners of the Plot No. MSA/BLOCK/IX/49 & 50 which lies within Mombasa County Development area and had regularly been paying the attendant county rates for the same. However, there was ongoing construction of unplanned structures and shelters that were cropping up in the above-mentioned premises contrary to the county government building by laws regulations 22(1) and the Physical Planning Act.
9. Moreover, the haphazard nature in which the structures were being set up had led to the accumulation of increasing amounts of garbage and waste which not only continued to endanger the health of the public and the environment but posed a security threat in that the area was proving to be a habitat for other nefarious activities such as drug dealing and peddling.
10. The continued dumping of garbage and development of unplanned, unhygienic, and unlicensed eateries (bandas) continued to pose a serious health and security risk to the members of the public especially with diseases such as cholera

which were known to break out in unsanitary conditions. Their rights and those of members of the public specifically under the provision of Article 42 of the Constitution of Kenya, 2010 had been violated and were in danger of continued violation. That it was the Respondents duty to establish and maintain proper sanitary services and provision of disposal of refuse so as to maintain a clean and healthy environment in line with article 42 of the Constitution.

11. The Respondents had failed in this constitutional duty placed on them which had resulted in accumulated toxins and refuse in the Petitioners property which was increasingly posing a health and security threat to the members of the public and which was also degrading the value of the Petitioners property. In the premises this Honourable court should issue mandatory orders to the Respondents to ensure discontinuance of any activity that would lead to further damage to the property and the environment which it was located and to ensure that all illegal structures set up in the premises were permanently brought down.

12. The Petition was premised on the testimonial facts, grounds and the averments made out in the 5 Paragraphed Affidavit of PREM JETHANAND GIDOOMAL, 2<sup>nd</sup> Petitioner who averred that:

- a. He was a male adult of sound mind.
- b. He was one of the Petitioners herein duly authorized by the 1<sup>st</sup> Petitioner to make this affidavit and therefore competent to swear this affidavit.
- c. He had read and understood the contents of the Amended Petition.
- d. He verified the correctness of the averments stated herein.
- e. What is deponed was true to the best knowledge and belief except where otherwise stated.

**V. The response by the 2<sup>nd</sup> Respondent**

13. The 2<sup>nd</sup> Respondent responded to the Amended Petition by way of a 20 paragraphed affidavit sworn by JIMMY WALIAULA on 13<sup>th</sup> August, 2024 listed on its face. He averred that:-
  - a. The Petition and the Application had principally sought to compel the 2<sup>nd</sup> Respondent to, inter alia, demolish all unplanned, unlicensed and unapproved housing structures on the property known as Plot No. MSA/BLOCK/IX/49 and 50.
  - b. The 2<sup>nd</sup> Respondent had had opposed the orders being sought by the Petitioners on the grounds the Affiant explained in the ensuing paragraphs.
  - c. To begin with, the Affiant had been advised by advocates on record that the crux of the Petition had been wrongful entry, trespass and squatting on private land, which issues had not raised any constitutional questions or interpretation of the Constitution. A perusal of the Petition had shown that the

Petitioners had made the alleged construction of unplanned structures cropping up in the premises the sole backbone of their prayer for compensation.

- d. The Affiant had further been advised, which advice the Affiant verily believed to have been true, that the orders sought by the Petitioners lay in ordinary civil law and not in a Constitutional Petition, and that no constitutional issues had arisen. The Affiant had therefore been advised that under the principle of “constitutional avoidance,” the Court would not determine the Petition which had been disguised as a constitutional issue when the matter could have been determined on another basis.
- e. Additionally, Courts had consistently maintained that when a party had an appropriate forum before which to seek redress, it had been incumbent upon them to raise their concerns before the said forum as opposed to invoking the constitutional jurisdiction of the Court at the outset. The Kenyan Courts had also relied on the doctrine of constitutional avoidance to strike out claims presented before Court where it had been shown that there existed alternative, sufficient and adequate avenues for parties to ventilate their grievances.
- f. Without prejudice to the foregoing, the Affiant had been aware that there had been other orders sought by the Petitioners against the 1<sup>st</sup> - 4<sup>th</sup> Respondents. However, the Affiant had been advised that the substratum of the Petitioners’ case remained the claimed invasion and occupation of their land by squatters.

- g. If squatters had been removed from the equation, and assuming there had been no invasion of the suit land, then the case would not have existed, and neither would the complaints raised against the 2<sup>nd</sup> Respondent have arisen.
- h. All this would have been ably dealt with in an ordinary suit to its concise conclusion. Having found that the Petitioners ought to have filed an ordinary suit, the substratum of the Petition had failed. The Respondent had thus urged the Court not to grant the orders sought in the Petition.
- i. The Affiant had known of his own knowledge that eviction of squatters or invaders of private land who physically dispossessed the owner had not been the work of a County Government. The 2<sup>nd</sup> Respondent had therefore been incapable of performing such functions.
- j. The Affiant had equally been advised by the 2<sup>nd</sup> Respondent's advocates on record, which advice the Affiant verily believed to have been true, that Section 152E of the Land Laws (Amendment) Act No. 28 of 2016 had provided for the steps the Petitioners ought to have taken to evict squatters from their property.
- k. The said section had stated as follows:
- “...with respect to private land the owner or the person in charge had been of the opinion that a person had been in occupation of his or her land without consent, the owner or the person in charge might have served on that person a notice, of not less than three months before the date of the intended eviction.”**

I. Additionally, Regulation 65 of Legal Notice 280 of 2017 (Land Regulations) had provided as thus:

**“Upon establishing that a particular parcel of private land had been unlawfully occupied, the owner of the land had been required to issue a notice in Form LA 57 set out in the Third Schedule to the unlawful occupiers to vacate the land.”**

m. From the above sections, there had been no mention of the County Government, being the 2<sup>nd</sup> Respondent herein, being responsible. The onus had been fully placed upon the owners of the land, the Petitioners herein, to issue eviction notices to the unlawful occupants and serve the eviction notices on the Deputy County Commissioner in charge of the area as well as the Officer Commanding the Police Division of the area.

n. By the Petitioners’ own admission, they had been the legal and registered owners of the property through a lease issued in their names, making the same private land thus falling squarely under the ambit of Section 152E of the Land Laws (Amendment) Act No. 28 of 2016.

o. Further to the foregoing, the Affiant had equally been informed that the Petitioners had failed to indicate in their Petition any legal basis for the claim that the 2<sup>nd</sup> Respondent had been capable of evicting squatters from their property, the same being clearly private land.

p. In view of the matters set out above, the Affiant verily believed that the Petition had failed to establish the threshold for grant of the orders sought as against the 2<sup>nd</sup> Respondent, as the said structures had lain within privately-owned premises. The Petition had thus been an abuse of the court process and

entirely lacked merit. The Affiant had urged the Honourable Court to dismiss the Petition with costs.

q. In view of the foregoing, the Affiant verily believed that the Petition had not contained any substance and had prayed that the Court dismissed it with costs to the Respondent.

r. The Affiant had made the Affidavit from matters within his own knowledge save for matters sworn on information and belief, the sources and grounds whereof he had duly disclosed.

**VI. The response to the Petition by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> & 7<sup>th</sup> Interested Parties**

14. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> & 7<sup>th</sup> Interested Parties on 21<sup>st</sup> November, 2022 responded to the Amended Petition by way of a 16 paragraphed affidavit sworn by ANTONY MURITHI NKATHA together with annexures marked as “AMK” annexed hereto. The contents of the affidavit, he in verbatim averred:-

a) He was the Director of the 1<sup>st</sup> Interested Party with the authority to depone herein.(Annexed and marked “AMN - 1” was a copy of Resolution.)

b) He had the authority from the other Interested Parties to represent and depone on their behalf. (Annexed and marked “AMN - 2” was a copy of the Authority.)

c) He swore the Affidavit in response to the Amended Petition on behalf of the Interested Parties who ought to have been included therein as Interested Parties as per the ruling of the court delivered on 17<sup>th</sup> October, 2022.

- d) In response to Paragraph 5 of the Amended Petition the Interested Parties deny that the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners were the legal owners of plot MSA/BLOCK/IX/49 and 50 (Hereinafter referred to as “The Suit Properties”) and state that the issue of ownership of the suit properties was the subject of several Court cases between the Petitioners and third parties, for instance the Miscellaneous Civil Application No. 332 of 2019.
- e) The Interested Parties deny that the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners were instituting this Petition on behalf of members of the public and states that they had no capacity to represent them.
- f) In response to the contents of Paragraphs 6 - 12 of the Amended Petition the Interested Parties deny that the Articles of the Constitution stated therein apply herein and that there was breach of the Constitution of Kenya, 2010.
- g) In response to the contents of Paragraphs 13 - 19 of the Amended Petition the Interested Parties deny that the articles of the Constitution stated therein apply herein and that there was breach of Constitution.
- h) In response to the contents of Paragraphs no. 24 - 31 of the Amended Petition the Interested Parties deny the averments therein.
- i) Interested Parties stated that the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners were using this Petition to maliciously evict them from their place of business which was not and did not form part of the suit properties.
- j) The Interested Parties operated legitimate and/or legal business outside the suit properties and which the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents gave licenses and relevant approvals to. (Annexed and marked "AMN - 3" was a copy of the license).

- k) The businesses did not affect the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners in any way neither do their businesses amounted to any breach of the Constitution.
- l) The Interested Parties had not constructed any unplanned structures on the Petitioners property and only had containers which had been converted to businesses with fixtures, fittings and stocks for business and had not contravened any laws. (Annexed and marked "AMN - 4" was a copy of photographs).
- m) The Interested parties deny that their businesses after the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners in any way whatsoever.
- n) It was thus in the interest of justice that the Amended Petition be dismissed with costs.

## **VII. Submissions**

- 15.** Specifically, the matter having commenced a re - fresh in as far as the 2<sup>nd</sup> Respondent was concerned, on...April, 2025, in the presence of all the parties Court directed that the Petition be disposed off by way of written submissions. Pursuant to that, the Petitioners and the 2<sup>nd</sup> Respondent prepared and filed their written submissions. Accordingly, upon full compliance the Honorable Court reserved a date for the delivery of Judgment on ]notice accordingly.

## **A. The Written Submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners**

16. On behalf of the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners through the Law firm of Messrs. Borona & Associates Advocates filed their written submissions. Mr. Borona Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners commenced his submissions by providing Court with a detailed background of the suit. He stated that in the Petitioners sought the following orders:

- a) A declaration that the Respondents act of abdicating their responsibility contravenes the provisions of Article 42 of the Constitution of Kenya, 2010.***
- b) A declaration that the violation of Article 42 of the Constitution of Kenya 2010 by the Respondent has resulted in a denial of the right to a clean and healthy environment to the Petitioners and to the residents of Mombasa County.***
- c) A declaration that in breach of the above the Petitioners have a right for redress for orders of injunction and compensation pursuant to Article 23 (3) (b) and (e) of the Constitution of Kenya as read with Section 13 (7) of the Environment Management and Co - ordination Act of 1999.***
- d) A mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite and to stop any further dumping from taking place on Plot Nos. MSA/BLOCK/IX/49 and 50.***
- e) A mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite.***
- f) An order directing the 3<sup>rd</sup> Respondent (KURA) herein to remove the containers illegally placed on the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners boundary wall encroaching the pedestrian pathway.***

**g) An order for compensation to the Petitioners against the 1<sup>st</sup> Respondent as is provided under Article 70 (1) (2) (c) as read with Article 3 as well as Article 23 (3) (a) and (e) of the Constitution of Kenya, 2010.**

**h) Any other relief this court may deem fit to grant.**

17. The Learned Counsel indicated that he would be submitting on the following two (2) issues to be determined by the Court:-

- a. Whether the Petitioners rights to a clean and healthy environment under the provision of Article 42 of the Constitution of the Kenya, 2010 had been breached or were in danger of breach by the Respondents;
- b. Whether the Petitioners were entitled to the reliefs sought in the Amended Petition.

18. Firstly, on whether the Petitioners rights to a clean and healthy environment under the provision of Article 42 of the Constitution of Kenya, 2010 had been breached. On this issue, the Learned Counsel cited the case of:- **“Martin Osano Rabera & Another - Versus - Municipal Council of Nakuru & 2 others( 2018) eKLR”** where the Court noted the following:

**“After promulgation of Constitution of Kenya 2010 and establishment of County Governments, the functions of refuse removal, refuse dumps and solid waste disposal were devolved to county governments pursuant to Section 2 (g) of Part 2 of the Fourth Schedule of the Constitution. There is in fact no dispute that the 3rd Respondent took over the operation of Gioto from the 1<sup>st</sup> Respondent and continues to do so up to now. Gioto**

***mainly receives waste from Nakuru Town. The Petitioners case and evidence is that Gioto is a dangerous place to reside nearby since it has become a heaven for street boys and criminals who pose a threat to unsuspecting members of the public, that it harbors stray dogs that feed on refuse and may bite passers by and turn off to tourists; that the dumpsite emits offensive gas which is toxic and pose risk of causing respiratory ailments; that during rainy seasons, needles, nails and stones spread to the nearby road thus causing tire busts and punctures which in turn expose motorists to risk of being attacked by marauding street boys and other criminals; that since the refuse normally consists of non-compacted materials, it rolls over to the lowlands; that the dumpsite is a breeding ground for mosquitoes which cause malaria; and that of these contentions the Petitioners annexed several photographs which depict aspects of Gioto. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have acknowledged at paragraphs 16 of Mr.Wilson .M. Maroas replying affidavit that Gioto garbage site presents a real environmental hazard to motorists and residents of the area. He further concedes that the 1st Respondents has faced sanctions from the 2<sup>nd</sup> Respondents as regards the way they have operated Gioto... The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have not offered any evidence to show specific steps taken to address the issues that were raised by the Petitioners and the 2<sup>nd</sup> Respondents in its restoration order dated 30<sup>th</sup> September 2011. The matters companied of affect not only the Petitioners but the residents of Nakuru at large. Though the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have argued that they have faced financial difficulties that alone cannot be an excuse. Clearly, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have operated and continue to operate the Gioto..... dumpsite in a manner that violates Article 42 of the Constitution.....In view of and 3<sup>rd</sup> Respondents actions violated and threaten to violate the Petitioners right to a clean and healthy environment. "In the***

*instant case, the Petitioners have shown by way of photographs, that the suit property has become a dumpsite that is increasingly posing a health and security threat to members of the public. This evidence has not been rebutted by the Respondents. Furthermore, this honorable court also conducted a site visit on the suit premises on 6<sup>th</sup> October 2022 and indeed saw the extent of dumping and waste on the premises. In the circumstances, it is our humble submission that the Petitioner's right to a clean and healthy environment has been violated."*

19. On whether the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners were entitled to the reliefs sought in the Amended Petition. The Learned Counsel held that the court also had a similar finding in the case of: "**African Centre for Rights and Governance (ACRAG) & 3 others - Versus - Municipal Council of Naivasha (2017) eKLR**" where the Court held:-

*"I have mentioned that there are plastic papers everywhere around the site. That was clearly visible. The bigger danger is however i what the eyes cannot see, the possible contamination of the aquifer underneath and of Lake Naivasha; the health risk to humans posed by pollution of the air and the soil, and the risk to the health of animals which ingest waste dumped at the site. Even without tangible evidence, this is a case that speaks for itself, a res ipsa loquitor situation. The Dumpsite is clearly and environmental hazard. I have no doubt in my mind that the facility in issue is a threat to a clean and healthy environment. Its operations are indeed illegal. The operation of the facility by the Respondent and its successor, the County Government of Nakuru, violates the rights of the Petitioners and indeed the rights of the residents of Naivasha, and of all person's resident in Kenya, to clean and healthy environments as provided for in*

**Article 42 of the constitution. I do find that there has been a violation of this right by the Respondent and now the County Government of Nakuru.... This case has brought forth an important element touching on the management and conservation of our environment. I honestly do not know whether NEMA has conducted an audit of the way all county governments manage solid waste. I however, doubt if NEMA has done so given what has revealed itself in this suit. I believe it is time that NEMA considered a countrywide audit and proceeded to embark on measures to ensure that only licensed facilities operate as required by law. NEMA also needs to introduce rules and regulations on the operation of such facilities and have mechanism to ensure that these rules are followed. The aspect of licensing of transporters of waste and has to be involved and work together with County Governments and NEMA so that solid wastes are properly managed. Funding will always be an issue, and this should be looked at by both County and National Governments. We cannot continue risking the health and lives of Kenyans by failing to have properly managed solid waste management systems. The time to act is now if we must safeguard a good future for this and future generations. I therefore order that this judgement be served upon NEMA so that they can proceed to ensure compliance with the orders issued herein, and report to this court as directed." In the instant case, NEMA the 1st Respondent has not denied the presence of dumpsite and garbage in the Petitioners property and has also confirmed that"...it is prepared and willing to implement the orders that would result from these Honorable Courts proceedings".**

20. Therefore, the Learned Counsel urged this honorable court do grant the prayers sought in the Amended Petition. Specifically, it

should direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite and stop any further dumping from taking place on plot nos. MSA/BLOCL/IX/49 & 50. This would be in line with the provision of Section 108 (1) of the EMCA, 1999.

21. He cited the case of **"KM & 9 others - Versus - Attorney General & 7 others (2020) eKLR"** the Court had the following to say on the issue of proof of violation of a fundamental right or freedom:-

***"To protect the right to a clean environment guaranteed under Article 42 of the constitution, Article 70 states that any person who alleges that this right is being or is likely to be denied or violated, infringed or threatened; the person may apply to the court for redress. The Constitution gives Kenyans access to courts even where there are only threats of violation." In the instant case it is our submission that the Petitioners have without a doubt demonstrated that the suit premises has a growing dumpsite that is a public health concern for all those in and around the suit premises."***

In the same case (supra) the court found that:-

***"The RIO Declaration imposes an obligation on the state actors to develop law regarding liability and compensation for the victims of pollution . The principle states, "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall cooperate in an expeditious and more determined manner to develop further international law regarding liability and activities within their jurisdiction or control to areas beyond their jurisdiction. The Petitioners would not have moved the court had***

***the state actors performed their roles immediately the adverse effects of the 7<sup>th</sup> Respondent were established.”***

22. In conclusion, the Learned Counsel asserted that having shown that the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners right to a clean and healthy environment had been violated, it was their humble submission that this Amended Petition should be allowed as prayed.

### **B. The Written Submission by the 2<sup>nd</sup> Respondent**

23. Through the Law firm of Messrs. Soni & Associates Advocates LLP, the 2<sup>nd</sup> Respondent filed their written Submissions dated 19<sup>th</sup> January, 2025. Mr. Makori Advocate commenced his submissions by stating that the Petition herein sought to compel the 2<sup>nd</sup> Respondent to “inter alia” demolish all the unplanned, unlicensed and unapproved housing structures in the property known as Plot No. MSA/Block/IX/49 and 50.

24. The Learned Counsel submitted that the 2<sup>nd</sup> Respondent opposed the Petition on two broad grounds. Firstly, the case did not meet the threshold for Constitutional Petition.

25. Secondly, eviction of Squatters was not the legal mandate for the 2<sup>nd</sup> Respondent.

### **A. The 2<sup>nd</sup> Respondent’s written submissions**

26. The 2<sup>nd</sup> Respondent through the firm of Messrs. Soni & Associates Advocates filed their written submissions dated 19<sup>th</sup> January, 2025 wherein they submitted that the Petition had principally sought to compel the 2<sup>nd</sup> Respondent to, inter alia, demolish all unplanned, unlicensed and unapproved housing structures on the property known as Plot No. MSA/BLOCK/IX/49 and 50. However, the 2<sup>nd</sup> Respondent had opposed the orders that were being sought by the Petitioners on the grounds set out in the ensuing paragraphs.
27. On the whether the case did not meet the threshold for constitutional petitions, the Learned Counsel began by stating that the crux of the Petition had been wrongful entry, trespass and squatting on private land, which issues did not raise any constitutional questions or interpretation of the Constitution. A perusal of the Petition had shown that the Petitioners had made the alleged construction of unplanned structures cropping up on the above-mentioned premises the sole backbone of their prayer for compensation.
28. The orders that had been sought by the Petitioners lay in ordinary civil law and not in a Constitutional Petition, and no constitutional issues had arisen. The 2<sup>nd</sup> Respondent had therefore submitted that under the principle of “constitutional avoidance”, the Court

ought not to have determined the Petition, which had been disguised as a constitutional issue when the matter could have been determined on another basis. Additionally, Courts had consistently maintained that when a party had an appropriate forum before which to seek redress, it had been incumbent upon them to raise their concerns before the said forum as opposed to invoking the constitutional jurisdiction of the Court at the outset. Kenyan Courts had relied on the doctrine of constitutional avoidance to strike out claims presented before Court where it had been shown that there existed alternative, sufficient and adequate avenues for parties to ventilate their grievances.

29. Without prejudice to the foregoing, the substratum of the Petitioners' case had remained the claimed invasion and occupation of their land by squatters. If squatters had been removed from the equation, and assuming that there had been no invasion of the suit land, then the case would not have existed, and neither would the complaints raised against the 2<sup>nd</sup> Respondent have arisen. As such, the 2<sup>nd</sup> Respondent had submitted that all this would have been ably dealt with in an ordinary suit to its concise conclusion. Having found that the Petitioners ought to have filed an ordinary suit, the substratum of

the Petition had failed, and the Court had been urged not to grant the orders sought.

30. On the eviction of the squatters and whether it had not been the work of the 2<sup>nd</sup> Respondent, the Learned Counsel submitted that eviction of squatters or invaders on private land who had physically dispossessed the owner had not been the work of a County Government. The 2<sup>nd</sup> Respondent had therefore, contrary to what had been submitted by the Petitioners, been incapable of performing such functions. The Court in **“Atik Mohamed Omar Atik & 3 others - Versus - Joseph Katana & Another [2019] eKLR”** had stated as follows on the procedure for eviction of persons unlawfully occupying public, community or private land:

**“As it were, the Land Laws (Amendment) Act 2016 which came into operation by virtue of the Presidential Assent on 31<sup>st</sup> August 2016, brought forth radical changes to the eviction regime. One of the novel features of the Act had been the introduction of a procedure that governed evictions of persons deemed to be unlawfully occupying public, community and private land.”**

31. In this regard, the first step in an eviction had been for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice had lain in the need to give the persons affected an opportunity to seek relief in Court. Under Section 152E of the Land Act, any

person or persons served with such notice had been entitled to apply to Court for relief against the notice. Section 152E of the Land Laws (Amendment) Act No. 28 of 2016 had provided for the steps the Petitioners ought to have taken to evict the squatters from their property.

32. The above statutory provisions had not in any way placed the burden of eviction on the 2<sup>nd</sup> Respondent or any of the Respondents. The onus had been solely on “the owner or the person in charge.” There had been no provision or mention of any other person in that mandatory statutory provision. As such, the claims by the Petitioners blaming the 2<sup>nd</sup> Respondent for the squatters had been baseless and had lacked legal backing.
33. Additionally, the Learned Counsel relied on Regulation 65 of Legal Notice 280 of 2017 (Land Regulations) which provides that upon establishing that a particular parcel of private land was unlawfully occupied, the owner of the land had been required to issue a notice in Form LA 57 to the unlawful occupiers to vacate the land. By the Petitioners’ own admission, they had been the legal and registered owners of the property through a lease issued in their names, making the same private land and thus falling squarely

under the ambit of Section 152E of the Land Laws (Amendment) Act No. 28 of 2016.

34. Further to the foregoing, the Petitioners had failed to indicate in their Petition any legal basis for the claim that the 2<sup>nd</sup> Respondent had been capable of evicting squatters from their property, with the same being clearly private land.

35. In view of the matters set out above, the Learned Counsel submitted that the Petition had failed to establish the threshold for grant of the orders sought as against the 2<sup>nd</sup> Respondent, as the said structures had lain within privately-owned premises. The Petition had therefore been an abuse of the Court process and had entirely lacked merit. The Court had been urged to dismiss the Petition with costs.

#### **VIII. Analysis and Determination**

36. I have carefully considered all the filed pleadings pertaining to the Amended Petition dated 10<sup>th</sup> November, 2022, the Affidavits by both the Petitioners and the 2<sup>nd</sup> Respondent, the articulate written submissions, the cited authorities, the appropriate provisions of the Constitution of Kenya, 2010 and the statutes.

37. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following three (3) salient issues for its determination. These are:-

- a) Whether the Amended Petition by the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners meets the threshold for Constitution Petitions.**
- b) Whether the Constitution Petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?**
- c) Who will bear the Cost of the suit.**

**ISSUE No. a). Whether the Amended Petition by the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners meets the threshold for Constitution Petitions.**

38. Under this Sub - heading, for the Court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of Article 2 (1) & (4) of Constitution of Kenya defines the Constitution as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.

39. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these

things are not just metaphorical. They are real. As a matter of course, the Constitution of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

**This Constitution shall be interpreted in a manner that:-**

- a) Promotes its purposes, values and principles;**
- b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- c) Permits the development of the law; and**
- d) Contributes to good governance.....”**

40. This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

41. Based on the principles set out in the edit of the Court of appeal case of **“Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & Another (2013) eKLR”** provided the standards of proof in the Constitutional Petitions as founded in the case of **“Anarita Karimi Njeru - Versus - Republic [1980] eKLR 154”** where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

***“Constitutional violations must be pleaded with a reasonable degree of precision.....”***

***Further, in the “Thorp - Versus - Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:***

***“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....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”.***

42. Further to the above, without wanting to sound too academic nor abstract, it will be inevitable and critical to deliberate on the issue of the Environmental Science & Law. This is a Science Law and policy - system complex and interlocking statutes, common law treaties, conversation and regulations that seek to protect the natural environment which may be affected impacted or endangered by human activities, for instance setting allowable levels of pollution or requiring permits for potentially harmful activities. To begin with, the provision of Article 42 of the Constitution holds that:-

**Every person in Kenya is entitled to clean and healthy Environment and has a duty to safeguard and enhance Environment”.**

43. It will be noted that statutory Legal Remedies are based on common law - against environmental pollution are available under the law of TORT. TORT is a Civil Wrong other than breach of trust or contract for any tortious action, which result in damage to property, person or reputation of another person, the affected party can claim damages compensation or injunction or both the liabilities are in form of:-

- i) Nuisance: annoys, hurts/offence.
- ii) Trespass: intentional or negligence
- iii) Negligence; and
- iv) Strict Liability: e.g. the case of: "**Rylands -versus- Fletcher - 1968 L.R. 3HL 330** - a person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and if he fails to do so, is prima facie liable for the damage, which is the natural consequences of its escape - he is liable for strict liability

44. The scope of Environmental Science is rather wide. It ranges from pollution control (air and climate change, water, noise, land). Contamination and environmentally hazardous chemicals) national parks wildlife, flora and fauna, wilderness and biodiversity. Environmental and occupational health,

conservation, environmental planning, environmental impact assessment (EIA) of projects ecologically sustainable development and resource management generally under the provision of Articles 69 and 70 of the Constitution of Kenya, 2010.

45. Fundamentally, the principles of Environmental law is based on the write up: “**Our common future (1987) and world commissions on Environmental Development and Earth Summit RIO Declaration 1992**”. These are namely:-

- a) **The Preventive Principles**:- This one requires that if there is any strong suspicion that t a certain activity/ies may have environmental consequences/threat, it is better to control it now rather to wait for incontrovertible evidence.\_The Rio Declaration of 1982 stipulates: “***Where there are threats of serious or irreversible scientific evidence/damage, lack of full participation certainty shall not be used as a reasoning for postponing cost-effective measures to prevent environmental degradation***”
- b) **The Preservation/Protection Principle**: This one is based on the fact that preventing environmental harm is cheaper, easier and less dangerous than reacting to environmental harm that already has taken place. For instance the current floods and the loss and damage on lose of life and property.
- c) **“The Polluter Pays” Principle**: Much environmental harm is caused by providers who “externalize” the costs of their activities. For instance, factories that emit unfiltered exhaust into the atmosphere or discharge untreated chemicals into a river pay little to dispose their waste instead, the costs of waste disposal in form of pollution is borne by the entire

community, or the driver of an automobile bears the costs of funds and maintenance but externalizes the costs associated with the fumes emitted from the tail pipe. Accordingly, the purpose of many environmental regulations is to force polluters bear the real costs of their pollution though such costs are often difficult to calculate precisely.

- d) **Public Participation:** This is where public views in environmental decision-making process (EIA) are pertinent.
- e) **Sustainable development:** -This is an approach for economic planning on environmental issues.
- f) **Public Trust Doctrine:-** This is where people have to participate in environmental protection and at the same time, they have to protect their rights e.g. against Hogging of trees.

46. In this Amended Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are seeking for a declaration that the Respondents act of abdicating their responsibility contravenes the provisions of article 42 of the Constitution of Kenya, 2010, a declaration that the violation of article 42 of the Constitution of Kenya 2010 by the Respondent has resulted in a denial of the right to a clean and healthy environment to the Petitioners and to the residents of Mombasa County, that in breach of the above the Petitioners have a right for redress for orders of injunction and compensation pursuant to article 23(3)(b) and (e) of the Constitution of Kenya as read with Section 13(7) of the EMCA Act of 1999, a mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to restore the degraded dumpsite and finally a

mandatory injunction to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to restore the degraded dumpsite and to stop any further dumping from taking place on Plot nos. MSA/BLOCK/IX/49 and 50.

47. This Honorable Court must establish the constitutional basis of the Petition which is founded under paragraph 7 to 11 which include:-

- a. Article 42 of the Constitution of Kenya 2012, which provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures.
- b. Article 69 of the Constitution, which places obligations on state organs and every person in respect of the environment. Article 69(1) provides that the State shall:
  - i. Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits.
  - ii. Work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya.
  - iii. Protect and enhance intellectual property in and indigenous knowledge of biodiversity and the genetic resources of the communities.
  - iv. Encourage public participation in the management, protection, and conservation of the environment.
  - v. Protect genetic resources and biological diversity.
  - vi. Establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

- vii. Eliminate processes and activities that are likely to endanger the environment.
  - viii. Utilize the environment and natural resources for the benefit of the people of Kenya.
- c. Article 70 of the Constitution of Kenya provides for the Enforcement of environmental rights. Specifically, Article 70 (1) states if a person alleges that a right to a clean and healthy environment recognized and protected under article 43 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.
- d. Article 70 (2) states that on application under clause (1), the court may make any order, or give any directions, it considers appropriate-
- i. To prevent, stop or discontinue any act or omission that is harmful to the environment
  - ii. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment
  - iii. To provide compensation for any victim of a violation of the right to a clean and healthy environment.
48. The central issue is whether the Petitioners' invocation of Articles 42 and 70 of the Constitution of Kenya, 2010—alleging environmental degradation on their private land—raises a legitimate constitutional question, or whether the dispute is, in substance, a private land matter involving trespass and eviction, better suited for ordinary civil litigation. The Respondents argue

that the Petition is an abuse of constitutional process, invoking the doctrine of constitutional avoidance. The Petitioners, on the other hand, assert that the environmental degradation on their land, caused by state inaction and third-party encroachment, implicates their constitutional right to a clean and healthy environment.

49. The doctrine of constitutional avoidance holds that where a dispute can be resolved through ordinary legal mechanisms, courts should refrain from determining it as a constitutional matter. This principle was articulated in ***“Communications Commission of Kenya & 5 others - Versus - Royal Media Services Limited & 5 others [2014] eKLR”***, where the Supreme Court held:

***“A Court’s jurisdiction to interpret and apply the Constitution is not to be invoked where there exists some other legal course which offers a more efficacious remedy.”***

50. In the case of:- ***“Mumo Matemu case (supra)”***, the Court of Appeal emphasized that constitutional petitions must be pleaded with precision, and that not every legal dispute should be elevated to a constitutional issue. Thus, courts are cautious not to allow litigants to bypass ordinary legal procedures by couching civil disputes in constitutional language.

51. However, environmental rights under Article 42 are unique. They are enforceable by any person, not just those directly affected, and

can be invoked even where a violation is merely threatened. This is reinforced by:

**Article 70(1) of the Constitution**

**A person may apply to court for redress if the right to a clean and healthy environment “has been, is being or is likely to be, denied, violated, infringed or threatened.”**

52. In ***“Martin Osano Rabera & Another - Versus - Municipal Council of Nakuru & 2 others [2018] eKLR”***, the Court found that continued operation of a dumpsite in a residential area violated Article 42, even though the land was not public.
53. Further in ***“African Centre for Rights and Governance (ACRAG) & 3 others - Versus - Municipal Council of Naivasha [2017] eKLR”***, the Court held that environmental degradation, even on land with contested ownership, raised constitutional questions under Article 42. These cases demonstrate that environmental degradation—whether on public or private land—can raise constitutional issues if it implicates the right to a clean and healthy environment.
54. The Petitioners allege that the Respondents have abdicated their statutory and constitutional duties under Articles 42, 69, and 70 of the Constitution and EMCA. The dumping and unregulated structures have created a public health and environmental hazard. The County Government has failed to regulate waste disposal and

enforce planning laws. The Kenya Urban Roads Authority (KURA) has allowed encroachment on pedestrian pathways.

55. These allegations go beyond a mere land ownership or trespass dispute. They implicate the State's positive obligations under Article 69(1) of the Constitution to eliminate activities harmful to the environment. The Petitioners' and public's right under Article 42 to a clean and healthy environment. The duty of public officers under Article 70(2)(b) to take preventive measures. While the issue of eviction of squatters may fall under the Land Laws (Amendment) Act, 2016, the broader environmental concerns—garbage accumulation, public health risks, and state inaction—raise constitutional questions.

56. The Petition, though arising from a dispute over private land, raises genuine constitutional questions concerning environmental rights under Articles 42 and 70 of the Constitution. The doctrine of constitutional avoidance does not apply where the Petition alleges a violation or threat to a fundamental right, particularly one as expansive and public-facing as the right to a clean and healthy environment.

57. Accordingly, the Petition meets the constitutional threshold and is properly before this Court.

**ISSUE No. b). Whether the Constitution Amended Petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?**

58. Being that I have found that the Petition meets the constitutional threshold and is properly before this Honourable court. I will embark on the analysis on the merits of the Petition but before embarking on the issues under this Sub - title herein, as indicated from the beginning, on 6<sup>th</sup> October, 2022 based on the consensus of the parties, the Honorable Court conducted a successful Site Visit (***Locus in Quo***) on the suit property. Below is it's the site visit report re - produced verbatim:-

**A REPORT ON THE SITE VISIT HELD AT TUDOR MWISHO WAS MAGARI AREA**

**MOMBASA HELD ON 6<sup>TH</sup> OCOTBER, 2022 AT 3.15 P.M.**

I. **COURT**

- (a) Hon. Justice L.L. Naikuni - ELC. No. 3
- (b) M/s. Yumnah Court Assistant
- (c) Mr. Omar Court Assistant

II. **The Petitioners:**

- a) Mr. Borona – Advocate
- b) Mr. Daniel Mwangi – Legal Association
- c) No Petitioner Present

III. **The 1<sup>st</sup> Respondent – Naional Land Commission**

- (a) M/s. Opio – State Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondent

- (b) Mr. Victor Obiko – KURA Surveyor
- (c) Deputy OCS Central Police
- (d) Mr. T. Mutugi holding brief for Mr. Daniel Kihiko for the 2<sup>nd</sup> Respondent.
- (e) Mr. Ian Njoroge – Legal

IV. **Intended Interested Parties**

- (a) M/s. Kyalo Advocate.
- (b) Mr. Antony Mureithi – Director Vacuum Cleaner Limited.
- (c) Mr. Babeto Kyalo – Car Wash.
- (d) M/s. Fatuma Omar – Car Wash.
- (e) Mrs. Brenda Kohoi – Tuko Life Investment – Car Wash.
- (f) Mr. Kennedy Mwania – Shallom Shop.
- (g) Mr. Charles Kioko – Maze Logistics.

II. **The Purpose of the Visit**

The purpose of the site visit was explained to all the parties present. It was stated that pursuant to a court directive made on 29<sup>th</sup> September, 2022 and in view of the numerous activities reported to be taking place on the suit property founded along the Makupa road round about and the Tudor bus Terminus, also known as Tom Mboya street. It was twelve metres tarmac and a busy road. It became imperative to conduct the site visit.

The team was informed that the court was empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, *to wit*:-

***Power to court to inspect;***

***“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”***

Ideally the site visit – the Locus in quo was with a view of gathering further evidence on the above stated arising two (2) issues – of the alleged containers being on the road reserve and the conducting of various businesses onto the suit land by the Intended Interested Parties to assist it in its decision making functions and/or process.

Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavoured to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

## **II. The Procedure**

We all agreed the KURA surveyor provide leadership for the team and hence be as a guide for purposes of this site visit. Each party to be at liberty to engage their own Private surveyor in future who will prepare reports to be filed in court for consideration. It was explained that the team would commence by fully guided by the maps available – and under the guidance of the Land Surveyor by Kenya Urban Roads Authority. The KURA Surveyor had a Map, Co – ordinates and the Real time GPS. We all agreed the KURA surveyor as a guide for purposes of this site visit. Each party to be at liberty to engage their own Private surveyor in future who will prepare reports to be filed in court for consideration. The team then move from one spot to the other within the suit land in sequential manner accompanied by the Security operatives. The said sketch maps are attached hereof for ease of reference.

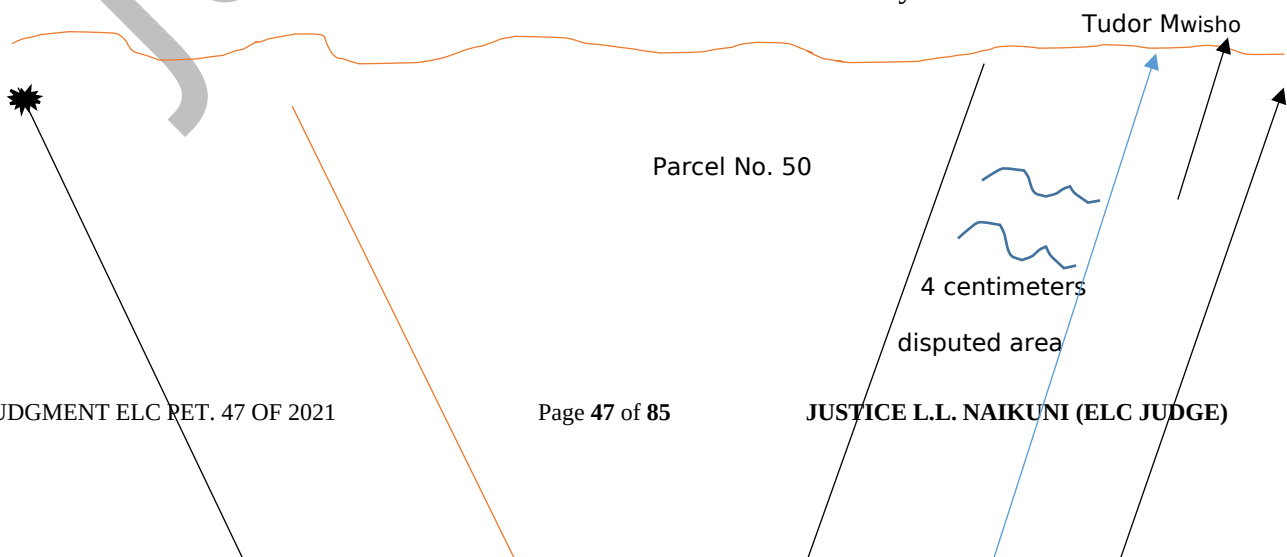
**iii. The process, the inspection and the findings**

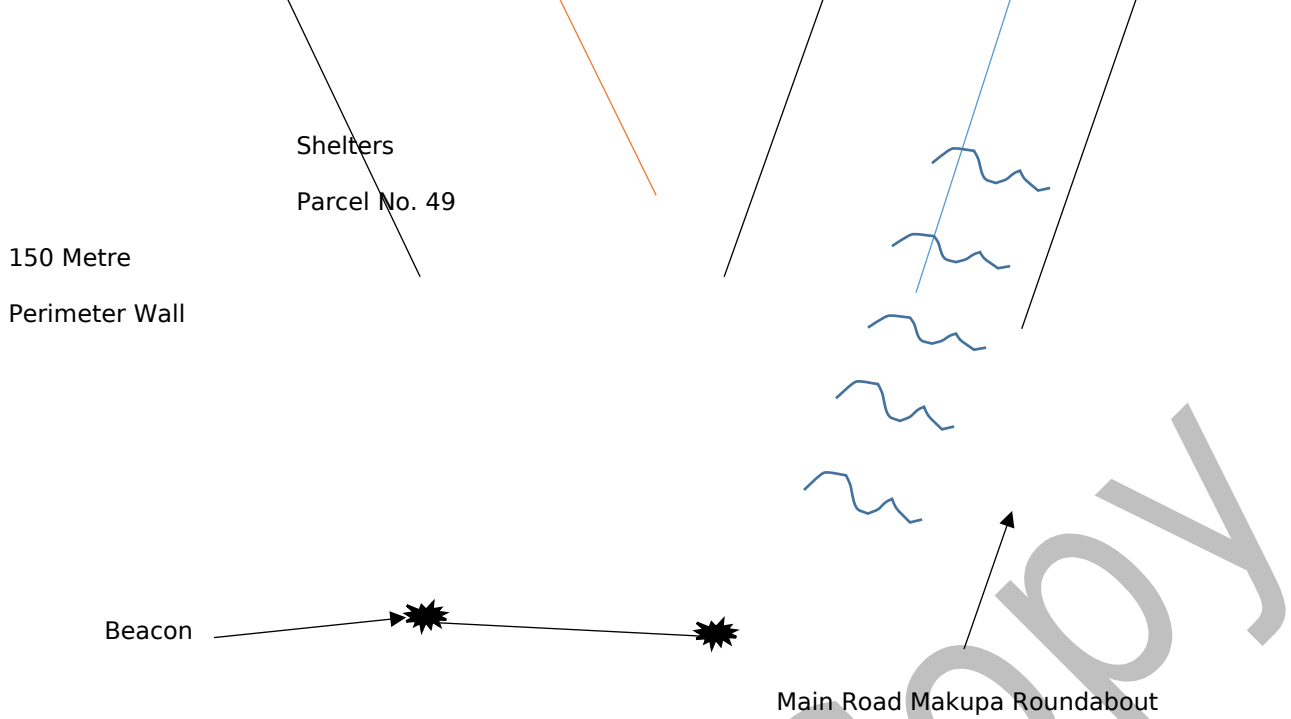
The team conducted an intense physical inspection of the suit land. They moved from one plot to the other plot. The team conducted spot check and inspection of these plots. Eventually, these were the findings:-

**VII. The Observations**

Led by the KURA Surveyor, the team was taken round the two (2) parcels Number MN/BLOCK IX/49 & 50, the following features were observed from the Site. These were: -

- a) The intended parties were mainly licenses carrying our several businesses on the suit land
- b) There was in existent two (2) parcels of land. They are surrounded by a 150 Meters by 100 Meters hexagon 5 feet high concrete perimeter wall surrounding the parcels.
- c) In the middle of the surrounded area are:-
  - Around 50 Semi permanent Swahili/Makuti – Iron sheet built shelters and over 200 squatters.
  - There were a few scattered plantation of bananas, Pawpaw, swampy and marshy plantation, stagnant (storm water way) waters prone to mosquito breeding area/nests; huge heaps of dumping grounds, full of liquid and solid waste disposals from the inhabitants and the business in the from side of the suit land. The dumping site was such an eye sore and also dangerous to pollution, contamination and other related health and environmental degradation. It was in the middle of human habitations. There was no evidence of the disposal or removal of the waste.
  - There were a few beacons at each corner.
  - There was a huge Boabab Tree next to the main Makupa round about and Tudor bus terminus road known as Tom Mboya street.





- d) There were close to 50 concrete electricity poles along the road.
- e) There were four (4) large metallic containers fixed on next to the main tarmac road and the pedestrian foot path. These containers were converted to be inconformity and accommodate the following business premises: -
  - i. A Saloon Barber Shop;
  - ii. A Cafeteria;
  - iii. A Wine/Beer shop.
  - iv. Several Car Wash stands.
  - v. A Shoe shop.
  - vi. A furniture shop.
  - vii. An Mpesa shop.
  - viii. An Electric Shop.
  - ix. A heap of firewood stand.

The team estimated that there were close to fifty (50) people who were dependent on these businesses as owners or employees. It was alleged the containers were on what was described as the road reserve. This claim was made by KURA. This is subject to proof with empirical evidence.

- f) The KURA road measures 12 Metres – intended to be 24 Metres.
- g) There was a 100 metres long narrow pedestrian walk/pathway.

The suit land consisted of close to a 500 Metres stretch – between the main Makupa road about and Tudor bus stop. It's in the middle. The other portion was for the County Government of

Mombasa. We learnt that there had been a protracted land court case being ELC No. 332 of 2009 over the legal ownership of the above two (2) parcels of land. The suit was pending hearing and determination.

**VII. Conclusion**

There being no other business the site visit ended at 4.30 P.M. The matter shall be mentioned on 12<sup>th</sup> October, 2022 when court will be delivering its Ruling.

**SIGNED AND DATED AT MOMBASA THIS .....6<sup>TH</sup>.....DAY OF .....  
OCTOBER.....2022**

.....  
**HON. JUSTICE (MR) L.L NAIKUNI (JUDGE),  
ENVIRONMENT & LAND COURT AT  
MOMBASA**

59. Now turning to the issues under this Sub heading. The Amended Constitutional Petition in Draft Pet 46 of 2021 presents a multifaceted dispute at the intersection of environmental rights, land law, and constitutional remedies in Kenya.

60. The Petitioners allege that their right to a clean and healthy environment under the provision of Article 42 of the Constitution of Kenya, 2010, has been violated due to environmental degradation, illegal dumping, and the erection of unregulated structures on their private land (Plot Nos. MSA/BLOCK/IX/49 and 50). They seek a range of reliefs, including declarations, mandatory injunctions, environmental restoration orders, and compensation, invoking Articles 23(3), 70, and relevant provisions of the Environmental

Management and Coordination Act (EMCA). The Respondents, in turn, challenge the legal merit of the Petition, arguing that it is an abuse of process, that the issues are essentially civil (trespass and eviction), and that no constitutional violation has been demonstrated.

61. This sub - title provides a comprehensive legal analysis of the Petition addressing the following core questions: -

- a. **Does the Petition meet the threshold for constitutional redress under Article 42 and Article 70?**
- b. **Is the Environment and Land Court (ELC) properly seized of jurisdiction?**
- c. **Does the evidence support the alleged violations of environmental rights?**
- d. **Are the reliefs sought—declarations, injunctions, restoration orders, and compensation—legally sustainable?**
- e. **How do statutory and case law principles, including the doctrine of constitutional avoidance, the polluter-pays principle, and the role of public authorities, inform the outcome?**
- f. **What is the appropriate apportionment of liability and the scope of remedies in such disputes?**

62. I will draw on the Constitution, EMCA, the Environment and Land Court Act, the Physical and Land Use Planning Act, recent Kenyan Supreme Court and ELC jurisprudence (including "***the Uhuru - Owino, Abdalla, Ken Kasing'a***", and related cases), and statutory interpretation.

63. Notwithstanding the pending suit - ELC No. 339 of 2009, at least from these proceedings, which is purely on environmental discourse, it is not disputed that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are the registered owners of the suit property. Fundamentally, the Petitioners claim is that there was an ongoing construction of unplanned structures and shelters that were cropping up in the above-mentioned premises contrary to the County government building by laws regulations 22(1) and the Physical Planning Act.
64. Moreover, the haphazard nature in which the structures were being set up had led to the accumulation of increasing amounts of garbage and waste which not only continued to endanger the health of the public and the environment but posed a security threat in that the area is proving to be a habitat for other nefarious activities such as drug dealing and peddling. The continued dumping of garbage and development of unplanned, unhygienic, and unlicensed eateries (bandas) continue to pose a serious health and security risk to the members of the public especially with diseases such as cholera which are known to break out in unsanitary conditions.
65. The Respondents have failed in this constitutional duty placed on them which has resulted in accumulated toxins and refuse in the

Petitioners property which is increasingly posing a health and security threat to the members of the public and which is also degrading the value of the Petitioners property.

66. It is trite that under the provision of Article 40 of the Constitution, the Petitioner has the right to property, which right includes the use of the suit property. Article 40 of the Constitution provides as follows:

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

**(a) of any description; and**

**(b) in any part of Kenya.**

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

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

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

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

67. The Environment and Land Court (ELC) is established under Article 162(2)(b) of the Constitution and the Environment and Land Court Act, 2011. Its jurisdiction is both original and appellate, encompassing all disputes relating to the environment and land, including the enforcement of rights under the provision of Articles 42, 69, and 70 of the Constitution of Kenya.

68. The provision of Section 13 of the Environment and Land Court Act, No. 19 of 2011 provides: -

**“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... Nothing in this Act shall preclude the Court from hearing and**

**determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”**

69. Kenyan courts have consistently affirmed the ELC’s jurisdiction over constitutional environmental claims, even where alternative statutory mechanisms exist. In the case of:- **“Ken Kasing’a - Versus - Daniel Kiplagat Kirui & 5 others [2015] eKLR”**, the court held: -

**“There can be no question that this court has jurisdiction to hear a dispute on whether or not the right of a person to a clean and healthy environment has been violated, for this jurisdiction, is explicitly set out in Section 13 (3) of ELCA. Indeed, this court has jurisdiction to hear any constitutional petition/claim so long as such petition relates to the environment or land.”**

70. Similarly, in the case of **“Paolo Di Maria & 5 others - Versus - Alice M. Kuria & 5 others [2021] eKLR”**, the ELC dismissed a preliminary objection challenging its jurisdiction, emphasizing that constitutional environmental claims are within its original jurisdiction, and that the existence of the National Environment Tribunal (NET) or County Physical and Land Use Planning Liaison Committees does not oust the ELC’s power to hear such matters.

71. The Supreme Court, in the case of: **“Nicholus - Versus - Attorney General & 7 others [2023] KESC 113 (KLR)”**, reaffirmed that the ELC has original jurisdiction over disputes involving the management of

the environment, including constitutional violations, and that the NET and other tribunals do not have jurisdiction to determine constitutional questions.

72. While the doctrine of exhaustion requires parties to utilize available statutory mechanisms before approaching the courts, the Supreme Court has clarified that this does not bar constitutional claims where the issues raised are of a constitutional nature or where the statutory forum lacks jurisdiction to grant the relief sought. The ELC retains discretion to hear constitutional petitions directly, especially where the alternative forum cannot address constitutional violations or where urgent redress is required.
73. The Environment and Land Court which is the status of this Honourable Court is properly seized of jurisdiction to hear and determine the Petitioners' claims under Article 42 and Article 70, including the grant of constitutional remedies. The existence of alternative statutory mechanisms does not oust this jurisdiction, particularly where constitutional rights are at stake.
74. On the threshold for Constitutional Redress under the provision of Articles 42 and 70 of the Constitution; Article 42 of the Constitution provides:

**“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.”**

75. This right is both individual and collective, and is enforceable against both public and private actors. **EMCA** defines the environment to **include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics. It includes both the natural and the built environment.** From this definition, it is clear that the environment goes beyond the physical settings to include issues such as social, economic and cultural conditions that influence the life of an individual or a community. People form part of the environment which is why it is critical to eliminate processes that pose danger to human health.

76. The provision of Article 69 (1) (g) of the Constitution obligates the State to eliminate processes and activities that are likely to endanger the environment. The Oxford Advanced Learner’s Dictionary defines **‘eliminate’** as to remove or get rid of something. The Constitution behoves the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents herein

to remove or get rid of all the processes and activities that cause pollution.

77. The Constitution of Kenya under the provision of Article 42 of the Constitution guarantees every person the right to a clean and healthy environment, which includes the right 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 to have obligations relating to the environment fulfilled under Article 70.

78. Article 70 of the Constitution on the other hand provides for:

**“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.”**

79. Article 70(2) empowers the court to make any order it considers appropriate, including:

- a. Preventing, stopping, or discontinuing any act or omission harmful to the environment;**
- b. Compelling public officers to take measures to prevent or discontinue such acts or omissions;**
- c. Providing compensation for any victim of a violation of the right to a clean and healthy environment**

80. Crucially, Article 70(3) provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
81. The provision of Section 3 of EMCA gives effect to the entitlement to a clean and healthy environment which is enshrined in Article 42 of the Constitution. Every person has a duty to safeguard and enhance the environment. That section empowers a person alleging that the right to a clean and healthy environment has been or is being denied, violated, infringed or threatened to apply to the Environment and Land Court (ELC) for redress.
82. The threshold for standing in environmental matters is deliberately broad. Section 3(4) of EMCA and Article 70(3) of the Constitution eliminate the need for a petitioner to show personal loss or injury; it suffices to allege a violation or threat to the right to a clean and healthy environment. This liberal approach is designed to facilitate public interest litigation and ensure that environmental rights are not rendered illusory by procedural barriers.
83. The provision of Section 9 (1) of the EMCA establishes and makes NEMA the principal instrument of Government in the implementation of all policies relating to the environment. Consequently, NEMA has to play a primary role in the elimination of processes and activities that endanger the environment. EMCA

bestows specific roles on NEMA in relation to preventing air and water pollution in the country.

84. In the case of ***Martin Osano Rabera & Another (supra)***, the court stated that NEMA was not just an investigator and prosecutor whose success is measured in terms of successful investigations and prosecutions, rather that as the principal instrument of government it had a bigger mandate towards the people of Kenya in the implementation of all policies relating to the environment.
85. There is much more that the law enjoins NEMA to do pursuant to Section 9 of EMCA. It should exercise co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment is safeguarded and in this case, to ensure that the pollution. The success and efficiency of NEMA will ultimately be seen in the realization of the right to a clean and healthy environment by every Kenyan more than the information on its website as it urged the Petitioners to acquaint themselves with. In light of the nationwide challenge posed by urban waste, NEMA must be proactive and take the lead in enforcing the law and assist the county governments to develop and implement policies and strategies for dealing with the disposal and management of urban waste in a safe manner that does not

derogate from every citizen's right to a clean and healthy environment.

86. Under the provision of Article 61 of the Constitution of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the Land Act No. 6 of 2012 provides the said methods as follows:

**S. 7 Title to land may be acquired through:-**

- i. Allocations;**
- ii. Land Adjudication process;**
- iii. Compulsory acquisition;**
- iv. Prescription;**
- v. Settlement programs;**
- vi. Transmissions;**
- vii. Transfers;**
- viii. Long term leases exceeding Twenty one years created out private land; or**
- ix. Any other manner prescribed in the Act of Parliament.**

87. From the filed pleadings, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners has demonstrated that they were the absolute and legally registered

owners of the Plot No. MSA/BLOCK/IX/49 & 50 with all the indefeasible rights, title and interest vested in them by law. The suit property lies within Mombasa County Development area and had regularly been paying the attendant county rates for the same. However, and even from the site visit conducted by Court, it was evident that there were ongoing construction of unplanned structures and shelters that were cropping up which were perpetrated by the Interested Parties in the above-mentioned premises contrary to the county government building by laws regulations 22(1) and the Physical Planning Act at the close watch, tolerance and support by the 2<sup>nd</sup> Respondent herein.

88. Moreover, the haphazard nature in which the structures were being set up had led to the accumulation of increasing amounts of garbage and waste which not only continued to endanger the health of the public and the environment but posed a security threat in that the area was proving to be a habitat for other nefarious activities such as drug dealing and peddling.

89. The continued dumping of garbage and development of unplanned, unhygienic, and unlicensed eateries (bandas) continued to pose a serious health and security risk to the members of the public especially with diseases such as cholera

which were known to break out in unsanitary conditions. Their rights and those of members of the public specifically under the provision of Article 42 of the Constitution of Kenya, 2010 had been violated and were in danger of continued violation. That it was the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents duty to establish and maintain proper sanitary services and provision of disposal of refuse so as to maintain a clean and healthy environment in line with Article 42 of the Constitution.

90. The Honourable Court strongly holds that the Respondents had failed in this constitutional duty placed on them which had resulted in accumulated toxins and refuse in the Petitioners property which was increasingly posing a health and security threat to the members of the public and which was also degrading the value of the Petitioners property. In the premises this Honourable court should issue mandatory orders to the Respondents to ensure discontinuance of any activity that would lead to further damage to the property and the environment which it was located and to ensure that all illegal structures set up in the premises were permanently brought down.

91. On the contrary, none of the Respondents nor the Interested parties were able to demonstrate under which of these ways that

they acquired the ownership to the suit land and hence justify the bases upon which they were in occupation and possession of it. Indeed, from a ruling delivered by this Court over the subject matter and whether to Interested parties should be joined in the proceedings, the Honorable Court challenged KURA, the 3<sup>rd</sup> Respondent herein to file within stipulated timeframe any empirical evidence of ownership of the land and any strategic development plan it had on the utility of this space. Unfortunately, that was never accomplished for no apparent nor justifiable cause whatsoever. Having cited the provisions of Article 40 of the Constitution, and having shown how they has been deprived the clean and healthy use of the suit property by the Respondents, the Petitioners have particularized the provisions of the Constitution which have been allegedly contravened by the Respondents.

92. In the case of ***Trusted Society of Human Rights Alliance - Versus - Attorney General & 2 Others Civil Appeal No. 290 of (2012) eKLR***", the Court of Appeal held as follows:-

***"However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand***

***mathematical precision in drawing Constitutional Petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a Constitutional Petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”***

93. The doctrine of constitutional avoidance holds that where a dispute can be resolved on another legal basis, courts should refrain from deciding constitutional questions. However, where the gravamen of the dispute is the violation of constitutional rights, and where statutory remedies are inadequate or unavailable, the constitutional avenue remains open.
94. In the case of ***“Anyango - Versus - Attorney General & 2 others [2024] KEHC 254 (KLR)”***, the court dismissed a petition that was essentially a civil dispute (malicious prosecution and false imprisonment) disguised as a constitutional claim, emphasizing that constitutional redress is not available where ordinary civil remedies suffice. Conversely, in environmental matters, the courts have recognized that the right to a clean and healthy environment is justiciable and enforceable through constitutional

Petitions, even where civil remedies (such as trespass or nuisance) may also be available.

95. The Petitioners allege that illegal dumping, environmental degradation, and unregulated structures on their private land have violated their right to a clean and healthy environment. They seek both constitutional and statutory remedies. The allegations, if substantiated, fall squarely within the scope of Articles 42 and 70, and are not merely civil disputes in disguise. The Petition is therefore properly framed as a constitutional environmental claim.

96. The Petition clearly brings out the complaint that the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners have as against the Respondents, that is the breach of the Petitioners' right to a clean and healthy environment, but also to use the property. Consequently, the Petition is validly before this court.

97. The Court finds that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents have failed to eliminate the process and activities that cause pollution in the suit property due to the dumping of waste and the unplanned structures on the suit property. The Petitioners have shown by way of photographs, that the suit property has become a dumpsite that is increasingly posing a health and security threat

to members of the public. This evidence has not been rebutted by the Respondents. Furthermore, this honorable court also conducted a site visit on the suit premises on 6<sup>th</sup> October 2022 and indeed saw the extent of dumping and waste on the premises. In the circumstances, it is our humble submission that the Petitioner's right to a clean and healthy environment has been violated.

98. It is also important for this Honourable Court to bring out a distinction between Civil Trespass/Eviction claims and Constitutional Environmental Claims. Trespass to land is a civil wrong, actionable per se, and entitles the landowner to remedies such as damages, injunctions, and eviction orders. The Trespass Act and common law principles provide the framework for such claims. Where the dispute is solely about unauthorized entry or occupation, the appropriate remedy is typically a civil suit for trespass or eviction.
99. Where the acts complained of go beyond mere trespass and amount to environmental degradation, pollution, or violation of statutory environmental standards, the matter transcends private law and engages constitutional rights. The courts have recognized that environmental harm may simultaneously constitute a tort

(e.g., nuisance or trespass) and a violation of constitutional rights, warranting both civil and constitutional remedies.

100. In the case of:- **“Abdalla & 2 others - Versus - County Government of Kilifi & 2 others [2023] KEELC 19898 (KLR)”**, the ELC granted both constitutional and civil remedies where illegal dumping on private land violated the Plaintiffs’ property rights and their right to a clean and healthy environment.

101. The key question is whether the substance of the claim is the violation of constitutional environmental rights, or whether the constitutional claim is merely a cloak for an ordinary civil dispute. Where the facts support a genuine environmental rights violation, the constitutional avenue is appropriate.

102. The Petitioners allege not only trespass but also illegal dumping, environmental degradation, and regulatory failures by public authorities. The reliefs sought include environmental restoration, compensation for environmental harm, and orders against regulatory authorities. The substance of the claim is environmental, not merely civil. The Petition is therefore properly before the ELC as a constitutional environmental claim.

103. On the evidence required to prove environmental degradation, illegal dumping and unregulated structures, the Honourable Court

notes that the burden and standard of proof especially in Constitutional environment claims is on the petitioner to establish, on a balance of probabilities, that the right to a clean and healthy environment has been violated or is threatened. However, the courts have adopted a precautionary approach, shifting the burden to the respondent to demonstrate that their activities are not harmful where there is credible evidence of potential harm.

104. The Evidence Act, Cap. 80 and Civil Procedure Rules, 2010 govern the admissibility and weight of evidence, with primary evidence preferred but secondary evidence admissible in appropriate circumstances. The precautionary principle, enshrined in EMCA and recognized by the courts, dictates that where there is uncertainty as to environmental harm, the burden shifts to the proponent of the activity to demonstrate that it is not harmful.

105. In the case of:- ***“Ken Kasing’a case (supra)”***, the court held:

***“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 is given a clean bill of health or its***

***benefits are found to far outweigh the adverse effects to the environment.”***

106. The Petitioners must adduce credible evidence of illegal dumping, environmental degradation, and unregulated structures on their land. This may include photographs, expert reports, and correspondence with NEMA or the County Government. If the Respondents claim to have obtained EIA licenses or development permissions, they bear the burden of producing such documentation. The absence of required licenses or approvals, or evidence of regulatory non-compliance, supports the Petitioners' case.

107. NEMA is the principal instrument of government for the implementation of environmental policies and the enforcement of EMCA. Its duties include:

- a. Granting or refusing EIA licenses (Section 58, EMCA);
- b. Monitoring compliance with environmental standards;
- c. Issuing environmental restoration orders (Section 108, EMCA);
- d. Taking enforcement action against violators.

108. I take note that NEMA the 1<sup>st</sup> Respondent and the County Government of Mombasa, the 2<sup>nd</sup> Respondent have not denied the

presence of dumpsite and garbage in the Petitioners property and have also confirmed that:- **“.....it is prepared and willing to implement the orders that would result from these Honorable Courts proceedings”**. It is therefore the Petitioners’ submission that this Honorable court do grant the prayers sought in the Amended Petition and specifically direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite and stop any further dumping from taking place on plot nos. MSA/BLOCL/IX/49 & 50. This would be in line with provision Section 108 (1) of the EMCA, 1999.

109. It is helpful to analyse the role citizens’ play and that of State organs in environmental protection. The County Governments, under the Fourth Schedule of the Constitution and the Physical and Land Use Planning Act, are responsible for waste management, development control, and enforcement of land use regulations.

110. The Supreme Court, in the case of: **“Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino - Uhuru Village in Mikindani, Changamwe Area, Mombasa) - Versus - National Environment Management Authority & 3 others (Petition E021 of 2023) [2024] KESC 75 (KLR)**

**(6 December 2024) (Judgment”**, held that both public and private entities may be held liable for environmental harm, including regulatory failures. NEMA and other authorities may be liable for failing to prevent, control, or remedy environmental degradation, or for issuing licenses without due diligence. The court apportioned liability among the polluter (private company), NEMA, EPZA, and relevant ministries, emphasizing the **Principle of Polluter - Pays”** and the duty of public authorities to protect environmental rights.

111. The provision of Article 69 1 (a) to (h) of the Constitution gives the broad obligations of the State in relation to the environment. It is only Article 69 1(d) which brings citizens into the picture by requiring the State to encourage public participation in the management, protection and conservation of the environment. A reading of Article 69 (1) confirms that the State carries a bigger burden in relation to the management and protection of the environment. Article 69 (2) provides that every person has a duty to cooperate with State organs to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The role of citizens under the Constitution is to cooperate with State organs, such as the

Respondents, for the protection and conservation of the environment. The duty to eliminate processes and activities that pollute the environment falls on the State and its agencies.

112. The provision of Section 3(1) of EMCA provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws, and is required to safeguard and enhance the environment. The provision of the provides that every person shall cooperate with State organs to protect and conserve the environment and ensure the ecological sustainable development of natural resources. The Fourth Schedule of the Constitution places the control of air pollution as well as refuse removal, refuse dumps and solid waste disposal in the hands of County Governments who are the 2<sup>nd</sup> Respondent herein.

113. The Fourth Schedule specifically makes the protection of the environment and natural resources and water protection the work of the National Government, which in this case is performed by the Respondents. The onus of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents,

recommending measures for the treatment of effluents before they are discharged into the sewerage system and making recommendations for the monitoring and control of water pollution falls within the docket of the Cabinet Secretary responsible for environmental matters on NEMA's recommendations under Section 71 of EMCA.

114. Alongside the statutory responsibility, Kenyans owe future generations a duty to sustain the environment for their benefit, as highlighted in the preamble to the Constitution. The court is required by Section 3 of EMCA to be guided by principles of intergenerational and intragenerational equity when exercising its jurisdiction in claims where a person alleges that the right to a clean and healthy environment has been denied or violated. Intergenerational equity enjoins the present generation while exercising its rights to the beneficial use of the suit property.

115. The ELC is mandated by the provision of Section 3 of EMCA to make orders, issue such writs or give directions it may deem appropriate to prevent, stop or discontinue any act deleterious to the environment. The court may also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible

for the environmental degradation to restore the environment to the position it was in before the damage, and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulates that a person bringing a suit regarding the entitlement to a clean and healthy environment does not need to show that the defendant's act or omission caused him personal injury or loss. All the person needs to show is that his suit is not frivolous, vexatious or an abuse of the court process. Contrary to what the AG contended, EMCA does not require a person who claims that their right to a clean and healthy environment has been violated to establish a prima facie case with probability of success and show the harm they stood to suffer if the orders were not granted.

116. The provision of Article 70 of the Constitution stipulates that where a person alleges that their right to a clean and healthy environment protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to the court for redress in addition to any other legal remedies that are available in respect to the same matter. On such an application 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. The court may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.

117. In summary the obligations of the Respondents are as follows: -
- a. The 2<sup>nd</sup> Respondent (the County Government of Mombasa) bears devolved responsibility for refuse removal and solid waste management under Part 2, Section 2(g) of the Fourth Schedule to the Constitution.
  - b. The 1<sup>st</sup> Respondent (NEMA) is mandated under EMCA to regulate waste disposal and issue restoration orders.
  - c. The 3<sup>rd</sup> Respondent (KURA) is responsible for road reserves and pedestrian pathways.

118. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents cannot abdicate these constitutional and statutory duties. Financial constraints are not a valid excuse, as held in the case of:- **“Martin Osano Rabera (Supra)”**.

119. It is very clear that the NEMA, the 1<sup>st</sup> Respondent or the County Government who is the 2<sup>nd</sup> Respondent herein failed to enforce environmental standards, issued licenses without proper

assessment and or neglected to act on complaints, I therefore hold them jointly liable with private actors for the resulting harm.

120. On the remedies available for the Petitioner, Articles 23(3) and 70(2) of the Constitution empower the court to grant a wide range of remedies, including:

**d. Declarations of rights;**

**e. Injunctions (prohibitory and mandatory);**

**f. Environmental restoration orders;**

**g. Compensation for victims of environmental harm;**

**h. Judicial review orders.**

121. Under the Article 70 (3) of the Constitution, an applicant bringing a claim relating to contravention or threat of violation of his right to a clean and healthy environment does not have to demonstrate that any person has incurred loss or suffered injury. The court is empowered by the Constitution and EMCA to make appropriate orders to prevent, stop or discontinue the pollution attributable to any piece of land or part of Kenya. Granting a statutory interdict or continuing orders would give effect to Article 70 (2) of the Constitution which gives the ELC the discretion to make orders or give directions which it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment.

122. The provision of Section 3 (3) of EMCA mirrors these remedies, and Section 108 empowers NEMA (and, by extension, the court) to issue environmental restoration orders.
123. An applicant seeking redress for breach or threat of breach of the right to a clean and healthy environment does not have to demonstrate that any person has incurred loss or suffered injury under Article 70 of the Constitution. The court can only order that compensation be paid to specific persons whose details were supplied in the suit, which in this case is the two Petitioners.
124. Declarations are appropriate where the court finds that constitutional rights have been violated. In the case of:- ***“Abdalla & 2 others - Versus - County Government of Kilifi & 2 others (Supra)”***, the court declared that the plaintiffs’ rights to property and a clean and healthy environment had been violated by illegal dumping on their land.
125. Prohibitory injunctions restrain ongoing or threatened harm, while mandatory injunctions compel affirmative action (e.g., removal of waste, restoration of land). The threshold for mandatory injunctions is higher, requiring a clear case and a high degree of assurance that the order is justified.

126. Restoration orders require the respondent to restore the environment as far as practicable to its original condition. Section 108 of EMCA and Section 111 empower the court to issue such orders, even in the absence of personal loss or injury to the petitioner.
127. Compensation may be awarded for loss or damage resulting from environmental harm. Article 70(2)(c) and Section 3(3)(e) of EMCA provide for compensation for victims of pollution and the cost of beneficial uses lost. The Supreme Court has clarified that, in constitutional environmental claims, compensation is not limited to quantifiable loss; the violation of rights itself warrants redress, and the court may award nominal or general damages as appropriate.
128. In the “**Uhuru-Owino**” case, the Supreme Court upheld a sum of Kshs. 1.3 billion compensation awards for personal injury and loss of life, and a sum of Kenya Shillings Seven Hundred Million (Kshs. 700, 000, 000.00/= awards for environmental restoration, emphasizing the need for effective remedies and the polluter-pays principle.
129. It should be noted by the litigants that this Honourable Court has power to enforce its orders, including contempt proceedings and

penalties for non-compliance. The provision of Section 29 of the Environment and Land Court Act, No. 19 of 2011 provides for fines and imprisonment for failure to obey court orders.

130. On declarations, the Petitioners have shown, through affidavits, photographs, and a site visit conducted by the Honourable Court that that dumping and unplanned structures exist on their property, creating health and security risks. In the case of:- **“Martin Osano Rabera - Versus -Municipal Council of Nakuru [supra]”**, unmanaged dumpsites were held to violate Article 42.

131. Further, in the case of:- **“ACRAG - Versus - Municipal Council of Naivasha [Supra]”**, the Court held that environmental hazards speak for themselves (based on the Tortious Maxim of **“Res ipsa loquitur”**). In this particular case I find the declarations merited and I therefore proceed to grant them.

132. On the mandatory injunction, the County Government (2<sup>nd</sup> Respondent) bears devolved responsibility for waste management under Part 2, Section 2(g) of the Fourth Schedule. NEMA (1<sup>st</sup> Respondent) regulates waste disposal. KURA (3<sup>rd</sup> Respondent) must ensure pedestrian pathways are not encroached. In the case of: **“Ken Kasinga - Versus - IEBC & 2 others [Supra]”**, the Court emphasized that environmental rights are enforceable even

where violation is merely threatened. I therefore make a finding that mandatory injunctions compelling restoration and cessation of dumping are justified.

133. On the compensation, the provision of Article 70 (2)(c) of the Constitution and Section 13 (7) EMCA empower the Court to award compensation for violation of environmental rights. In the case of:- **“KM & 9 others - Versus - Attorney General [2020] eKLR”**, the Court affirmed that compensation may be awarded where environmental rights are infringed. Given the degradation of the Petitioners’ property and the public health risks, compensation is appropriate. The quantum, however, requires assessment based on evidence of loss, diminution of property value, and environmental harm.

134. Nonetheless, there should be need to provide orders for the preservation of the suit land and the restoration of to its original and better environmental state.

135. In conclusion, the Honourable Court discerns that the Petitioners have established violation of their constitutional right to a clean and healthy environment. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents, being custodians of environmental management, cannot abdicate their duties.

**ISSUE No. c). Who will bear the Costs of the Petition.**

**136.** It is now well established that the issue of Costs is the discretion of Courts. According to the Black Law Dictionary, “Cost” is defined to mean, **“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”**. The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

**“26. (1) The award of costs is at the discretion of the Court.**

**(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”**

**137.** In the case of **“Reids Hewett & Company - Versus - Joseph AIR 1918 cal. 717** and **Myres - Versus - Defries (1880) 5 Ex. D. 180**, the House of the Lords noted:-

**“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate**

***issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."***

**138.** Further, these legal principles were upheld in the Supreme Court case of "***Jasbir Rai Singh - Versus - Tarchalans Singh, (2014) eKLR and the Court of Appeal cases of Cecilia Karuru Ngayu - Versus - Barclays Bank of Kenya & Ano. (2016) eKLR the Courts held:-***

***".....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case".***

139. Therefore, the events in the instant case is that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein have succeeded in establishing their case on preponderance of probabilities. For that very fundamental reason, therefore, and as already held vide the delivered Judgement of this Court, the costs of this suit will be made to the Petitioners to be borne by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and the Interested Parties herein jointly and severally.

## **IX. Conclusion and disposition**

140. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein have succeeded in

all the prayers sought from their filed Amended Petition. For avoidance of doubt, I allow the Amended Petition dated 10<sup>th</sup> May, 2022 specifically under the following terms:-

- a) **THAT Judgement be and is hereby entered in favour of the Petitioners in its entirety.**
- b) **THAT a declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents act of abdicating their responsibility contravenes the provisions of Article 42 of the Constitution of Kenya, 2010.**
- c) **THAT a declaration that the violation of Article 42 of the Constitution of Kenya 2010 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents has resulted in a denial of the right to a clean and healthy environment to the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners and to the residents of County of Mombasa.**
- d) **THAT order for compensation to the Petitioners as is provided for under Article 70 (1), (2) (c) as read with Article 3 as well as Article 23(3) (a) and (e) of the Constitution of Kenya, 2010.**
- e) **THAT a declaration that in breach of the above the Petitioners have a right for redress for orders of injunction and compensation amounting to a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/-) pursuant to the provision of Article 23 (3) (b) and (e) of the Constitution of Kenya, 2010 as read with Section 13 (7) of the Environment Management and Co-ordination Act of 1999 which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein should be compelled to pay jointly and severally.**

- f) **THAT** a mandatory injunction do hereby issue compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore the degraded dumpsite and to stop any further dumping from taking place on Plot nos. MSA/BLOCK/IX/49 and 50.
- g) **THAT** an order pursuant to the provision of Sections 152A, B, D & E of the Land Act, No. 6 of 2012 directing the 3<sup>rd</sup> Respondent (KURA) herein to and all the Interested Parties to remove all the containers illegally placed on the Petitioners boundary wall encroaching the pedestrian pathway **WITHIN THE NEXT NINETY (90) DAYS** from the date of the delivery of this Judgement hereof.
- h) **THAT** failure to adhere with this order, the Petitioner to proceed on causing peaceful and lawful eviction but at the costs of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the Interested Parties.\_
- i) **THAT** the County Commander of Mombasa and the Officer in Charge of the Central Police Station Mombasa to ensure full compliance and strict adherence of this Court Order.\_
- j) **THAT** each party to bear their costs.

**IT IS SO ORDERED ACCORDINGLY.**

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....20<sup>TH</sup> .....DAY OF .....FEBRUARY.....2026.**

.....  
**HON. MR. JUSTICE L.L NAIKUNI  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**Judgement delivered the presence of:-**

- a) M/s. Fridaus Mbula - the Court Assistant.
- b) Mr. Borona Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners.
- c) No appearance for the 2<sup>nd</sup> Respondent

Judge's Copy