



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC PETITION NO. 2 OF 2019**

**MARTIN WANYONYI.....1<sup>ST</sup> PETITIONER**

**(C.E.O WESTERN KENYA LEGAL  
AND ORGANIZATION)**

**JOHN WEKESA KHAOYA.....2<sup>ND</sup> PETITIONER**

**(C.E.O CENTRE FOR HUMAN  
RIGHTS ORGANIZATION)**

**VERSUS**

**COUNTY GOVERNMENT OF BUNGOMA.....1<sup>ST</sup> RESPONDENT**

**C.E.C MEMBER OF ENVIRONMENT**

**WATER & NATURAL RESOURCE.....2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY**

**GOVERNMENT OF BUNGOMA.....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

Having obtained leave of this Court in **BUNGOMA ELC MISCELLANEOUS APPLICATION NO 8 OF 2019** exempting them from paying fees, **MARTIN WANYONYI** and **JOHN WEKESA KHAOYA** (the Petitioners herein) filed this Petition on 24<sup>th</sup> July 2019 seeking the following orders against the Respondents: -

- 1. That this Honourable Court be pleased to grant orders compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to close the dumping site at LUMORO village for violating the law.**
- 2. That this Honourable Court be pleased to grant orders against the Respondents by themselves, their servants, agents and/or contractor be restricted from further dumping of waste at LUMORO village pursuant to Section 9(3)(1) of the URBANS AREAS AND CITIES ACT Laws of Kenya.**
- 3. That this Honourable Court be pleased to grant orders for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to compensate CNB aged 15 years and any other person for the violation of the rights to a clean and healthy environment pursuant to Article 70(2)(c) of the Constitution of Kenya 2010 and who had been hospitalized at BUNGOMA REFERRAL HOSPITAL T.B UNIT, on 14<sup>th</sup> June 2019.**
- 4. That this Honourable Court be pleased to grant orders against the 3<sup>rd</sup> Respondent the accounting officer to be removed from office for violating Articles 42(a) (b), 69(1) (f) (g) (h), 2, 70(1) 2(a) (b) (c), 3 of the Bill of Rights Chapter four of the Constitution 2010.**
- 5. That this Honourable Court be pleased to grant orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for violating Article 73 (1)**

**(a) (i) (ii) (iii) (iv) (b) (2) (a) (b) (c) (d) (i) (ii) (d) (e) of Chapter six of the Constitution.**

The Petition is predicated on the grounds set out therein together with the Petitioners affidavit dated 24<sup>th</sup> July 2019. The Petitioners also filed, with leave, an answer to the Respondents' replying affidavit dated 11<sup>th</sup> October 2019 and without leave a document titled "**ADDITION OF DOCUMENT AFFIDAVIT**" dated 31<sup>st</sup> October 2019.

The basis of this Petition is that the Respondents are utilizing private property being land parcels **NO SOUTH BUKUSU/WEST MATEKA/1147** and **1148** as a dumping site thus polluting the environment and causing infection to members of the **LUMORO** village community. Further, that the Respondents are carrying out the functions of Municipalities without Gazette Boards being in place in violation of **Section 11** of the **URBAN AREAS AND CITIES ACT**. And in response to the replying affidavit of **MOSES SICHEI SOET** the **CHIEF OFFICER** of the **COUNTY GOVERNMENT OF BUNGOMA**, the Petitioner averred that he is not a party to the said Petition. The Petitioners further filed the document already referred to above headed "**ADDITION OF DOCUMENT AFFIDAVIT**" dated 31<sup>st</sup> October 2019 to which they annexed a water sample certificate from the Water Resource Management Authority dated 15<sup>th</sup> April 2013 to the effect that water from the **CORNEL SPRING** is condemned and not fit for human consumption.

The Petition is contested and the Respondents have filed a replying affidavit by one **MOSES SICHEI SOET** the 1<sup>st</sup> Respondent's Chief Officer in which it is averred, inter alia, that the Petition is fatally incompetent for failure to meet the threshold as laid down in the **ANARITA KARIMI NJERU** case since it lacks particularity. That the **BUNGOMA /KIMILILI MUNICIPALITIES** were confirmed with the status of **MUNICIPALITIES** having met the threshold set out in Section 9 of the **URBAN AREAS AND CITIES ACT**. That in compliance with the provision of the **ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT 1999 (EMCA)**, the Respondents engaged the **NATIONAL ENVIRONMENTAL AND MANAGEMENT AUTHORITY (NEMA)** on the viability of the then proposed dump site at **LUMORO** village which was found viable and the finding was communicated to the 2<sup>nd</sup> Respondent by a letter from **NEMA** dated 27<sup>th</sup> October 2015 (annexture MSS-1). That the Respondent complied with the condition in the said letter by seeking purchase of the land on which the proposed site was to be established and commissioning an Environmental Impact Assessment (**EIA**) and a licence from **NEMA**. The Respondent also sought time to finalize on the **EIA** and time to use the site pending full compliance with the terms of **NEMA's** letter dated 27<sup>th</sup> October 2015. By its letter dated 7<sup>th</sup> December 2016, **NEMA** granted permission to use the site. That the Respondents followed due process and acquired from **PETER MAKHAYO MAKINA** and **KHAEMBA NJIULE** the land parcels number **WEST BUKUSU/ NORTH MATEKA/1146** and **1147** for use as dump site. That the said owners who are not parties herein have acknowledged the transactions and have been paid for their land (annextures **MSS – 3**). That in the Financial Year 2019 – 2020, the Respondents commenced the process of constructing a perimeter wall along the dumpsite and developed Bills of Quantities in readiness for the procurement process. Therefore, due process was followed in establishing the dump site which has benefited the residents of **LUMORO** village and the entire County and there is no medical or scientific report that the dumping of waste has caused infections to the residents of **LUMORO** village and in any event, no complaints have been raised since 2017. That the prayer for compensation of **CNB** is unfounded as there is no direct evidence to link her alleged ailments to the dumpsite.

It is further deponed by **MOSES SICHEI SOET** that the prayers sought in this Petition are not merited and could be contra – public interest if granted since the closure of the dump site would frustrate the Respondents'

The Respondents pray therefore that this Petition be dismissed with costs.

The Petitioners filed what they referred to as an "**Answer to replying affidavit**" in which they deponed that **MR MOSES SICHEI SOET** is not a party to the Petition and he is a stranger introduced to buy time. They also filed, without leave a report of the **WATER RESOURCE MANAGEMENT AUTHORITY** dated 19<sup>th</sup> September 2019 as evidence that the water from **CORNEL SPRING** which is the only source of water for the residents of **LUMORO** village is not fit for human consumption.

With the consent of the parties, it was agreed that the Petition be heard by way of written submissions which were subsequently filed both by the Petitioners in person and by the firm of **GUMBO & ASSOCIATES ADVOCATES** for the Respondents.

I have considered the Petition, the replying affidavit and the submissions filed.

Even before I consider the merits or otherwise of the Petition, I think it is important that I determine whether this Court has the jurisdiction to remove the 3<sup>rd</sup> Respondent from office as prayed in paragraph IV of the Petition. The 3<sup>rd</sup> Respondent is the County Secretary to the County of Bungoma and the power to remove him from office is vested in the Governor. **Section 44(2) (c) of the County Government Act** provides as follows: -

*"The County Secretary*

*(a) –*

*(b) –*

*(c) May, subject to the conditions and terms of appointment, be dismissed by the governor."*

This Court has no jurisdiction to remove the 3<sup>rd</sup> Respondent from office. My jurisdiction is circumscribed by **Section 13 of the Environment and Land Court Act** and **Section 150 of the Land Act**. Those provisions do not donate to this Court the power to remove a County Secretary from office.

The Petitioners are acting in person without the benefit of counsel. Their Petition is therefore what I refer to as "**home – made.**" At the

commencement of this Judgment, I outlined the remedies sought by the Petitioners. They include the closing of the dump site at **LUMORO** village, compensation for **CNB** for being hospitalized at the T.B Unit **BUNGOMA REFERRAL HOSPITAL** and of course the removal of the 3<sup>rd</sup> Respondent from office which remedy, as I have already found, is not within this Court's jurisdiction.

There is no doubt that what the Petitioners seek in this Petition is to enforce the environmental rights of the residents of **LUMORO** village. There is also no doubt that **Article 70 of the Constitution** empowers the Petitioners to file this Petition. They therefore have the requisite locus standi to seek the redress which they seek and to enforce the environmental rights of the residents of **LUMORO** village. That has not been disputed by the Respondents. Similarly, **Article 3 of the Constitution** grants a duty on every person, natural or juristic to respect, uphold and defend the constitution.

Much of the submissions by the Respondents' counsel dwell on the claim that the Petition, as drafted, lacks particularity and does not specify with reasonable precision, how the various provisions of the Constitution alleged to have been infringed were breached by the Respondents. The case of **ANARITA KARIMI NJERU V R CRIMINAL APPLICATION NO 4 OF 1979 [1979 eKLR] [1980 KLR 1271]** and **MUMO MATEMU .V. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & OTHERS C.A CIVIL APPEAL NO 290 OF 2012 [2013 eKLR]** are the cases cited among others.

There is merit in that submission. The Petitioners are acting in person and I have already referred to their Petition as **"home – made."** However, whether **"home – made"** or **"factory made"**, a Constitutional Petition such as this one should at least set out the Constitutional provisions that the other party has contravened and how that has been done. These Petitioners have simply cited the various Constitutional provisions without clearly setting out how those provisions have been infringed. In paragraphs **III, IV, and V** of their Petition, they have pleaded as follows: -

**III: "This Honourable Court be pleased to grant orders for the 1<sup>st</sup> – 3<sup>rd</sup> Respondents to compensate CHRISTINE NANGEKHE BARASA aged 15 years and any other person for the violation of the rights to clean and healthy environment pursuant to Article 70(2) (c) of the Constitution of Kenya 2010 that who had hospitalized at Bungoma Referral Hospital T.B Unit on the 14/6/2019."**

**IV: "This Honourable Court be pleased to grant orders against the 3<sup>rd</sup> Respondent the accounting officer to be removed from office for violating Article 42 (a) (b), 69(1) (d) (f) (g) (h), 2, 70(1) (2) (a) (b) (c), 3 of the Bill of Rights Chapter Four of the Constitution of Kenya 2010."**

**V: "This Honourable Court be pleased to grant orders against the 1<sup>st</sup> – 3<sup>rd</sup> Respondents for violating Article 73(1) (a) (i) (ii) (iii) (iv), (b) (2) (a) (b) (c) (i) (ii) (d) and € of Chapter Six Constitution of Kenya 2010."**

However, the Petitioners have not pleaded how the above Constitutional Provisions were infringed by the Respondents. Counsel for the Respondents is therefore right when he submits that: -

**"Your Lordship, the Petition as drawn falls short of meeting the threshold of a Constitutional Petition, lacks particularity, and does not specify with reasonable precision how the provisions of the Constitution alleged to have been infringed were breached by the Respondent."**

Counsel therefore urged this Court to dismiss with costs the Petition for being broad, unmeritorious, baseless, misplaced and an abuse of the process of the Court.

I have looked at the decision in **ANARITA KARIMI NJERU** (supra). It was decided in January 1979 some thirty years before the promulgation of the 2010 Constitution. The Court, inter alia, said: -

**"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."**

That principle was followed in the **MUMO MATEMU** case (supra). However, I do not see the **ANARITA** and **MUMO MATEMU** cases (supra) as laying down a hard rule that a Petition which does not set out with particularity the Constitutional provisions alleged to have been infringed must suffer the fate of dismissal or striking out. Indeed, the **MUMO MATEMU** case (supra) refers to **"reasonable precision"** while the **ANARITA KARIMI NJERU** case (supra) talked about a **"reasonable degree of precision."** The **ANARITA KARIMI NJERU** case (supra) also emphasizes the need **"to ensure that justice is done."** The view I take of the matter is that whereas it is important to follow the guidelines and draw proper pleadings because they are the background upon which Constitutional Petitions and indeed all other claims are determined, transgressions that do not prejudice the opposing party should not in themselves be employed to defeat a claim because even **Article 159(2) (d) of the Constitution**, while not a panacea, for all ills, recognizes that:-

**"Justice shall be administered without undue regard to procedural technicalities ...."**

It is also provided for in **Article 22(3) (b) of the Constitution** with regard to the enforcement of the Bill of Rights that: -

**"formalities relating to the proceedings including commencement of the proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation."**

That was the route that I took in **GRACE WAMBUI GICHUHI V COUNTY GOVERNMENT OF KIRINYAGA & OTHERS**

**PETITION NO 2 OF 2017 KERUGOYA [2018 eKLR]** when, after citing **ANARITA KARIMI NJERU** and **MUMO MATEMU** cases (supra) I said: -

*“Having said so, however, it is clear that no prejudice has been occasioned to the Respondents in this Petition by the lack of precise pleadings. Indeed, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not raised it in their response which is a clear indication that they knew the nature of the case facing them. Indeed, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have adequately responded to the Petition through the exhaustive replying affidavit of **TIMOTHY W. MWANGI** dated 15<sup>th</sup> August 2017.”*

Unlike in the **GRACE WAMBUI GICHUHI** case (supra), the Respondents herein through paragraph six of the replying affidavit of **MOSES SICHEI SOET** have specifically drawn this Court’s attention to the fact that the threshold set in the **ANARITA KARIMI NJERU** case (supra) has not been met. However, as I shall be demonstrating shortly, that in itself is not fatal to this Petition.

It is also not lost to this Court that long before the promulgation of the 2010 Constitution, the Court of Appeal in the case of **PETER M. KARIUKI V A – G 2014 eKLR** declined to follow the case of **ANARITA KARIMI NJERU** (supra) and stated as follows with respect to **Section 84(1) of the old Constitution**:-

*“Although Section 84(1) was, on the face of it, abundantly clear, it was from the early days of post-Independence Kenya Constitutional litigation, interpreted in a rather pedantic and constructive manner that made nonsense of its clear intent. Thus, in decisions like **ANARITA KARIMI NJERU V REPUBLIC (NO 10) 1979 KLR 154**, the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her rights of appeal ..... The narrow approach in **ANARITA KARIMI NJERU** was ultimately abandoned in Kenya in favour of purposive interpretation of Section 84(1).”*

Similarly, in **TRUSTED SOCIETY OF HUMAN RIGHT ALLIANCE V A – G AND OTHERS 2012 eKLR**, it was held as follows: -

*“We do not purport to overrule **ANARITA KARIMI NJERU** as we think it lays down an important rule of Constitutional adjudication; a person claiming Constitutional infringement must give sufficient notice to the violations to allow her adversary to adequately prepare her case and to save the Court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raised issues which are too insubstantial and so attenuated that a Court of Law 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 require talismanic formalism in identifying the specific Constitutional provisions which are alleged to have been violated. The test is a substantive one and enquires whether the complaint against the Respondent 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.”*

I would also echo the words of **ODUNGA J** in **ANM & ANOTHER (suing in their own behalf and on behalf of AMM (minor) as parents and next friend) .V. FPA & ANOTHER 2019 eKLR** where the Judge held that: -

*“It must therefore be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a Constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its Constitutional duty of granting relief to deserving persons and to sacrifice the Constitutional Principles and dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and Constitutional principles especially with respect to the provision relating to the Bill of Rights, it is my view and I so hold that the latter ought to prevail over the former.”*

Finally, as was held by **OUKO JA** in **NICHOLAS KIPTOO ARAP KORIR SALAT .V. IEBC & OTHERS C.A CIVIL APPEAL NO 228 OF 2013 [2013 eKLR]**: -

*“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provision of procedural law which at times create hardship and unfairness.”*

Guided by the above, and notwithstanding the convoluted manner in which this **“home – made”** Petition was framed, it is clear, reading it in its totality, that the Constitutional right that the Petitioners allege to have been infringed is the right to a clean and healthy environment by the residents of **LUMORO** village which has been breached by the establishment of a dumpsite by the Respondents herein. **Articles 42 and 70 of the Constitution** have been cited and among the annexures filed by the Petitioners are three photographs of the dumpsite. There is no dispute that **Article 42 of the Constitution** protects the right to a clean and healthy environment while **Article 70** provides for the enforcement of such rights. And whereas the Respondents lamented about the failure of the Petitioners to abide by the procedure laid down in the case of **ANARITA KARIMI NJERU** (supra), there is no doubt in my mind that they fully comprehended the nature of the allegations

facing them. Indeed, that is very clear from the thirty paragraphs of the replying affidavit of **MOSES SICHEI SOET** in which he gives a very comprehensive response to the issues raised in the Petition. I do not see in the replying affidavit anything to suggest that the Respondents were prejudiced on account of the not so elegant pleadings. In any event, nothing would have stopped the Respondents from applying to be furnished with further and better particulars if they did not know the precise allegations levelled against them. The main role of pleadings is to inform the other party of the case against them and if that is achieved and the Court itself knows the duty cast on it, no prejudice is caused to either party nor hardship to the Court which should therefore proceed to determine the contest between the parties which is its cardinal objective. Therefore, as far as format is concerned, this Petition is for sustaining and not dismissing.

As regards the merit or otherwise of the prayers sought, I have already found that the jurisdiction to remove the 3<sup>rd</sup> Respondent from office is reposed in the County Governor and not this Court. Prayers **NO IV** and **V** of the Petition are not available.

Prayer **NO III** seeks orders that the Respondents compensate one **CNB** aged 15 years and any other person for the violation of their rights to a clean and healthy environment following her hospitalization at the Bungoma Referral Hospital T.B Unit on 14<sup>th</sup> June 2019. A medical card dated 10<sup>th</sup> July 2019 is part of the Petitioners' annexures and shows that **CNB** was indeed attended to at the Tuberculosis Unit. However, there is no evidence to prove that the said **CNB** contracted Tuberculosis as a result of the pollution caused by the dump site or because of consuming contaminated water from the **CORNEL SPRING**. There is only a bare allegation to that effect which I find to be too remote to attach liability. Prayer **NO III** must also be dismissed.

Prayer **I** and **II** shall be considered together as they seek orders that the dump site at **LUMORO** village be closed for violating the law and that the Respondents by themselves, their agents or servants be restricted from further dumping of waste at the site at **LUMORO** village. **Articles 42, 69 and 70 of the Constitution** have been cited as among those that have been contravened by the Respondents in setting up a dump site at **LUMORO** village and in their submissions, the Petitioners have also stated that the provisions of the **ENVIRONMENT MANAGEMENT AND COORDINATION ACT (EMCA)** specifically **Sections 87 and 88** were not followed.

While not denying that indeed a dump site has been set up at **LUMORO** village, the Respondents claim that they dutifully complied with the relevant provisions of the **ENVIRONMENT MANAGEMENT AND COORDINATION ACT**. They engaged the **NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA)** of the viability of the proposed dump site at **LUMORO** village and **NEMA** found it viable and communicated to the Respondents through the letter dated 27<sup>th</sup> October 2015 (annexture **MSS – 1**). The Respondents went ahead to request for time to finalize on the **ENVIRONMENT IMPACT ASSESSMENT (EIA)** and were granted permission to use the site at **LUMORO** pending full compliance through the letter dated 7<sup>th</sup> December 2016 (annexture **MSS – 2**). The Respondents also aver through the replying affidavit of **MOSES SICHEI SOET** that proper procedures were followed in the acquisition of the land for the proposed dump site being land parcels **NO WEST BUKUSU/NORTH MATEKA/1146 and 1147** which were then registered in the names of **PETER MAKHAYO MAKINA** and **KHAEMBA NULE** respectively and who have been paid for the land. That the Respondents are ensuring compliance with **NEMA's** letter dated 27<sup>th</sup> October 2015 and have in the Financial Year 2019/2020 commenced the process of constructing a perimeter wall around the dump site. That since 2017, there have been no complaints raised and to close the dump site would be against Public Interest.

It is not in dispute that the **Constitution of Kenya 2010** protects the right to a clean and healthy environment. **Article 42** provides that: -

**42 "Every person has the right to a clean and healthy environment which includes the right –**

**(a) to have the environment protected for the benefit of present and future generations through legislative and other measures particularly those contemplated in Article 69; and**

**(b) to have obligations relating to the environment fulfilled under Article 70."**

**Article 70** on the other hand provides as follows: -

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

**(2) "On application under clause (1), the Court may make any order or give directions it considers appropriate –**

**(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;**

**(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or**

**(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.**

**(3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury."**

That a dump site has been established by the 1<sup>st</sup> Respondent at **LUMORO** village is not contested. It is in fact admitted in the replying affidavit of **MOSES SICHEI SOET** who however, states that it has been set up in compliance with the necessary laws. The 1<sup>st</sup> Respondent is the body in charge of, inter alia, refuse removal, dumps and solid waste disposal. That is clear under schedule four of the Constitution.

Sections 87, 88 and 89 of the Environment Management and Coordination Act provide as follows: -

**87(1):** *“No person shall discharge or dispose of any wastes, whether generated within or outside Kenya, in such manner as to cause pollution to the environment or ill health to any person.*

**(2)** *No person shall transport any waste other than –*

*(a) in accordance with a valid licence to transport wastes issued by the Authority; and*

*(b) to a waste disposal site established in accordance with a licence issued by the Authority.*

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

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

**(5)** *Any person who contravenes any provisions of this section shall be guilty of an offence and liable to imprisonment for a term of not more than two years or to a fine of not more than one million shillings or to both such imprisonment and fine.”*

**88(1)** *“Any person intending to transport wasters within Kenya, operate a wastes disposal site or plant or to generate hazardous waste, shall prior to transporting the wastes, commencing with the operation of a wastes disposal site or plant or generating hazardous wastes, as the case may be, apply to the Authority in writing for the grant of an appropriate licence.”*

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

**(3)** *“Where the Authority rejects an application made under this section, it shall within twenty-one days of it’s decision, notify the applicant of the decision specifying the reason therefore.”*

**89:** *“Any person who, at the commencement of this Act, owns or operates a waste disposal site or plant or generated hazardous waste, shall apply to the Authority for a licence under this part, within six months after the commencement of this Act.”*

Among the annexures to this Petition are photographs of the dump site at **LUMORO** village. To refer to the dump site as an eye sore is clearly an understatement and I have not heard the Respondents refer to it in any other flattering terms. It is no doubt a violation of the right to a clean and healthy environment which the residents of **LUMORO** village are entitled to by law. The Respondents cannot really deny that. Their case, however, is that they have duly complied with the relevant laws in establishing the dump site. This is what **MOSES SICHEI SOET** has deponed in paragraph thirteen of his replying affidavit:-

**13** *“That I am aware that in compliance with the provision of EMCA, the Respondents engaged the National Environmental Management Authority (the Authority) on the viability of the then proposed dump site and the Authority in their letter dated 27<sup>th</sup> October 2015 found the proposed site at LUMORO village Muanda sub – location (the subject dump site) viable and communicated this finding to the 2<sup>nd</sup> Respondent (annexed and marked MSS – 1 is a true copy of the letter from NEMA dated 27<sup>th</sup> October 2015).”*

I have perused the letter dated 27<sup>th</sup> October 2015 from **NEMA**. It approves the site at **LUMORO** village as suitable for a dump site and recommends its purchase but subject to the following conditions which are relevant for purposes of this Judgment: -

**2:** *“The proposed site must be subjected to full Environmental Impact Assessment Study as per the Environmental Management Coordination Act of 1999 together with amendments of 2015 before any disposal of waste.”*

**3:** *“The waste disposal site must be licensed under the waste management regulations 2006.”*

It is clear from the replying affidavit of **MOSES SICHEI SOET** that the Respondents started using the dump site at **LUMORO** village in October 2015 after it had been found viable. **EMCA** came into force in January 2000 and it is clear therefore that the Respondents were required to apply for a licence before proceeding to use the site at **LUMORO** village as a dump site. This is clear from **Section 87(3)** of **EMCA**. No such licence has been displayed by the Respondents and the dump site at **LUMORO** village is an unlicensed disposal site and the activities thereon constitute a criminal offence as provided by the provisions of **Section 87(5)** of **EMCA**.

Not being able to comply with the requirements stipulated in **NEMA**’s letter dated 27<sup>th</sup> October 2015, the Respondents sought additional time to do so. By it’s letter dated 7<sup>th</sup> December 2016, **NEMA** wrote to the Respondents in the following terms: -

*“Reference is made to your letter dated 5<sup>th</sup> December Ref CG/BGM/TE/NEMA/ WLI/14) requesting for more time to conduct environment impact assessment and temporal use as you do not have an alternative dump site.*

*The office takes cognizance the effort you have made in ensuring the County has a designated dump site. In the meantime, the office grants you more time to undertake environmental impact assessment and permission to use the site as you seek compliance. The office however requests proper waste management at the site and speeding up of the licensing process.”*

That was three (3) years ago last week. To – date, the Respondents have neither secured the licence nor had an Environmental Impact Assessment Report prepared. The dump site at **LUMORO** village is not only a health hazard as is clearly depicted in the photographs annexed to this Petition and therefore a threat to the rights of the residents of **LUMORO** village to a clean and healthy environment but also, and very sadly, the Respondents do not appear to be in a hurry to comply with the law and arrest the situation. The site is not even fenced and it can be no consolation when **MOSES SICHEI SOET** avers in paragraph twenty of his replying affidavit that the process of constructing a perimeter wall around the dump site has been factored in the 2019/2020 Financial year. There may have been no concerns raised by any person since 2017 when, according to **MOSES SICHEI SOET**, the dump site was established (evidence before me suggests it was earlier than that), but it must be appreciated that it takes time for the waste disposal to build up and become a hazard to a clean and healthy environment. The time for the impact of the activities at the **LUMORO** dump site to be realized has now come hence this Petition. I am satisfied from the evidence before me that the Petitioners have proved that the Respondents act of establishing a dump site at **LUMORO** village constitutes an infringement to the constitutional rights of the residents to a clean and healthy environment.

What remedies shall I grant? The Petitioners seek the orders that this Court compels the Respondents to close the dump site at **LUMORO** and stop further dumping of waste thereon. Counsel for the Respondents has submitted that there is no alternative dump site should the current one be closed. I take cognizant of the fact that waste disposal is a daily occurrence and if the **LUMORO** dump site is the only one available as stated, the Respondents would have no other site to dispose the waste that is generated in the County. Such action would be drastic and simply create another problem in another village. This Court would not want to precipitate such a scenario. On the other hand, this Court would not wish to see the Constitutional rights of the residents of **LUMORO** village to a clean and healthy environment continue being infringed with impunity. I must also express my displeasure about the conduct of **NEMA** in abating this infringement by abdicating its responsibilities under **Section 9** of **EMCA**. There was absolutely no justification in allowing the Respondents to use the dump site of **LUMORO** ad infinitum without complying with the law.

Ultimately therefore, I make the following orders: -

- 1. The prayer to remove the 3<sup>rd</sup> Respondent from office is declined.**
- 2. A finding is made that the establishment of a dump site at the LUMORO village by the Respondents constitutes an infringement of the right to a clean and healthy environment to the residents under Article 42 of the Constitution.**
- 3. The 1<sup>st</sup> Respondent shall within thirty (30) days of this Judgment apply for the relevant licence under Sections 87, 88 and 89 of the EMCA.**
- 4. The 1<sup>st</sup> Respondent shall also within thirty (30) days of this Judgment undertake an Environmental Impact Assessment (EIA) study and prepare a report to be submitted to EMCA for its consideration as per Section 58 of the EMCA.**
- 5. In default of (3) and (4) above, the 1<sup>st</sup> Respondent shall stop utilizing the dump site at LUMORO village and restore it to its original state withing sixty (60) days of this Judgment.**
- 6. The 1<sup>st</sup> Respondent shall meet the Petitioners' costs.**

**It is so ordered.**

**Boaz N. Olao.**

**J U D G E**

**11<sup>th</sup> December 2019.**

**Judgment dated, delivered and signed in Open Court this 11<sup>th</sup> day of December 2019 at Bungoma.**

Petitioners both present

Ms Khadambi for the Respondents present

Joy/Okwaro – Court Assistants

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

11<sup>th</sup> December 2019.