



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 53 OF 2012

MARTIN OSANO RABERA.....1ST PETITIONER

JOHN NDUNGU KINYANJUI.....2ND PETITIONER

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

COUNTY GOVERNMENT OF NAKURU.....3RD RESPONDENT

JUDGMENT

(Petitioners being residents of Nakuru living near Gioto waste disposal site sought a declaration that their right to a clean and healthy environment under Article 42 of the Constitution of Kenya 2010 was violated; petitioners also sought compensation, relocation and restoration of the waste disposal site and an order stopping the 3rd respondent from depositing or permitting the depositing of waste at the site; the court found that the petitioners' right to a clean and healthy environment had been violated as regards the manner in which the 1st and 3rd respondents operated the Gioto waste disposal site; compensation not awarded since no quantum had been sought; the 3rd respondent ordered to apply for a waste disposal site licence)

Parties

1. Proceedings herein commenced through petition dated 21st November 2012 and filed in court on the same date. Subsequently, an amended petition was filed on 17th February 2017.
2. The petitioners are residents of Kiamunyi area in Nakuru and they live within the vicinity of parcel of land known as **Nakuru Municipality Block 21/236** where the 3rd respondent operates a dump site known as **Gioto**. The 1st petitioner is an advocate while the 2nd petitioner is a member of the public.
3. The 1st respondent was a local government under **Local Government Act (Cap 265)** (repealed) prior to the promulgation of the Constitution of Kenya, 2010. It is the predecessor of the 3rd respondent, a county government established pursuant to Article 176 of the Constitution of Kenya, 2010 and the **County Governments Act, 2012**.
4. The 2nd respondent is a body corporate established under the **Environmental Management and Coordination Act (EMCA)** with the objective of exercising general supervising and co-ordination over all matters relating to the environment and to be the principal instrument of the government of Kenya in implementation of all policies relating to the environment.

The Petition

5. It is averred in the amended petition that the 3rd respondent has the responsibility of establishing and maintaining disposal of settlement and refuse for purposes of ensuring a clean and healthy environment for the residents of Nakuru. The petitioners accused the 1st and 3rd respondents of allowing the dumping of refuse at **Gioto** and failing to find an alternative or proper place for dumping waste.
6. The petitioners further aver that **Gioto** emits offensive gas thus contaminating the air; that it harbours stray dogs which threaten people, flies and other disease causing agent, street boys and criminals who cause insecurity; that the dumpsite spreads to the road whenever it rains thus causing damage to motor vehicles and that dirt from the site is spread by wind or scavenging birds to homes thus contaminating drinking water and human food.

7. The petitioners thus seek judgment for:

- a) A declaration that the 2nd and 3rd 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 the residents of Nakuru Municipality.*
- 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, 2010, as read with section 13(7) of the Environment Management and Coordination Act of 1999.*
- d) A mandatory injunction compelled [sic] the 3rd respondent to identify and relocate the afore stated dumpsite to a different and suitable site other than Nakuru Municipality Block 21/236 for disposal of waste in accordance to the Environmental Management and Coordination Act.*
- e) A mandatory injunction to compel the 2nd and 3rd respondents to restore the degraded dumpsite.*
- f) A prohibitory injunction to the 3rd respondent that it be permanently restrained them from dumping and/or permitting the dumping of refuse at the NAKURU MUNICIPALITY BLOCK 21/236.*
- g) An environmental restoration order to be issued against the respondent.*
- h) An order of 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 order or relief his honourable court may deem fit and just grant.*

Evidence in Support of the Petition

8. The petition is supported by an affidavit sworn on 21st November 2012 by the 1st petitioner and another affidavit sworn on 22nd November 2012 by the said 1st petitioner. He deposed that he is an advocate and a resident of the area neighbouring **Gioto**. As at the time of swearing the affidavit, he had lived in the area for 8 years. He annexed a registry index map showing the plot where the dump is located as well as neighbouring plots. He also annexed photographs depicting various aspects of the dump site.

9. He deposed that the dumpsite is a dangerous place to reside nearby for the reasons that street boys, idlers and criminals lazy around and pose threat to unsuspecting members of public; that stray dogs that feed on the refuse pose threat to passers-by and when they bite their victims face risk of dangerous diseases like rabies; that **Gioto** is an ugly place that is a 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 spreads to the nearby road thus causing tire bursts and punctures which in turn expose motorists to risk of being attacked by marauding street boys and other criminals especially if this occurs at night; that since the refuse normally consists of uncompact materials, it rolls over to the lowlands as it; that the dumpsite is a breeding ground for mosquitoes which cause malaria; and that sometimes the refuse is burnt thus releasing hazardous smoke.

10. He added that he is aware that there have been public concerns over the site and that many people have even written to the national daily newspapers calling for the respondents to fence it off but all that has been in vain. He concluded by stating that he believes that the respondents have abdicated their responsibility under the law.

11. The petition is also supported by an affidavit sworn by the second petitioner. He deposed that he is a resident of the area neighbouring **Gioto** and can therefore attest to the fact the dumpsite is an embarrassment to the residents.

12. According to the second petitioner, the dumpsite is a dangerous place to reside nearby because it attracts chickens, cows, goats and sheep that are left unattended and when they consume the refuse they get infected. The same animals are later slaughtered and consumed by unsuspecting public; that little children who are oblivious of the risk get sick when they pick up or play with objects from the dump; that the dumpsite emits offensive gas yet the respondents have not made attempts to plant trees to freshen up the air in the surrounding area; that flies that get attracted to decomposing refuse fly to homesteads thus spreading diseases like dysentery; that the dumpsite harbours rodents like rats and reptiles like snakes which find their way homes.

Response by 1st and 3rd Respondents

13. The 1st and 3rd respondents responded to the petition through a replying affidavit sworn by Mr. Wilson M. Maroa on 23rd January 2013. He was the first respondent's clerk, appointed as such pursuant to **section 109** of the **Local Government Act**.

14. He deposed that the 1st respondent was aware of the problem complained of by the petitioners and that it considers the issue as one of great priority.

15. He stated that the dump site has been in existence for a long time and was initially designed to be in a place that was not near residential

homes or learning institutions. He blamed population pressure for the present situation where the site is now surrounded by residential homes.

16. He added that the 1st respondent received a letter from the 2nd respondent on the 3rd of October 2011 requiring it to meet certain directives regarding the dumpsite. As a result, the 1st respondent started on a plan to address the immediate issues surrounding the dumpsite. He annexed a copy of the letter dated 3rd of October 2011 as well as copies of various communication with the 2nd respondent.

17. According to him, some of the actions taken by the 1st respondent were that it applied for a licence from the 2nd respondent; it required waste transporters contracted by it to comply with EMCA; it contracted a plan to scoop out waste from the road and work started on the same on 6th October 2011; it awarded tender for construction of a perimeter wall to contractors and work started on 6th of October 2011; that the site office and gate are under construction; it had engaged watchmen and gate keepers to control movement of people and traffic into and out of the dumpsite; that its lorries and tractors which transport garbage have been covered as required; it was referring traders who cart way garbage for recycling to the 2nd respondent for licensing.

18. He stated that the 1st respondent is in the process of seeking alternative sites to set up sanitary landfills. In that regard, he annexed copies of an invitation for expression of interest issued on the 21st April 2011, a copy of letter to the Vice President and Minister of Home Affairs and minutes of the tender award committee held on 27th July 2011.

19. He added that the dump site has been receiving garbage from Nakuru town for many decades now and that to correct it requires a lot of planning and financial commitment which is beyond the capability of the 1st respondent. That the 1st respondent had an environmental impact assessment done which estimated the cost of rehabilitating the dumpsite at over KShs. 32,000,000/=. Consequently, the 1st respondent sought financial assistance from the Ministry of Local Government and the Ministry of Home Affairs to enable it to implement part of its environmental management plan in respect of Gioto waste management site which were partly successful as the government allocated funds for the constructing a new site but the land has yet to be acquired. That the 1st respondent lacks the technical and financial support to deal with the Gioto garbage site problem.

20. He stated that the 2nd respondent is well aware of the magnitude of the waste management problem that the 1st respondent faces but instead of helping the 2nd respondent instituted criminal proceedings against him in Nakuru CM Criminal Case No. 2888 of 2012.

21. He further deposed that the constitutional obligation with regard to the environment has been placed on the state and also everybody else and that the right to a clean and healthy environment is a right that is to be achieved through a unified and cooperative approach towards the rehabilitation of the destroyed parts of the environment, such as Gioto garbage site.

22. He acknowledged that the 1st respondent recognizes Gioto garbage site as presenting a real environmental hazard to motorists and residents of the areas and added that the 1st respondent has taken decisive steps to alleviating the problem. Consequently, the 1st respondent has neither abdicated its responsibility nor violated the provisions of article 42 of the constitution and is willing to apply every effort, in consultation and cooperation of every relevant government organ to relocate the landfill to a site that is environmentally sound and thereafter implement a waste disposal plan that is environmentally viable. In the meantime, the 1st respondent has and continues to take measures to deal with the problem as best as it can within its authority and its financial capability.

23. It is important to note that Mr. Wilson M. Maroa's affidavit was sworn on 23rd January 2013, before the first general elections which were held on 4th March 2013. In terms of the provisions of **Section 2(2)** of the **Sixth Schedule** of the **Constitution of Kenya 2010**, the county governments did not come into being until after the aforesaid elections. It is for that reason that the affidavit generally refers only to the 1st respondent and not the 3rd respondent.

Response by the 2nd Respondent

24. The second respondent answered the petition through a replying affidavit sworn by Mr. Wilfred Osumo, the County Director of Environment, Nakuru County. He deposed that the 2nd respondent undertook several environment inspections on Gioto dumpsite and made recommendations to the 1st respondent on the management of Gioto dumpsite as required by law but when the 1st respondent failed to comply, the 2nd respondent issued an improvement order to the 1st respondent requiring it to comply with environmental regulations. He annexed various inspection reports and correspondence related to the issue. He added that when the 1st respondent failed to comply with the improvement order and the 2nd respondent commenced criminal proceedings against the then Town Clerk of the 1st respondent for failure to comply with Waste Management regulations in regard to the dumpsite and that the case is still pending in court. He annexed a copy of the charge sheet.

25. He stated that the 2nd respondent later issued an Environmental Restoration Order to the 1st respondent vide a letter dated 30th September 2011 and that by a letter dated 5th October 2011, the 1st respondent agreed among others to notify waste transporters to comply with EMCA, to remove or scoop the waste from the road commencing 6th October 2011 to do the service feeder roads within 30 days after waste is cleared and continue with routine maintenance, and to construct the perimeter wall and gate. The 1st respondent requested also for 45 days to comply with the Environmental Restoration Order issued by the 2nd respondent.

26. He added that the 1st respondent did not comply with the environmental restoration order within 45 days as promised and instead filed judicial review proceedings seeking prohibitory orders. He concluded by stating that the 2nd respondent has not abdicated its responsibility of protecting the environment and therefore the suit against the 2nd respondent is frivolous and vexatious and should be dismissed with costs.

Submissions

27. The petition was argued by written submissions. The petitioners filed their initial submissions on 10th May 2016 and supplementary submissions on 18th September 2017. The 1st and 3rd respondents filed their submissions on 12th May 2017 while the 2nd respondent filed submissions on 14th June 2016.

Petitioners' Submissions

28. According to the petitioners, there are two issues which arise for determination. These are:

- i. Whether the respondents' actions violate or threaten to violate the petitioners' right to a clean and health environment.
- ii. Whether the petitioners are deserving of the reliefs sought in the petition.

29. On issue (a) above, the petitioners referred the court to the provisions of Article 42 of the Constitution of Kenya, 2010 which provides that every person has the right to a clean and healthy environment. Citing the central place that the environment and its sustainability play in the Constitution, the petitioners quoted pages 196 to 197 of the book **The Constitution of Kenya, 2010: An Introductory Commentary** (Strathmore University Press, 2014) by P.L.O Lumumba and Luis Franceschi where the authors quote J. B Ojwang SCJ as stating as follows:

“The environment is accorded an eminent place in the governance agenda of the Constitution. Governance, which is required to be performed as a service to the people, must comply with ‘national values and principles’ one of which is sustainable development. It is common knowledge that the first principles of sustainable development relate to the basic elements that sustain life; and the conservation of the environment is invariably the first component of this principle. The complexities of the environment, and its vulnerability to inappropriate human activity, render it a sensitive sphere of disputes in respect of which the judicial role is mandatory. A constitution so pre-occupied with safeguards for social welfare has necessarily to accord primacy to the environment and to the judicial role therein.

...

(i) Prudence in the use of environment resources – to the intent that they may, as the capital base for the economy, not be exhausted; (ii) Effective control and management of social and economic activities – so that they may not generate harmful levels of pollution and waste; and (iii) Ecological planning and management – so as to achieve and maintain an aesthetic and healthful arrangement of the structures, features, assets and resources surrounding us to such extent as we achieve those goals, so much is the quality of life for humanity enhanced; and so the constant concern for the sustenance of the integrity of the environment, is a fundamental dimension in the quest for greater civilization in the human environment, is a fundamental dimension in the quest for greater civilization in the human world; it bears on the very principle of governance in quest of the welfare of the people.”

30. The petitioners also submitted that under Article 2(5) and (6) of the Constitution, the general rules of international law as well as treaties or conventions ratified by Kenya form part of the law of Kenya. In that regard, the petitioners referred the court to **Communication No. 155/96: The Social and Economic Rights Action Center and the Center for Economic and Social Rights –vs- Nigeria** where the African Commission on Human and People's Rights stated as follows:

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

The right to a general satisfactory environment, as guaranteed under Article 24 of the Africa Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources....

31. The petitioners further referred the court to various sections of the **EMCA** such as **Section 2** which defines the term “waste”, **Section 3** which provides for entitlement to a clean and healthy environment, **Section 87** which prohibits dangerous handling and disposal of wastes and **Section 88** which provides for application for waste licence so as to operate a waste disposal site.

32. The petitioners submitted that rendering of sanitary services was one of the 1st respondent's mandatory duties under Section 160(a) of the Local Governments Act Cap 265 (repealed). That under **paragraph 3 (g) of part 2 of the Fourth Schedule** of the Constitution, refuse removal and solid waste disposal are devolved functions reserved for the respondents. Further, the petitioners submitted that the adverse effected of the dumpsite and the dangers posed by it have been acknowledged by the 1st respondent through its affidavit at paragraphs 3 and 16. Despite this, the respondents have done nothing to alleviate the situation.

33. The petitioners added that **rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** envisages that a respondent will traverse each and every allegation made on oath by petitioners. They pointed out that in their replying affidavit the 1st and 3rd respondents have not discounted the petitioners' averments as regards the effects of the dump site and the manner in which it is being operated. Indeed, the respondents have admitted the existence of the adverse effects. The respondents

have not produced any evidence to show that the impugned dumpsite was established and is being operated in accordance with the provisions of the **EMCA**. Accordingly, the petitioners submitted that the impugned dumpsite is being operated illegally and urged the court to answer issue (a) by finding that the respondents had violated and continue to violate the petitioners' right to a clean and healthy environment.

34. Regarding issue (b) on whether they deserve the reliefs sought, the petitioners submitted that they had ably demonstrated that the respondents had violated the petitioners' right to a clean and healthy environment and are thus in violation of the law. They further submitted that what the respondents were doing not only constituted a tort but was also criminal since **section 192** of the **Penal Code Act Cap 63** makes it an offence for any person voluntary to vitiate the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way. They also cited the offence of common nuisance created under **Section 175**, that of fouling water created under **Section 191** and the duty of persons in charge of dangerous things imposed by **Section 219** of the **Penal Code**.

35. The petitioners further submitted that they are entitled to the remedies owing to the aforementioned violation of right to clean and healthy environment by the respondents and that the court is vested with jurisdiction under **Article 23 (3)** to hear and determine applications for redress of a denial, violation, or infringement of threat to a right or fundamental freedom in the Bill of Rights.

36. In their supplementary submissions the petitioners, submitted that it was necessary to join the 2nd respondent in the petition in view of its legal mandate. The petitioners also submitted that they are entitled to general damages and costs of the petition.

1st and 3rd Respondents' Submissions

37. The 1st and 3rd respondents submitted that although **Article 70** of the Constitution provides for enforcement of environment rights through the court, the petitioners have to clearly show how the respondent has violated the particular right and to what extent. The cases of **Anarita Karimi Njeru –vs- Republic (No.1) [1979] 1KLR154** and **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** were cited. The 1st and 3rd respondents submitted that the petitioners had not specifically shown how the Gioto dumpsite is causing pollution.

38. Regarding the question of whether or not the 1st and 3rd respondents had abdicated their responsibility in contravention of **Article 42** of the Constitution, the 1st and 3rd respondents submitted that they complied with conditions stated in an environmental restoration order issued by the 2nd respondent. Regarding the issue of relocating the dumpsite, they submitted that it is very expensive and that they have not obtained financial support from the national government towards that end. Nevertheless, they pointed out that under **Section 12** of the **EMCA**, the 2nd respondent ought to have supported them to relocate the dumpsite to a more suitable location. In that regard, they cited the case of **Republic –vs- National Environment Management Authority & another Ex parte Philip Kisia & City Council of Nairobi [2003] eKLR** where Korir J. stated:

“NEMA assists and guides lead agencies in the preservation and protection the environment but when a lead agency fails to comply with the directives given by NEMA then NEMA has no option but to engage the powers granted to it by EMCA.”

39. Additionally, the 1st and 3rd respondents submitted that they do not have adequate resources such as land and funds to relocate the dumpsite. They cited **Section 22 of Part 1** of the **Fourth Schedule** of the Constitution and submitted that the national government has a role to play in protection of the environment and natural resources with a view to establishing a durable and sustainable system of development.

40. On the question of whether or not they can be compelled to relocate the dumpsite, the 1st and 3rd respondents argued that the petitioners have not presented an exceptionally special and clear case to warrant granting a mandatory injunction. They submitted that they had made great efforts to acquire alternative land and that these efforts include writing letters to the Ministry of Home Affairs seeking allocation of suitable land, holding meetings in relation to proposals to fence the dumpsite and even publishing a notice in the press seeking suitable land from the public. In the circumstances, the 1st and 3rd respondents argued that granting an order compelling relocation when there is no suitable land would be futile. They also argued that the petition is pre-mature since the petitioners did not show any evidence of having raised their complaints with the 2nd respondent.

41. On the issue of whether or not an environmental restoration order should be issued, the 1st and 3rd respondents argued that in view of the efforts that they had made and the difficulties encountered, a restoration order should not be issued. They further pointed out that such an order including an order for relocation would greatly affect other residents of Nakuru town. In conclusion, the 1st and 3rd respondents urged the court to dismiss the petition.

2nd Respondent's Submissions

42. The 2nd respondent (**NEMA**) lauded the petitioners' action of bringing the petition and noted that judgment in the matter is way overdue. It pointed out that disposal of waste is a great menace not only in the County of Nakuru but nationally. NEMA posed the following questions for determination: whether the 2nd respondent abdicated its responsibility as alleged? If yes, which responsibility? Whether the 2nd respondent violated Article 42 of the Constitution? Whether NEMA dumps waste/refuse at the subject dumpsite or even permits others to do so? Whether an environmental restoration order be issued against NEMA?

43. NEMA submitted that looking at the different statutory mandates of the 2 respondents, the answers to the above questions can only be in the negative.

44. As regards the written submissions of the petitioners, NEMA argued that no responsibility had been apportioned to NEMA and that it

would have been better for NEMA to be enjoined as an interested party. NEMA submitted that the replying affidavit of Wilfred Osumo (for NEMA) stated the steps that NEMA took in alleviating the Gioto dumpsite problem. Inspections were conducted, discussions and deliberations entered into, statutory orders were issued to the 1st respondent and even charges preferred against the Town Clerk of the 1st respondent. NEMA cannot therefore be said to have been indolent. NEMA did all that was possible within its powers.

45. It was further argued for NEMA that the Constitution of Kenya at **Schedule 4, part 2** is categorical that the function of refuse removal belongs to the county government. This is not a national government function. That the Gioto dumpsite has not even met the conditions for a proper dumpsite and operates without an Environmental Impact Assessment Licence. It is a dumpsite of necessity and not out of compliance and this problem replicates itself in all the counties.

46. Nevertheless, NEMA submitted that even though the petitioners seem to lay a lot of expectation on the 1st respondent and as much as such expectation has merit or legal backing, this court must be alive to the fact that the 1st and 3rd respondents have not been financially capable to meet the demands of the petitioners and only rely on willing partners such as international organizations.

47. In conclusion, NEMA argued that the petitioners had made a very arguable case and probably would satisfy this court that there is a violation of the right to a clean and healthy environment. NEMA reiterated that the mandate of refuse removal rests with the 1st and 3rd respondents. However, NEMA urged that in setting precedent the court must ensure not to make orders that may be in vain by reason that the respondents may not have the budget necessary to implement for example an order of total closure and commissioning of an alternate site. Such Orders may be pleasing to the petitioners and public at large but would be best if tampered with gradual steps. NEMA urged that reliefs to be issued must be 'appropriate'.

Analysis and Determination

48. I have considered the petition, the evidence both in support and opposition to it and the submissions. That a clean and healthy environment is a fundamental prerequisite for life is not a matter that needs belabouring. It is for this reason that the drafters of the Constitution of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at **Article 42** within the Bill of Rights. Needless to state, Kenyans voted overwhelmingly in favour of the draft, thus giving their seal of approval to its provisions. **Article 42** states as follows:

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.

49. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under **Article 69** which among others requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. In short, the obligation to ensure a clean and healthy environment imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.

50. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by Article 42, **Article 70** of the constitution provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.

51. Provisions similar to those at **Article 42** are found at **Section 3** of the **Environmental Management and Co-ordination Act, 1999** (EMCA). Under **Section 3 (3)** of EMCA, if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.

52. I have outlined all these provisions to underscore the importance placed by the constitution and statute law on protection of the right to a clean and healthy environment and conservation of the environment generally.

53. Three issues arise for determination in the petition:

- i. Whether the 1st and 3rd respondents' actions violate or threaten to violate the petitioners' right to a clean and healthy environment.
- ii. Whether the 2nd respondent's actions violate or threaten to violate the petitioners' right to a clean and healthy environment.

iii. Whether the petitioners are entitled to the reliefs sought in the petition.

Whether 1st and 3rd respondents' actions violate or threaten to violate the petitioners' right to a clean and healthy environment

54. I have outlined above the provisions of **Articles 42, 69 and 70** of the constitution and **Section 3** of EMCA on the right to a clean and healthy environment. The petitioners are residents of Kiamunyi area in Nakuru. They live near the parcel of land known as **Nakuru Municipality Block 21/236** where the 1st and 3rd respondents operate a dump site or waste disposal site known as **Gioto**. In the replying affidavit that was filed by the 1st respondent, the dump site is described as having been in existence for a long time and having been in use for several decades.

55. There is no dispute that Gioto was originally established and operated by the 1st respondent which was a local government established under **section 12** of the **Local Government Act (Cap 265)** (repealed) prior to the promulgation of the Constitution of Kenya, 2010. It was the predecessor of the 3rd respondent, a county government established pursuant to Article 176 of the Constitution of Kenya, 2010 and the **County Governments Act, 2012**.

56. Under **section 160(a)** of the **Local Government Act (Cap 265)** (repealed), the 1st respondent had the mandate:

to establish and maintain sanitary services for the removal and destruction of, or otherwise dealing with, all kinds of refuse and effluent and, where any such service is established, to compel the use of such service by persons to whom the service is available.

57. 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 1st respondent and continues to do so up to now. Gioto mainly receives waste from Nakuru Town.

58. The petitioners' case and evidence is that Gioto is a dangerous place to reside nearby since it has become a haven for street boys and criminals who pose threat to unsuspecting members of public; that it harbours stray dogs that feed on the refuse and may bite passers-by and infect them with dangerous diseases like rabies; that the place is ugly and a 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 bursts 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 sometimes the refuse is burnt thus releasing hazardous smoke.

59. Further, the petitioners gave evidence that Gioto attracts chickens, cows, goats and sheep that are left unattended and when they consume the refuse they get infected only to be later slaughtered and consumed by unsuspecting public; that the dump is not fenced thus little children who are oblivious of the risks involved get sick when they pick up or play with objects from the dump; that the dumpsite emits offensive gas yet the respondents have not made attempts to plant trees to freshen up the air in the surrounding area; that flies that get attracted to decomposing refuse fly to homesteads thus spreading diseases like dysentery; that the dumpsite harbours rodents like rats and reptiles like snakes which find their way homes.

60. In support of these contentions the petitioners annexed several photographs which depict aspects of Gioto. The 1st and 3rd respondents have not contested these allegations by the petitioners. If anything, the 1st and 3rd respondents have acknowledged at paragraph 16 of Mr. Wilson M. Maroa's replying affidavit that Gioto garbage site presents a real environmental hazard to motorists and residents of the area. He further concedes that the 1st respondent has faced sanctions from the 2nd respondent as regards the manner in which they have operated Gioto.

61. EMCA has adequate provisions on how to handle waste. For starters, **"waste"** is defined at **section 2** thereof as including:

any matter prescribed to be waste and any matter whether liquid, solid, gaseous or radioactive, which is discharged, emitted or deposited in the environment in such volume, composition or manner likely to cause an alteration of the environment.

62. Under **Section 87**, dangerous handling and disposal of waste is prohibited. The section provides as follows:

87. Prohibition against dangerous handling and disposal of wastes

(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.

.....

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

.....

(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.

63. EMCA came into operation on 6th January, 2000. Though no evidence was offered as to when Gioto waste disposal site was started, the 1st respondent's clerk deposed on 23rd January 2013 that it has been in operation for a several decades. It is therefore safe to assume, as I do, that it pre-dated EMCA. The 1st respondent was therefore required to apply for a waste disposal site licence from NEMA by 6th July 2000 in terms of **section 89** of EMCA. It seems that the 1st respondent did not obtain such a licence and as a result, the 2nd respondent issued to the 1st respondent an environmental restoration order dated 30th September 2011. The said order states categorically that no licence had been applied for or issued. Further, it states that the site had not been fenced, it extended to the road reserve and waste was overflowing to the road, the site was unmanned thus leaving it to cartels who harass waste transporters thus leading to dumping at the entrance, and that the 1st respondent had allowed youths to scavenge at the site thus posing a health risk. The order required the 1st respondent to take several corrective measures including applying for a licence within three days.

64. Though the 1st respondent contends that it applied for a waste disposal site licence under **section 89** of EMCA, no copy of such an application was exhibited. The 1st respondent did not either offer any evidence on the fate of the application. One is therefore left to draw the irresistible inference that no application was made or that if it was made, a licence was not granted. The 1st respondent in deed admits that its clerk was charged on 22nd August 2012 in Nakuru CM Criminal Case No. 2888 of 2012 with the offence of failing to carry out an improvement as ordered on 30th September 2011, among other counts. The 1st respondent reacted to the criminal case by seeking prohibition in a judicial review filed as Nakuru High Court Misc. Civil Application No. 67 of 2012. It is not clear what became of both the judicial review application and the criminal case.

65. The 1st and 3rd respondents have not offered any evidence to show specific steps taken to address the issues that were raised by the petitioners and the 2nd respondent in its restoration order dated 30th September 2011. The matters complained of affect not only the petitioners but the residents of Nakuru at large. Though the 1st and 3rd respondents have argued that they have faced financial difficulties, that alone cannot be an excuse. Clearly, the 1st and 3rd respondents have operated and continue to operate the Gioto dump site in a manner that violates Article 42 of the constitution.

66. The 1st and 3rd respondents dwelt at length on explaining that they had faced financial and other challenges while trying to address the challenges posed by Gioto. Whereas the 1st respondent estimated the cost of rehabilitating the site at KShs. 32,000,000, a sum that I do not consider to be so huge as to be beyond the 3rd respondent, no specifics were offered as to how much of this amount had been raised and what specific strategies have been put in place to raise the funds which are needed. Though I acknowledge that resources, both financial and material are much needed, the 1st and 3rd respondents cannot be excused from performing their obligations under Article 42 of the constitution on this score alone. They needed to show clear efforts to raise the funds from their own sources as well as external sources. Instead, the 1st and 3rd respondents resorted to a general defence of lack of funds and lack of land. It cannot be that the 1st and 3rd respondents can do nothing about the situation yet they have both the constitutional and statutory mandate as far as waste disposal is concerned.

67. In view of the foregoing, I have no hesitation in finding, as I hereby do, that the 1st and 3rd respondents' actions violated and threaten to violate the petitioners' right to a clean and healthy environment.

Whether the 2nd respondent's actions violate or threaten to violate the petitioners' right to a clean and healthy environment

68. The 2nd respondent (NEMA) is a body corporate established under **section 7** of EMCA. Its objects and functions are specified under **section 9 (1)** of EMCA as follows:

The object and purpose for which the Authority is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

69. Further, under **section 9 (2)** NEMA shall:

a) *co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya;*

.....

n) *develop, publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environmental degradation;*

o) *render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection;*

70. The petitioners have argued that NEMA is properly joined to this case as a respondent and that it abdicated its responsibility. The 1st and 3rd respondents on the other hand argue that NEMA ought to have invoked its powers under **section 12** of EMCA to carry out the restoration measures itself. Whereas NEMA has specific functions some of which I have outlined above and whereas the functions under **section 9 (2)** are couched in mandatory terms, NEMA's powers to perform restorative measures or cause restorative measures to be performed under **section 12** of EMCA are not mandatory. NEMA cannot therefore be faulted for not taking it upon itself to carry out the restorative measures

that are necessary at Gioto dump site.

71. NEMA has also given a detailed account of the steps that it took with a view to enforce the restoration order. Such steps included charging the 1st respondent's clerk in court with offences under EMCA and regulations made thereunder. In this regard, NEMA discharged its mandate well.

72. Nevertheless, NEMA is not just an investigator and a prosecutor. Its success cannot be measured in terms of successful investigations and prosecutions. It has a bigger mandate: to be the principal instrument of government and the people of Kenya in the implementation of all policies relating to the environment. In deed under **section 9 (2)**, NEMA has mandatory obligations to among others co-ordinate with lead agencies to ensure the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya and to render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection.

73. NEMA acknowledges that management of urban waste and waste disposal site is a challenge across the country, not just in Nakuru County. Though NEMA must be commended for discharging its investigative and prosecutorial powers in this case, it needed to do much more pursuant to its functions under **section 9** of EMCA. It ought to have exercised its co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment is safeguarded. Success of NEMA will ultimately be seen more in a clean and healthy environment for Kenyans than in anything else. In view of the nationwide challenge posed by urban waste, I urge NEMA to actively get involved in looking for solutions and enforcing the law. NEMA is well placed and has a legal duty to assist the county governments to come up with policies and strategies for dealing with the constant problem of urban waste disposal and management. For example, can incinerators be used for particular types of urban waste? If so, what type of incinerators? What about recycling? I mention just a few. NEMA needs to show that it has taken practical steps in these matters pursuant to its functions under **section 9** of EMCA. This however does not mean that county governments should blame NEMA. The primary obligation in waste disposal and management rests with the county governments.

74. The foregoing discourse notwithstanding, I find and hold that though NEMA was properly joined to this case as a respondent, it did not violate the petitioners' right to a clean and healthy environment.

Whether the petitioners are entitled to the reliefs sought in the petition

75. The petitioners have sought judgment for a declaration that the 2nd and 3rd 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 the residents of Nakuru Municipality; a mandatory injunction compelling the 3rd respondent to identify and relocate the dumpsite to a different and suitable site other than Nakuru Municipality Block 21/236 for disposal of waste in accordance to the Environmental Management and Coordination Act; a mandatory injunction to compel the 2nd and 3rd respondents to restore the degraded dumpsite; a prohibitory injunction to the 3rd respondent that it be permanently restrained them from dumping and/or permitting the dumping of refuse at the NAKURU MUNICIPALITY BLOCK 21/236; an environmental restoration order to be issued against the respondent and; an order of 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.

76. Though I have found that the petitioners' right to a clean and healthy environment under Article 42 has been breached and though the petitioners have sought a mandatory injunction compelling relocation of Gioto dump site as well as an order restraining further dumping of waste at the site, the solution to the problem at hand requires a delicate balancing act. The site currently receives waste from the whole of Nakuru Town. This waste is being generated daily and it has to be deposited somewhere. I am not aware of any alternative waste disposal site for Nakuru Town. An immediate relocation order or an order stopping delivery of waste at the site may sound enticing but will in reality be impractical. A cautious graduated approach would be more appropriate.

77. A similar situation arose recently in **African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR** where Munyao J. stated:

42. On my part, I think this is the best path to take. It would be easy, as was done in the Tanzanian case of Festo Balegele & 794 Others vs Dar es Salaam City Council (supra), to issue orders stopping any further dumping on the site; neither is it hard to order that the dumpsite should be closed forthwith, but then I have to ask myself, where is the garbage that is going to be generated today be disposed off? I am alive to the fact that garbage is generated on a daily basis. There is no other alternative site, and if this is closed, then there will be nowhere to dump waste. I would not want to make an already bad situation worse. I think it is the role of the courts, especially, the Environment and Land Court, to be a part of the solution and not part of the problem, in so far as tackling environmental challenges is concerned. Ordering the dumpsite to be closed forthwith will not be helping matters.

78. In the circumstances, I am not persuaded to issue mandatory injunction compelling relocation of Gioto dump site or an order restraining further dumping of waste at the site as sought.

79. Though the petitioners sought compensation, no submissions were made on the nature and quantum of such compensation. That being the case, I am not persuaded that an order for compensation should be made in the circumstances.

Disposition

80. In the end, I make the following orders:

a) A declaration is hereby made that the 1st and 3rd respondents have violated the petitioners' right to a clean and healthy environment under Article 42 of the Constitution of Kenya, 2010 as regards the manner in which they have operated the Gioto waste disposal site.

b) The 3rd respondent shall apply for a waste disposal site licence in respect of Gioto waste disposal site under sections 87,88 and 89 of EMCA or other relevant legal provisions within 30 (thirty) days from the date of delivery of this judgment.

c) NEMA shall consider such application and process it pursuant to the relevant legal provisions within forty-five (45) days from the date the application is made.

d) If no application for a waste disposal site licence is made as ordered above or if the terms of any licence granted by NEMA are not complied with, NEMA shall make an application to this court under section 90 of EMCA.

e) NEMA shall monitor compliance with these orders and cause this matter to be mentioned periodically as necessary to update the court on compliance by the 3rd respondent and compliance by NEMA itself.

f) The petitioners are awarded costs of this petition. The costs to be paid by the 3rd respondent.

81. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of February 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the petitioners

No appearance for the 1st and 3rd respondents

Mr. Gitonga for the 2nd respondent

Court Assistants: Gichaba & Lotkomoi