**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 283 OF 2016**

**1. AMINA SAID ABDALLA**

**2. OMAR SAID SWALEH**

**3. AHMED SAID SWALEH……...……...……PLAINTIFFS**

**=VERSUS=**

**1. THE COUNTY GOVERNMENT OF KILIFI**

**2. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY**

**3. THE HON. ATTORNEY GENERAL……DEFENDANTS**

**R U L I N G**

1. By a Notice of Motion application dated 8th November 2016, brought under Article 2,10,22,40,42 and 69 of the constitution as well as Section 3 of the Environmental Management & Coordination Act, the Plaintiff/Applicant pray for the following orders to issue as against the Defendants/Respondents-:

**(i) ……..**

**(ii) THAT an injunction do issue, initially for 14 days and thereafter as the court may order or the parties may agree, to bar the 1st and 2nd defendants from dumping, or continuing to dump and incinerate solid waste and/or any other form of waste, on the plaintiffs' land (i.e. sub-division No. 6071 -6101 Malindi,) situate at Malindi, on the grounds that: -**

*(a) Plot numbers 6071 to 6101, Malindi, are private properties, created from original plot No. 5143 Malindi;*

*(b) Dumping of solid waste and other forms of waste on the Plaintiff's land aforesaid has been going on for a long time, and the defendants have despite remonstrance, failed to abate the nuisance, or cease dumping waste on private land thus rendering this action necessary;*

*(c) The dump site and solid waste dumping on private property has not been approved under any law;*

*(d) The solid waste dumping complained of is: -*

- *Unconstitutional, and contravenes Article 42 of the Constitution, 2010; as read with Section 3 of Environmental Management & Coordination Act,*
- *Unconstitutional, and contravenes Article 40 as read with Article 69 of the Constitution, 2010;*
- *Contravenes part 2 of the Fourth Schedule of the Constitution, 2010; Section 2(g) and 3);*
- *Criminal, and offends the provisions of Chapter XVII of the Penal Code (PC);*
- *Tortuous for offending and contravening part VI of the Civil Procedure Act(CPA), and in particular Section 61 of the CPA;*

*(e) The dumping of solid waste on the plaintiffs' land has the effect of polluting the environment as the waste is being continuously and indiscriminately burnt on site, thereby producing obnoxious and toxic smoke, thereby rendering the plaintiffs land and surrounding areas unsafe for human habitation;*

*(f) The toxic smoke and mounds of solid waste have diminished completely the value of the plaintiffs' land and those of neighbouring owners, land, that the County Government of Kilifi(CHK) ought to be compelled to take immediate action to prevent further violation of the plaintiffs' fundamental rights under Articles 10, 22, 23, 40 and 69 of the Constitution, as read with part 2 of the Fourth Schedule of the Constitution, 2010;*

*(g) An alternative dump site ought to be provided; and the County Government of Kilifi has a duty to enforce the Constitution and Municipal Law to ensure protection of property rights of the poor and destitute plaintiffs, whose land has been forcibly taken away for establishment of a dump site without a hearing, or adequate and prompt compensation.*

**(iii) Directions on service of this application, and any order issued by court; and further hearing *inter-partes* of this action are given;**

**(iv) Costs of this application are provided for;**

2. When the mater came up for hearing before me on 13th February 2017, there was no appearance of either the County Government of Kilifi, the National Environment Management Authority and/or the Honourable the Attorney General who are all named as the Defendants/Respondents herein. It was however clear from an Affidavit of Service sworn by one Isaac Kariuki Kinyua on 11th January 2017 and filed in court on 13th February 2017 that the three parties and/or their representatives were served. Accordingly, the application proceeded to hearing in the absence of the three Respondents.

3. Urging the Application Mr. S.K. Kimani, Learned Counsel for the Applicant informed the court that his clients have a proprietary interest in Plot No. 5143 Malindi which gave rise to sub-division numbers 6071-6101, Malindi. It was his submission that at some point in the past the County Government of Kilifi, the 1st Respondent herein, began dumping solid and other forms of waste on a site which comprises part of the aforesaid plots and other adjoining lands situated on the way to Kivulini Beach Area, Malindi. Learned Counsel submitted that the continuous dumping and incineration of the waste had rendered his clients' parcel of land worthless as toxic smoke and obnoxious smells emanating therefrom were dangerous to health, the air and the underground water aquifers.

4. I have perused the application dated 8th November 2016, the Supporting Affidavit and the annextures thereto. I have also keenly listened to the submissions made ex-parte by Counsel before me.

5. The Environmental Management and Co-ordination Act (EMCA) 1999 establishes the legislative framework for the management of the environment in Kenya. Section 3(1) of the Act provides every person in Kenya an entitlement to a clean and healthy environment

"and clothes such a person with a duty to safeguard and enhance the environment.

Section 3(3) of the Act States that:

> **3(3) "If a person alleges that the entitlement conferred under Subsection (1) has been; is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate."**

6. A private citizen wishing to take court action can proceed under either the criminal law or the civil law. In either case, the substantive law under which such a private citizen would proceed is the Common Law. The Common Law applies in Kenya by virtue of Section 3(1) of the Judicature Act, which allows the Jurisdiction of the High Court to be exercised in conformity with the substance of the Common Law. The Common Law rule was always that a private person can only take court action to seek redress for a private injury under the common law. Any private individual who wished to bring action to redress an injury to the public had to seek the permission of the Attorney General to use his name in an action.

Basing its reasoning on this Common Law principle, the *House of Lords in Gouriet-vs-Union of Post Office Workers (1997) AC 435)* stated thus:

> **"The jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to Litigants whose rights in private law have been infringed or are threatened with infringement. To extend that Jurisdiction to the grant of remedies for unlawful conduct, which does not infringe any rights of the plaintiff in private law, is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply.**

7. The ideological, rationale for this Common Law position as I understand it may be found in the history of the Common Law as a body of law for the protection of the interests of the landed class. In Kenya, as in many other Common Law jurisdictions, this restriction on suits by private individuals was first removed through a Statutory Intervention. Section 3 (4) of EMCA now provides that "a person proceeding under Subsection (3) shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury." This Statutory provision now re-emphasized at Article 70(3) of the Constitution of Kenya 2010 eliminates the Common Law requirement that the plaintiff needs to demonstrate Locus Standi before bringing such a suit. Expressing the frustrations of the courts before the Statutory Intervention and the relief thereafter Waki J (as he then was) had this to say in *Insurance Company of East Africa -vs-Attorney General & Others KLR (E&L) 1 406 at 420:*

> **"When it comes to environmental matters, I think with respect, that the Ogre of Locus Standi which has for a long time shackled courts of Law must be tamed. Happily, it was expressly tamed by Parliament in the legislation enacted in 1999, the Environmental Management and Co-ordination Act 1999 which came into effect on 14.01.00**.

8. Section 111 of the EMCA states:

> (1) Without Prejudice to the powers of the Authority under this Act, a court of competent Jurisdiction may in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.
>
> (2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this Section to show that he has a right or interest in the property, environment or land alleged to have been or likely to be harmed.
>
> Following the promulgation of the Constitution of Kenya 2010, the above Legislative Provisions have now taken more prominence and urgency as can be discerned from a reading of Articles 40, 42, 69 and 70 of the Constitution.

9. The law applicable to granting of interlocutory temporary injunctions is as provided for under the Provisions of Order 40 Rule 1 of the Civil Procedure Rules which provides:

> (1) **In an suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after Judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.**
>
> **(2) The court may by order grant such injunction on such terms as to an inquiry into damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit**."

10. The above legal position has been interpreted and applied in many cases as was settled in the *Giella - vs Casman Brown & Co Ltd(1073) EA 358* case that :-

> : …First, an applicant must show a Prima Facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience."

11. In *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*, the Court of Appeal states that:

> " a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable Case."

12. It is the Plaintiff's case herein that the 1st Respondent has began dumping of solid and other forms of waste on a site which comprises part of Plot No. 5143 Malindi and more particularly sub-division Numbers 6071 – 6101, Malindi) in which the Plaintiffs have a proprietary interest. Annexed to the Plaintiff's Preliminary List of documents is a Certificate of Ownership for Plot No. 5143 containing by measurement 14.569 Hectares in the name Said Swaleh Bahmed. Similarly annexed to the list is a copy of Grant of Letters of Administration issued to the 2nd and 3rd Plaintiffs on 23.4.1999 in respect of the estate of Said Swaleh Bahmed (Deceased). Thus while it is not necessary that the plaintiffs demonstrate any particular interest in the land, it is evident that other than being keen to protect this land from wastage, the plaintiffs have proprietary interest thereon.

13. It is the plaintiff's contention that the continuous dumping and incineration of the waste on the suit land has rendered the land worthless as toxic smoke and obnoxious smells emanating therefrom are dangerous to their health, the air and the ground aquifers. At paragraph 5 of the first Plaintiff's affidavit in support of the application, she depones that the dumping is unplanned, illegal and a violation of the family's fundamental right to clean air, unpolluted environment and a pollution-free property. In addition, she depones that the 1st Respondent has continued to pollute the land without seeking the sanction of the National Environment Management Authority(NEMA), the 2nd Respondent herein and further that there is no leave sought to establish a dumpsite near the shoreline and/or otherwise acquire the suit land for such public use.

14. In *Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR* at page 10, the Court of Appeal held as follows in explaining a Prima facie case:

> "The Party on whom the burden of proving a Prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to

prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation… The applicant need not establish title, it is enough if he can show that he has fair and bona fide questions to raise as to the existence of the rights which he alleges…."

15. In support of their claim regarding pollution and waste of the suit land, the plaintiffs have annexed a Rapid Environmental Impact Assessment Report prepared 'by one Robert Kariuki Wango'ombe who describes himself as NEMA Associate Expert No. 1641 dated 21/10/2016. I have perused the Report. At page 13 under the Title "Waste Substances Dumped at the Facility and their Impacts" It is noted that all kinds of wastes are dumped at the site; that rummaging through the garbage heap revealed that domestic, industrial, office and hospital wastes are disposed of at this site. The Report concludes at page 18 thereof that the disposal site is a time bomb whose impacts will reach far and wide due to its location within the vicinity of the Indian Ocean which it describes as an environmentally sensitive area.

16. It is apparent that vide a demand letter dated 24th September 2011 annexed to the Plaintiff's Preliminary List of Documents aforesaid, the Plaintiffs gave notice to the three Respondents herein (including the Municipal Council of Malindi which I presume to be the predecessor to the 1st Respondent) of their intention to move to the court after 30 days of Service to compel the Respondents to act and stem the pollution and to restore, at their expense, the land which they had allegedly polluted for a long time. It is again apparent that the 3rd Respondent received the demand letter and had sufficient notice of the suit herein. In a letter dated 3rd November 2011 attached to the List of Documents, the then Senior Deputy Solicitor General at the Attorney General's Office Ms Muthoni Kimani wrote to one Ali Dawood Mohammed the Permanent Secretary at the then Ministry of Environment and Mineral Resources informing the Ministry of the Notice of intention to institute proceedings against the 3rd Respondent and requesting the Ministry to furnish the 3rd Respondent with certain information to enable the Government forestall this suit. It would appear that no action was taken by any of the Respondents on the said complaint.

17. The Environmental Law is principally concerned with ensuring the sustainable utilization of natural resources according to a number of fundamental principles developed over the years through both municipal and international processes. In an ideal setting, the utilization of land and land based resources should adhere to a number of principles. These are the principle of sustainability, intergenerational equity; the principle of prevention; the precautionary principle, the polluter pays principle and public participation.

18. The Principle of Prevention decrees that "the protection of the environment is best achieved by preventing environmental harm in the first place rather than relying on remedies or compensation for such harm after it has occurred. The reasoning behind this principle is that prevention is less costly than allowing environmental damage to occur and then taking mitigation measures. Closely related to the principle of prevention is the precautionary principle. This recognizes the limitations of Science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where there is uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities. I am satisfied in light of the weighty issues raised in the application that there is the danger of the suit land and the surrounding areas suffering serious environmental damage

19. Arising from the foregoing and in the absence of any replying affidavit(s) from the Respondents, I am satisfied that on the face of it, the plaintiffs have clearly demonstrated that they have a right which has been violated or is threatened with violation. Accordingly, I find merit in the Notice of Motion application dated 6th October 2016 and grant the following Orders:

(a) An order of injunction do issue restraining the 1st and 2nd Respondents, their Servants and/or agents from dumping, or continuing to dump and/or incinerate solid and/or any other form of waste,

on the plaintiffs' land (ie Sub-division No. 6071-6101, Malindi), situate at Malindi until the hearing and determination of this Suit.

(b) The costs of this Application be borne by the Respondents.

**Dated, signed and delivered in Malindi on 6th day of March 2017.**

**J. OLOLA**

**Judge**