



**Godoomal & another v Nationa Environment Management Authority (Nema)... & 3 others
(Constitutional Petition 47 of 2021) [2022] KEELC 3841 (KLR) (18 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 47 OF 2021**

**LL NAIKUNI, J
JULY 18, 2022**

BETWEEN

CHANDAN JETHANAND GODOOMAL 1ST PETITIONER

PREM JETHANAND GIDOOMAL 2ND PETITIONER

AND

**NATIONA ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)... 1ST
RESPONDENT**

MOMBASA COUNTY GOVERNMENT 2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY (KURA) 3RD RESPONDENT

**DEPUTY COUNTY COMMISIONER MOMBASA THRO' THE
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 4TH RESPONDENT**

RULING

I. Preliminaries

1. For this court's determination is the notice of motion application dated October 18, 2021 brought by the 1st and 2nd petitioners herein. The application is premised on the provisions of article 22 (1), 23 (3), 42 & 70 of the [Constitution of Kenya](#) and rule 3 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) and all other enabling provisions of the law.



II. The 1st & 2nd Petitioners Case

2. The 1st and 2nd petitioners are seeking for the following orders:-
 - a. Spent.
 - b. That pending the hearing and determination of the application “inter _parties”, the 1st respondent (NEMA) be directed to stop any further dumping from taking place on the property known as plot No MSA/Block/IX/49 and 50.
 - c. That pending the hearing and determination of the petition herein, the 2nd respondent be directed to demolish all unplanned, unlicensed and unapproved housing structures in the property known as plot No MSA/Block/IX/49 and 50.
 - d. That pending the hearing and determination of the petition herein, the 3rd respondent (KURA) be directed to remove the containers illegally placed on the Petitioner’s boundary wall encroaching the pedestrian pathway.
 - e. That pending the hearing and determination of the petition herein, the 4th respondent be directed to provide security to the 1st, 2nd and 3rd respondent to facilitate the above-mentioned exercises.
 - f. That this honourable court be pleased to issue such further orders in the interest of justice.
 - g. That the costs of this application be provided for.
2. The application as grounded on the facts, testimony and averments founded in the 14 paragraphed supporting affidavit sworn by Prem Jethanand Gidoomal on October 18, 2021 and seven (7) annexures marked as exhibits A, B, C, D, E, F and G respectively annexed thereto.
3. He averred that he was an adult male of sound mind and conversant with this matter and therefore competent to make and swear this affidavit. He deponed that the 1st and 2nd petitioners were the absolute and legal owners of all that property known as plot No MSA/Block/IX/49 & 50 and to that effect annexed the certificates of leases marked as “A” (hereinafter referred to as “the suit properties”) which were situated within the planned development area of the County of Mombasa and had been regularly been paying the attendant country land rates to the 2nd respondent herein.
4. The deponent stated that on April 14, 2009 he engaged a contractor to construct a perimeter wall and also act as a caretaker and to prevent illegal structures from being put up on the suit property. From this, he mobilized labour and material as he proceeded to undertake the said construction. However, he deposed that there were ongoing construction of unplanned structures and shelters that were cropping up in the above-mentioned premises contrary to the County Government Building By Laws regulations 252 (1) and the *Physical Planning Act*.
5. Moreover, he asserted that due to the haphazard nature in which the structures were being set up, it had led to the accumulation of increasing amounts of garbage and waste which not only continued to endanger the health of the public and the environment but posed as a security threat in that the area was proving to be a habitat for other nefarious activities such as drug dealing and peddling in the suit premises creating what was emerging as public health and environment crisis to the city residents



contrary to the Environmental Management and Co – ordination Act (hereinafter referred to as “the EMCA”).

6. He held that the unlicensed cooking enterprises were not bringing any income to the County Government of Mombasa in terms of payments of single business permit or rates to the current landowners and neither were they were observing public health as the County Government Health Act required of them hence posing a real danger to the safety of the city residents.
7. He pushed and expressed a wish that the 1st and 2nd respondents implemented the laws by demolishing all unplanned and unapproved structures and the 3rd respondents to remove the containers placed against the perimeter wall which was obstructing the pedestrians foot path in the suit premises to protect the public interest and ensure public health safety was maintained for the common good of all.
8. He alleged that the 2nd respondent seemed to have conspired with the 3rd respondent whereby the 3rd respondent had authorized the placement of the containers against his perimeter wall which operated business premises licensed by the 2nd respondent herein. He held that although on August 13, 2021 through his advocates on record they issued a demand letter to the respondents it had never elicited any responses from them to date. He strongly held that all these acts by the respondents were in contravention, violation and threat of several provisions of the Constitution of Kenya to wit:-
 - a. Article 2(1) of the Constitution which provides that the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.
 - b. Article 3 (1) provides that every person has an obligation to respect, uphold and defend this constitution.
 - c. Article 10(1) provides that the national values and principles of governance in this article bind all state organs, state officers, public officers, and all persons.
 - d. Article 10(2)(b)(d) provides that that the national values and principles of governance include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized and sustainable development.
 - e. Article 19 provides for rights and fundamental freedoms.
 - f. Article 20 provides for the application of bill of rights and it's that: The bill of rights applies to all law and binds all state organs and all persons Every person shall enjoy the rights and fundamental freedoms in the bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom. In interpreting the bill of rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and the spirit purport and objects of the bill of rights.
 - g. Article 21 speaks to the implementation of rights and fundamental freedoms.
 - h. Article 22 (1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.
 - i. Article 24 (1) provides that a right or fundamental freedom in the bill of rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.



- j. Article 27 of the *Constitution of Kenya* provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - k. Article 28 of the *Constitution of Kenya* provides that every person has inherent dignity and the right to have that dignity protected and respected.
 - l. Article 42 states that:- every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures.
 - m. Article 69 of the *Constitution of Kenya 2010* places obligations on state organs and every person in respect of the environment. Article 69(1) provides that the State shall: Ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources and ensure equitable sharing of the accruing benefits. Work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya. Protect and enhance intellectual property in and indigenous knowledge of biodiversity and the genetic resources of the communities. Encourage public participation in the management protection, and conservation of the environment. Protect genetic resources and biological diversity. Establish systems of environmental impact assessment environmental audit and monitoring of the environment. Eliminate processes and activities that are likely to endanger the environment. Utilize the environment and natural resources for the benefit of the people of Kenya.
 - r. Article 70 of the *Constitution of Kenya* provides for the enforcement of environmental rights. Specifically, article 70 (1) states if a person alleges that a right to a clean and healthy environment recognized and protected under article 43 has been, is being or is likely to be, denied, violated, infringed, or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
 - s. Article 70 (2) states that on application under clause (1), the court may make any order, or give any directions, it considers appropriate- To prevent stop or discontinue any act or omission that is harmful to the environment. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. To provide compensation for any victim of a violation of the right to a clean and healthy environment.
9. For the purpose of this provision of the law, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
10. In summary it is the petitioners case that
- a. The continued dumping of garbage and development of unplanned, unhygienic, and unlicensed eateries (bandas) continue to pose a serious health and security risk to the members of the public especially with diseases such as cholera which are known to break out in unsanitary conditions.
 - b. Their rights and those of members of the public specifically under article 42 of the *Constitution of Kenya* have been violated and are in danger of continued violation.
 - c. That it is the respondents duty to establish and maintain proper sanitary services and provision of disposal of refuse so as to maintain a clean and healthy environment in line with article 42 of the *Constitution*.



- d. That the respondents have failed in this constitutional duty placed on them which has resulted in accumulated toxins and refuse in the Petitioners property which is increasingly posing a health and security threat to the members of the public and which is also degrading the value of the petitioners property.
 - e. In the premises this honorable court should issue mandatory orders to the respondents to ensure discontinuance of any activity that would lead to further damage to the property and the environment which it is located and to ensure that all illegal structures set up in the premises are permanently brought down.
11. Unless these proceedings are certified as urgent and the conservatory orders sought pending petition for purposes of conserving the environment of the property in question granted, the petitioners rights and those of the members of the public to a clean, healthy, hygienic, and secure environment shall be defeated rendering the petition filed herewith nugatory.

III. The 1st Respondent's Replying Affidavit

12. On February 17, 2022 the 1st respondents filed a 15 paragraphed replying affidavit sworn by Samuel Lopokoiyit and dated February 10, 2022. He deposed that he was the County Director of Environment, the County of Mombasa under the employment of the NEMA – the 1st respondent and hence he was familiar with the facts of this case and therefore duly competent and authorized to swear this Affidavit.

He held that NEMA was the principal instrument of Government established under section 7 of the *Environmental Management and Coordination Act* (hereafter referred to as *EMCA 1999*) to exercise general supervision and coordination over all mater relating to the environment.

13. He held that on or about the August 16, 2021, they received at the Mombasa offices a complaint with regard to public health and environment safety concerns onto the land belonging to the Petitioners being plots No MSA/Block/IXI 49 and MSA/Block/IX/50 along Tom Mboya Avenue. Mombasa dated August 13, 2021 from the petitioners advocate the law firm of Messrs. Borona & Associates.

The complainant highlighted ongoing unplanned structures large amounts of garbage and waste and unlicensed cooking enterprises onto suit properties and requested demolition of the said structure.

Following the complaint NEMA made no premature intervention since the issues did not directly fall under its legal mandate – particularly the illegal and unplanned structure which were under the ambit of the physical planning and the County Government.

However, de deposed that upon the institution of this suit, a site visit was conducted whereby the following information was gathered:-

- a. The general area is known to the office although the beacons of the plots could not be clearly ascertained without the expertise of a land surveyor.
 - b. The erected mud houses did not warrant an environmental impact assessment for they were not listed of *EMCA 1999*.
 - c. The occupants of the temporary structures were purported to be squatting on the suit property and were a security threat to the NEMA's inspection.
14. Further, he held that the request for the demolition of the structures by the 1st and 2nd petitioners was not NEMAs legal mandate.

Instead and based on the legal advise given by his advocates on record were:-



- a. Subject to the provisions of section 56 of the *Physical and Land Use Planning Act, 2019* the *Urban Areas and Cities Act 2011* No 13 of 2011 and the County Government Act 2012 (No 17 of 2012) the County Government had powers to:-
 - i. Prohibit our control the use and development of land and buildings in the interested of proper and orderly development of its area and
 - ii. Ensure the proper execution and implementation of approved physical and land use development plans.
 - b. The provisions of section 2, 48 and the second schedule of the *Physical and Land Use Planning Act, 2019*, recreation areas and other public purposes land uses (which included the purposes of settlement of squatters, the poor and landless and the internally displaced persons) under housing and infrastructure analysis were matters which would be dealt with in a local physical and land use development plan prepared by the County Government of a particular area.
15. He posited that although NEMA and its officers were guided by the provisions of section 87 of the *EMCA 1999*, in relation to the general prohibition against dangerous handling and disposal of wastes, by dint of part 2 (2) (g) of the fourth schedule of the *Constitution of Kenya, 2010*, refuse removal, refuse, dumps and solid waste disposal were under the County Health Services under the functions and powers of the County Government. He held that NEMA at all times had remained conscious of the statute and Regulations in place and had made every step necessary in ensuring that they adhered to the correct procedure outlined in the *EMCA 1999*. For these reason, he affirmed to this court that NEMA would be prepared and willing to implement the orders that would result from this court proceedings.

IV. The 2nd Respondent's Replying Affidavit

16. On November 16, 2021, the 2nd respondent opposed the notice of motion application through filing of a 13 paragraphed replying affidavit sworn by Jimmy Waliaula the acting County Attorney of the County Government of Mombasa, the 2nd respondent herein. He deponed that he was conversant with matters relating to the petition, the subject of the proceedings herein. He was fully authorized and competent to make the affidavit on behalf of the 2nd respondent. He averred that he swore the affidavit in response to the notice of motion dated October 18, 2021 that he would at the opportune time and to the extent necessary also rely on the averments contained in this replying affidavit.
17. He deponed that the petition and the application principally sought to compel the 2nd respondent to inter alia demolish all the unplanned, unlicensed and unapproved housing structures in the suit property known as plot No MSA/Block/IX/49 and 50. He deponed that they opposed to the orders being sought by the petitioners on the grounds that they lied in ordinary civil law and not in a constitutional petition. According to him, there was no constitutional issue that has been raised from the said filed pleadings. Therefore, he as advised by his advocates on record and which advise he verily believed to be true that under the principle of "constitutional avoidance", this court would not determine the petition which was disguised as a constitutional issue when the matter could be determined on other basis.
18. He further averred that he was advised that the crux of the petition was wrongful entry, trespass and squatting on private land, which issues did not raise any constitutional issues or interpretation of the *Constitution*. He deponed that he was aware that there were other orders sought by the petitioner against the 1st – 4th respondents. However he had been advised that the substratum of the petitioner's case remained the claimed invasion of the suit land. In that case, then they should have neither lodged this case nor preferred any complaints against the 2nd respondent. He stated that having found that the



petitioners ought to have filed an ordinary suit, the substratum of this petition failed. He urged the court not to grant the orders sought in the application and/or the petition.

19. He deponed that in his knowledge that eviction of squatters or invaders of private land who physically dispossessed the owners of their parcels of land was never the legal mandate of the 2nd respondent. The 2nd respondent was therefore incapable of performing such functions. He stated that he was equally advised by the respondents' advocates on record that the provision of section 152E of the Land Act, No 6 of 2012 provided for the steps the petitioners ought to have taken to evict the squatters from their property. From that provision, the 2nd respondent was never mentioned as being responsible or playing any role. He deponed that he was equally informed that the petitioners had failed to indicate in their petition any legal basis for the claim that the 2nd respondent was capable of evicting squatters from their property.
20. He averred that the application failed in view of the grounds he had stated to establish the threshold for grant of the orders sought. It was an abuse of the court process and entirely lacks merit. He urged the court to dismiss the application with costs to the 2nd respondent.

V. Submissions

21. On December 9, 2021 in the presence of all parties the court ordered that the submissions to be canvassed by way of written submissions. Pursuant to that, all parties complied and the court reserved a date for delivery of ruling.

A. The Petitioners Written Submission

22. On December 8, 2021 the Learned Counsels for the 1st and 2nd petitioners the law firm of Messrs. Borona & Associates filed their written submissions dated December 7, 2021. Mr Borona Advocate submitted that the applicants had demonstrated that their rights to a clean and healthy environment under the provision of article 42 of the Constitution of Kenya and those of the public had been infringed by the dereliction of duty of the 1st and 2nd respondents. In the case of Castle Rock Gardens Management Limited v Attorney General & 4 others [2018] eKLR the court stated thus:

“NEMA is tasked by section 9 of the Environmental Management and Coordination Act (EMCA) to co-ordinate the various environmental management activities being undertaken by lead agencies and promote the integration of environmental considerations into developments policies, plan projects and programs to ensure the proper management and use of the environmental resources. Section 87 of EMCA prohibits any person from discharging or disposing of any wastes in a manner that may cause pollution to the environment or ill health to any person.”

23. In the instant suit, the petitioners submitted that they had clearly annexed to this application pictures showing the growing amount of waste that was in and around the suit premises which fact had not been disputed by the 1st respondent. The petitioners also submitted that they had shown that their right to clean and healthy environment had been infringed by the failure of the 1st respondent to act in compliance with article 47 of the Constitution and on the provisions of the EMCA Act specifically the provisions of sections 87 and 12 of the said Act.
24. The petitioner submitted that it was the 1st respondent position that the petitioners had failed to meet this threshold. The petitioners had pleaded in their petition that there was ongoing buildup of waste and garbage which was now becoming a real health and security crisis. From their application dated October 18, 2021 they had annexed photographs showing the dilapidated environmental state of the



suit premises and its environs. Indeed, they had more than provided the necessary particulars to show how their rights under article 42 of the Constitution were being infringed.

25. The petitioner submitted with reference with the case of Martin Osano Rabera and another v Municipal Council of Nakuru and 2 Others [2018] eKLR where the court stated thus:-

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

26. The petitioners submitted that these erudite words by Justice Ohungo need not be further elaborated as they speak to the issue whether the 1st respondent had a legal duty in these proceedings. The petitioners submitted that in the case of Jorum Kabiru Mwangi & 2 others v Co-operative Bank of Kenya, Kawangware Branch [2016] eKLR, the principle of constitutional avoidance was raised as an ouster of the constitutional court’s jurisdiction. The court stated thus:

“...In addition to the above, the doctrine of constitutional avoidance is well and truly alive in our realm. That doctrine is to effect that where a dispute is one which can be determined under another area of law other than constitution, then it is best that it be so determined, and pure constitutional issues left to be determined as such.”

The court went on to add

“Applying the above principles to the present case, granted, the dispute between the parties indeed raised issues of a criminal nature as well as issues of bank – client confidentiality. However, I can only but agree with the petitioners that once they have specifically invoked article 31(a) and (d) of the Constitution as the sole basis for their petition, then a constitutional question arises for determination. The merits or otherwise of that question is a wholly different matter because proof thereof would have to be on the basis of a constitutional principles as set out in the case of Anarita Karimi Njeru v Republic [1976 – 1980] 1 KLR 1272.....”

27. It was their submission that in the instant suit the petitioners main case was anchored on article 47 of the Constitution. The constitutional question arising therefrom would be have their rights to a clean and healthy environment been infringed? That question could only be answered after the merits of the case had been heard and determination made by this honourable court and that the court with its requisite power under article 162 (2) to hear and determine the applicants petition on its merits.
28. The petitioners submitted that it was the position by the 2nd respondents that the eviction of squatters on private land was not the work of the 2nd respondent. It was the petitioners position that those housing structures set up in and around the suit premises had been set up right in the Mombasa central business area in stark contravention to building regulations and laws of the county. The 2nd respondent was failing in its legal duty as per the County Governments Act and the Urban Areas and cities Act. Specifically, the provision of sections 102 - 112 of the County Governments Act and section 3,



sections 36 - 42 of the *Urban and Cities Act*. These laws place an obligation on County governments to ensure that the cities and towns they govern were managed in a planned and organized manner. The petitioner's land was right in the heart of Mombasa city, yet unapproved structures and businesses had been set up in and around the premises as was demonstrated in the annexures of the applicants supporting affidavit dated October 18, 2021. The provision of section 30 of the *Physical Planning Act* prohibited any person from carrying out development within a local authority/county government without permission. It was their humble submission that this provision of law had been infringed to the detriment of all county inhabitants within and without the petitioners suit property. It was also their submission that the petition raises constitutional and legal questions around the failure of government institutions to carry out their legal mandates as prescribed by the law.

29. In conclusion, the petitioners reiterated that what was currently before the court was the application dated October 18, 2021. They stated that they had demonstrated that the applicants right to a clean and healthy environment has been infringed by the failure of the 1st to 4th respondents to perform their constitutional and statutory functions. The fact that garbage and waste was accumulating on the property had not been disputed by any party. The fact that there existed unplanned and unlicensed housing structures had also not been disputed by the respondents.
30. What was disputed, specifically by the 1st and 2nd respondents whether it was their duty to intervene in such a matter. They submitted that they had demonstrated that the law places an obligation on the state and other juridical persons to ensure a clean and healthy environment. They maintained they had also highlighted the various laws that mandated the county government to plan and manage its cities and townships in an organized way. According to the petitioners therefore, it was beyond doubt that the respondents had failed in these duties. They prayed that the honorable court intervened and granted the prayers c, d, and e of their application.

B. The 1st Respondent's Written Submission

31. On February 17, 2022 the learned counsel for the 1st respondent the law firm of Messrs. Simon Ngara Advocates filed their written submissions dated February 10, 2022. Mr Ngara Advocate submitted that the 1st respondent was relying on the grounds of opposition dated November 1, 2021 and the replying affidavit dated February 10, 2022. Their sole main issue for determination by this court was whether the petitioners had proved any breach of their constitutional rights by the 1st respondent and whether the 1st respondent had been indolent in discharging their duties. He brought out the legal mandate of NEMA as a statutory body established under section 7 of the *EMCA 1999*. He took court to the object of NEMA under section 9(2) of *EMCA* and section 24 (2) of Waste Management Regulations and part 2(2) (g) of the fourth schedule of the *Constitution of Kenya, 2010* whereas the 1st respondent had an objective to ensure the public a right to healthy environment was preserved in the case of waste disposal and its general management objective was limited to certain functions and was further devolved to some extent to the County Governments when it came to refuse removal, refuse dumps and solid waste.
32. The learned counsel referred court to the case of *African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] eKLR where the court opined as follows in relation to waste disposal; mandate by the County Government:-

“Having shown that the right to a clean and health environment does exists, we need to determine the obligations of the respondent under the law in relation to waste disposal operations. The named respondents is the Municipal Council of Naivasha, which was a local authority established by now repealed Local Government Act, cap, 265 laws of Kenya,



the Local Government Act, did provide for the powers duties and provisions relating to local authorities of significance to us in section 160 which provided as follows:-

160 – Every Municipal Council and expert in regard to matters contained in paragraphs (a) and (h) every town Council and every urban Council shall have power.

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

33. Thus he averred that the order sought by the petitioners to have court direct the 1st respondent to stop further dumping from taking place on the suit property was therefore misplaced and unwarranted as solid waste refuse disposal and management was handled by the County Government of Mombasa.

He contended that the claim by the petitioner that the 1st respondent had refused to fulfill its statutory responsibility to protect the environment from degradation in relation to dumping of waste. The 1st respondent had no legal mandate to demolish unplanned structures in the manner sought by the petitioner. By referring court to the provisions of section 58 of *EMCA* he held that the *EMCA* listed projects requiring the submissions of an environment impact assessment study reports to the 1st respondent.

Hence based on the statutory provisions and the site visit undertaken by the County Director of Environment the structures on the suit had never merited an Environmental impact assessment by NEMA.

In the long run he urged court to dismiss the application and petition against the 1st respondent and each party to bear its own costs.

C. The 2nd Respondent's Written Submissions

34. On February 21, 2022 the learned counsel for the 2nd respondent, the law firm of Messrs. Muthee Kihiko Soni Advocates filed their written Submissions. Mr Kihiko Advocate submitted that from the onset, the 2nd respondent had been opposed to the petitioners' application for the reasons that the petitioners' case did not meet the threshold for constitutional petitions. That the 2nd respondent did not have an identifiable legal duty in these proceedings. The 2nd respondent submitted that the orders sought by the petitioners lie in ordinarily civil law and not in a constitutional petition. They argued that that there was no constitutional issue raised. Therefore the filed petition was disguised as one raising constitutional issues when the matter could be determined on other legal basis.

35. The 2nd respondent submitted that the crux of the petition was wrongful entry, trespass and squatting on private land, which issues did not raise any constitutional issues or interpretation of the *Constitution*. The Supreme Court addressed the principle of constitutional avoidance in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where the court stated as follows:-

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis.



In South Africa, in *S v Mhlungu* 1995 (3) SA 867 (CC) the constitutional court, Kentridge AJ, articulated the principle of avoidance in his minority judgment as follow [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

(257) Similarly the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347(1936).

(258) From the foundation of principle well developed in the comparative practice we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the appellate court.

36. The 2nd respondent submitted that without prejudice to the foregoing, the 2nd respondent submitted that whereas there were other orders sought by the 1st and 2nd petitioners against the 1st – 4th respondents, the substratum of the petitioner’s case still remained the claim invasion and occupation of its land by the squatters. The submitted that if one removed the squatters from the equation, and assuming that there was no invasion of the suit land, there would be no case, and neither would the complainants raised against the 2nd respondent exist. Having found that the petitioner ought to have filed an ordinary suit, the substratum of this petition fails, they urged the court not to grant the orders sought in this petition.
37. They made reliance to the case of *Bandari Investment Company Limited v National Police Service & others* [2021] eKLR, the court faced with similar circumstances as the present case, dismissed the petition under the principle of constitutional avoidance and directed the petitioners to seek recourse through ordinary civil law.
38. The 2nd respondent submitted that the eviction of squatters or invaders of private land who physically disposes the owners was not the work of the 2nd respondent. Therefore, it was incapable of performing such functions. As a matter of fact, they held that the provision of section 152E of the *Land Act*, No 6 of 2012 provides for the steps the petitioners ought to have taken to evict the squatters from their property. They stressed that at no place part was the 2nd respondent mentioned as being responsible for eviction of squatters.
39. The 2nd respondent submitted that the provision of section 152E of the *Land Act* provides as follow:
1. If with respect to private land the owner of the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner of the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
 2. The notice under subsection (1) shall-
 - a. Be in writing and in a national and official language



- b. In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 3. specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 4. be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.
40. The 2nd respondent submitted that the petitioners have failed to demonstrate any steps taken to evict the squatters from their property, and instead, they cunningly want to shift the responsibility to the 2nd respondent, in the pretext that this petition concerned the right to a healthy environment. According to the 2nd respondent, this matter purely related to squatting and all other issues stem therefrom. The 2nd respondent submitted that it did not have any legal duty to guard and protect private property from invasion or trespass. The petitioners ought to have put in place a proper boundary wall or fence to keep off trespassers and squatters its property. It concluded that in view of the matter set out above, the application failed to establish the threshold for grant of the orders sought. Indeed, it was an abuse of the court process and entirely lacked merit. The 2nd respondent urged the honorable court to dismiss the application with costs.

VI. The Issues For Analysis & Determination

41. This court has considered all the petitioner/ applicant's application and the respondents' response, written submission, the relevant provision of the Constitution and statutory law. So that it is able to arrive at an informed, just and reasonable decision, this court has condensed the following five (5) salient issues for its determination. These are:-
- a. Whether this court has jurisdiction to hear and determine the dispute herein?
 - b. Whether the 1st and 2nd petitioners have met the threshold for constitutional petitions?
 - c. Whether the 1st and 2nd respondent have an identifiable legal duty in these proceedings?
 - d. Whether the 1st and 2nd respondents herein have met the threshold for striking out the application and petition?
 - e. Who will bear the costs of the application.

Issue No (a) Whether This Court Has Jurisdiction To Hear And Determine The Dispute Herein?

42. That a clean and healthy environment is a fundamental prerequisite for life is not a matter that needs belabouring. It is for this reason that the drafters of the Constitution of Kenya, 2010 saw it fit to provide for the right to a clean and healthy environment at article 42 within the bill of rights. Needless to state, Kenyans voted overwhelmingly in favour of the draft, thus giving their seal of approval to its provisions. Article 42 states as follows:

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



- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69; and
- (b) to have obligations relating to the environment fulfilled under article 70.

Background

43. It was not in dispute that the 1st and 2nd petitioners were owners of all that plot No Msa/Block/ix/49 and 50 situated within the County of Mombasa Development Area. The petitioners contended that there were ongoing construction of unplanned structures and shelters that were cropping in the premises contrary to the County Government Building By-laws Regulations 252 (1) and the *Physical Planning Act*. The petitioners additionally contended that the haphazard nature in which the structures were being set up had led to accumulated number of increasing amounts of garbage and waste which continued to pose environment risk. The petitioners have made several prayers inking an interim order directing the County Government of Mombasa, the 2nd respondent herein, to demolish all unplanned, unlicensed and unapproved housing structures on the petitioners' property.
44. The *Constitution of Kenya 2010* is bold and robust and the previous strictures on standing remedies were done away with by it. This is what the Court of Appeal in the case *Coi & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR stated thus:-

- “ 1. The *Constitution of Kenya 2010*, unlike our previous one, enshrines a detailed, liberal and robust bill of rights. Additionally, the strictures on standing and remedies capable of being issued for violation and/or enforcement of the fundamental freedoms and rights thereunder, which were present in the former constitutional order, are no more. This constitutional milestone was aptly set out by this court in *Attorney general v Kituo cha sheria & 7 others* [2017] eKLR as follows:-

“On the application of the bill of rights, article 20 is couched in wide and all-pervasive terms, declaring the bill of rights to apply to all law and to bind all state organs and all persons... It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the bill of rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts ... are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the bill of rights the ethos and credo, the values and principles that underlie and therefore mark us



out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom.”

45. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

46. The Environment and Land Court (ELC) was established pursuant to the provisions of article 162(2) (b) of the *Constitution*. Under the said article, the court is mandated to deal with disputes relating to the Environment and Land. The provision of article 165(5) (b) of the *Constitution* divested the High Court from dealing with matters, constitutional or otherwise, falling within the jurisdiction of the Environment and Land Court and the Employment and Labour Relations Court. This article also establishes the *Environment and Land Court Act, 2011*.

47. The said Act gave this court its jurisdiction under section 13 which elaborates on the issues which the court should deal with in relation to land use, occupation and title to land. The provision of section 13, the *Environment and Land Court Act* provides that:

- (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under article 162
 - (2) (b) of the *Constitution*, the court shall have power to hear and determine disputes;
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.



48. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened. Article 23.

- (1) The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of; or threat to, a right or fundamental freedom in the bill of rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of," or threat to, a right or fundamental freedom in the bill of rights.
- (3) In any proceedings brought under article 22, a court may grant appropriate relief including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation;

49. Under the provision of article 23 of the [Constitution](#) further provides that the High Court has jurisdiction in accordance with article 165 of the [Constitution](#) to hear and determine applications for redress, of a denial, violation or infringement of, or threat to a right or fundamental freedoms in the bill of rights. The right to a clean environment is provided in the [Constitution](#) and hence gives this court the power to hear and determine the matter it being a matter relating to the violation of rights of peaceful enjoyment of owners of property.

50. The issue in consideration is whether the court should grant the orders sought in the petition. Article 42 of the [Constitution](#) guarantees the petitioner the right to a clean and healthy environment which includes the right to seek redress where this right is violated.

Article 42 of the [Constitution of Kenya, 2010](#) provides that every person has the right and is entitled to a clean and healthy environment, which right includes the right to have the environment protected for the benefit of the present and future generations.

51. The right to a clean and healthy environment is bestowed on every person, and has been considered by the courts and eminent authors to be essential for the existence of mankind. In [Adrian Kamotho Njenga v Council of Governors & 3 others](#) [2020] eKLR, it was held that:

“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.

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.”

52. Further to the foregoing, the Constitution under article 69 obligates all persons 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 establish systems of environmental impact assessment and environmental audit and monitoring of the environment.

53. This position was elaborately considered in the case of Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR where 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 v 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.”

54. Under section 13(3) of the Environment and Land Court Act, the court has the mandate to hear and determine applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution. However, the Act does not limit or preclude the court from hearing applications for redress of a denial or violation of any other right, if that right is in furtherance of a dispute relating to land and the environment.

55. The court is satisfied that it has the jurisdiction to handle the above application and to hear and determine the petition filed herein. I proceed to deal with the other issues raised by the parties. This Petition is properly before the court, it is a constitutional petition alleging violations of various rights enshrined in the Constitution, including a violation of the right to a clean and healthy environment provided for in article 42 of the Constitution. Article 162(2) (b) of the Constitution and section 13(1) of the Environment and Land Court Act provides that this court can hear and determine any matter related to the Environment and Land. Section 13(3) of the Environment and Land Court Act further provides as follows:

“13(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or



fundamental freedom relating to the environment and land under articles 42, 69 and 70 of the Constitution.”

Issue No (b) Whether The Petitioners’ Case Has Met The Threshold For Constitutional Petitions

56. Indeed, as was held by the Court of Appeal in Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority [2016] eKLR;

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

57. Rule 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides as follows;

“10.

- (1) An application under rule 4 shall be made by way of a petition as set out in form A in the schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.”

58. The provision of rule 4 thereof provides that where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

59. The court in the case of Anarita Karimi Njeru v Republic [1979] eKLR set out the legal threshold for a constitutional petition thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that



of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

60. From the foregoing, it is indisputable that for a constitutional petition to be sustainable, it must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation.

61. Tied together with the above is the principle of constitutional avoidance which precludes the court from determining ordinary civil issues disguised as constitutional questions. The doctrine of constitutional avoidance was addressed by the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where the court held as follows:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the appellate court.”

62. The question of what constitutes a constitutional question was discussed at length in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern Cape & others* [2002] 23 ILJ 81 (CC) in which the court citing the Constitutional Court’s observations in *S v Boesak* [2001] (1) SA 912 (CC) stated thus;

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of...the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,... is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the bill of rights. If regard is had to this and to the wide scope and application of the bill of rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the constitutional court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”



63. The petitioner instituted this suit pursuant to the provisions of articles 22 and 23 of the Constitution which empowers any person to institute a suit claiming violation and/or threatened violation of their rights and freedoms as set out in the bill of rights. The petitioner alleges that the respondent contravened his rights as protected by articles 42 and 70 of the Constitution.
64. It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights. All these rights have to be interpreted in the context of the petitioners' right to own land and the right to a clean and healthy environment, and not in isolation as argued by the respondents. Finally, it is only this court that has the mandate of determining if indeed the petitioners' constitutionally rights have been infringed upon or are likely to be infringed upon.

Issue (c) Whether The 1st And 2nd Respondents Have Identifiable Legal Duty In These Proceedings

65. The 1st & 2nd petitioners have argued that NEMA is properly joined to this case as a respondent as it abdicated its responsibility. The 1st and 2nd respondents on the other hand argue that NEMA ought to have invoked its powers under section 12 of EMCA to carry out the restoration measures itself. Whereas NEMA has specific functions some of which I have outlined above and whereas the functions under section 9 (2) are couched in mandatory terms, NEMA's powers to perform restorative measures or cause restorative measures to be performed under section 12 of EMCA are not mandatory.
66. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under article 69 which among others requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The obligation to ensure a clean and healthy environment is imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.
67. So as to further safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured by articles 42 & 70 of the Constitution provides that if a person alleges that a right to a clean and healthy environment recognised and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect to the same matter and that he does not have to demonstrate that any person has incurred loss or suffered injury.
68. To safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured article 70 of the Constitution of Kenya provides for enforcement of environmental rights as follows: -
- (1) If a person alleges that a right to a clean and healthy environment recognized and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.



- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate-
 - (a) To prevent, stop or discontinue any act or omission that is harmful to the environment;
 - (b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;

Or

 - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

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

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

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



72. The petitioners submitted that it was the 2nd respondents position that the eviction of squatters on private land is not their work. It was the Petitioners position that those housing structures set up in and around the suit premises have been set up right in the Mombasa central business area in stark contravention to building regulations and laws of the county. The 2nd respondent is failing in its legal duty as per the County Government Act and the *Urban Areas and cities Act*. Specifically, section 102-112 of the County Government Act and section 3, section 36-42 of the *Urban Areas and Cities Act*. These laws place an obligation on County governments to ensure that the cities and towns they govern are managed in a planned and organized manner.
73. The petitioner's land is right in the heart of Mombasa city, yet unapproved structures and businesses have been set up in and around the premises as is demonstrated in the annexures of the applicants supporting affidavit dated October 18, 2021. Section 30 of the *Physical Planning Act* prohibits any person from carrying out development within a local authority/county government without permission. It was their humble submission that this provision of law has been infringed to the detriment of all county inhabitants within and without the petitioners suit property. It was also their submission that the petition raises constitutional and legal questions around the failure of government institutions to carry out their legal mandates as prescribed by the law.
74. The 2nd respondent has the obligation to make sure that all building permits are correct and inspection before any buildings are erected in Mombasa County is done. It is an obligation that has been bestowed to them by the *County Governments Act* an obligation that they have to uphold for the smooth running of the county and for every resident to enjoy coexistence in the said county.
75. The foregoing discourse notwithstanding, I find and hold that NEMA and the County Government of Mombasa were properly joined to this case as a respondents, they indeed contributed to the violation of the petitioners' right to a clean and healthy environment by ignoring the proper protocols of proper County management.
76. This court shall therefore not shy from allowing the issuance of closure orders aimed at preventing, stopping or discontinuing harm to the environment in deserving cases. In the case of *National Environment Management Authority & another v Gerick Kenya Limited* [2016] eKLR, Mutungi, J, held as follows:

“In this matter we have a situation where we have competing interest. On the one hand we have the public interest where the Community needs protection against potential harm to the environment through contamination or pollution, and on the other hand, we have the defendant's private commercial interest where the defendant wishes to develop the site for commercial gain. Where in a case such as the instant one, the public interest as the public interest is pitied against private interest, the public interest overrides the private interest is for the good of the wider public as opposed to the narrow private interest. The public interest no doubt outweighs the private individual interest.”

Issue (d) Whether The 1st, 2nd & 3rd Respondents Have Met The Threshold For Striking Out The Petition

77. In their submissions the 2nd respondent contended that the court should use its inherent power and jurisdiction to strike out the petition for not meeting the threshold set for constitutional petitions. The honorable court has also noted that the 2nd respondent also contended that the court has no jurisdiction to entertain a constitutional petition. I discussed above that as the Environment and Land Court this court has the jurisdiction to entertain constitutional petitions that touch on matters of land and the



environment and as long as a party proves that their rights under the bill of rights have been infringed then it is trite in law that a court of competent jurisdiction should listen and determine their grievances.

78. The 2nd respondent urges that the court's power to strike out a pleading is only reserved for rare occasions such as where it is shown that the pleading is clearly untenable. In this matter, it is contended that in filing the present petition, the petitioners have attempted to circumvent a clearly laid out statutory mechanisms to address its grievances. It is further stated that there is manifestly a procedure and forum which is the civil courts where the Petitioners may have their grievances sufficiently and expeditiously addressed. In view whereof the respondents argue in the premises, the petition herein is clearly untenable before this court. The 2nd respondent further submits that petition does not meet the constitutional threshold to make it fit for determination by this court. In view whereof the 2nd respondent contend that the only remedy available in the circumstances is to strike out the petition with costs.
79. It is petitioner's contention on the other hand that the right to a clean and safe environment cannot be taken lightly as it is a prerequisite for life. The petitioner further avers that the same is equally linked to economic and social rights. In Communication No 155/96: *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* the African Commission on Human and People's Rights stated as follows:-

“These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss,

“an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”

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

80. I am alive to the fact that numerous courts have held that the striking out of pleadings is a discretionary and draconian remedy to be employed only as a last resort and even then, in the clearest of cases as seen in the case of *DT Dobie v Muchina* [1982] eKLR.
81. In the instant petition it is alluded by the 2nd respondent to be a plain and obvious case for striking, I find the respondents' contention not only interesting but contrary to the provisions of law and decided cases. I have to point out that this is a constitutional petition which under article 22 of the *Constitution* provides every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 23 of the *Constitution* clearly provides the High Court has jurisdiction to hear and demine application for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of rights. The instant petition seeks to vindicate the petitioner's fundamental and human rights to a clean and safe environment. I find that this is one of the fundamental rights which a party is entitled to seek form the High Court.



VII. Conclusion & Disposition

82. In conclusion, the court wishes to look at the provision under the rule 3(4) and 5(d) of the *Constitution of Kenya (protection of rights and fundamental freedom) practise and procedure Rules, 2013* popularly referred as the *Mutunga Rules* which grants courts power to make orders so as to achieve the ends of justice.

Rule 3 (4) provides:

“The court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.”

a. Rule 5 (d) provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just...

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.”

83. Applying the above principles to the instant case, I do not see what prejudice the respondents will suffer if the instant application is allowed as they have in one way or another contributed or allowed for the rights of the petitioners to be infringed contrary to the bill of rights. The respondents have in no way shown the court how the orders in the application are prejudicial to them and it is my humble view that in the interest of the overriding principles to hear and determine this matter.

84. In the end, I now proceed to make the following orders:

- a. That a declaration that this court has the jurisdiction to hear and determine a constitutional petition as empowered by the provisions of articles 22, 23, 42, 69 and 70 read together with article 162(2) of the *Constitution of Kenya, 2010* which also establishes the Environment and Land Court with the status of a High Court. Also by virtue of section 4 and 13 of the *Environment and Land Court Act* of Kenya
- b. That notice of motion application dated October 18, 2021 filed by the petitioners herein has merit and therefore be and is hereby allowed.
- c. That a declaration that pending the hearing and determination of the petition, the court there shall conduct a site visit (*locus in quo*) to be decided on October 6, 2022 to the suit property known as plot No MSA/Block/IX/49 and 50 to ascertain the allegations made by the petitioners and the extent of the damage caused by the alleged degradation and right to a clean environment to enable the court come a justifiable conclusion and verdict at the end of these proceedings.
- d. That a direction be and is hereby made that that the main petition be heard inter parties within the next ninety (90) days from the delivery of this ruling. There should be a mention on October 6, 2022 for pre – trial session and other direction including fixing a hearing date. All parties should purpose to attend the intended hearings.
- e. That a declaration is hereby made that the issues stated out in the petition are substantial and can only be determined through a hearing on priority basis.



f. That a declaration that pending the hearing and determination of the petition herein, the 3rd respondent (KURA) be and are hereby directed to remove the containers illegally placed on the 1st & 2nd petitioner's boundary wall encroaching the pedestrian pathway within the next fourteen (14) from this date without fail .

g. That costs will be in the cause.

It is ordered accordingly.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2022

HON JUSTICE (MR) LL NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of: -

- a. M/s Yumnah Hassan, court assistant.
- b. Mr Borona Advocate for the 1st & 2nd petitioners/applicants
- c. M/s Mwangi Advocate holding brief for Mr Ngara Advocates for the 1st respondent.
- d. Mr Daniel Kihiko Advocates for the 2nd respondent.
- e. Non appearance for the 3rd respondent.

