



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KILIFI COUNTY

COURT NAME: MALINDI ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCPET/E006/2022

MALINDI RESIDENTS DEVELOPMENT GROUP(MRDG) -----

-- 1st Petitioner

- Versus -

National Environment Management Authority ----- 5th

Respondent

JUDGMENT

INTRODUCTION

This is a petition seeking remedies against the respondents owing to their acts and/or omissions in respect of waste management in Kilifi County and it is not the first. Other litigations filed by other parties exist, the notable one which relates to the same subject matter, being Abdalla & 2 Others V County Government of Kilifi & 2 Others [2023] KEELC 19898 (KLR) filed Sept 2016 and concluded on 22nd September 2023. The present suit having been filed on 11/2/2022, it is the case that at some point therefore, these two suits co-existed and ought to have been heard together as the same issue of improper waste disposal arose in both, but it would appear that the attention of the court was not drawn to that fact, or any application made for consideration of consolidation, or even the making of an order that they be heard together. Be that as it may, it is clear that while the petitioners in that case were agitating their own private claim. They sought the following orders:

a. A declaration that the defendants' trespass upon the plaintiffs' land by way of a dumping

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site in Casaurina village Malindi in Kilifi county is wrongful and actionable, illegal, and a violation of the plaintiffs' environmental rights, as well as applicable environmental laws, and must stop and discontinued forthwith;

b. An order of injunction or judicial review as may be appropriate under Article 23 of the Constitution issued to forthwith compel the defendants to cease/discontinue acts of pollution and environmental degradation of Plot No 5143 Malindi and the general area of Casaurina village, Malindi, and the defendants ordered to restore the land to its original state before the establishment of the dumping site; aggravated damages for trespass, violation of property rights and diminution of value of Plot No 5143 Malindi and the subdivisions created therefrom and aggravated damages for blatant violation of the plaintiffs' fundamental rights to property, a clean and healthy and pollution free environment and underground aquifers;

c. An order to put the plaintiffs in possession of Plot No 5143 Malindi and sub-divisions created therefrom do issue forthwith;

d. Costs of this action to be borne by the defendants.

In contrast, the petitioners herein are different persons; they are residents' associations, entities whose professed purpose is advocating for the welfare of the Residents of Malindi and this claim lies perfectly within the realm of public law. It must however be stated clearly from inception that some of the findings of the court in Abdalla & 2 Others (supra) have answered many of the issues framed for determination in the present suit and this court is disinclined to reinvent the wheel which is also helpful in saving much judicial time. The crucial issues that arise is whether damages should be awarded to the residents' associations who are the petitioners herein and whether some structural interdicts are necessary to ensure compliance with the order sought that a programme of public participation with regard to waste management be commenced afresh by the respondents.

The Petition

On 11th February, 2022, the 1st and 2nd Petitioners filed the present suit by way of a petition dated 4th February, 2022. They sought the following orders:

a) A declaration that the Petitioners' right to a clean and healthy environment as provided in Article 43 of the Constitution has been violated by all the Respondent's through their actions and/or inactions outlined in the Petition, which is in breach of their obligations in respect to the environment under Article 69 of the Constitution;

b) A declaration that all the failure of all the respondents to prevent the burning of the solid waste at the Malindi Dumpsite violated the Malindi residents right to the highest attainable standard of health articulated in Article 43 of the Constitution;

c) A declaration that the failure by the 1st and 4th respondents, through the negligence and/or inaction of the 2nd and 3rd respondents to develop and maintain a safe solid waste management system in Malindi is a violation of the petitioners right to reasonable standards



of sanitation provided under Article 43 of the Constitution;

d) A declaration that the failure to develop and maintain a proper solid waste collection and disposal system in Malindi is a violation of the Malindi residents' right to solid waste disposal services of reasonable quality within the provisions of Article 46(1) (a) of the Constitution;

e) A declaration that the 1st and 4th Respondents have violated the Petitioner's right to the information necessary for them to gain full benefit of proper solid waste disposal services as provided under Article 46(1) (b) of the Constitution;

f) A declaration that by not taking measures to ensure proper solid waste disposal services, the 1st and 4th respondents, through the negligence and/or inaction of the 2nd, 3rd and 5th respondents have violated the rights of Malindi residents to the protection of their health, safety, and economic interest provided for under Article 46(1) (b) of the Constitution;

g) A declaration that the 2nd and 3rd respondents have personally contravened and threaten further violation of the right of the petitioners and the residents of Malindi to access to publishing and publication of all information concerning the purchase of land for garbage collection and building of an incinerator therein under Article 35 of the Constitution;

h) A declaration that the exercise of public office by 2nd and 3rd respondents herein threatens and/or has contravened the national principles of transparency, accountability, public participation and the Rule of Law under Article 10 of the Constitution and as such renders them unsuitable to hold public office;

i) A renewed programme of public participation be and is hereby ordered;

j) The 1st and 4th Respondents herein who are the project proponents of the solid waste disposal project in Malindi be and are hereby directed to file a written report to this court on the progress made in this regard within six (6) months of today;

k) The Petitioners do open a Special Bank Account to which all service levies and rates due and payable to the 1st and 4th petitioners shall be deposited and kept until the Petitioners prove to the satisfaction of the court that a proper solid waste disposal system has been developed in Malindi before access to the funds in that account are made accessible to the 1st and 4th Respondents;

l) An award of Special, general, exemplary and punitive damages as may be assessed by the Honourable Court;

m) Costs of this petition;

n) Interest on (l) and (m) at court rates;

o) Any other order (s) that the Honourable Court may deem fit and just in the circumstances.

In the petition, the petitioners averred that the 1st and 2nd Petitioners are registered residents' associations advocating for the welfare of the Residents of Malindi Town/Municipality. The 1st Respondent is an entity formed under Article 176 of the

Constitution and is a body corporate with perpetual succession; the 2nd respondent is the County Executive Committee member Department Of Water, Environment And Natural Resources in Kilifi County; the 3rd Respondent is the County Executive Committee member for the Department Of Land, Energy, Housing, Physical Planning And Urban Development in Kilifi County; the 4th Respondent is a board established under the Urban Areas and Cities Act No 13 of 2011 while the 5th Respondent is a body corporate established under the Environmental Management and Coordination Act 1999(EMCA).

The Petitioners aver that they have a right under Article 22(a) as read with Article 258 of the Constitution either on their own or acting in public interest or other one to institute court proceedings to enforce their rights and or to act on behalf of other persons whose rights have been violated, and/or to act in the public interest; that this court has jurisdiction under Article 70, Article 159 (1), Article 162(2) (b) as well as Part 3 of the Environment and Land Court Act No 19 of 2011 to hear any question regarding violation, infringement or threat to the right to a clean and health environment recognized and protected under Article 42 of the Constitution; that this court is constitutionally mandated to assert the Authority and supremacy of the Constitution ensuring that all organs of the state including the respondents act within the law and fulfil their Constitutional obligations.

The petition is founded on Article 2(1), 10, 19, 20, 21, 22, 35, 42, 43, 46, 69, 2(5), 2(6), Principle 1 of the Stockholm Declaration of the United Nations Conference on the Human Environment, EMCA, the Kilifi County Solid Waste Management Act 2019 (KCSWMA).

It is averred that the Stockholm Declaration provides for the fundamental rights to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and wellbeing; that the EMCA establishes the National Environment Management Authority and tasks it to monitor and assess activities including activities carried out by relevant lead agencies in order to ensure the environment is not degraded by that activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given; it is also averred that the Kilifi County Solid Waste Management Act 2019 provides a framework for solid waste management in the County creating an obligation for solid waste management on the County Government and particularly in Section 6, tasks the 1st Respondent through the 2nd Respondent to facilitate public participation of among others community and neighbourhood association and organizations in all aspects of solid waste management.

The facts relied on by the Petitioners for their petitions are as follows: solid waste disposal and management in Malindi Municipality which falls within the responsibility of all the respondents has remained unaddressed by them and has become a constant threat to the health safety and livelihood of the residents resulting in violation of the petitioners' human rights to a clean and healthy environment among others. Solid waste is transported using open trucks thus spreading noxious fumes within Malindi; garbage is burned at the Malindi Dumpsite leading to rampant pollution of the environment; the petitioners have sought by

way of correspondence to the 1st respondent and the seeking of intervention by the 2nd, 3rd, 4th and 5th respondents, to have the issue of pollution arising from improper waste management resolved but in vain; all attempts by the residents of Malindi to have the Respondents resolve the problem of environmental degradation emanating from the Malindi dumpsite have not yielded fruit; following protests by the residents in December 2020, the 5th respondent issued a notice to the 1st respondent to stop burning toxic waste and on 30th January 2021 the 5th respondent undertook a visit to the dumpsite and reiterated the order to the 1st respondent but the order was ignored; during the budgeting process on 27th April, 2021, the 2nd petitioner submitted a memorandum to the 1st respondent requesting that appropriate budgetary intervention be taken to resolve the problem of improper waste disposal in Malindi; on 21st June 2021, the petitioners wrote to the 5th respondent over the constant toxic fumes emanating from the Malindi dumpsite which was causing serious public health concerns, seeking intervention under its statutory mandate; that despite giving directions to the 1st respondent to undertake measures to prevent environmental pollution, the 5th respondent has not followed up to enforce the directives of orders.

It is further stated that the World Bank provided Kshs 230,000,000, part of which was specifically earmarked for a solid waste recycling plant for Malindi Municipality under the Urban Development Grant to County in the 2019/2020 financial year, but no steps have been taken to implement that programme.

In its budget for the Financial Year 2020-2021 the 1st respondent made provision for solid waste management; however, no action was taken towards developing any proper solid waste management system in Malindi by either the 1st or the 4th respondent in whose docket the mandate lies; despite the dire condition of the dumpsite and availability of funds the 1st and 4th respondent have neglected and/or declined to take measures to ensure that the waste at the dumpsite is handled in a manner that is environmentally safe and health for the residents of Malindi Municipality. In the light of the perpetual condition of the dumpsite, the 1st petitioner wrote to the 1st respondent and copied the letter to the other respondents requesting for information regarding measures being undertaken and the progress made in addressing environmental degradation and pollution and the resultant health hazard caused by the activities at the dumpsite; the 1st respondent through its County Attorney responded to the said letter but in that response provided no substantive proposal for the resolution of the problem.

Public participation as required by the Constitution where the petitioners will be involved in the process of solid waste disposal has not been effectively carried out by the 1st-4th Respondents thereby violating Constitutional provisions on public participation.

Finally it is stated that the 1st, 2nd and 4th respondent have refused, and/or ignored to implement the Kilifi County Solid Waste Management Act 2019 which provides a legal framework for solid waste management in the County and obligates the County Government

to undertake solid waste management and facilitate public participation of community and neighbourhood association and organizations in all aspects of solid waste management; that 1st, 2nd and 3rd respondent have failed and/or neglected to enforce their legal obligations which would have helped in proper solid waste management in the County.

It is necessary to examine the petition from the angle of the stated Constitutional violations. The alleged violations of the Constitution are expressed to have occurred in the following manner:

Under Article 35 of the Constitution on the Citizens Rights to Access to Information held by the state for the exercise or protection of their environmental rights:

The Petitioners aver that despite seeking by way of correspondence to the 1st respondent information on measures being undertaken to address solid waste management in Malindi Municipality no substantive information was provided to facilitate the exercise of the petitioners' rights to a clean and healthy environment; though the letter was copied to all the others respondents, none replied to it. Consequently, it is alleged that failure to disclose that information violates Article 35 of the Constitution.

Under Article 42 of the Constitution on the Citizens Rights to a clean and health environment:

It is alleged that by allowing the use of open trucks to ferry rotting solid waste from dumpsters within Malindi to the main dumpsite spread noxious fumes and leads to falling of garbage on the road all the way from the collection point to the main dumpsite that endangering the environment.

Further, the 1st and 4th Respondents have failed to implement or oversee the implementation of a solid waste management system with the funds provided by the World Bank. This has been condoned through the negligence and/or inaction on the part of the 2nd, 3rd and 5th respondent.

It is stated that the 1st, 4th and 5th respondent have failed to prevent burning of solid waste at the Malindi dumpsite which has caused and continually threatens to cause airborne diseases to the residents; the personal negligence on the part of the 2nd and 3rd respondent and/or their ignorance or omission has contributed to the bad state of the environment in Malindi.

Under Article 43 of the Constitution on the protection of economic and social rights:

It is alleged that the failure on the part of the respondent to prevent the burning of solid wastes at the Malindi dumpsite has occasioned the residents breathing problems and unending affliction with airborne diseases thereby violating their rights to the highest attainable standard of health under Article 43 (1) (a) of the Constitution; that the failure of the 1st and 4th respondent and inaction or negligence of the 2nd and 3rd respondent to develop and maintain a safe solid waste management system in Malindi is a violation of the right to reasonable standard of sanitation under Article 43(1)(b) of the Constitution.

Under Article 46 of the Constitution on the Citizens Consumer Rights:

It is alleged that the residents of Malindi are consumers of services from the County of which they are taxed and by failure to develop and maintain a proper solid waste collection and disposal system, the 1st and 4th respondents through the negligence and inaction of the 2nd and 3rd respondent have denied the residents of Malindi the right to solid waste disposal services of reasonable quality provided under Article 46(1)(a) of the Constitution; that the 1st and 4th Respondents has violated the rights of the petitioners to information necessary for them to gain full benefit of proper solid waste disposal services by failing to give sufficient feedback to the petitioners about their plans including the funds set aside for the development of a solid waste management system as provided under Article 46(1) (b) of the Constitution.

It is also stated that the 1st and 4th respondents through the negligence and inaction of the other respondents have violated the Malindi residents' rights to protection of their health, safety and economic interest provided under Article 46 (1) (c) through refusing to ensure proper solid waste disposal services.

Finally, it is stated that the respondents' action or inaction has occasioned loss and injury to the residents of Malindi.

Under Article 69 of the Constitution on the obligations in respect of the environment:

It is stated that by failing to provide the petitioners with information about the solid waste management plan for Malindi and to engage them in resolving the plans emanating from improper waste disposal at the dumpsite, the 1st and the 4th respondent through the office of the 3rd respondent has failed to encourage public participation in the Management, protection and conservation of the environment as required under Article 69 (1) (d); that by allowing the continuous burning of wastes at the Malindi dumpsite, the 1st and 4th respondent through the negligence and/or inaction on the part of the 2nd and 3rd respondent have failed to eliminate processes and activities that are likely to endanger the environment as required by Article 69(1) (g).

Finally, it is alleged that the respondents have failed to ensure that the environment on Malindi is clean and hospitable by failing to implement the applicable laws and policies and to utilize available funds to develop appropriate solid waste disposal and management measures by building an incinerator even after the World Bank had funded the project.

Under Article 21 of the Constitution on the fundamental duty of state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights:

It is alleged that the 2nd and 3rd respondents' negligence/omission/ignorance has contributed to a bad state of the environment in Malindi in violation of their fundamental duty to observe, respect, protect, promote and fulfil the rights on fundamental freedoms in the bills of rights for which they ought to be held personally accountable.

The Petition is supported by the sworn affidavit of Naomi Ang'erah, Secretary of the 1st petitioner who states that she has Authority of the 1st petitioner to swear it. It is also

supported by the sworn affidavit of Philip Ayub Chai the Deputy Chairperson of the 2nd Petitioner also authorized by the 2nd Petitioner. The executed Authority granted to each of the deponents was filed together with the petition.

In those affidavits, it is deponed that the residents have attempted to engage the County Government Officials over the necessary steps that ought to be taken to address the issue of environmental pollution to no avail, as evidenced by the attached correspondence; that the correspondence was not replied to in substance by the respondents; and the residents of Malindi have been adversely affected by the heavy smoke emitted from the burning of waste at the dumpsite; that the advocates for the petitioners sought information from the 1st respondent through its County Secretary seeking to know what was being done to stop pollution at the dumpsite; that is public information, as seen from annexure "PAC3" (the Kenya News Agency Media Report dated 27th July, 2020); that the World Bank through the Kenyan Urban Support Programme provided 90 Million Shillings for solid waste, recycling plan for Malindi Municipality under the Urban Development Grants to County in the financial year 2019/2020 but that notwithstanding, no steps have been taken to implement that programme; that if the solid waste disposal project in Malindi had been implemented, the residents will not be suffering ill health or any financial implications.

The affidavit of the 1st Petitioner exhibits a report marked "NA1" on the attempts to engage the 1st Respondent over the Malindi dumpsite, email communications dated 14th May 2021 between the petitioners and the CEC for Health in the County, email communication dated 25th May, 2021 to the CEC Environment Kilifi County, and email communication to the Cabinet Secretary for Environment dated 31st May, 2021, a letter dated 23rd September 2021 from the Petitioner's advocate to the County Secretary Kilifi County Government, a program appraisal document on proposed credit in the amount of 300,000,000 dollars to the Republic of Kenya for the Kenya Urban Support Programme dated 5th July, 2017, comprising of pages 33, 13, 14-26; an email communication of 2nd December, 2021 by a concerned tourist complaining of the foul smell around Silver Sand Beach, vowing not to return to Malindi.

To the 2nd petitioner's affidavit is attached the following set of documents: a memorandum to the County Government of Kilifi and the Kilifi County Treasury on the budget estimate for the financial year 2021-2022 submitted on 27th April 2021; a letter dated 21st June, 2021 from the 2nd petitioner and the 1st petitioner to Mr. Mamo Boru, the Director General of the National Environment Management Authority attaching some photographs of the dumpsite, a media report from the Kenya News Agency dated 27th July, 2020 on a Kshs 233 Million World Bank project to carry out road, drainage and solid waste project in Malindi, a letter from the petitioners' advocate dated 28th September, 2021 to the County Secretary Kilifi County Government expressing concern over lack of information regarding the development surrounding the projects undertaken by the County Government in relation to waste management.

1st To 5th Interested Parties Replying Affidavit Dated 13th June, 2023.

The 1st Interested Party filed an affidavit dated 13th June, 2023 on behalf of the 1st to 5th Interested Parties in which he stated as follows: he resides at Muyeye in Malindi and is well versed with the issues in dispute in this petition. He lamented that the respondents have allowed the continued operation of the dumpsite; that there is no waste disposal site licence; that the site spreads all the way to the Malindi Marine Park and the Airport Area to the detriment of the surrounding residents who are being suffocated by the toxic fumes and smoke on daily basis, which situation is exacerbated by the advent of weekends, nights, rainy and windy days being the worst affected; he also accuses the respondents of allowing the site to be used for sewage waste disposal in a random fashion by exhaustor truck drivers; that the toxic fumes accelerate contraction of inspiratory diseases and other complications by residents, and the area surrounding the dumpsite is rampant with respiratory diseases including asthma, throat, chest and lung diseases, cancer, headaches, coughs among others attributable to toxic fumes; there are mosquitoes, flies, rats and other animals and it is an environmental catastrophe silently ravaging unsuspecting and voiceless Malindi residents' lives, which requires intervention of this court; that medical wastes are also indiscriminately dumped there from hospitals around Malindi and the environs including body parts, blood and syringes, which are burnt at the site. He attaches a report titled "Municipal Solid Waste Management Report for Malindi, Watamu and The Surrounding Peri-Urban Areas" said to have been commissioned by, among others, the 1st Respondent in which the Municipal Manager admits to the fact of inadequate solid waste services in Malindi leading to informal burning, illegal dumping and serious health concerns affecting the economy. He states that the site has an unaesthetic appearance which has rendered the hotel business operations in the area unattainable as tourists are unwilling to visit the area; further uncontrolled entry into the site has led to invasion and settlement by scavenging families who burn wastes and seek materials to sell. He asserts that the fumes and smokes limit visibility to approximately 20 metres. Other media reports regarding the dumpsite are also attached to the affidavit. The deponent adds that the Malindi Sub-County Hospital incinerator was decommissioned recently and in the absence of that facility which serves all hospitals in Malindi, medical wastes from hospitals is directed to the dumpsite. He alluded to NEMA Director General's directives to the 1st Respondent which included the construction of a wall to secure the waste from overflowing and to regulate entry into the site, which has not been observed and which omission is in alleged breach of duty to the residents nearby. It is stated that the 5th Respondent has not taken any further action with regard to closure, restoration or even ensuring the NEMA Director General's directives to the 1st Respondent have been complied with.

The deponent also states that adequate budgetary allocations are key to sustainable implementation of an effective solid waste management programme, but despite being availed with the necessary funds, to relocate or manage the dumping site, the 1st to 4th

Respondent have failed to rectify the situation. He refers to "Exhibit KH4" a news Article from the media "Uzalendo News" titled "World Bank Grants Malindi with Kshs 233M Facelift" and avers that the respondents have not denied the fact that those funds were availed to them.

It is stated that the 2021 UN Habitant Report attached as Exhibit "KH5" confirmed that Kilifi lacks a Solid Waste Management System; that the failure of the respondents to respond to the petitioners' request for information on the steps taken to address the environmental and social menace arising from the dumpsite amounts to violation of rights to information guaranteed in the Constitution.

6th Interested Party's Replying Affidavit Dated 13th June, 2023

Vide a Notice of Motion dated 29th November, 2022 the interested parties applied to be joined to the present suit and to submit any information they may think important for the just disposition of this matter. Pursuant to that joinder as well as leave granted in that application, the 6th Interested party filed an affidavit dated 13th June, 2023 sworn by Annette Mbogoh in support of the petition in which she stated as follows: that she is the Executive Director of the 6th Interested Party which is a Non-Governmental Organization dealing with the protection and promotion of the rights of the vulnerable and marginalized individuals and communities in Kenya since its inception in 1973. That she is aware that the County Government of Kilifi operates the Kilifi dumpsite without a licence; that the dumpsite has been in operation for several decades without a waste disposal site licence; that it is the fault of the County Government which has allowed the dumping of waste at the dumpsite and which has failed to find an alternative or proper dumping point to the detriment of Malindi residents; that the dumpsite omits offensive gas, contaminates the air, harbours stray dogs which threatens people and vectors such as flies, and street boys and criminals who cause insecurity; that the dirt from the dumpsite is disseminated by wind or scavenging birds to homes thus contaminating drinking water and human foods; that the dumpsite is therefore a threat to the health of Malindi residents; that it is not in dispute that the County Government received funds from the World Bank towards setting up a proper waste management programme but the County Government has failed to account for the funds; that Article 10 of the Constitution demands accountability, and failure by the County Government to give an account of the funds received from the World Bank violates this value; that Article 42 guarantees every person a right to a clean and healthy environment and continued exposure of the residents to toxic waste on fumes violates their dignity contrary to Article 28 of the Constitution (especially due to omissions to correct the situation), thus subjecting them to a life of disease contrary to Article 43 of the Constitution, and that the petitioners have demonstrated violation of constitutional and legal rights to clean and healthy environment, and they are entitled to the remedies sought.

1st - 4th Respondents' Replying Affidavit Dated 26th February 2025

The affidavit was sworn by Lennox Mwangolo, the County Environment Officer in the

Department of Environment Water Forestry and Natural Resources on the County Government of Kilifi. The deponent states that the dispute relates to the waste disposal site and solid waste management system located at Mayungu in the Casuarina area of Malindi. That solid waste management is a shared responsibility amongst all actors including the county government, waste generators, owners, and occupiers under Article 69(2). That contrary to the petitioners' allegation, the 4th respondent is using the modern and standard vehicles for collecting and transporting solid waste instead of open trucks. That any additional hired trucks contracted for the purpose are covered with nets and supervised so that no waste is spilled on the way during transportation for disposal.

That air pollution at the dump site is caused by smoke due to the burning of materials to expose metal for sale. The burning is done by waste pickers. In response to the burning, the 1st respondent has deployed 9 county enforcement officers to man the dump site during the day and 5 officers to man it during the night to ensure that there is no burning of waste whatsoever. In addition, there is a standby county fire engine to put out any fires that may arise.

Further, it is stated that the first to fourth respondents have developed a compliance plan for the major waste disposal site for implementation that will address the problems related to operations and management of the site. The 1st Respondent is in the process of implementing the 10 points minimum requirements for ways to disposal sites as required by law. The compliance plan is attached to the marked Exhibit "LM1". The 4th respondent also budgeted for and procured some waste storage bins in the financial year 2023-2024 in an effort to ensure improved waste management within the municipality. The waste material recovery facility for Malindi municipality that has been budgeted for implementation was not implemented through the World Bank because those it was objected to by those living around the Jacaranda area. Consequently, the Municipality requested the funds to be reallocated to and used for a road project instead, and the road project, located in Majengo in Malindi, was completed.

That the 1st respondent has continuously and progressively been enhancing the waste management systems in the county by provision of waste storage bins/chambers and garbage collection trucks, conducting public awareness on waste management through cleanups and enforcement of the relevant regulations, training waste handlers and enhancing collaboration with the stakeholders.

1st - 4th Respondents' Supplementary Replying Affidavit Dated 3rd April 2025.

The affidavit was also sworn by Lennox Mwangolo. The gist of that affidavit is that engagements have been undertaken with key stakeholders, including the 1st petitioner herein, and a plan of action for the immediate implementation and resolution of identified challenges pertaining to waste management was formulated; that in particular on 3rd February 2025, a foundational training session was convened, specifically designed for the capacity building of supervisors in areas and encompassing street cleaning protocols and

fundamental best practices in waste management and essential supervisory skills.

On 12th February 2025, a continuous professional development engagement for supervisors was conducted with the principal aim of eradicating waste disposal sites, conducting sensitization in public education initiatives targeting community groups to promote the adoption of a circular economy and instituting the practice of waste segregation at the point of origin. The deponent also speaks of other plans by the first respondent for equipping enforcement officers with comprehensive knowledge of waste management regulations and public sensitization as well as systematic mapping and zoning of prospective new waste management units and a review of existing waste management zones in the third quarter of 2024/2025. That the 1st respondent is committed to embracing the reduce, reuse and recycle paradigm, the demarcation of designated areas within disposal sites for the segregated disposal of different waste constituents, providing of mechanical means for periodic levelling and compression of waste with soil at bi-weekly intervals, undertaking a comprehensive survey of the existing waste disposal area and constructing a secure perimeter wall. Besides, the first respondent has deployed enforcement officers to ensure proper utilization of the designated waste chambers and to actively prevent instances of illegal dumping at the Mayungu waste disposal site. The County Government is also in the process of procuring or constructing additional refuse segregation chambers.

Petitioners' Further Affidavit Dated 12th November 2025

This affidavit was sworn by Chesoli Dennis Chebayi advocate on behalf the petitioners. The gist of the affidavit is that the first to fourth respondent's affidavit evinces knowledge of the provisions of the same Constitution which have violated by failing to play their proper part in respect the solid waste management in Kilifi County, which omission has led to this petition. The deponent faults the Replying Affidavit of the petitioners by stating that their averments are unsupported by evidence, for example, that there are no photographs of the alleged garbage compactors, waste bins or the enforcement officers while in the course of their duties manning the dumping sites, or even the budget that facilitated the procurement of those waste storage bins and/or the purchase receipts; that it is in the public domain that the respondents are still dumping and burning the waste while ignoring their duty of care to the petitioners' rights to a clean environment. The deponent denies that there has been any provision of garbage collection trucks bins or waste segregation chambers, otherwise the present petition would not have been lodged. The deponent also asserts that the residents of Kilifi County have never witnessed any public awareness on proper waste management through cleanups and enforcement of relevant regulations, training of waste handlers, or enhancing of collaboration with stakeholders which are alleged by the first to fourth respondents to have happened.

5th Respondents' Replying Affidavit Dated 3rd February 2026.

This affidavit has been sworn by David Ongare, Director in Charge of Environmental

Compliance at the National Environment Management Authority. The deponent sets out the duties of the Authority in his affidavit as well as the provisions of the Constitution and of EMCA with regard to the right of every citizen to a clean and healthy environment, and acknowledges the supervisory mandate of the Authority over all matters relating to the environment, as well as the status of being the principal instrument of government in the implementation of all policies relating to the environment.

At paragraph 8 of his affidavit, he concedes that the Authority issues licenses and enforces compliance, but is not involved in service delivery as is the first respondent under the Fourth Schedule Part 2 Paragraphs 2 And 10 of the Constitution of Kenya.

The deponent specifically denies that the Authority remains responsible for supervisory mandate and does not operate dumping sites, and that courts have indeed emphasized that point in their decisions; that it has put in place the National Solid Waste Management Strategy which elaborates the role of both the County Governments and the Authority in solid waste management.

Regarding its response to the waste management situation in Malindi, the fifth respondent states that it exercised its supervisory jurisdiction by visiting the Malindi Municipality dumping site on 30th January 2021, carrying out a survey thereof and issuing instructions to the county government regarding waste management in the area. The deponent stated that contrary to Section 87(1) of EMCA the first respondent has allowed burning of toxic waste at the dump site. During the visit on 30th January 2021 the fifth respondent warned the first respondent on the risks of toxic fumes occasioned by the burning of waste and ordered the fifth respondent to halt the burning of waste at the dumpsite.

The deponent also stated that NEMA officers have conducted environmental audits and inspections and required the County Government of Kilifi to prepare correction plans, besides engaging the County Department of Environment to ensure progressive compliance with the environmental waste Management regulations.

He also adds that under the fourth schedule to the Constitution, the county government has been tasked with the control of air pollution.

The deponent further states that under Section 120(1) and 3(h) of the County Governments Act the 1st respondent is obliged to adopt and implement tariffs and pricing policy for the provision of public services while being guided by the promotion of the economic, efficient, effective and sustainable use of resources the recycling of waste and other appropriate and environmental objectives.

The deponent further states that it is the Kilifi County Government that is mandated with solid waste disposal and management in Malindi Municipality; that Section 6 of the Kilifi County Solid Waste Management Act 2019 provides a legal framework for solid waste management in the county and imposes the duty of solid waste management on Kilifi County Government. He denies that the Authority is culpable for the acts and omissions of the County Government of Kilifi. He also terms the petition as vague and not setting out with

particularity in the statutory duty that NEMA failed to perform or any specific act or omission constituting a breach of Articles 42 and 70 of the Constitution; that the newspaper Articles and photographs exhibited by the petitioners are unverified and there is no scientific proof linking the Authority to any pollution or public health risk; that the Authority has at all times remained conscious of the statutes and regulations in place and has taken every necessary steps in ensuring that the correct procedures outlined in the law are complied with; that any delays in full compliance on the part of the 1st - 4th respondents arise from logistical and resource constraints of the County Government and not from willful inaction from the Authority; that Section 8(1) and Section 9 of the Sustainable Waste Management Act Cap 387C provide for the responsibilities of the Authority and the County Government respectively.

He sums up by stating that the petition as against the fifth respondent should be dismissed with costs.

SUBMISSIONS OF THE PARTIES

Petitioners' Submissions

The petitioners filed their submissions dated 17th July 2024 and framed the following issues for determination:

- a. Whether the Petitioners are entitled to the Prayers sought;
- b. Who should bear costs;

Regarding the first issue the petitioners urge that the applicable principles that should be applied by this Honourable Court in determining liability as against all the Respondents are both private and public law principles; that the private or civil law principles on liability which are centered on the torts of nuisance and negligence, only determine the liability of private persons, and of public bodies to a limited extent with respect to breach of statutory duties.

The petitioners averred that under the rule in *Rylands v Fletcher* the liability of the 1st and 4th Respondents is not contested, the ground for that being that they are the entities who dispose of rotting solid from dumpsters with Malindi Town to the main dumpsite using open trucks. They aver that the waste has polluted the environment and caused adverse effects to the Petitioner's herein and other residents. They state that the rule in *Rylands v Fletcher* is relevant in environmental regulation, as the standard of care was imposed in respect of hazardous activities.

The petitioners stated that under Section 2 of EMCA, the definition of the polluter-pays principle is to the effect that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that were connected with or incidental to the foregoing, was to be paid or borne by the person convicted of pollution under the Act or any other applicable law.

It is further stated that the 1st Respondent is engaged in the process of regulation and

development of economic policies within the entire Kilifi County, while the 5th Respondent as a State agency is also engaged in economic activities as well as regulation. Therefore, the 1- 5th Respondents are not exempted from the application of the polluter pays principle.

It is urged that in Section 18(a) of Environment and Land Court Act and in Section 3(5) of EMCA the Environment and Land Court in exercising the jurisdiction conferred upon it is required to be guided by principles of sustainable development including the polluter pays principle.

The petitioners also urge that the law that regulates the County Governments and the State's obligations in relation to the right to a clean and healthy environment and environment protection is public law, and that the 1st, 4th and 5th Respondents' liability occurred when they violated their statutory or Constitutional obligations or duties, and a nexus has been established between the wrongful acts and the damages or injuries caused by the environment; that the Constitution places positive obligations upon the State and State agencies to promote and protect the right to a healthy environment by taking all necessary measures; that state liability is derived from either administrative authorization or absence of regulation, or also from inadequate measures relating to activities of other actors, which results in harm to the environment; that the violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originated from the actions of the State or its organs, but also if it resulted from lack of effective regulation of private activities.

The petitioners further submitted that Article 69 of the Constitution imposes shared obligations and responsibility for environmental protection, management and conservation on both the state actors as well as private actors; that under Article 260 of the Constitution, the State is defined to mean the collectivity of offices, organs and other entities comprising the Government of the Republic under the Constitution; a "state organ" means a commission, office, agency or other body established under the Constitution while a "person" includes a company, association or other body of persons whether incorporated or unincorporated; that Article 69 of the Constitution embodied the shift that has occurred over the years in the regulation of the environment, from reactive provision of remedies for environmental pollution to more proactive provisions of standards and preventative measures designed to reduce or eliminate the risk of environmental damage. It is stated that in particular, Article 69 embodies the principle of sustainable development which attempts to reconcile the conflicting demands of economic development and environmental protection so as to ensure that the benefit of any development outweighed its costs, including costs to the environment.

It was further submitted that Regulation 17 of the Environmental Management and Co-ordination (Waste Management) Regulations, 2006 provides that no person shall engage in any activity likely to generate any hazardous waste without a valid licence issued by NEMA under the provisions of the Act; that an Environment Impact Assessment report is a key



environmental law and regulation mechanism, whose essence is that information about likely environmental impacts of development projects, plans and programs is properly considered before potentially harmful decisions are made.

The petitioners aver that it is the responsibility of NEMA, the 5th Respondent herein, to ensure compliance with the requirements of Environment Impact Assessment processes and to also take into account the information thereon when making a decision whether or not to approve and license a project in default of which development may occur that has unmitigated, damaging effects on nearby properties and human health.

The petitioners aver that there was no evidence adduced at the hearing of the Petition by NEMA that an EIA Study report was undertaken and subjected to technical evaluation in light of the parameters required to be satisfied in terms of impact as set out in the Second Schedule to the Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations, as well as confirmation of the relevant standards that were required to be met by the 1st to 4th Respondents, including on hazardous waste.

It was stated that once the evidence of the adverse and hazardous effects of the operations of the Respondents became apparent, and given the nature of the wide ranging effects on both the ecosystem, human health, water and air quality, NEMA ought to have applied the wide range of enforcement measures at its disposal, including prosecution of the perpetrators of the pollution who are the 1st to 4th Respondents.

The petitioners stated that under Article 186 of the Constitution of Kenya, 2010, the functions and powers of the County Governments are as set out in Part II of the Fourth Schedule to the Constitution and include county health services including refuse removal, refuse dumps and solid waste disposal, control of air pollution, noise pollution, other public nuisances and outdoor advertising, implementation of specific National Government policies on natural resources and environmental conservation, including soil and water conservation.

Clear duties with respect to environmental protection are by virtue of those provisions of the 2nd Schedule to the Constitution imposed upon on the County Government of Kilifi. The petitioners aver that they have tried communicating with the County Government but their numerous letters to the offices of the 2nd and 3rd Respondents concerning the toxic smoke from the Malindi dumpsite fell on deaf ears in clear contravention of the Petitioners' Constitutional rights to information and a clean, healthy and sustainable environment. It is stated that the 1st -4th Respondents are one and the same and should be strictly held liable to the pollution caused.

The petitioners stated that they have discharged their burden of proof as per the required standard balance of probabilities. They asserted that Respondents' letter inviting the Petitioners to negotiations for an out of court settlement is clear evidence that indeed there was pollution and violation of their right to a clean and sustainable environment. They urged the court to grant all the prayers sought in the petition. In particular, they averred that

compensation is a recognized remedy for Constitutional violations under Articles 23(3)(e) and 70(2)(c) of the Constitution; that Article 70(3) specifically provides that an applicant whose rights to a clean and healthy environment has been violated does not have to demonstrate that any person has incurred loss or suffered injury; that while general damages are sought for personal injuries that arose from the violation, the law allows award of damages for the losses that are presumed to be the natural and probable consequence of a wrong, and may be granted for a loss that is incapable of precise estimation, such as pain and suffering. The Petitioners urged court to award general damages in the sum of Kshs. 950,000,000/= and Kshs. 350,000,000/= as special damages as against the Respondents.

Regarding the issue of costs, it was urged that although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21); that a successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise as was held in Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. They submitted that the costs of the Petition be awarded to the Petitioners herein.

1st -6th Interested Parties' Submissions.

The 1st to 6th Interested Parties' submissions identified the following issues for determination:

1. Whether the Respondents' failed to develop and maintain a safe solid waste management system in Malindi;
2. Whether failure by the Respondents to respond to correspondence amount to serious violations of right to information;
3. Whether the funds received by the County Government from World Bank towards the set-up of proper waste program should be accounted for.

Under the first issue, it is urged that under the Section 2(g) of Part 2 of the Fourth Schedule to the Constitution, the functions of waste removal, refuse dumps and solid waste disposal were devolved to County Government; Section 96 of EMCA 1999 requires the Cabinet Secretary on the recommendation of NEMA to identify materials dangerous to human health and environment and to give guidelines and prescribe measures for management of such materials. Section 97 EMCA prohibits discharge of waste in a manner that causes pollution to the environment, transportation of waste without a licence and operation of a waste disposal site or plant without a licence. It further provides that any person whose activities generates wastes shall employ measures to minimize the wastes. Reference is made to the African Commission on Human and Peoples Rights, Communication No. 115/96 entitled "The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs Nigeria". Use of open trucks to transport decaying solid wastes to the main dumpsite is decried. It is stated the 1st and 4th respondents have omitted to act

appropriately to implement a solid waste management system due to negligence of the 2nd, 3rd and 5th respondent.

On the 2nd issue, Article 35 is involved. It is stated that access to information is a fundamental right and it must be provided unless it falls under exception in Section 6 of the Access to Information Act.

On the 3rd issue, Article 201 of the Constitution is invoked, with respect to principles of public finance as calling for fiscal discipline and accountability in managing public finances. Article 201 (d) is relied on for the preposition that public funds must be used in a prudent and responsible way. The Interested Parties then referred to the World Bank and KUSP Programme for 233 million which has been addressed herein above and assert that no steps have been taken to implement the program and so the 1st respondent is required by law to account for those funds.

Petitioners' Further Written Submissions Dated 21st January 2026

In their further submissions, the petitioner's counsel dissected the responses of the first to the fourth respondents through their replying affidavit dated 26th February 2025.

He stated that the first to the fourth respondents represent the weakest link in the process of shared responsibility for sustainable waste management; that the continual dumping of waste on private land demonstrates the failure of the respondents to comply with their obligations under Section 30 of the Kilifi County Solid Waste Management Act 2019; that in *Abdallah And 2 Others Versus County Government Of Kilifi And 2 Others* 2023 KEELC 198198 KLR, the court recognized the importance of the constitutional right to a clean and healthy environment and directed the relocation of the unlawful dumpsite; that the proposals now contained in the replying affidavits are mere knee-jerk reactions to the petition; that the first respondent has acted inconsistently by violating Section 30 of the Kilifi County Solid Waste Management Act 2019 by dumping waste on the unlicensed site while at the same time penalizing illegal entry to the same site by applying the same Section. Counsel blamed the first to fourth respondents for what he called "lengthy discussions and paperwork rather than tangible actions on the ground." He also pointed out that no timelines have been provided for addressing the ongoing pollution; that this lack of a clear action plan implies delays in action and exacerbates the urgent health consequences; that such lack of timelines and lack of clear action renders the present petition to be of great significance. He pointed out that there was lack of accountability from the relevant offices regarding funds received for improving the environmental neglect faced by the petitioners; that the provisions of Section 5 of the Kilifi County Solid Waste Management Act 2019 affirms the rights of the first respondent's residents to a clean and healthy environment which has been violated by the first to the fourth respondents; that it is clear that as the first respondent has no Solid Waste Management Policy, no key Integrated Solid Waste Management Strategies have been adopted. It is given, as an example, that there is

no adoption of registration for packaging waste controls on hazardous waste and investment in handling solid waste, and nor is there any developed auditing system for existing waste infrastructure and local capability.

1st To 4th Respondents' Written Submissions Dated 29th January 2026.

These submissions identify the following issues for determination by the court:

- i. Whether the transportation of solid waste using open trucks amounts to violation of Article 42 of the Constitution Section 87 of the EMCA and Sustainable Waste Management Act 2022 and if so, whether immediate cessation or time bound remedial compliance is the appropriate remedy;
- ii. Whether the alleged burning of garbage at the dump site constitutes a breach of Article 42 of the Constitution EMCA and the Sustainable Waste Management Act and whether the first to fourth respondents bear strict liability where such burning is caused by third parties or spontaneous combustion;
- iii. Whether the first to fourth respondents have failed to implement the Kilifi County Solid Waste Management 2019 or whether the Act is being implemented progressively consistent with Constitutional and statutory principles;
- iv. Whether environmental protection obligations under Article 42 and 69 of the Constitution are the exclusive responsibility of the County Government or a shared duty between the state and citizens including obligations relating to proper waste disposed by residents;
- v. Whether remedies sought by the petitioners including immediate closure prohibition of waste transport and compensatory orders are proportionate, just and in the public interest, or whether this court should grant phased, court-supervised remedial relief with the monitoring and reporting.

Regarding issue no. 1, hereinabove the first respondent did not contest the existence of its statutory duties under Article 42 and Section 87(1) of EMCA. Its Counsel pointed out that *Martin Wanyonyi CEO Center for Human Rights Organization and Another Versus County Government of Bungoma And 2 Others 2019 KEELC 486 KLR*, the court did not order immediate closure of the dump site but directed the County Government to apply for the requisite licences within 30 days and implement specific remedial environmental measures within defined timelines; that the court in the *Wanyonyi Case (supra)* adopted a corrective and supervisory approach, recognizing that County Governments must be given an opportunity to regularize non-compliant practices where they demonstrate willingness to comply; counsel sought that the same approach to be applied to the present case.

Regarding the issue no 2, counsel cited *Odando and Another Versus National Environment Management Authority and 3 Others 2023 KEELC 21 For 31 KLR* and urged that in that case, the court ordered closure of the dump site after extensive scientific and medical evidence of toxic emissions, proof of long-term public health harm, and demonstrated failure by the authorities to mitigate the risks over many years; that the *Odando Case (supra)* was

supported by empirical data, and does not mandate a trend of automatic closure of all dump sites upon mere allegations of burning of waste without data; that even where the burning is caused by third parties such as scavengers or by spontaneous combustion, the County Government should not escape liability altogether but also that strict liability under the law is imposed within a context; that in the present case, the County Government's duty is to demonstrate reasonable site management including fencing, firefighting measures, patrols and engagement with NEMA; that therefore unless the petitioners place before the court empirical evidence comparable to the Odando case (supra), the proportionate remedy is court-supervised mitigation and not abrupt closure.

On issue number 3 above, it was submitted that environmental rights are aspirational rights achieved progressively within available resources. The County Government obligations are supposed to have progressive implementation tied to budgetary allocation institutional capacity regulations and public participation; that the courts have consistently balanced environmental protection against public interest particularly where essential services such as waste collection are concerned; that a complete halt to waste collection would prejudice the rights of many and expose residents to heightened health risks and undermine public order; that going by Kipsiwo Community Self-Help Group Versus Attorney General And Six Others 2013 KEELC 63 KLR , the court, though upholding the residents' rights to enforcement of environmental rights against public authorities, did not hold that every shortcoming attracts immediate coercive orders; that the guiding principle should be whether the County has taken demonstrable steps towards implementation, including establishment of budget lines, policy frameworks, public participation, institutional arrangements, and the presence of this should guide the court to issuing a timebound compliance rather than immediate punitive relief.

Regarding issue no 4, it was stated that Article 69(1)(d) expressly places a duty on every person to cooperate in protecting and conserving the environment. Counsel for the respondents submitted that failure to use sealed or appropriate waste containers contributed to spillage, odour and secondary pollution, and the County Government cannot be solely blamed for that default; that any relief granted by the court should therefore be consistent with Article 69, and promote compliance by all stakeholders including the residents.

Regarding issue no. 5, it was submitted that the court has a wide remedial discretion under Article 70 and that that discretion must be exercised to proportionate tree and either public interest; that litigation has in the past adopted either immediate closure where the harm is severe, ongoing and empirically proven, or timebound remedial compliance where harm arises from infrastructural gaps or transitional delays. It was urged that waste collection being an essential public service, immediate closure or prohibition would prejudice the rights of the many, contrary to Articles 24 and 43, and thereby undermine public health.

The first to fourth respondent therefore urge to the court to grant a phased court-

supervised remedial orders with oversight consistent with the settled Environment and Land Court practice; that the court should adopt a corrective rather than a punitive approach.

5th Respondent's Submissions

The fifth respondent never filed any submissions in this matter.

ANALYSIS AND DETERMINATION

It is necessary to state that this matter was first placed before me for dealing on a mention on 10/6/2024 when I ordered that the petition be disposed of by way of written submissions. The respondents were not represented on that date. The court ordered that the matter be disposed of by way of written submissions and both sides were given 21 days each to comply with the order. On 8/10/2024, the matter came up for another mention and the petitioners confirmed filing of their submissions. The 5th respondent sought more time to file submissions which was granted. Counsel for the 1st respondent were present at that session. The court observed as follows:

"This is an environmental case involving delicate matters and the 5th respondent is a crucial player in the environment sector. Consequently, I am inclined to order as follows in the interests of justice:

1. The proceedings are hereby reopened for all the respondents to file replies if they have not filed any by today within 21 days;
2. Mr Chesoli shall have leave to file on the petitioner's behalf any fitting rejoinder to those replies within 14 days of service together with his further submissions if any shall be needed;
3. The respondents shall file and serve their submissions within 14 days of being served with the petitioners' rejoinder and/or submissions or, if none are served, within 14 days of the expiry of the period given for the filing of the rejoinder. Mention on 10/12/24 for a judgment date."

When the matter came up on 10/12/2024, all the respondents' counsel were absent and the petitioners' counsel applied for a judgment date which this court issued. However, the case was reopened at the instance of the 1st -4th respondents who subsequently filed their responses and submissions with leave of court.

In the judgment in Malindi Land Case 283 of 2016 - Amina Said Abdalla, Omar Said Swaleh & Ahmed Said Swaleh V County Government of Kilifi & 2 Others [2023] KEELC 19898 (KLR) there was constant reference to the lack of a response by the 1st respondent therein, who is now named as the 1st respondent in the present petition. The court in the case observed as follows:

"4. The suit was contested and a full trial was conducted. At the close of the case on both sides, the court directed parties to file written submissions. The plaintiff and the second defendants did comply. The first and third defendants did not. The inaction by the first and third defendants in the conduct of these proceedings is quite evident as will be seen later in

this judgment.....

.....

8. A defence hearing was scheduled on 18th March 2021, 6th October 2021, 10th November 2021, and 25th October 2022, in all those dates the first defendant never called for any evidence - no reasons were provided to this court. Mr. Bwire for the first defendant informed the court that he had his witnesses in attendance but elected not to have them take the witness stand, without offering any reasons or at all.”

This court having carefully perused the petition and the supporting documents and the submissions, it is clear that the petition is primarily premised on the following postulates:

- i. All the respondents have neglected and/or declined to take measures including implementing the Kilifi County Solid Waste Management Act 2019 to ensure that the waste at the Mayungu dump site is handled in a manner that is environmentally safe and health for the residents of Malindi Municipality;
- ii. In particular, the National Environment Management Authority has failed to fulfil its obligations under EMCA to monitor and assess activities of the rest of the respondents and to take the appropriate action to ensure proper waste management strategies are effected by them, including by applying the wide range of enforcement measures at its disposal, and especially the prosecution of the perpetrators of the pollution who are the 1st to 4th Respondents;
- iii. The respondents actions/inaction with regard to solid waste disposal and management in Malindi Municipality has resulted in a constant threat to the health safety and livelihood of the residents resulting in violation of the petitioners’ human rights to a clean and healthy environment especially through transporting waste using open trucks thus spreading noxious fumes within Malindi; burning garbage is going on at the Mayungu Dumpsite; dirt from the Mayungu dumpsite is disseminated by wind or scavenging birds to other areas in Malindi thus contaminating drinking water and human foods;
- iv. There has been no accountability of funds meant for solid waste management leading to violation of the value of accountability under the Constitution in that:
 - a. despite the World Bank providing Kshs 230,000,000/= part of which was specifically earmarked for a solid waste recycling plant for Malindi Municipality under the Urban Development Grant to County in the 2019/2020 financial year, and which was not utilized for the purpose;
 - b. despite the availability of local funds too in the budget (the 1st respondent having made provision for solid waste management in its budget for the Financial Year 2020-2021) no action was taken towards developing any proper solid waste management system in Malindi by either the 1st or the 4th respondent;
- v. The 2nd, 3rd, 4th and 5th respondents have failed to engage in useful and fruitful communication with the residents on solid waste management issues in that:
 - a. They have failed to heed residents’ requests for intervention in order to have the issue of

pollution arising from improper waste management resolved but in vain;

b. Despite the 1st petitioner requesting from the 1st respondent for information regarding measures being undertaken and the progress made in addressing environmental degradation and pollution and the resultant health hazard caused by the activities at the dumpsite, its County Attorney's response to the 1st petitioner's correspondence provided no substantive proposal for the resolution of the problem;

c. Public participation as required by the Constitution where the petitioners will be involved in the process of solid waste disposal has not been effectively carried out by the 1st -4th respondents thereby violating Constitutional provisions on public participation.

vi. That the County Government of Kilifi is at fault for allowing the dumping of waste at the Mayungu dumpsite for failing to find an alternative or proper dumping point to the detriment of Malindi residents, and besides, it operates the Mayungu dumpsite without a licence;

vii. That the violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originated from the actions of the State or its organs, but also if it resulted from lack of effective regulation of private activities;

viii. That Article 69 of the Constitution embodies the shift that has occurred over the years in the regulation of the environment, from reactive provision of remedies for environmental pollution to more proactive provisions of standards and preventative measures designed to reduce or eliminate the risk of environmental damage;

ix. That an Environment Impact Assessment report is a key environmental law and regulation mechanism, whose essence is that information about likely environmental impacts of development projects, plans and programs is properly considered before potentially harmful decisions are made;

x. That no EIA Study was undertaken with regard to the dumpsite under the Environmental (Impact Assessment and Audit) Regulations, 2003 Regulations yet the dumpsite is a health hazard for Malindi residents;

xi. That the dirt from the dumpsite is that the dumpsite is therefore a threat to the health of Malindi residents; that consequently, the fundamental duty of state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights under Article 21 of the Constitution has been violated.

The above are the issues that the respondents were meant to comprehensively address and controvert, but when they finally filed their defence to the petition, most of the contents of their documents comprised of admissions and attempts at mitigation. It is those admissions that will cut out most of the discourse in this judgment, so that the court will mostly concentrate on the question of whether, by reason of the respondents' acts and omissions, constitutional violations have occurred with regard to the petitioners and if so, the remedies are available.

The issues that arise for determination in the present petition are identified by this court as

follows:

1. Whether the petition is res judicata;
2. Whether the action and/or inaction on the part of the respondents in regard to (i) developing and maintaining a safe solid waste management system in Malindi and (ii) in failing to prevent the burning of solid waste at the Malindi dumpsite is in breach of their Constitutional obligations in Article 69 of the Constitution of Kenya 2010;
3. Whether the action and/or inaction on the part of the respondents in regard to (a) developing and maintaining a safe solid waste management system in Malindi and (b) in failing to prevent the burning of solid waste at the Malindi dumpsite is in violation of the Malindi residents' right to the highest attainable standard of health articulated in Article 43 of the Constitution and the Malindi residents' rights to a clean and healthy environment as provided for in Article 42 of the Constitution of Kenya 2010;
4. Whether the action and/or inaction of the respondents have violated the Malindi residents' rights to solid waste disposal services of reasonable quality within the meaning of the provisions of Article 46(1) (a) of the Constitution;
5. Whether the right of the petitioners to obtain information from the respondent to enable them gain full benefit of proper solid waste disposal services under Article 46(1)(b) of the Constitution has been violated;
6. Whether the actions and/or inactions of the 1st and 4th respondents have violated the Malindi residents' rights to protection of their health, safety and economic interest within the meaning of the provisions of Article 46(1) (c) of the Constitution;
7. Whether the 2nd and 3rd respondents have contravened or threatened further violation of the Malindi residents' rights under Article 35 of the Constitution to access to publishing and publication of all information concerning the purchase of land for garbage collection and building of an incinerator;
8. Whether the 2nd and 3rd respondents have threatened and/or contravened the national principles of transparency, accountability public participation and the rule of law under Article 10 of the Constitution and as such renders them to hold public office;
9. Whether a renewed programme of public participation should be ordered and whether the 1st and 4th respondents should be compelled to file a written report to this court on the progress of such a programme within 6 months of the order;
10. Whether the petitioners should open a special bank account to which all service levies and rates due and payable to the 1st and 4th respondents shall be deposited and kept until the petitioners prove to the satisfaction of the court that a proper solid waste disposal system has been developed in Malindi before access to the funds in that account are made accessible to the 1st and 4th respondents;
11. Whether special, general, exemplary and punitive damages as assessed by court should be awarded to the petitioners and whether interest should be awarded on damages and costs awarded;

12. Who ought to pay the costs of the petition?

The issues are discussed as herein under.

On the first issue, it is the case that the individuals filed the case Abdalla & 2 others v County Government of Kilifi & 2 others (Land Case 283 of 2016) [2023] KEELC 19898 (KLR) (22 September 2023) (Judgment) Neutral citation: [2023] KEELC 19898 (KLR) (hereinafter also referred to as "the former case") and they were awarded Kshs. 50,000,000/= as damages, besides being accorded several other reliefs.

Res judicata is a doctrine that seeks to avoid a multiplicity of suits about the same subject matter. Lotta vs. Tanaki [2003] 2 EA 556 held as follows:

"The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit".

In the former case, the three claimants were concerned about the proprietorship of the land. It was, besides being a matter that touched on the environment, a dispute relating to the use and occupation of land and they were so entitled as title holders to bring their claim regardless of the use to which the County Government had put the land. It merely happened that the land was being utilized for dumping of solid waste hence the environmental angle that the proceedings took from inception.

In the present case, the petitioners are registered residents' associations advocating for the welfare of the residents of Malindi town/municipality. They plead that they have been enabled by the provisions of Article 22(1) as read together with Article 258 of the Constitution, to either on their own or while acting in the public interest to institute court proceedings to enforce their rights and to act on behalf of other persons whose rights have been violated. In Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR), the Supreme Court agreed with the 11th appellant therein, a registered non-profit registered community-based organization primarily engaged in advocating for the respect and recognition of human rights especially in the area of environmental rights and the assurance of a clean and sustainable environment for the communities, when it submitted that the petition was brought under Rule 22 of the Constitution of Kenya Practice and

Procedure Rules as a class action, as opposed to a representative suit, and the Court distinguished between class action suits and representative suits thus:

“The difference between a representative suit and a class action suit is that a representative suit is opt-in in nature; parties instituting a representative suit are required to give notice of the suit to all persons with the same interest. A class action relates to proceedings in which an individual or a group of people with a common complaint lodge a legal challenge in court against an organisation or an individual on behalf of a larger group or class of people. If successful, all consumers aggrieved stand to get compensated.”

The Supreme Court explored the issue of locus of organizations such as the petitioners herein as follows:

“148. We also find persuasive the determination in *Albert Ruturi, JK Wanywela & Kenya Bankers Association vs The Minister of Finance & The Attorney-General and Central Bank of Kenya* Nairobi High Court Misc Civil Application No 908 of 2001 where it was asserted on behalf of the respondents, that for them to have a locus standi in the matter, the injury they complained of must be specific to them and that if the injury was suffered by everybody else, then it gave them no locus standi nor did it give anybody else such locus standi since none of them suffered over and above everybody else. The court however found that the Kenya Association of Bankers was a registered Society constituted of 48 individual banks, each of which was interested in the matter which nevertheless was effectively represented by the Association. By filing the suit through the association, they had made the matter easier to handle instead of each bank bringing its own separate suit. The court also established that no single member in the said association had a different view or acted against the view of others who wished to file the suit. That none of them could therefore be termed a busy-body and that there could therefore be expected no flood of cases to be filed in the court since that one single case would decide the common interest of them. While the said decision was made under the retired Constitution, it applies even more firmly in a case like the present one filed under the Constitution 2010.” (Emphasis mine)

It is thus clear that the petitioners are entities that were not involved in the former litigation and that the plaintiffs in that case were agitating for their private rights and some of the remedies, e.g., damages they obtained were not to be shared with the present petitioners. Some of the reliefs however, perchance they are implemented, are beneficial to the present petitioners as well as will be seen in the latter parts of the present judgment. That notwithstanding, it is vital that the present action is by way of a petition specifically tailored for vindication of public rights to a clean and healthy environment for all members of the petitioners. There is thus a clear difference of subject matter and parties between the former suit and the present suit, and the present suit is thus not *res judicata*.

Regarding the second issue and on a preliminary basis, this court recalls that in the case of *Anarita Karimi Njeru -v- Republic* 1976-1980 KLR 1272, the court held that when a Petitioner approaches the court for redress of a violation of a constitutional right, he/she

must with precision state the right, the provision of Constitution under which that right is provided and the manner in which he alleges that the right has been violated. A similar finding was made by the Court of Appeal in *Mumo Matemu -vs- Trusted Society for Human Rights Alliance & 5 Others* [2013] eKLR where the court observed: -

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the Constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

With the above decisions in mind, the court will now proceed to address the issues identified above.

The Constitution of Kenya ardently seeks to protect the environment. Article 69 of the Constitution provides thus: -

“69. Obligations in respect of the environment

(1) The State shall—

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;

(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;

(d) encourage public participation in the management, protection and conservation of the environment;

(e) protect genetic resources and biological diversity;

(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) 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.”

As already stated, the Petitioners pleaded that by failing to provide them with information about the solid waste management plan for Malindi and to engage them in resolving the

plans emanating from improper waste disposal at the dumpsite, the 1st and the 4th respondent through the office of the 3rd respondent has failed to encourage public participation contrary to Article 69 (1) (d) above. Further, by allowing the continuous burning of wastes at the Malindi dumpsite, the 1st and 4th respondent through the negligence and/or inaction on the part of the 2nd and 3rd respondent have failed to eliminate processes and activities that are likely to endanger the environment as required by Article 69(1) (g).

Article 69 obligates all persons, the state included, to protect and ensure a clean and healthy environment, which include but is not limited to, elimination of processes and activities that are likely to endanger the environment as well as encourage public participation in the management, protection and conservation of the environment. In the case of *Martin Osano Rabera & Another -v- Municipal Council of Nakuru & 2 others* [2018] eKLR the court adopted the decision in *Communication No.155/96: The Social and Economic Rights Action Centre and the Centre 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 general satisfactory environment, as guaranteed under Article 24 of the Africa Charter or the right to healthy environment, as it is widely known therefore imposes clear obligations upon a government. It requires the State to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."

The Petitioners led evidence that the 1st and 4th Respondents failed to provide them with information about the solid waste management plan for Malindi, and to engage them in resolving the pollution emanating from improper waste disposal at the dumpsite and evidence to the effect that the 1st -4th Respondents failed in developing and maintaining a safe solid waste management system in Malindi. It is evident from both the petitioner's affidavit evidence and from the respondents' admissions that the Mayungu dumpsite is still operational. This can be seen from the several emails not responded to, and a letter to the 1st Respondent. The Respondents did not lead any evidence to controvert these allegations or even the existence of the dumping site. In that regard, I find that the 1st -4th Respondents were in breach of Article 69 of the Constitution.

The petitioners having established that the respondents failed to develop and maintain a safe solid waste management system in Malindi and to prevent the burning of solid waste at the Malindi dumpsite, I will consider whether the said inaction was in violation of the

Petitioners' rights under Article 42 and 43 (1) (a) and (b) of the Constitution. It is pertinent therefore that I reproduce the relevant provisions hereunder: -

"42. Environment

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.

43. Economic and social rights

(1) Every person has the right—

(a)to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;"

The right to a clean and healthy environment is bestowed on every person, and was discussed in the case of Adrian Kamotho Njenga -v- Council of Governors & 3 others [2020] eKLR as follows: -

"18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

19.Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment."

The 1st -4th Respondents being state organs, are tasked with the responsibilities under Article 69 and are enjoined to ensure, inter alia, that the environment is protected and maintained. There is also no doubt that County Governments are responsible for waste management and for ensuring a safe environment. This mandate is assigned to them under the Fourth Schedule, Part 2 of the Constitution which the relevant part provides thus:

"Part 2 - COUNTY GOVERNMENTS

The functions and powers of the county are—

2.County health services, including, in particular—

(g) refuse removal, refuse dumps and solid waste disposal.'

While Article 42 of the Constitution guarantees every person the right to a clean and healthy environment, Section 87 of the Environmental Management and Coordination Act, 1999 further prohibits improper waste disposal 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.

(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."

Also, Section 116 of the Public Health Act requires County Governments to prevent public nuisance that may be injurious to health as follows:

"116. Local authorities to maintain cleanliness and prevent nuisances

It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its district at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health, and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition."

The Abdalla case (supra) found the situation at the Mayungu dumpsite to be just as it is now, and the court stated as follows in its judgment:

"42. Evidence was led by the plaintiffs that the defendants in this matter have allowed the dumping of all manner of refuse on the suit land for a prolonged time. The defendants did not dispute the dumping and admitted that the suit land has been a dumping site, and in use since the defunct Municipal Council of Kilifi. No evidence was led to controvert the dumping as stated by the plaintiff. As narrated, earlier the first defendant elected not to adduce any evidence. The second defendant admitted the dumping and pointed a finger at the first defendant through the evidence adduced by one DW1 Samuel Lopokoiyet and stated that the Constitutional and Statutory mandate to operate and manage waste sites at the County level was a devolved function as envisaged in the 4th Schedule to the Constitution and EMCA on devolved functions. The second defendant said the dumpsite was undesignated and unapproved and was operating contrary to the EMCA and its advice. The third defendant called for no evidence." (Emphasis mine)



Indeed, the court in the Abdalla case, after full trial, gave inter alia, the following orders in September 2023:

- c. A prohibitory injunction be and is hereby issued restraining the first defendant and or its employees, agents, assigns, or anybody whosoever from transporting to, dumping, and or disposing of refuse or waste on Plot No 5143 Malindi and the general area of Casaurina village, Malindi and or from doing any other act or omission deleterious to the environment;
- d. A mandatory injunction be and is hereby issued compelling the first defendant to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance with the Sustainable Waste Management Act, of 2022 and the Environmental Management and Coordination Act, 1999;
- e. An Environmental Restoration Order be and is hereby issued against the first defendant compelling it through itself, its employees, agents, and or assigns to restore the degraded dumpsite as established within Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi as far as practicable to its immediate condition prior to the damage;
- f. A mandatory injunction be and is hereby issued compelling the second defendant to ensure that there should be no further or continued transportation to, storage, or disposal of any wastes on Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi by the first defendant or any other person failure to which the appropriate statutory sanctions and penalties to be applied including but not limited to citing the first defendant's officials for contempt.
- j. The first and second defendants are to comply with the above orders within 120 days from the date of this Judgment. The second defendant is to file a Compliance Report to this court after the lapse of the said 120 days."

There is no evidence to be found in the replying affidavits of the respondents showing that the orders issued by the court have been implemented to the letter. Their replying affidavits do not even remotely recognize the existence of that case. It is as though it were a bad dream that the respondents would fervently wish to forget. All the foregoing is confirmation that the dumpsite is still in place and operational, despite no licence from the 5th respondent having issued.

The existence of the uncontrolled dumpsite and pollution caused by improper waste management clearly violates the Petitioners' right to a clean and healthy environment. The evidence presented by the petitioners before this court demonstrates that the 1st -4th Respondents have failed to establish and maintain proper waste disposal mechanisms in Malindi. This is a situation that has prevailed for long hence the present petition.

Article 43 guarantees every person the right to the highest attainable standard of health, clean and safe water and reasonable sanitation standards. The Petitioners alleged that the Respondents' failure to prevent the burning of solid waste at the Mayungu dumpsite has caused residents to suffer from breathing problems and unending airborne diseases thus violating the Petitioners right under Article 43 (1) (a). There was however no evidence led to

demonstrate the number of persons allegedly suffering from such diseases. That notwithstanding, this court must take judicial notice that in many unregulated dumpsites, all manner of waste, including hazardous waste is likely to be dumped, thus leading to risk for the health of residents who may be reached by its dissemination through various agents. In one of the early post-EMCA 1999 environmental justice litigation in this country the court equated the right to a clean environment with the right to life; *Waweru v Republic* (Miscellaneous Civil Application 118 of 2004) [2006] KEHC 3202 (KLR) (Civ) (2 March 2006) (Judgment) held as follows:

22. As a Court we cannot therefore escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us. This larger issue should be of great concern to us as a court for the following reasons:

1. Under section 71 of the Constitution all persons are entitled to the right to life - In our view the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man, it is inherent from the act of creation, the recent restatement in the Statutes and the Constitutions of the world notwithstanding.

2. Section 3 of EMCA demands that courts take into account certain universal principles when determining environmental cases. Apart from the EMCA it is our view that the principles set out in s 3 do constitute part of international customary law and the courts ought to take cognisance of them in all the relevant situations.

It was not in vain that the court in the *Abdalla* case (supra) drew attention to the fact that the *Mayungu* dumpsite was located proximate to an ecologically sensitive site Coastal Zone. The court, while analyzing the petitioner's case, stated as follows:

"There is also a grave risk of adulterations of underground aquifers and the Coastal Malindi - Ugwana Bay Fishery Zone, which is 500 metres from the suit land."

Drawing from *Waweru* (supra) and *Abdalla* (supra) there is risk of seepage of leachates into the underground water aquifers and their interference with the aquatic ecology commencing a mere 500 metres from the dump site. I am thus satisfied that the mere operation of the unregulated *Mayungu* dumpsite near residential areas directly affects the availability of reasonable standards of sanitation contrary to the right guaranteed under Article 43 (1) (b).

The Petitioners further alleged that the Respondents' failure to manage waste violates their rights under Article 46 (1) (a), (b) and (c), which guarantee consumers the right to services of reasonable quality, protection of their health and safety. The said provisions provide: -

"46. Consumer rights

(1) Consumers have the right—

(a) to goods and services of reasonable quality;



(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests;"

It must be noted that waste management is a public service for which residents pay through levies and taxes. The failure by the Respondent to provide an efficient waste management system after collection of funds from the petitioners' members results into the delivery of substandard public services in turn violating consumer rights. Furthermore, the economic impact of air, water or other pollution from improper waste mismanagement would mean increased medical expenses, loss of businesses due to unhygienic environment and decreased property value.

In an article "Environmental Law in Uganda: Constitutional Approaches, Human Rights and Biodiversity Management" by Emmanuel Kasimbazi, featured in a publication titled "Environmental Governance in Kenya: Implementing the Constitutional Framework." University of Nairobi, Faculty of Law by Kameri-Mbote, P.; Kibugi, R.; Kabira, N., 2023. Published by Faculty of Law, University of Nairobi Email: law@uonbi.ac.ke the author states as follows:

"It is important to note that human beings are ecologically dependent, and this lays the basis for the relationship between the environment and human rights. The right to a clean and healthy environment is dependent upon the realization of other human rights, as contained in the Constitution including the rights to life, human dignity, non-discrimination, equality, the prohibition of torture, privacy, access to information, and the freedoms of association, assembly and movement. For example, the right to life cannot be enjoyed independent of the right to a clean and healthy environment, since environmental deterioration or pollution puts the life of present and future generations at risk. In *British American Tobacco Ltd v the Environmental Action Network Ltd (TEAN)*,³⁴ the court attempted to establish a link between environmental quality and the right to life. In determining whether the failure to warn consumers of the risks associated with cigarette smoking amounted to a violation of the right to life, the court held that failure to disclose the dangers of cigarette smoking to the consumers was too remote to constitute taking away the life of such a consumer. The court did not consider the fact that there are numerous disadvantages of environmental or passive smoking, and even if their real impact on life takes long to manifest, finally the affected consumers may die as a result of lung cancer and other related diseases. What is important to note is that the right to life requires that people live in an environment that is conducive for their survival and free from contamination and pollution? The devastation of the environment is a violation of all human rights. To the extreme, other human rights cannot be enjoyed at all if the environment is destroyed beyond a certain grave plane. The poorer the environment, the more impaired human rights will be, and vice versa." (emphasis mine.)

In this case, I must uphold the admission the 5th respondent NEMA made in Abdalla (supra) when it stated (as analyzed by the court in that case) as follows:

"25. In dumpsites management, the second defendant averred that under the umbrella of the Environmental Management and Coordination Act, 1999 (EMCA) is not entirely saved from responsibility when it comes to the management of dumping sites. Its defined role is that of designating and approving sites for dumping solid waste. In cases where dumping is going on without its approval (and which usually happens out of perhaps necessity), then the second defendant is behooved to take certain measures.

26. That EMCA requires that a proponent of a dumping site should take out an Environmental Impact Assessment (EIA) Licence upon having presented an EIA Report to be assessed and reviewed by the second defendant- Section 58 of EMCA."

In Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR) the Supreme Court held as follows:

"123. We have already outlined the responsibility that state organs have under article 69 of the Constitution in relation to protection of the environment. NEMA in this regard has a myriad of duties under EMCA to safeguard the environment. In its enforcement capabilities under section 117 of that Act, NEMA could order the immediate closure of any manufacturing plant or other establishment or undertaking which pollutes or is likely to pollute the environment contrary to the provisions of the Act and require the owner or operator of such establishment or undertaking to implement any remedial measures that an environmental inspector may direct; under sections 108 -116, NEMA can order restoration and conservation of the environment. Part XIII of EMCA also outlines environmental offences, Section 141 and 142 makes it an offence for failing to manage any hazardous waste and materials and polluting the environment. Despite this huge mandate, it is discernable that NEMA was negligent in the conduct of its duties in the present case or as the ELC held, NEMA's actions assisted Metal Refinery in breaching the law instead of holding them to account.

124. As to whether there was a causal link between the actions of NEMA and the damage suffered by the 2nd -11th appellants, there is no doubt that NEMA's actions and inactions provided the casual link between Metal Refinery's negligence and the injury occasioned to the 2nd - 11th appellants. NEMA had on numerous occasions the opportunity to avert the discharges from the factory but it clearly failed on its mandate and this led to the unwarranted suffering occasioned to the residents of Owino-Uhuru Village. We therefore find that the Court of Appeal was right in holding that NEMA bore a greater responsibility and that NEMA and EPZA were the main actors in so far as the cause of deleterious activities were concerned with the liability of the other actors being either passive or reactive in relation to the pollution.

125. We further note that the 2nd , 3rd and 4th respondents have advanced the argument that the negligence and inactions of Metal Refinery should not be placed on NEMA, EPZA,

the Ministry of Health and the Ministry of Environment, Water and Natural Resources. We have in that regard already highlighted that the State and its organs and agencies can be responsible even to actions of private persons, and that the provisions of articles 42, 69 and 70 of the Constitution bears both an individual and collective dimension. We also note that the superior courts imposed individual responsibility on each of the respondents and specifically on the 3rd respondent because it issued a mining license to Metal Refinery on December 31, 2006 whereas Metal Refinery had not obtained an EIA license. Under section 103 of the Mining Act, the Cabinet Secretary is to issue a mining license where inter alia; "The applicant has obtained an approved environmental impact assessment and environmental management plan in respect of the applicant's proposed mining operations". To the 4th respondent, the superior courts held that it had an obligation under sections 115 - 120 of the Public Health Act to have Metal Refinery remove any nuisance but it failed to do the same."

With respect to NEMA, the issue the petitioners raise is that beyond the entreaties it has made to the other respondents in the past, it ought to show that it has used its teeth in curbing their acts and omissions in the area of solid waste management. This is evident when they state that NEMA even has prosecutorial powers but no prosecutions have been witnessed. The lack of evidence of such serious action such as prosecution, which would probably have galvanized the 1st -4th respondents into remedial action, has been the Achilles heel of the 5th respondent's defence. It must also be held to account for only going so far and no more in environmental enforcement. In other words, I find that it is liable for failure to use all methods available for execution of its legally provided mandate to curb the pollution emanating from the Mayungu dumpsite. I would think the petitioners have established that the 1st -4th Respondents have failed to provide the petitioners' members with services of reasonable quality regarding the disposal of waste, and with the information sought regarding the same; the petitioners having established the said omissions, I am inclined to find that their rights under Article 46 (1) (a), (b) and (c) have been infringed by the said Respondents.

On the issue of whether the 2nd and 3rd respondents have contravened or threatened further violation of the Malindi residents' rights under Article 35 of the Constitution to access to publishing and publication of all information concerning the purchase of land for garbage collection and building of an incinerator, this court resorts to the contents of the 1st-4th respondents' replying two affidavits, who are the parties from whom information would ordinarily be expected.

In his article, Emmanuel Kasimbazi (supra) further asserts as follows:

"The genesis of the right of access to environmental information can be traced from the Stockholm Declaration on the Human Environment of 1972, which first pronounced itself on the interrelationship between the enjoyment of human rights and the quality of the environment and since then, it has been reiterated in various international soft law

instruments, including the Rio Declaration and its sister instrument, Agenda 21. Principle 10 of the 1992 Rio Declaration states that 'at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes'.

The environmental information to be accessed is defined by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 to mean any information in written, visual, aural, electronic form or any other material form on the following:

(a) the state of elements of the environments such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interactions among these elements;

(b) factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.³⁵

(d) Freedom of access to environmental information is a mechanism by which the public is equipped to advocate for accountable institutions, equitable distribution of resources, and transparency in public decision-making. The existence of a strong freedom of information legislation is essential to maintaining and restoring public confidence in public institutions by subjecting the activities of those institutions to intense public scrutiny.

The right of access to information has the following key ingredients;

i. The right to be informed of the existence of the information;

ii. the right to know with a high degree of certainty the procedures for obtaining the information;

iii. the right to receive the information or notification of refusal within a reasonable time;

and

iv. the right to have grounds for refusal expressly stated devoid of any ambiguities and evasiveness."

As per the holding in the case of *Okiya Omtatah Okoiti v. Attorney General*, High Court Petition 58 of 2014, in Kenya, the right to information is not absolute and the appropriate mechanisms for seeking the required information must be pursued to the end prior to the seeking of the court's intervention. In cases where the rights under Article 35 are sought to be enforced, one ought to therefore demonstrate that they had taken all relevant measures

to have the relevant information availed to them before resorting to seeking relief from court. I have viewed the petitioners' exhibits and I am of the view that this requirement has been fulfilled in that requests for information were made to the respondents through letters and electronic mail.

It was thus incumbent upon the respondents to establish to this court that they responded to such correspondence. However, I do not find any annexures in the form of correspondence in the 1st-4th respondents' replying affidavits suggesting in the remotest sense that the requests for information lodged by the petitioners were ever honoured with any responses. The provisions of Article 35 are as follows:

"35. Access to information

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation."

It is plain that all the respondents are included in the meaning of the expression "the state".

The County Governments Act provides as follows at Section 96:

"96. Access to information

(1) Every Kenyan citizen shall on request have access to information held by any county government or any unit or department thereof or any other State organ in accordance with Article 35 of the Constitution.

(2) Every county government and its agencies shall designate an office for purposes of ensuring access to information as required by subsection (1).

(3) Subject to national legislation governing access to information, a county government shall enact legislation to ensure access to information.

(4) A county legislation enacted pursuant to subsection (3), may impose reasonable fees or charges for accessing information held by the county government, its departments or agencies."

Sections 93,94 and 95 of the County Governments Act provide as follows:

"93. Principles of public communication

Public communication and access to information shall be based on the following principles—

(a) integration of communication in all development activities;

(b) observation of access to information by county media in accordance with Article 35 of the Constitution; and

(c) observation of media ethics, standards and professionalism.

94. Objectives of county communication

A County government shall use the media to—

- (a) create awareness on devolution and governance;
- (b) promote citizens understanding for purposes of peace and national cohesion;
- (c) undertake advocacy on core development issues such as agriculture, education, health, security, economics, sustainable environment among others; and
- (d) promotion of the freedom of the media.

95. County communication framework

(1) A County government shall establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county, which may include—

- (a) television stations;
- (b) information communication technology centres;
- (c) websites;
- (d) community radio stations;
- (e) public meetings; and
- (f) traditional media.

(2) The county government shall encourage and facilitate other means of mass communication including traditional media.”

Referring to the case of Nairobi Law Monthly & Another vs Kengen eKLR 2013, the court in Okiya Omtatah Okoiti (supra) held that Article 22 of the Constitution placed on the petitioners an obligation to request for information, and that the State also has an obligation to disclose to them the information sought unless there exist sufficient reasons for non-disclosure.

In the present case the petitioners as citizens and residents of Kilifi have right to access any information that the respondents hold in connection with waste management in Kilifi County especially since it is information required for the exercise or protection of a constitutional right under Article 35(b), to wit to a clean and healthy environment. It is also the case that in the context of the waste management in Kilifi County, information about acquisition of new land for a dumpsite is important information affecting the petitioners and it ought to be publicized freely under Article 35(3). No such information has been shown by the respondents in their replies to have been publicized under Article 35(3) or released as requested by the petitioners under article 35(1) (a) and (b); further, no communication has been disclosed in the replies by the 1st - 4th respondents that there exist sufficient reasons for non-disclosure of the information that they sought. In this court’s view, by withholding that information, the 1st-4th respondents have violated the petitioners’ rights under those respective provisions made under Article 35.

With regard to the question as to whether the 2nd and 3rd respondents have threatened and/or contravened the national principles of transparency, accountability public participation and the rule of law under Article 10 of the Constitution and as such rendered unfit to hold public office, this court must declare at the outset that it is not an easy one to

answer in the present petition. First, the holders of the offices of the 2nd and 3rd respondents have not been sued in their respective personal names, so it is not possible for this court to know who is being tried for being unfit for public office. Secondly, the prayer is framed such that it affects a particular holder of an office personally while only office descriptions have been given in the title; thirdly, any person holding public office would of necessity as a matter of justice and fairness be required to respond to any particular allegations or accusations levelled against him as rendering him unfit for such office, which was not the case in the present petition, and the lack of personal names and personal involvement of the holders of those offices means that claim has not attained the threshold for trial herein. This case was not about fitness to hold office. This court set out to try the issue as to whether various rights of the petitioners had been violated by the respondents. To this court, it does not automatically follow that with every declaration of violation of right of the claimant by a public official that the said official's name becomes synonymous with incompetence and consequently unfitness to hold office. On the foregoing grounds, this court finds that prayer misplaced in the present petition and it will therefore decline to even consider it further or grant it.

As to whether a "renewed" programme of public participation should be ordered and whether the 1st and 4th respondents should be compelled to file a written report to this court on the progress of such a programme within 6 months of the order, this court must confess that it has not seen any evidence of public participation regarding waste management in the replying affidavits of the 1st- 5th respondents; it is stated in the petition that the 1st, 2nd and 4th respondent have refused, and/or ignored to implement the Kilifi County Solid Waste Management Act 2019 which provides a legal framework for solid waste management in the County and obligates the County Government to undertake solid waste management and to facilitate public participation of community and neighbourhood association and organizations in all aspects of solid waste management.

In the Abdalla Case (supra) it was stated as follows:

" 79.The first defendant (County Government of Kilifi) has all along even after the issuance of injunctive orders by this court on 6th of March 2017 - Olola J. and given that the second defendant (NEMA) issued Improvement Orders in 2015 directing the first defendant to desist from further dumping waste at the suit land before complying with the NEMA guidelines on the operationalization of a dumpsite, continued and has continued to use the site as a dumping ground without approval from the second defendant, the consent of the plaintiffs or at all and also taking into account that the area is also proximate to an ecologically sensitive site Coastal Zone - the Malindi - Ungwana Bay fishery." (Emphasis mine.)

That finding has not been controverted in that case or in the present one. Further, it has not been demonstrated by the 1st - 4th respondents that the situation at the Mayungu dumpsite has changed since the court gave the above decision in September 2023. On the other hand,

the evidence adduced by the petitioners by affidavit and the admissions by the respondents shows that the dumping of waste and improper waste management is still going on at the Mayungu dumpsite to date. I think what is made clear by the above judgment in conjunction with the contents of the affidavits in support of the petition is that the 1st -4th respondents have been in continued and reckless breach of the provisions of Section 87 of EMCA and the Environmental Management and Co-ordination (Waste Management) Regulations, 2006, and that the 5th respondent has in the past attempted, albeit insufficiently, to call them to order but in vain.

In view of the gravity of the dangers of pollution pleaded and proved, the reflex recourse for a court of law anxious to safeguard the public, would be ordinarily to ensure that the provisions of Section 58 of EMCA should be enforced to the letter, and that in order to curb pollution forthwith the Mayungu dumpsite should be closed forthwith. That is what the court in the Abdallah case (supra) did as is seen in its orders reproduced herein above.

The above judgment in Abdalla case has never been appealed. This court has noted the plea of NEMA in the Abdalla case was to the effect that instead of an instant closure of the same, to apply the graduated approach employed by other ELC Judges in dealing with closure or decommissioning waste disposal sites, but the court, apparently owing to the length of time the pollution had persisted, in effect ordered immediate closure when it issued an order of prohibitory injunction restraining the first defendant in that case (the County Government herein) and/or its employees, agents, assigns, or anybody whosoever from transporting to, dumping, and/or disposing of refuse or waste on Plot No 5143 Malindi and the general area of Casaurina village, Malindi and/or from doing any other act or omission deleterious to the environment, and that decision still stands. The submission by NEMA was summed up by that court as follows:

"Further, the court was urged by the second defendant to be mindful of the daily and inevitable generation of waste in our dumpsites and instead of an instant closure of the same, to apply the graduated approach employed by other ELC Judges in dealing with closure or decommissioning waste disposal sites. for example, as reiterated in Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR and African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR."

In Waweru v Republic (Miscellaneous Civil Application 118 of 2004) [2006] KEHC 3202 (KLR) (Civ) (2 March 2006) (Judgment) it was stated as follows:

"35. For the above reasons orders of certiorari and prohibition shall forthwith issue as prayed and the proceedings in the lower court in Kibera Criminal cases 6398/2003 and 6399/2003 are hereby brought to this court and the charges quashed and we further reiterate that an order of mandamus shall immediately issue to compel the Ministry of Water - i.e. the Nairobi Water Services Board and the Olkejuado County Council to construct Sewerage Treatment Works. In this regard it is noted that the Republic is a party

to these proceedings via the Attorney General and the appropriate treatment works must be installed within a reasonable time and for this purpose there shall be liberty to apply. We further order that a copy of this judgment be served by the applicant on the Ministry of Water, Ministry of Local Government, Ol Kejuado County Council, NEMA, the Attorney General's office and whatever Ministry is concerned with Physical Planning. NEMA is also urged to consider making such restoration order as may be appropriate in the circumstance."

Waweru (supra) applied a more lenient approach in that the court referred to reasonable timelines for execution of the works. In the circumstances, since dumping has been going on, this court is of the view that proposed programme of public participation and decommissioning coupled with compulsory acquisition of land for waste management purposes in a location situated far away from a residential area should be implemented in order to put to rest concerns that the residents of Malindi have regarding the dumpsite. However, in this regard, this court will not reinvent the wheel but will adopt and renew the orders issued by my brother Makori J. in his judgment dated 22nd September, 2023 in Abdalla & 2 others v County Government of Kilifi & 2 others (Land Case 283 of 2016) [2023] KEELC 19898 (KLR) (22 September 2023) (Judgment) Neutral citation: [2023] KEELC 19898 (KLR) under limbs no (c) to (f) (inclusive) and (j) follows:

"c. A prohibitory injunction be and is hereby issued restraining the first defendant and or its employees, agents, assigns, or anybody whosoever from transporting to, dumping, and or disposing of refuse or waste on Plot No 5143 Malindi and the general area of Casaurina village, Malindi and or from doing any other act or omission deleterious to the environment.

d. A mandatory injunction be and is hereby issued compelling the first defendant to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance with the Sustainable Waste Management Act, of 2022 and the Environmental Management and Coordination Act, 1999.

e. An Environmental Restoration Order be and is hereby issued against the first defendant compelling it through itself, its employees, agents, and or assigns to restore the degraded dumpsite as established within Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi as far as practicable to its immediate condition prior to the damage.

f. A mandatory injunction be and is hereby issued compelling the second defendant to ensure that there should be no further or continued transportation to, storage, or disposal of any wastes on Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi by the first defendant or any other person failure to which the appropriate statutory sanctions and penalties to be applied including but not limited to citing the first defendant's officials for contempt.

j. The first and second defendants are to comply with the above orders within 120 days from the date of this Judgment. The second defendant is to file a Compliance Report to this court after the lapse of the said 120 days."

As to whether the petitioners should open a special bank account to which all service levies and rates due and payable to the 1st and 4th respondents shall be deposited and kept until the petitioners prove to the satisfaction of the court that a proper solid waste disposal system has been developed in Malindi before access to the funds in that account are made accessible to the 1st and 4th respondents, it is important to note Section 131 of the County Governments Act provides that:

“131. Financial provision

(1) The funds and financial management of county governments shall be as provided under the law relating to public finance.”

This therefore means that the provisions of Chapter 12 of the Constitution titled “Public Finance” have to apply to county funds.

Article 201 emphasizes on the principles of public finance so as to include openness and accountability including public participation in financial matters, the sharing of burdens and benefits of the use of resources (and public borrowing) equitably between present and future generations, and prudence in the application of public funds.

It is the case that under Article 201(a) that the petitioners are entitled to public participation in matters finance in Kilifi County.

Several issues therefore arise which I will discuss hereunder.

First, the expression “all levies and rates” leaves a lot to be desired. It indiscriminately refers to all incoming funds collected by the 1st respondent. It means that all the funds meant to be collected by the 1st respondent would have to be deposited into that account they shall be held in it until the petitioners prove to the satisfaction of the court that a proper solid waste disposal system has been developed in Malindi and before the 1st respondent can be allowed to access them.

Article 207 reads as follows:

“207. Revenue Funds for county governments

(1) There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament.

(2) Money may be withdrawn from the Revenue Fund of a county government only—

(a) as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the county; or

(b) as authorised by an appropriation by legislation of the county.

(3) Money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal.

(4) An Act of Parliament may—

(a) make further provision for the withdrawal of funds from a county Revenue Fund; and

(b) provide for the establishment of other funds by counties and the management of those funds.”

Under Article 207 of the Constitution of Kenya, therefore all own-source revenue collected by county governments must be deposited directly into their respective County Revenue Fund (CRF). These funds are retained by the county government to supplement its budget and fund local development projects. Consequently, firstly, even though the County Government of Kilifi is likely to get an apportionment from the consolidated fund under the national budget, the funds that it collects within its jurisdiction may be factored into its declared work plan during the national apportionment of funds by the National Treasury; in that event, the proposition by the petitioners that the said funds once paid into that account be withheld from the 1st respondent absolutely would in the opinion of this court, if upheld, suddenly leave a gap and in effect bar the County Government from providing some immediate service, which may even bar the development of a proper solid waste disposal system in Malindi; the last stated effect of such a remedy would possibly be of further deleterious effect to the very environment the petitioners are trying to protect. Secondly, even assuming other funds can be availed from other sources for the development of the proper solid waste disposal system, it not being known when the proper solid waste disposal system will ever be developed in Malindi, the funds may be held indefinitely. It is doubtful that this expressed remedy may assist the petitioners from any environmental angle, yet this is their principal field of concern. Thirdly, there is a judgment of this court that has already ordered the respondents to perform their duties, the Abdalla Case judgment (supra) and it would be proper that this court abstains from seeming to be throwing a spanner into the works by cutting off the funding stream that the respondents may be relying on, lest they acquire grounds to claim the order made herein has disabled them from acting in the best interests of the environment. Consequently, and without more, the petitioner's proposition that a special bank account to which all service levies and rates due and payable to the 1st and 4th respondents shall be deposited and managed with stringent conditions applied thereto is rejected by this court on those 3 principal considerations.

Regarding whether special, general exemplary and/or punitive damages as assessed by court should be awarded to the petitioners, and whether interest should be awarded on damages and costs awarded this court has considered the fact that the petitioners have established a wide range of violations of their rights. The petitioners have approached the court as organizations championing the environmental rights of the residents of Malindi and are therefore within the description of Resident's organizations. The court recently noted that residents association is a phenomenon that is becoming more and more mainstreamed into formal channels of legislation and governance systems in a recent case Malindi ELCPET NO. E003 OF 2023 - Watamu Association Vs Tara Wood & 3 Others and stated as follows:

"130. There is no doubt that the petitioner is a registered homeowners and residents association within Watamu area of Kilifi a famous tourism destination worldwide and it has about 160 members on whose behalf it has brought this action. It was founded and registered in 1994, long before the enactment of EMCA. Its stated objectives include

protection and promotion of the interests of its members and the residents of the Watamu area, protection of the biodiversity and ecology of the area, and its sustainable use for the benefit of Kenyans generally and local communities. The present petition is testimony of its engagement with environmental issues.

131. In the protection conservation and management of the environment in Kenya, the role of residents' associations in this era cannot be understated. They have been at the forefront of pursuing environmental justice where authorities mandated to act have refused or neglected to act. They have contributed heavily to Kenya's environmental law jurisprudence. Their activism has halted construction of illegal structures or the establishments of a illegal enterprises in inappropriate locations. They have been instrumental in the protection of green places and generally have compelled adherence to planning laws. The law is currently evolving to accommodate the new phenomena, for example, Section 11 of the Urban Areas and Cities Act 2011 recognizes residents' associations and includes "institutionalised active participation by its residents in the management of the urban area and city affairs" among the principles for governance and management of urban areas and cities. In the same vein at Section 13, it also includes "a cluster representing registered neighbourhood associations" in boards of cities. It is clear that with such expanded representation local opinions stand a chance of reaching the decision-making governance institutions for healthy debate to avert any environmental and planning errors.

132. In our governance setting where some institutions charged with environment appear to be conferring insufficient attention to some vital sectors of the environment, these residents' associations are crucial in ensuring the environment is protected and that environmental justice is done in cases of violations.

133. The critical principle that has given birth this newfound formal attention to residents' associations is nothing new at all: it is the formalization of the recognition that the people on the ground who know and understand what kind of activity may be salubrious or detrimental to their welfare. It may even be termed as a child of the principle of public participation enshrined in the constitution.

134. However, it is believable they do all this out of a public spirit for a better society which they also are part of. It is therefore also proper for this court to take into consideration that they also sacrifice much of their social, financial, and time resources for the purpose, hence the award of exemplary and punitive damages against environmental offenders the associations bring to court should be viewed as a constitutionally authorized means of holding those offenders civilly liable in contrast to seeking to hold them criminally liable, but with the same deterrent effect."

Given the holding of this court in the Watamu Association case (supra) and of the Supreme Court in the Export Processing Zone case (supra), it is axiomatic that the petitioners herein deserve compensation.

This court has considered the difficulties in assessing such compensation. The case of

Citizens Against Violence (CAVI) & 14 others v Attorney General & 3 others [2023] KEHC 17591 (KLR), held as follows:

“An action, such as the one before me, brought under Article 23 of the Constitution seeking enforcement, protection and preservation of fundamental rights is one borne of the realms of public law. Traditionally, the objectives of public law can be regarded as an acknowledgement that civilization is founded upon the power of the public. The fundamental rights and freedoms of citizens are not only guaranteed but are also protected and preserved. The rights are guaranteed through the constitutional and statutory provisions providing for the rights; they are to be protected by the various state ministries, departments and agencies (MDAs) so charged by the enabling statutes; and it is to be preserved by the Judiciary by way of a declaratory order or in some instances, penalizing the wrongdoer and fixing the liability for the public wrong on the State when it has failed in its public duty to protect the fundamental rights of the citizen. Monetary awards in damages in such cases is to be understood as a relief by an order of making 'monetary amends' under the public law for the wrong done in breach of public duty, or by not protecting the fundamental rights of the citizen, or by subjecting the citizen to acts which amount to infringement of the constitution.”

In the Watamu Association case (supra) the court also relied on the case of Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR where it was stated as follows:

“19. As for exemplary damages they are placed at the discretion of the court, though, they are awarded with some degree of caution and in limited situations. Ochieng J stated in the case of Mikidadi -vs- Khaigan and Another [2004] eKLR 496 that:

“Exemplary damages are only to be awarded in limited instances namely.

- (a) oppressive arbitrary or unconstitutional action by servants of government.
- (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or
- (c) Cases in which the payment of exemplary damages is authorized by statute.”

In the Abdalla Case, the petitioners laid claim to title to the Mayungu dumpsite land and obtained damages for violation of right to a clean and healthy environment as 3 individuals; in the present case the petitioners are not claiming to be the land owners having title to the Mayungu dumpsite land, but they have brought the petition in the public interest for the residents of Malindi at large due to environmental pollution. What the respondents herein have emphasized is that there is no empirical data furnished to the court to substantiate the claims of pollution and its effects. However, though data would have been ideal to enable the court assess compensation in a better and more informed manner, it is the case that the extreme pollution from the Mayungu dumpsite, and consequently its effects, have been

admitted by the respondents herein. Therefore, while it may be hard to assess compensation for effects such as illness or other damage, in this case, the lack of strict proof by way of empirical data should not bar the award of punitive or exemplary damages where the respondents have admitted that they have taken very little or no action to reverse the serious resultant and obvious pollution even after the Abdalla judgment (supra) ordered immediate closure and cessation of pollution. In Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR) the Supreme Court pronounced itself as follows:

"132. In exercising its mandate under article 70(2), article 70(3) guides the court when it provides as follows; "(3) For the purpose of this article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury". [Emphasis Added]

133. This court has in various cases addressed itself to the apportionment of compensation as a remedy to constitutional violation. In Wamwere & 2 others v Attorney General SC Petition No 34 & 35 of 2019 [2024] KECA 487 (KLR), this court held that the crafting of remedies in human rights adjudication goes beyond the realm of compensation for loss as it is principally for vindicating rights. In that case, the court further held that though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it was important for the court to vindicate and affirm the importance of the violated rights. In CMM (Suing as the next friend and on behalf of CWM) & 6 others v Standard Media Group & 4 Others, [2023] KESC 68 (KLR) this court equally addressed itself to what a trial court should do in its assessment of an award of compensation in constitutional rights violation claims when it held:

"...All the trial court was expected to do in considering this prayer was to assess what, in the circumstances of the case would be the appropriate compensation, or what other relief would vindicate the appellants' contravened rights. Examples of factors the court would have taken account of include the fact that the violations related to children; that some of the children had to transfer from the school; some were ridiculed, and being minors they were bound to suffer distress, trauma, anguish, fear and lowered self-confidence. On the other hand, exculpatory factors to consider would be the fact that some of the respondents, upon learning of the complaints about their publications immediately pulled down the offending story.[100] In the result, it was erroneous for the two courts below to ignore settled principles for the award of compensation in constitutional rights violation claims; namely, that once the burden of proving a violation was discharged, it was not necessary for the appellants to prove any damage or loss so as to be entitled to any of the reliefs contemplated in article 23(3)..."

134. In Musembi & 13 others v Moi Educational Centre Co Ltd & 3 others SC Petition No 2 of 2018 [2021] KESC 50 (KLR), this Court in overturning the decision of the Court of Appeal held that the questions and issues that a court has to consider in order to make an award of

damages with regards to constitutional violation is manifestly different to what the court would consider in say, tortious or civil liability claim. The court distinguished the same as follows;

"...In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straight forward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries. In this regard, the Court of Appeal was unclear of what other material that the Petitioners needed to present before the trial court to establish that there was a violation of their constitutional rights by the respondents, and that the court therefore abused its discretionary powers in issuing the award of damages. In the event and following our reasoning in *Martin Wanderi & 106 Others v Engineers Registration Board & 10 others*, SC Petition No.19 of 2015 [2018] eKLR we must overturn the appellate court's decision on this issue....." (emphasis mine.)

and also as follows:

"140. We have already outlined above that under the provisions of article 70 (3) of the Constitution, an applicant does not have to demonstrate that he/she has incurred loss or suffered injury. From the decisions cited it is clear that even in the absence of clear evidence to quantify the damage caused by the breach, courts may still award remedies based on the principle that the violation of constitutional rights itself warrants redress. These remedies can include a declaratory relief, nominal damages, or compensatory damages assessed on a more general basis, particularly in cases where the nature of the harm is difficult to quantify precisely. This ensures that the breach does not go unaddressed, upholding the integrity of the constitutional rights framework and providing some measure of justice to the aggrieved party.

141. On our part, we also find that there was sufficient evidence for the trial court to make a finding on compensation. The trial court had the opportunity to observe seven witnesses presented by the 2nd to 11th appellants and observe their injuries; the Deputy Government Chemist (PW8) provided a report detailing samples taken from fifty (50) residents of Owino-Uhuru Village which indicated elevated blood levels; soil, dust and water tested indicated high levels of lead which were hazardous especially for children in play areas and for persons who spend time in enclosed places. The Report of The Standing Committee on Health on The Owino- Uhuru Public Petition recommended the immediate cleaning of the environment including detoxifying and restoring the soil; the replanting of destroyed trees; the immediate testing of all residents of Owino-Uhuru Village for lead exposure and the

removal of hazardous waste slug the plant had disposed of over the years and continued to dispose of at Mwakirunge dumpsite. The Task Force on Decommissioning Strategy for Metal Refinery EPZ Limited found sufficient evidence of lead exposure at the factory and amongst the residents of Owino- Uhuru Village. It is also notable that the scientific findings on infringements of the rights of the residents of Owino-Uhuru Village is not disputed by NEMA, EPZA, Ministry of Health and Environment and the County Government of Mombasa." (emphasis mine.)

Turning to quantum in the present case, the submissions of the petitioners dated 17th July 2024 have exhorted this court to grant them general damages in the sum of Kshs 950,000,000/= as well as special damages of Kshs 350,000,000/=.

This court is guided by the Supreme Court decision in Export Processing Zone Authority (supra in the assessment of compensation where it held as follows:

"137. On the other hand, in constitutional claims, where fundamental rights have been violated, the court takes a broader approach to the assessment of damages. It considers various factors including;

- a. the nature of the violation.
- b. the length of time the alleged violation has taken.
- c. impact on the victim and whether there is a direct harm.
- d. the broader implications of the case, including the need to deter future violations, uphold the rule of law, and ensure that public authorities or private parties respect constitutional rights.

138. These differences in the approach between tortious claims and constitutional claims reflect the varying nature of the harm and the different objectives of each type of claim. While tortious claims are primarily about compensating specific losses, constitutional claims often aim to address broader issues of justice and the protection of fundamental rights."

From the filings herein, firstly, this court is aware that the Mayungu dumpsite and the effects of pollution have been there for a very long time and there are residential quarters near it, and it endangers the world-class tourist destination Malindi has been. Secondly, the Mayungu dumpsite is still operational today, nearly 3 years after the court ordered its closure in 2023; this continued operation clearly evinces unwillingness of the respondents to face head on the environmental challenges it poses to innocent residents and resolve them. Thirdly, the conduct of the 1st - 4th respondents with regard to accounting for the funds for the environmental docket have even been questioned by the petitioners, and though this court lacks sufficient material to enable it address such an issue squarely, it is a pointer to the acute awareness among the general populace as to what they expect from the respondents, which in their view they are not getting. Fourthly, simple, obvious solutions abound; it can be gathered by this court that all that the 1st - 4th respondents need do is approach the National Land Commission and seek compulsory acquisition of land in their county where land located away from the developed regions costs less than a million an

acre, and pay for, say 100 acres, and thus have not only a sufficient buffer zone between the waste management project and the residents, and obviate the need for the kind of eternal but needless conflict over the danger to life posed by improper waste management practices; such approach will also leave the 1st -4th respondents free space to plan an ultra-modern project premised on the zero-waste (circular economy) system to enhance the principle of sustainable development within the County; these are the sort of ideas that should afford a healthy debate between the 1st - 4th respondents and the residents who do want any more pollution in their neighbourhood. Fifthly, it is the case that damages are meant to act as deterrent to certain deleterious acts and omissions of the respondents. However, even in the midst of the gravity of the omissions of the respondents, this court is aware that any compensation awarded will be paid by the respondents and it is from those same funds that environmental and other services must be provided to the public hence a balance must be struck between the need to compensate the petitioners and the need to maintain continuity in service provision by the respondents.

In the Abdalla & 2 others v County Government of Kilifi & 2 others (Land Case 283 of 2016) [2023] KEELC 19898 (KLR) (22 September 2023) (Judgment) Neutral citation: [2023] KEELC 19898 (KLR) the three claimants were awarded Kshs. 50,000,000/= in compensatory damages.

In Namanyi & 4 others (Suing for themselves and on behalf of the entire body of waste parkers who are the most affected victims of the air pollution at Dandora Dumpsite) v Nairobi County Government & another [2026] KEELC 1158 (KLR), the court awarded the Plaintiffs and the 1032 persons claiming through them the sum of compensation of Kshs.25,000/= each, totalling to about Kshs 25,800,000/=.

In the case of Musa & Another (Suing on their own behalf and on behalf of two hundred and two affected residents of Shaurimoyo, Swahili Village and Bondeni Informal Settlements of Muhoroni Sub -County in Kisumu County v Kenya Railways Corporation & 2 Others (Constitutional Petition E020 of 2021) (2022) KEELC 2524 (KLR) (15 July 2022), the court granted Kshs 20,600,000/= in damages for breach of their constitutional rights.

Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR) was an appeal against the decision of the Court Of Appeal that had overturned an award of compensation made by the ELC in Mombasa Constitutional Petition No 1 Of 2016, the petitioners moved the court seeking declarations that their right to life, rights to a clean and healthy environment, clean and safe water and the highest attainable standard of health have been violated by the actions, inactions and omissions of the respondents. They also sought a declaration that there was a systematic denial of their right to information by the respondents, specifically the right to access to information about how exposure to lead would affect them and precautionary measures to be taken. The trial court accordingly

issued a declaration that the 2nd - 11th appellants' rights to a clean and healthy environment, rights to the highest attainable standard of health and right to clean and safe water, and rights to life were violated by the actions and omissions of the respondents and made an award of Kshs 1.3 billion to the victims for personal injury and loss of life payable within ninety (90) days from the date of judgment by the respondents. The Supreme Court affirmed the award upon appeal in its decision on appeal against the Court of Appeal judgment.

After considering the awards made in the cases cited herein above, and the wide range of governance matters affecting the respondents herein, this court is of the view that awards in favour of the petitioners of the sum of Kshs 120,000,000/= as against the 1st-4th respondents jointly and severally and an award of Kshs 30,000,000/= against the 5th respondent are sufficient as compensation for violation of the whole range of their constitutional rights found to have been violated as herein above.

CONCLUSION

In the end this court finds that the petition dated 4/2/2022 has merit, and it makes the following orders:

- a. A declaration is hereby made declaring that the acts and omissions on the part of the respondents in regard to (i) developing and maintaining a safe solid waste management system in Malindi and (ii) in failing to prevent the burning of solid waste at the Malindi dumpsite are in breach of their Constitutional obligations in Article 69(1)(d) and (g) of the Constitution of Kenya 2010;
- b. A declaration is hereby made declaring that the acts and omissions on the part of the respondents in regard to (a) developing and maintaining a safe solid waste management system in Malindi and (b) in failing to prevent the burning of solid waste at the Malindi dumpsite is in violation of the Malindi residents' right to the highest attainable standard of health articulated in Article 43(1)(b) of the Constitution and the Malindi residents' rights to a clean and healthy environment as provided for in Article 42(a) and (b) of the Constitution of Kenya 2010;
- c. A declaration is hereby made declaring that the acts and omissions of the respondents have violated the Malindi residents' rights to solid waste disposal services of reasonable quality within the meaning of the provisions of Article 46(1) (b) of the Constitution;
- d. A declaration is hereby made, declaring that the acts and omissions of the respondents have violated the right of the petitioners to obtain information from the respondent to enable them gain full benefit of proper solid waste disposal services under Article 46(1)(b) of the Constitution;
- e. A declaration is hereby made declaring that the acts and omissions of the 1st and 4th respondents have violated the Malindi residents' rights to protection of their health, safety and economic interest within the meaning of the provisions of Article 46(1) (c) of the Constitution;

f. A declaration is hereby made declaring that the acts and omissions of the 2nd and 3rd respondents have contravened or threatened further violation of the Malindi residents' rights under Article 35(1)(a) and (b) of the Constitution to access to publishing and publication of all information concerning the purchase of land for garbage collection and building of an incinerator;

g. There shall be total compliance by the 1st and 5th respondents, and by this order the present 2nd 3rd and 4th respondents are also included in such implementation measures in so far as they are responsible for the relevant matters therein addressed, with the orders issued by Makori J in his judgment dated 22nd September, 2023 in Abdalla & 2 others v County Government of Kilifi & 2 others (Land Case 283 of 2016) [2023] KEELC 19898 (KLR) (22 September 2023) (Judgment) Neutral citation: [2023] KEELC 19898 (KLR) under limbs no (c) to (f) (inclusive) and (j) set out therein as follows:

"c. A prohibitory injunction be and is hereby issued restraining the first defendant and or its employees, agents, assigns, or anybody whosoever from transporting to, dumping, and or disposing of refuse or waste on Plot No 5143 Malindi and the general area of Casaurina village, Malindi and or from doing any other act or omission deleterious to the environment.

d. A mandatory injunction be and is hereby issued compelling the first defendant to identify and relocate the aforesaid dumpsite to a different and suitable site for disposal of waste in accordance with the Sustainable Waste Management Act, of 2022 and the Environmental Management and Coordination Act, 1999.

e. An Environmental Restoration Order be and is hereby issued against the first defendant compelling it through itself, its employees, agents, and or assigns to restore the degraded dumpsite as established within Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi as far as practicable to its immediate condition prior to the damage.

f. A mandatory injunction be and is hereby issued compelling the second defendant to ensure that there should be no further or continued transportation to, storage, or disposal of any wastes on Plot No 5143 Malindi and the adjoining area of Casaurina village, Malindi by the first defendant or any other person failure to which the appropriate statutory sanctions and penalties to be applied including but not limited to citing the first defendant's officials for contempt.

j. The first and second defendants are to comply with the above orders within 120 days from the date of this Judgment. The second defendant is to file a Compliance Report to this court after the lapse of the said 120 days."

h. For violation of the constitutional rights of the petitioners' members, the 1st and 2nd petitioner are hereby awarded Kshs. 120,000,000 (One Hundred and Twenty Million only) in compensatory damages to be borne by the 1st- 4th respondents jointly and severally, and an additional Kshs 30,000,000/- (Thirty Million only) in compensatory damages to be borne by the 5th respondent;

i. The costs of the present petition shall be borne by the respondents;

j. Interest shall accrue at court rates on the sums awarded as compensation and costs awarded herein till settled in full.

It is so ordered.

Dated, signed and delivered at Malindi virtually this 26th day of May 2026.

SIGNED BY/FOR:



□ THE JUDICIARY OF KENYA □

HON. JUSTICE MWANGI NJOROGE

Malindi Environment and Land Court

Environment and Land Court

Date: 2026-05-27 19:01:18

