



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 50 OF 2012

AFRICAN CENTRE FOR RIGHTS

**AND GOVERNANCE (ACRAG).....1ST
PETITIONER**

JOHN MUCHINA2ND PETITIONER

JOHN MUCHIRI.....3RD PETITIONER

ELIZABETH WANJIRU4TH PETITIONER

VERSUS

MUNICIPAL COUNCIL OF NAIVASHARESPONDENT

JUDGMENT

(Case concerning the operation of a dumpsite in Naivasha; petitioners arguing that the continued operation of the dumpsite violates their right to a clean and healthy environment; evidence showing that the dumpsite is poorly managed and a clear hazard; EMCA requiring that all dumpsites be licenced; no evidence that the dumpsite in question has ever been licenced; its operations therefore illegal; question whether to immediately stop its operations; no alternative dumpsite; stopping operations immediately would not be solving the problem; orders issued for the County Government of Nakuru to forthwith apply for licencing of the dumpsite; NEMA directed to consider the application, have an EIA done and make a decision on the same; immediate mitigation measures also ordered; judgment to be served upon the Ministry of Environment and Natural Resources and Council of Governors to consider policy and other decisions to ensure proper management of solid wastes; costs to petitioners)

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a constitutional petition filed on 1 November 2012. The 1st petitioner is a Non-Governmental Organization while the 2nd, 3rd and 4th petitioners are residents of Naivasha and reside near the land parcel Naivasha/Maraigushu Block 11/4 (Karai) (hereinafter referred to as “the suit property” or “the dumpsite”). At the time of commencement of this suit, the Naivasha Municipal Council established under the Local Government Act, Cap 265, Laws of Kenya (now repealed) was the local authority in control of the suit land and was thus sued as the respondent. The functions of the said Municipal Council now fall with the County Government of Nakuru. It is pleaded in the petition

that it was the responsibility of the respondent to establish and maintain proper sanitary services and provision for disposal of refuse so as to maintain a clean and healthy environment in line with Article 42 of the Constitution. It is contended that the respondent has failed to do so by allowing improper, indiscriminate and wanton disposal of waste in the suit property and other surrounding properties. It is averred that the respondent has failed to locate an alternative, proper and safe place, for the disposal of refuse in Naivasha. This, it is stated, has subjected the residents of Naivasha to great inconvenience and suffering and has exposed them and the flora and fauna to major health and environmental risks.

2. In the suit, the petitioners have asked for the following orders :-

(a) A declaration that the respondent's acts are in contravention of Article 42 of the Constitution, 2010.

(b) A declaration that the violation of Article 42 of the Constitution, 2010, by the respondent has resulted in a denial of the right to a clean and healthy environment to the petitioners and residents of Naivasha Municipality.

(c) A declaration that in breach of (a) above the petitioners have a right of redress for an order of injunction, pursuant to Article 23 (3) (b) of the Constitution of Kenya, 2010 as read with Section 13 (7) (a) of the Environment and Land Court Act, No. 19 of 2011 and Section 3 (3) (a) to (e) of the Environmental Management and Coordination Act, 1999.

(d) A mandatory injunction compelling the respondent to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance to the Environmental Management and Coordination Act, 1999.

(e) A mandatory injunction to compel the respondent and/or its employees and/or agents and assigns and/or anybody whosoever to restore the degraded dumpside within Naivasha/Maraigushu Block 11/4 (Karai) as far as practicable to its immediate condition prior to the damage.

(f) A prohibitory injunction to the respondent and/or its employees and/or agents/or assigns and/or anybody whosoever to permanently restrain them and/or permanently prevent, permanently stop or permanently discontinue dumping refuse at Naivasha/Maraigushu Block 11/4 (Karai) and/or from doing any act or omission deleterious to the environment.

(g) An environmental restoration order to be issued against the respondent.

(h) Any other relief this court may deem fit and fair to grant.

(i) Costs of the petition.

3. The petition is supported by the affidavit of Gershom Otachi Bw'Omanwa who is one of the trustees of the 1st petitioner. He has stated that residents of Naivasha have approached the 1st petitioner raising concerns on the dumpsite situated on the suit property. One of its employees visited the site in the month of October 2012 and confirmed that the constitutional rights of the people of Naivasha as envisaged by Article 42 of the Constitution have been breached. He has deposed that it will be in the benefit of the general public if the injunction sought is granted.

4. There are also annexed other affidavits sworn by persons who reside near the dumpsite in issue. They all state that the dumpsite is dangerous to their health and is not well operated. They have complained, among other things, that the dumpsite is a breeding ground for flies; that these flies expose them to nuisance and diseases; that the dumpsite causes air pollution by emitting foul smell; that the smoke that is emitted when waste is burnt causes them chest complications; that there are dead wild animals on the site which decompose and emit a bad smell; that polythene papers are blown from the dumpsite and litter their properties; that garbage has spilled over the road making it almost impassable as the waste contains broken glass; that scavengers who visit the site are a risk to their security; that their livestock sometimes

consume the polythene papers blown by the wind from the dumpsite which leads to their death; that they are unable to enjoy their property to the fullest; that the land was designated a dumpsite without following the law; that there is a government school just next to the dumpsite and sometimes school children play there and eat some of the dumped leftover food which causes them diarrhea; that when it rains, water from the dumpsite flows along the road and into their compounds spilling waste; that the public is exposed to dangerous animals such as stray dogs, hyenas and snakes; that this exposes them to danger and diseases such as rabies; that there is no fence to stop the animals from accessing the dumpsite; that some of the waste include dead fetuses and hospital waste such as needles.

5. The respondent has opposed the petition through the replying affidavit of Isaac Felix Olwero, the then Town Clerk of the respondent. He has denied that the respondent has failed and/or neglected its duty and has contended that to mitigate the negative effects of the dumpsite, they have planted trees and employed the services of the National Youth Service to collect the garbage therein and compact them to prevent the same being scattered by the wind. He has stated that the dumpsite is located where it was alienated and that there was an evaluation of possible landfill sites which was done and it identified the suit land as the safest and most appropriate of the proposed areas. 6. He has annexed a report to demonstrate this. He has deposed that the school near the dumpsite was established after the alienation and establishment of the dumpsite and that prudence dictates that it should have been located elsewhere to prevent children from playing in the dumpsite. He has stated that nonetheless, the respondent has cleared the area near the school, so as to prevent garbage from being blown into the school compound as a mitigation effort. He has deposed that the respondent is awaiting the completion of a procurement process in a World Bank funded program to acquire equipment to help in compacting and fencing off the entire dumpsite. It is also averred that with the World Bank funds, machines will be purchased for maintaining the dumpsite. He has pronounced that the respondent has presented a budget to trigger funds to secure fencing of the entire dumpsite. He has stated that the respondent hires machines at a cost of Kshs. 300,000/= and that there are no sufficient funds to run these services thus the need to have the national government intervene. He has presented that the National Policy on Polythenes is not within the control of the respondent. He has argued that according to Urban Regulations, cows and other livestock should not be kept within urban areas. He has denied that there are residences within a considerable distance from the dumpsite. He is of the view that the petition herein is shallow as it does not give alternative views and that the petitioners have not conducted an environmental audit or analysis to help. He believes that the petition only has an academic purpose.

B. SITE VISIT

7. Having looked at the petition, I thought it prudent to visit the site. The site was visited on 23 February 2017. The parties were represented and their counsels were present.

8. I invited both petitioners and respondents to present any additional statements at the site. The 2nd petitioner stated that dumping on the site started about the year 2000 and that they asked the respondent to stop to no avail. One Stephen Kamau, the Environmental Officer for Naivasha Sub-County Nakuru County, was also present. He acknowledged that the dumpsite is in property owned by the County Government of Nakuru and that it measures approximately 10 acres. He presented that most developments around the area are new and that the persons put up these developments in the knowledge that there was a nearby dumpsite. He stated that there is a dumping manager who controls the dumping activities and that the County Government tries to separate the waste. He averred that the site was started in the year 1998 and is the only dumping site covering the former Municipal Council of Naivasha. He asserted that they do clear ups of polythene. He also added that they have engaged investors to develop a modern sanitary landfill.

9. The area where the dumpsite is situated is not densely populated and not very developed and is about 3km away from the Nakuru-Nairobi Road. I understand the area is called Karai, although the petitioners also seem to call it Kayole. The vegetation is mostly grassland with short acacia trees, not the yellow fever type. It is a savanna like terrain. The dumpsite is somewhat between Nakuru-Nairobi Road and Naivasha-Mai Mahiu Road which run parallel to each other. It is on high ground and the land slopes towards the Naivasha-Mai Mahiu Road. Beyond the Naivasha-Mai Mahiu Road is Lake Naivasha which

provides quite a scenic view when seen from the elevated site in issue. You would have had a fantastic scenery if you lived here, but well, there is a dumpsite. I would estimate the site at between 5-7 acres but I do not contest that the land itself could go upto 10 acres as mentioned by the Environmental Officer. Bordering the dumpsite, on the immediate right side as one faces the Mai-Mahiu road, is a school. It appeared to me to be a boarding school.

10. I went all round the dumpsite and also ventured inside the dumpsite. I am unable to find the proper words to express what I saw at the dumpsite. Maybe "shocking" comes close, but does not quite express my impression of the dumpsite. One has to see for themselves the deplorable state of the site to appreciate just how bad it is. The dumpsite is an open surface dump and not a landfill. Well, as one would expect of any dumpsite, there is of course lots of garbage. At the middle of the suit land is where the main dumping is done. That is not to say that there is no dumping in the rest of the land; it is only that a lot of the garbage is at the core. There is still a lot of garbage outside this core. I saw a dog at the dumpsite scavenging. You will not believe it, but there were cows having their fill both in and around the dumpsite. Need I say that these are the same cows that will tomorrow be slaughtered and their meat put on the table to be consumed by people.

11. The whole area outside the dumping area was littered with polythene bags blown by the wind. The polythene bags extend to the neighbouring properties and go quite a distance, as far as the eyes can see. These polythene bags get blown and lodge themselves in the grass and the acacia trees found in the area. I did not see any trees that can be said to have been planted as claimed by Mr. Olwero. The vegetation, as I have mentioned is grass and short acacia trees, which is natural to the area and that is all that I saw. Neither did I see any personnel from the National Youth Service or any efforts made at compacting the waste.

12. There was no fence around the dumpsite. There was indeed some garbage on the road including glass. Inside the dumpsite were persons separating waste. They seemed more interested in plastic bottles more than anything else. I think for them, it is a commercial venture rather than a deliberate activity of environmental conservation and/or protection. There was a Nakuru County Government tractor which had come loaded with waste and which dumped the same at the core of the dumpsite. There appeared to have been some recent attempt to clear part of the dumpsite.

13. With my above brief description, I trust that one can get a synopsis of what we are dealing with.

C. SUBMISSIONS OF COUNSEL

14. In his submissions, Mr. Magata, learned counsel for the petitioners, submitted inter alia that Article 42 of the Constitution provides for the right to a clean and healthy environment. He also submitted that this right is entrenched in international instruments and in the Environmental Management and Coordination Act, Act No. 8 of 1999 (EMCA). He pointed at Section 3 which provides for the right to a clean and healthy environment and Section 87 which prohibits dangerous handling and disposal of wastes. He further submitted that Section 88 of EMCA enjoins a person to apply for a licence to operate a waste disposal site. He submitted that under Section 160 (a) of the Local Government Act, Cap 265 (repealed), sanitary services was one of the mandates of the respondent which has now been succeeded by the County Government of Nakuru. He was of the view that the allegations of fact of pollution and their adverse effects have not been controverted in the respondent's replying affidavit. He submitted that what the respondent is doing does not only constitute the tort of nuisance, but is also criminal, and he referred to Section 192 of the Penal Code which makes it an offence to inter alia make noxious the health of persons. He also referred to the offence of common nuisance at Section 175, and the offence of fouling water at Section 191 of the Penal Code. He was of opinion that the petitioners are entitled to the orders sought. He relied on several authorities which I have considered.

15. On his part, Mr. Madialo for the respondent, did not contest the right to a clean and healthy environment. He however asked the court to appreciate that it is nearly impossible to eliminate solid waste and all that the respondent can do is to reduce the environmental impacts of solid waste through proper management of the same. He submitted that the petitioners have failed to demonstrate that the

activities of the respondent have resulted in contamination of the environment. He submitted that some of the persons who live near the dumpsite found it there. He referred to the mitigation measures mentioned by Mr. Olwero in his replying affidavit, as being sufficient and contended that the respondent has ensured the balance between provision of waste disposal services and minimization of the adverse environmental effect. He was further of the view that the petitioners have not tendered any proof of the claimed adverse effects. He also relied on several authorities and asked that the petition be dismissed.

D. ANALYSIS AND DECISION

16. I have considered the matter. This is an important if not welcomed public interest suit. It is vital that all persons be vigilant about the protection of the environment and any person litigating for the sustainability of the environment deserves applause. Of course, each case must be considered in light of the facts tabled and the applicable law.

17. The petitioners grime is in the manner in which the respondent has managed a dumpsite in Naivasha. The petitioners are of the view that this dumpsite is not well managed and it poses a risk to the environment. They thus claim that the respondent has violated their right to a clean and healthy environment.

18. There can be no question that the Constitution of Kenya, 2010, does protect the right to a clean and healthy environment. This is clear from a reading of Article 42 of the Constitution which provides as follows :-

42. Every person has the right to a clean and healthy environment, which includes the right—

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

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

19. Article 70, referred to in Article 42 above, permits any person to file suit for the enforcement of the right to a clean and healthy environment. It is drawn as follows:-

70. (1) 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 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 any 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.

20. It will be observed from Article 70 (3) above, that it is not necessary for one to demonstrate that they have suffered loss or injury, for them to move the court when claiming that the right to a clean and healthy environment has been violated or is under threat of violation. It is not therefore a requirement for the petitioners to show that they have personally suffered or that the presence of the dumpsite has directly

caused them any direct harm. It is sufficient for the petitioners to point out, that there is an ongoing, or imminent threat of harm, to the environment.

21. Having shown that the right to a clean and healthy environment does exist, we need to determine the obligation of the respondent under law in relation to waste disposal operations. The named respondent is the Municipal Council of Naivasha, which was a local authority established by the now repealed Local Government Act, Cap 265, Laws of Kenya. The Local Government Act, did provide for the powers, duties, and provisions relating to local authorities. Of significance to us is Section 160 which provided as follows :-

160. Every municipal council and, except in regard to matters contained in paragraphs (a) and (h), every town council and every urban council shall have power—

(a) 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

It will be observed from the above provision that Municipal Councils, under the repealed Local Government Act, had the mandate to manage waste. Indeed, the named respondent, the Municipal Council of Naivasha, has admitted to being in charge of the dumpsite in issue.

22. The Constitution of 2010, introduced County Governments to replace the former local authorities. The dumpsite in question is now under the management of the County Government of Nakuru, under Naivasha Sub-County. Schedule 4 of the Constitution, which distributes the functions between the National Government and County Governments, provides at Section 2, that County Governments will be in charge of County Health Services including, at paragraph (g), refuse removal, refuse dumps, and solid waste disposal. There cannot therefore be any doubt that the matters herein were, before the coming into being of the County Government, under the Municipal Council of Naivasha, and now after the coming into being of County Governments, the County Government of Nakuru.

23. The manner in which solid waste is to be disposed of, or managed, is set out in EMCA, specifically at Sections 87, 88 and 89 which 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 wastes 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. *Any person intending to transport wastes 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 its decision, notify the applicant of the decision specifying the reasons therefor.

89. (1) 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.

24. When waste is generated, say in our homes, it is usually collected, then transported and thereafter taken to a waste disposal site. The process, from collection of the waste to disposal, is well articulated in the above sections. It will be noted from a reading of the above that first, if one wishes to engage in the transportation of waste, one requires a licence to do so. It is also a requirement that one also needs to procure a licence to operate a waste disposal site. This is clear from Section 88 of EMCA above. There can be no question that the law requires a waste disposal site to be licenced. In other words, waste ought to be disposed of only in a site which is properly licenced. The licences to transport waste and to operate a waste disposal site are issued by the National Environmental Management Authority (NEMA). It will be noted that Section 87 (5) creates an offence where there is contravention of these requirements.

25. EMCA was assented to on 6 January 2000 and came into operation on 14 January 2000. Section 89, which is outlined above, took care of operations that were ongoing at the time of commencement of the statute. As can be discerned from a reading of it, a person who operated a waste disposal site was to apply to NEMA for a licence, within 6 months of commencement of EMCA.

26. It follows from the above, that persons, including local authorities, needed to apply for licences to operate waste disposal sites after EMCA came into force. If at the time that EMCA came into force, local authorities, or other persons, were already operating waste disposal sites, they needed to apply, within 6 months, for a licence to continue operating these sites.

27. I have not been shown any application made to NEMA for issuance of a licence to operate the dump site in issue. I have also not been shown any licence, issued by NEMA, giving permission to the respondent, and now the County Government of Nakuru, to operate the dumpsite.

28. It was said in the replying affidavit of Mr. Olwero, that the respondent had undertaken a study before commissioning the site in issue and I was referred to a report titled "*Evaluation of Possible Landfill Sites for Naivasha Town.*" The report was a study which considered various sites for the location of a landfill. Two sites were singled out, one in a place called Mirera and another in an area described as Kwa Kairo, which I assume to be another name for the site in issue, for Mr. Olwero has mentioned that the current site was commissioned after this report. That report was prepared on 22 February 2000. It does appear, therefore, that this site started being used as a dump after EMCA came into force, and not before. Thus, the respondent needed to apply to EMCA for a licence, before starting to use this area as a dumpsite. If I am wrong on this, and assuming that the dumpsite was already in operation by the time EMCA came into force, then, within 6 months of EMCA coming into force, the respondent needed to apply to NEMA for the dumpsite to be licenced.

29. Since the named respondent, and now the County Government of Nakuru, has no licence to operate this site, it follows that the same is an unlicenced facility and an illegal dumpsite. The continued operation of the suit land as a dumpsite constitutes a criminal offence as set out in Section 87 (5) of EMCA.

30. I have already deduced that the dumpsite herein must have been commissioned after February 2000 by which time EMCA had come into force. EMCA does provide at Part VI that any project must first undergo an Environmental Assessment and an Environmental Impact Assessment (EIA) report be prepared before such project can be commenced. A dumpsite or landfill, must first undergo an EIA before being permitted. There is no evidence before me that any EIA was ever done before the site in issue was allowed to be used as a dumpsite.

31. The report annexed by Mr. Olwero provides in part that:-

"the site is located reasonably far from the densely populated residential areas, and it can therefore not be a nuisance/health risk to residents. The major considerations in this regard would be methane gas (as a consequence of anaerobic organic matter decomposition) and the consequent fires, as well as toxic domestic, hospital and industrial waste, flies, rats, cockroaches and scavenging dogs. The site is also comparatively far from the lake (approximately 5-7 kilometres). This is an important consideration particularly with regard to the potential for contamination of ground waters. There will be hazardous waste in such a landfill, such as batteries and household insecticide cans, even industrial waste, and such material must not be allowed to seep into the aquifer from which the township draws its water- or contaminate the lake. Another major concern would be the problem of litter (especially plastics) being blown away by the wind."

32. It will be noted from the above, that the report envisaged the very dangers complained of by the petitioners herein. They foresaw that the proposed landfill (forget for a moment that we do not have a landfill) would hold toxic waste. They mentioned that there would be flies, rats, cockroaches and scavenging dogs. They gave a caution on the risk of contamination posed to the aquifer underneath and to Lake Naivasha. They were concerned about the problem of plastics being blown by the wind. It is unfortunate that these risks have come alive. I have mentioned that there are plastic papers everywhere around the site. That was clearly visible. The bigger danger is however in what the eyes cannot see; the possible contamination of the aquifer underneath and of Lake Naivasha; the health risk to humans posed by pollution of the air and the soil; and also the risk to the health of animals which ingest waste dumped at the site. Even without tangible evidence, this is a case that speaks for itself, a *res ipsa loquitur* situation. The dumpsite is clearly an environmental hazard.

33. I have no doubt in my mind that the facility in issue is a threat to a clean and healthy environment. Its operations are indeed illegal. The operation of the facility by the respondent and its successor, the County Government of Nakuru, violates the rights of the petitioners and indeed the rights of the residents of Naivasha, and of all persons resident in Kenya, to a clean and healthy environment as provided for in Article 42 of the Constitution. I do find that there has been a violation of this right by the respondent and now the County Government of Nakuru.

34. In this petition, the petitioners have asked for the various orders which I had earlier outlined at the beginning of this judgment. They are at the very least fully entitled to a declaration that their rights under Article 42 of the Constitution have been violated.

35. The other significant prayers sought are a mandatory injunction to compel the respondent to relocate the dumpsite to a different area suitable for waste disposal in accordance with EMCA; a mandatory injunction to compel the respondent to restore the dumpsite to its condition before the damage in essence an environmental restoration order; and a prohibitory injunction to stop the respondent from continuing to dump waste on the site.

36. I have considered these prayers which I would generally not have a problem granting. However, I am alive to various issues that came to my attention when hearing this petition. Most significantly is the fact that the present site is the only prevailing dumpsite in Naivasha. There is no other dumpsite. I was informed that there was another site, far away in Mai Mahiu. I did not have occasion to visit this site and I do not know its condition.

37. The proper disposal of waste is a global problem which we have to take positive steps to remedy. It is not just a Kenyan problem. Other countries have also grappled with the same challenge that we have here. I was indeed referred to a case emanating from Tanzania, that of ***Festo Balenge & 794 Others vs Dar-es-Salaam City Council, High Court of Tanzania at Dar es Salaam, Misc.Civil Cause No. 90 of 1991***. This was a case brought by certain residents of Dar es Salaam against the Dar es Salaam City Council. They sought orders to quash by way of certiorari, the decision of the City Council to dump waste in a place called Kunduchi Mtongani; an order of prohibition, to stop any further use of this site as a waste dump; and an order of mandamus to compel the City Council to establish an appropriate refuse dumping site.

One of the arguments raised in opposing the suit was that the decision to dispose of refuse in this site was a temporary one as an alternative place was being looked for, and if the orders were granted, the respondent would otherwise fail to perform its statutory obligations. Justice Yahya Rubama, who dealt with the matter, was not moved by these arguments and proceeded to allow all orders sought in a decision rendered on 3 January 1992. I am not however sure if this decision ever went on appeal.

38. In the now fairly old American case of *New Jersey vs City of New York, 283 US 473 (1931)*, the issue concerned the dumping of waste by the City of New York into the Atlantic Ocean, which garbage would then float into New Jersey water and pollute the same. The State of New Jersey sought an order to stop the said disposal of waste. In its decision, the US Supreme Court issued the injunction but allowed for reasonable time to the City of New York to effect a proper waste disposal plan. The court stated as follows :-

A decree will be entered declaring that the plaintiff, the State of New Jersey, is entitled to an injunction as prayed in the complaint, but that before injunction shall issue a reasonable time will be accorded to the defendant, the City of New York, within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials such as are now being dumped by it at sea or to provide other means to be approved by the decree for the disposal of such materials.

39. The case was then referred to a Special Master to determine what would constitute reasonable period.

40. India has also grappled with severe pollution of the environment and has had a serious problem of disposal of municipal waste. Several cases have indeed been filed on this topic. One of the more famous is the case of *Almitra H. Patel vs Union of India (1998) 2 SCC 416* decided by the Supreme Court of India. The Court issued certain directions on the treatment of wastes. The India Green Tribunal has also recently dealt with the same subject matter in the case of *Tapesh Bhardwaj vs UP State Pollution Control Board & Others, Application No. 596 of 2016*. In this case, the complainant argued that the respondents have failed to implement proper waste disposal methods which led to the pollution of River Yamuna. The subject matter was a dumpsite/landfill situated about 100m away from the river. The Tribunal inter alia noted that there was no boundary wall around the dumpsite and that waste was being burnt openly thus leading to air pollution. The Tribunal also found non-compliance of various statutory provisions on the dumping of waste, one of which was that the dumping site was being used without authorization from the Pollution Control Board (UP, PCB). Apart from fining the Mathura Cantonment Board (who were in charge of the waste site), the Tribunal also made the following orders :-

(a) ...

(b)...

(c)...

(d) *We hereby direct the Mathura Cantonment Board to submit application for consent to operate and for authorization, complete in all respects, within two weeks from today to the U.P. PCB, which shall process the same in accordance with law and dispose of the same within four weeks thereafter.*

(e) *The Mathura Cantonment Board, within a period of three months from today would complete the construction of the wall between the river and the trenching site in question to ensure that under no circumstances the MSW should be permitted to enter directly or indirectly into the flood plain of the River or in River Yamuna.*

(f) *The U.P. PCB shall issue complete and comprehensive directions in relation to the collection, transportation, segregation and dumping of waste at the site in question in accordance with the SMW Rules of 2016, within a period of four weeks as afore-stated, even if no application is submitted to it. There shall be complete segregation of waste into bio degradable and non-bio*

degradable waste.

(g) Around the trenching site, the Cantonment Board shall provide green belt and also put barbed wires to ensure that no animals enter the trenching site.

(h) All these conditions should be complied within four weeks from today. The Cantonment Board is at liberty to approach the State Government requesting for financial assistance, if needed. But this shall not be treated as a ground or reason for non-compliance of the order of the Tribunal.

All the above directions issued by the Tribunal shall be complied with by all the officers and authorities without any delay and default. In the event of non-compliance, the senior most officer shall be liable to be proceeded against, in accordance with the law.

(i) We hereby issue clear directions to the Mathura Cantonment Board, U.P. PCB, local authorities and the State Government to comply with all the directions contained in the judgment of the Tribunal in the case of Almitra H. Patel (supra) and Kudrat Sandhu (supra). They shall submit compliance report within six weeks from today.

(j) We also direct all the above authorities and Boards to ensure that the directions of the Tribunal contained in the case of Manoj Mishra (supra) in relation to prohibition on dumping of any waste in the river or the flood plain of River Yamuna or carrying on of any activity in that area, are complied with.

41. It will be seen from the above judgment, that the Green Tribunal, allowed the respondents some time to comply with the various rules that had been violated. It was a more or less similar approach taken in the *New Jersey v New York case (supra)*.

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.

43. After considering all issues, I think in my view, this court ought to make some orders, some of which ought to take place immediately and some of which can be graduated over time. The immediate step is of course to order the respondent, now the County Government of Nakuru, to engage personnel and measures to immediately collect all plastic bags littering the area and to ensure that on a daily and continuous basis, plastic bags will continue being put aside for incineration or other forms of destruction so that the area is not prone to these. The County Government of Nakuru, must also forthwith, if it intends to continue using the site as a dump, apply for the requisite licence from NEMA, as required by Sections 87 and 88 of EMCA and such application must be made within 14 days from today. If such application is made, NEMA must proceed to assess this application having in mind all requisite criteria, and either decline or permit it with the necessary conditions for operations. In assessing the application, I direct NEMA, to ensure that a thorough Environmental Impact Assessment is done, with a consideration of among other things, alternative sites, all necessary mitigation measures including fencing of the site, and annual auditing. The option of having a landfill other than an open dumpsite should also be considered, for a landfill is a more modern and less environmentally destructive method of waste disposal. NEMA should consider such application if made, and issue the appropriate directions within 45 days of receipt and report to this court. Depending on the report, this court reserves the discretion to issue any further orders that may be deemed necessary in order to properly safeguard the petitioners' rights to a clean and healthy environment. If no application to operate the site is made within 14 days as directed above, then it will be clear that the County Government of Nakuru, no longer wishes to have the same site utilized as a

dumpsite and must then stop any further dumping of waste on the site, and proceed to restore it to its original state and such restoration must be done within 90 days of today.

44. This case has brought forth an important element touching on the management and conservation of our environment. I honestly do not know whether NEMA has conducted an audit of the manner in which all County Governments manage solid waste. I however doubt if NEMA has done so given what has revealed itself in this suit. I believe it is time that NEMA considered a countrywide audit and proceed to embark on measures to ensure that only licenced dumping facilities operate as required by law. NEMA also needs to introduce rules and regulations on the operation of such facilities and have mechanisms to ensure that these rules are followed. The aspect of licencing of transporters of waste also has to be considered. Rules need to be made and to be followed. The National Government also needs to get involved and work together with County Governments and NEMA so that solid wastes are properly managed. Funding will always be an issue and this should be looked at by both County and National Governments. We cannot continue risking the health and lives of Kenyans by failing to have properly managed solid waste management systems.

45. The time to act is now if we have to safeguard a good future for this and the future generations.

46. I therefore order that this judgment be served upon NEMA so that they can proceed to ensure compliance with the orders issued herein, and to report to this court as earlier directed.

47. I also order that this judgment be served upon the Cabinet Secretary of the Ministry of Environment and Natural Resources and the Council of Governors to consider issues of policy, compliance with EMCA on the subject of solid waste management, cooperation, funding, and all other matters touching on this topic, so that countrywide and in the shortest time possible, we will have waste management systems that we can all be proud of.

48. Finally on costs, the petitioners have succeeded and I do award them the costs of this petition. For the avoidance of doubts, the costs will be payable by the County Government of Nakuru.

49. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 31st day of May 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In the presence of :

Mr. Owen Magata for the petitioners.

Mr. Charles Langat holding brief for Mr. Madialo for the respondent.0

Court Assistant: Nelima Janepher.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU