



**Asili Mali Company Limited v County Government of Lamu & another
(Petition 30 of 2022) [2024] KEELC 455 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 455 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION 30 OF 2022

EK MAKORI, J

JANUARY 31, 2024

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES
22(1) (2)(B), 23, 70, 162(2)(B), AND ARTICLE 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: AN ALLEGED CONTRAVENTION OF ARTICLE 40(B),
42(A) & (B), 43(1)(B), 47(1) & (2) AND 69(D) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: SECTION 268(1) AND 87 OF THE ENVIRONMENTAL
MANAGEMENT AND COORDINATION ACT CHAPTER 387 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF: THE ENVIRONMENT MANAGEMENT
AND COORDINATION (ENVIRONMENTAL IMPACT
ASSESSMENT/ENVIRONMENT AUDIT) REGULATIONS OF 2003**

AND

**IN THE MATTER OF: SECTIONS 24, 36 AND THE SECOND SCHEDULE
OF THE PHYSICAL PLANNING CHAPTER 286 OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF: SECTION 118(1)(C) OF THE PUBLIC
HEALTH ACT CHAPTER 242 OF THE LAWS OF KENYA**

BETWEEN

ASILI MALI COMPANY LIMITED..... PETITIONER

VERSUS

COUNTY GOVERNMENT OF LAMU.....1ST RESPONDENT

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



BETWEEN

ASILI MALI COMPANY LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF LAMU 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

RULING

1. The application dated 16th December 2022 brought by the applicant/petitioner is seeking various orders:
 - i. Spent.
 - ii. Spent
 - iii. This Court be pleased to issue a temporary order of injunction restraining the respondents whether by themselves, their servants, agents, or any person from dumping and permitting the dumping of refuse and waste in the land parcel known as Unsurveyed land parcel along Kenyatta Road pending the hearing and determination of this petition
 - iv. Costs of this application be provided for.
2. The respondents have opposed the application. The same was canvassed by way of written submissions.
3. The applicant averred that it is the registered proprietor of land parcel No. Lamu/Block I/1203 which property is adjacent to the 1st respondent's land parcel known as unsurveyed land parcel along Kenyatta road. The 1st respondent unlawfully converted and positioned it as a waste disposal site. The 1st respondent has unlawfully declared the land as a dumping site without obtaining an Environmental Impact Assessment (EIA) license from the 2nd respondent as provided in Section 88 of the [Environment Management and Coordination Act](#) (EMCA).
4. The petitioner/applicant asserted that the 1st respondent has unlawfully declared the land as a dumping site without conducting public participation and consulting the neighbouring plot owners thus violating their right to participate in decision-making and to safeguard their properties. The neighbouring plots are highly valuable and directly face the ocean thus setting up a dumping site within the area would reduce the value of the said plots and affect their viability in the tourism business as some of the developed plots serve tourists.
5. The petitioner/applicant claimed that it intends to develop a tourist hotel on the plot and with the adjacent land declared a dumping site shall adversely interfere with its investment as the development shall not attract any tourist clientele with a dumpsite next to it.
6. The applicant contended that the waste disposal site is directly facing the ocean and the spill and spread of waste as it is common in the other landfill will cause undesirable environmental impacts by polluting the ocean water, damaging the soil quality, affecting the air quality and negatively impacting the petitioner's business environment.



7. If an Environment Impact Assessment is done, the 1st respondent will not succeed in obtaining positive results and that is why the 1st respondent has decided to sidestep the process of obtaining a license from the 2nd respondent. The land slated for waste disposal is not situated in an area that is conducive for holding a dumping site as there are residential areas and tourist hotels within the area. There is no way such investments can exist together with the commonly known effects of landfills.
8. The applicant submitted that the fact that the 1st respondent is not licensed to operate and create a dumping site on the said property, this court must protect the applicant together with the other landowners within the said area from the adverse effects that will be caused by having a waste disposal site within the area.
9. The applicant cited several authorities to support the plea for interlocutory injunction - *Giella .V. Cassman Brown and Company Ltd, Mrao Ltd v First American Bank Of Kenya Ltd* [2003] eKLR, *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 Others* [2015] eKLR, *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited* [2001]eKLR, *Registered Trustees of Jamie Masjid Abl- Sunnait-Wal-Jamait Nairobi v Nairobi City County & 2 Others* [2015], *Said Ahmed v Manasseh Benga & Another* [2019] eKLR, *Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others* [2008]eKLR and *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018]eKLR
10. The 1st respondent stated that under its function in matters of refuse removal, refuse dumps, and solid waste disposal, under Part 2 of the Fourth Schedule of the *Constitution*, on a sponsorship program by the Lamu Museum commenced the rehabilitation of the Kanu dump site on or about October 2022, which culminated to the filing of the instant application and petition by the petitioner on the allegation that, the 1st respondent was constructing a waste disposal site and is in the process of building a wall fence in readiness of operation of the dumping site by January 2023, which alleged facts are devoid of any truth and are meant solely to mislead this Court.
11. In the 1st respondent's replying affidavit on record, the area around Kanu was traditionally, the sole dumping site, serving the entire locality but land was subsequently acquired at a place called Kandahari, which started serving as the dumping site, as Kanu dumping site had to be closed due to its proximity to the ocean. Though the dump site was relocated to Kandahari, the area residents continued dumping at Kanu as there was no waste collection point within the vicinity. With the advent of devolution and to control the dumping of waste in the Kanu area, the County Government through the Department of Public Health and Sanitation introduced skips but unfortunately, they were misused and deliberately set on fire prompting their removal for safety reasons, as indicated in the 1st respondent's replying affidavit, the removal of the skips compounded the problem of haphazard dumping of waste hence the 2nd respondent's letter dated 15th March 2021.
12. The 1st respondent in its renewed effort to prevent the dumping, rehabilitated the area through the Department of Public Health and Sanitation in the year 2019 and fenced it. The 1st respondent has annexed pictures of the area after the aforesaid rehabilitation.
13. The 1st respondent further deployed enforcement officers to patrol the area in a bid to stop the dumping but unfortunately, it became a cat-and-mouse race as people continued to indiscriminately dump waste, necessitating the 1st respondent to reintroduce skips and ensure regular removal of dumped waste using trucks.
14. Despite concerted efforts by the 1st respondent to stop the dumping, the same proved futile as people continued to indiscriminately dump waste all over the place destroying both land and marine environment.



15. The 1st respondent stated further that in its replying affidavit, the rehabilitation of the Kanu area is a top priority, as the Lamu Municipality which has jurisdiction over the area, had budgeted for the same in its annual budget for the year 2022 – 2023 but before the project was implemented, they were approached by the Lamu Museum which offered to do the same, as they had a project to clean/rehabilitate the Kanu area and some other parts of the heritage site the 1st respondent annexed in its replying affidavit pictures of the area after the said rehabilitation.
16. The 1st respondent further deposed in its replying affidavit, that there was never a plan for the Kanu area to be made and/or declared a dumping site as alleged by the petitioner. On the contrary, efforts have been made to rehabilitate the place and stop the dumping. The small temporary structure measuring approximately 5 metres by 6 metres serves as a waste collection point being an urgent intervention necessary to prevent the haphazard dumping of waste.
17. The 1st respondent argued that the petitioner’s allegations that they have been deprived of their right to a clean and healthy environment are without any basis, as they are well aware that, the area on which their alleged land is situated was traditionally a waste dumping site and that dumping had continued even after the dumping site was relocated to Kandahari.
18. The land around the area in which the waste collection point has been constructed is indicated in a map obtained from the Survey of Kenya and marked as annexure “GN 6” as Government Land and/or Public Land, and it appears the petitioner’s alleged land was irregularly alienated depriving the 1st respondent of land for construction of public amenities such as a waste transfer station which is necessary in the circumstance to stop the indiscriminate dumping but the same has been rendered impossible due to irregular allocation of public land. The petitioner is crying foul yet it is the author of its misfortune, as it is alleged the land was traditionally a dumping site and it has taken concerted efforts by the 1st respondent to rehabilitate the area and stop the haphazard dumping of waste.
19. Given the foregoing, the 1st respondent submitted that the applicants have not shown a prima facie case with a probability of success as the allegations that the 1st respondent has declared the un-surveyed land parcel along Kenyatta Road as a dumping site are without any basis or truth, on the contrary, the 1st respondent has taken several steps and/or measures to rehabilitate the area and prevent the indiscriminate dumping of waste, it is evident from the 2nd respondent’s letter dated 15th March 2021, that as at that date, the Kanu transfer stations was in a deplorable state and that the 1st respondent was ordered to undertake the proposed measures to ensure a clean and healthy environment. The building of the waste collection point is in line with the 2nd respondent’s aforesaid proposed measures, as the 1st respondent is in the meantime, looking for a more tangible solution in its quest to rehabilitate the area and beautify the seafront.
20. It is further submitted by the 1st respondent that the petitioner’s alleged plot is not next to the waste collection point as alleged and/or at all, as it is some distance away and hence unlikely to deprive the petitioners of their right to a clean and healthy environment, more so, in light of the raft of measures put in place by the 1st respondent to ensure waste is collected daily to avoid piling up and spilling of waste on the ground.
21. According to the 1st respondent, the petitioner has misunderstood the project as the 1st respondent has not and is not intending to construct a waste dumping site or landfill and has not constructed a wall fence as alleged or at all. The place where the temporary waste collection point has been constructed is on a riparian reserve and within the area in which dumping was being done, all in an effort not to transfer the problem to another site and to also decrease chances of waste getting into the ocean as was the case when waste was being dumped haphazardly.



22. The 1st respondent avowed that the petitioner has not established the infringement of any of its rights by the 1st respondent, to call for a rebuttal. Consequently, the petitioner has not established a prima facie case with any probability of success.
23. On the second issue whether the petitioner will suffer irreparable loss and damage, the 1st respondent asserted that the petitioner has not established that it will suffer irreparable loss and damage. The petitioner must demonstrate to the Court by evidence or otherwise the damage or loss being occasioned or likely to be occasioned if the order is not made. It is evident from the contents of the petitioner's supporting affidavit that, no loss or damage has been demonstrated. It is further affirmed that the petitioner will not suffer any irreparable loss or damage if the orders sought are not granted, as a monetary award will adequately compensate the petitioner in the event its case is successful. The purpose of a temporary injunction pending the hearing of the main suit is to preserve the subject matter of the suit. No evidence was tendered showing that, the subject matter of the suit is being wasted or damaged by the 1st respondent to warrant the orders sought in the application. It is trite law that Court orders are not issued in vain and since from the evidence adduced, there are no justifiable grounds to restrain the 1st defendant as prayed in the application, the balance of convenience tilts in not allowing the application as the premature removal or demolition of the waste collection site or the stoppage of its operation before an alternative site is acquired for the said purpose, will erode all the gains so far made, as people will revert to indiscriminate dumping making the whole area a health risk. It is alleged by the 1st respondent that the petitioner being a beneficiary of the land on which the dumping site was located, cannot today wake up and allege that its right to a clean and healthy environment is being violated when it is largely to blame for the problem.
24. Given the foregoing, it is argued that the petitioner has not satisfied any of the grounds for the grant of interlocutory injunctive orders as held in the case of *Charter House Investment Limited v Simon K. Sang & 3 Others* [2010] eKLR, where the Court in dismissing the applicant's application held based on the case of *Giella Case* (supra) that the plaintiff had not established the grounds to be granted an injunction. In this case, the applicant has not established a prima facie case, has not established that it will suffer irreparable damage and the balance of convenience is not in its favour.
25. The 2nd respondent submitted that it is not its duty to issue EIAs on waste collection sites like the Kanu waste collection site. However, the 2nd respondent did an environmental audit in Lamu Municipality and raised concerns over poor management of solid waste within Lamu town highlighting the Kanu waste collection point. An Environmental Restoration Order was issued vide letters marked as NEMA -1 and 2 respectively.
26. The 2nd respondent is of the view that the petitioner has not achieved the threshold set in the case of *Anarita Karimi Njeru v Republic* [1979] where the Court set the parameters for granting reliefs of a Constitutional nature, where one has to specifically address the nature of the rights infringed or threatened to be infringed. The case of *Ken Kasing'a v Daniel Kiplangat Kirui and 5 Others* [2015]eKLR, is cited.
27. The 2nd respondent is opposed to the grant of mandatory injunction which has the potential of having the collection point closed and stated that the decisions from the ELC do not support that position, citing various decisions – *Boniface S. Katana & 199 Others v Director General NEMA & 2 Others* [2020] eKLR, *Martin Osano Rabera 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. The 2nd respondent concluded that it would be imprudent to close down the Kanu Waste Collection Centre, as there will be no other site to be used to segregate the refuse by the neighbouring residents.



28. The issues for the determination of this Court are whether injunctive orders can be issued at this point pending the hearing and determination of this petition. And who should bear the costs?
29. In *Registered Trustees of Jamie Masjid Abl-Sunnait-Wal-Jamait Nairobi v Nairobi City County & 2 Others* [2015], Onguto J. faced with a situation whether to issue an injunction on an ongoing project where an EIA had not been sought stated as follows:

“Has the Plaintiff established a prima facie case with a probability of success? If an injunction is not granted, notwithstanding a prima facie case being established, will the Plaintiff suffer irreparably? Is the court in doubt? If so, then in whose favour does the balance of convenience tilt? Are there special circumstances as to warrant the court to without delay grant an interlocutory mandatory injunction as sought by the Plaintiff? These issues arise from the various principles set out by case law where a court is dealing with interlocutory mandatory and prohibitory injunctions. The cases of *Giella -v- Cassman Brown & Co. Ltd* [1973] E.A 358, *American Cyanamid Ltd -v- Ethicon* [1975] AC 396, *Ibrahim -v- Sbeik Bros Investments Ltd* [1973] EA 118, *Mrao Ltd -v- First American Bank Ltd & 2 others* [2002] LLR 3801, *Bonde -v- Steyn* [2013] 2 EA 8, *The Despina Pontikos* [1975] EA 38 and *Locabail Intern Finance -v- Agro Export & others* [1986] 1 All ER 901 are all instructive, to mention but a few. It must also be remembered that granting of an interlocutory injunction is a discretionary matter and in the exercise of such jurisdiction the court must take into account all the circumstances of the case including the conduct of the parties prior to and after commencement of the suit.

1. Even though it has previously been stated that the decision of the English House of Lords in *American Cyanamid Ltd. -v- Ethicon* [1975] AC 396 did not alter the local principles for granting an interlocutory injunction: see Mustafa JA in *Abel Salim -v- Okongo* [1976] KLR 42, I still find *American Cyanamid* (ibid) extremely good law especially when Lord Diplock states at pages 406 and 408 that:

“The object of an interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial... if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff’s claim appeared to be at that stage”.

One must also not forget the very strong words of Odunga J. in *Bonde -v- Steyn* [2013] 2EA 8 where he made it clear that the principles out set in *Giella -v- Cassman Brown Co. Ltd* [1973] EA 358 were not conclusive. In fewer words, the court should not be beholden to *Giella -v- Cassman Brown Co. Ltd* (ibid). I would not want to expound further on this point save to point out that a court of equity must always keep in mind the fact that if a party can be adequately compensated in damages then there ought to be no rush in granting an injunction even if a prima facie case is established.”

30. I agree with the 2nd respondent that it’s the 1st respondent who should establish and manage waste sites within its County and that before founding a waste site an Environmental Impact Assessment Report (EIA) has to be applied for and approval granted by the second respondent as elaborately held



by Angote J. in the *Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties)* [2020] eKLR as follows:

“59. As already stated above, the 1st Respondent has the constitutional responsibility for refuse removal, refuse dumps, and solid waste disposal in the County, which mandate includes identifying and operating waste disposal sites within the County on application to the 2nd Interested Party. This was the position that was taken by the court in *Castle Rock Gardens Management Limited vs. Attorney General & 4 others* [2018] eKLR where the Court held as follows:

“The function of dealing with county health services including refuse removal, refuse dumps and solid waste disposal was devolved to the county under the *Constitution*.”

60. Consequently, it is the County Governments that are vested with the authority to issue business licences to parties that wish to carry out the business of waste collection and disposal within their boundaries after complying with the provisions of the *Environmental Management and Co-ordination Act* and the National Solid Waste Management Strategy Paper.

61. The 1st Respondent has not produced any Environmental Impact Assessment Report to show that an Environmental Impact Assessment was conducted before designating the endangered property as a dump site. The failure by the 1st Respondent to prepare an Environmental Impact Assessment Report left the following crucial areas unaddressed as mandated under Regulations 7 and 18 of the *Environmental (Impact Assessment and Audit) Regulations, 2003*;

- a) The nature of the project;
- b) The location of the project including the physical area that may be affected by the project’s activities;
- c) The potential environmental impacts of the project;
- d) A plan to ensure the health and safety of the workers and neighboring communities; and
- e) The economic and socio-cultural impacts to the local community and the nation in general;

62. Having not conducted an Environmental Impact Assessment in respect of the dumpsite in question, the 1st Respondent ran afoul the law when it purported to licence the 2nd - 5th Respondents to dump solid waste on the suit property.

63. Section 87 of the *Environmental Management and Coordination Act* provides that no person shall operate a waste disposal site or plant without a licence issued by the 2nd Interested Party. Further, Section 88 of the *Environmental Management and Co-ordination Act* provides that any person intending to operate a waste disposal site or plant shall prior to commencing with the operation of a waste disposal site or plant apply to the Authority (the 2nd Interested Party) in writing for the grant of an appropriate licence.



64. The 1st Respondent, in contravention of Sections 87 and 88 of the *Environmental Management and Co-ordination Act* and Regulation 10 of the *Environmental Management and Co-ordination (Waste Management) Regulations, 2006*, and aware that it does not hold a licence to operate a dumpsite, proceeded and issued licences to the 2nd to the 5th Respondents directing them to dispose waste “at the only legal sub-county Disposal site next to Kay Construction Quarry.”
65. As evinced from the Affidavit filed by the 2nd Interested Party, the 2nd Interested Party has not issued any licence whatsoever to the 1st Respondent or any person for the operation of the endangered property as a dump site.
66. In fact, the 2nd Interested Party conducted a ground inspection on 17th July 2015 at Mulinge Scheme Area within the Athi River locality, which revealed that the 1st Respondent was operating a waste management facility where there was massive dumping of mixed solid waste-household, industrial and excavated soil without the requisite licence and without meeting the ‘10 minimum points’ for licensing of dumpsites as provided in the National Solid Waste Management Strategy, 2014.
67. Consequently, the 2nd Interested Party issued an improvement Order and an Environmental Restoration Order due to the continued dumping of waste by the 1st Respondent in four (4) different sites without an Environmental Impact Assessment licence which were not acted upon by the 1st Respondent.
68. Furthermore, from the admission of the 2nd to 5th Respondents, the said Respondents have, with the direction and authority of the 1st Respondent, been disposing refuse on the endangered property.
69. It is the finding of this court that the 1st Respondent is operating an unlicensed disposal site on the endangered property, which activity constitutes a criminal offence under Section 87(5) of the Environmental Management and Coordination Act. That being so, it is the finding of this court that the establishment of a dumpsite at the impugned location by the 1st Respondent constitutes an infringement of the right to a clean and healthy environment of the Petitioners and the other residents of the area.”
31. The recently enacted *Sustainable Waste Management Act*, of 2022 has further clarified the legal and institutional framework for the sustainable management of waste; to ensure the realization of the Constitutional provision on the right to a clean and healthy environment and for connected purposes. The Act provides under Section 9 (1) as follows:
- “County governments shall be responsible for implementing the devolved function of waste management and establishing the financial and operational conditions for the effective performance of this function.
- (2) County governments shall ensure that county waste management legislation is in conformity with this Act within a period of one year of the coming into operation of this Act.



- (3) County governments shall ensure that the disposal of waste generated within the county is done within the county's boundaries except where there is an agreed framework for inter-county transportation and disposal of waste.
- (4) County governments shall provide central collection centres for materials that can be recycled.
- (5) County governments shall establish waste management infrastructure to promote source segregation, collection, reuse, and set up for materials recovery.
- (6) County governments shall maintain data on waste management activities and share the information with the Authority.
- (7) County governments shall mainstream waste management into county planning and budgeting.
- (8) County governments shall develop, manage, and maintain designated disposal sites and landfills.
- (9) County governments shall maintain a register of all waste service providers operating within their boundaries.”

32. The *Constitution*, *EMCA*, the *Sustainable Waste Management Act*, of 2022, and cases already decided by the ELC envisage that it is the responsibility of the County Governments to establish and manage disposal sites and landfills within their respective jurisdictions. The Act futuristically expects Counties to enact laws and regulations, budget and plan for and provide for funds in their annual budgets for that purpose to sustain a clean and healthy environment within their jurisdictions in a manner that recognizes and protects the right to a clean and healthy environment as reverberated in Article 42 of the *Constitution*:

“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.”

33. Section 14 of the new *Act* enacts for the establishment of materials recovery facilities in the Counties:

- “(1) Each county government shall establish a materials recovery facility.
- (2) A materials recovery facility shall be used for final sorting, segregation, composting, and recycling of waste generated or transported to the county and transport the residual waste to a long-term storage or disposal facility or landfill.
- (3) A materials recovery facility shall be licenced by the Authority.
- (4) The Cabinet Secretary shall, in consultation with the Authority and county governments, make regulations for the establishment and proper management of materials recovery facilities.”

34. As a result, the 1st respondent, the County Government of Lamu is required by the *Constitution* and the law to establish, manage, and regulate waste sites, or what is now known as Materials Recovery Facilities



under the new Act. The 1st respondent is required to apply for an environmental impact assessment from the 2nd respondent to determine the viability of the waste site – whether it meets the threshold of an environmentally sound site - before obtaining a licence from the 2nd respondent to operate the same.

35. In this case from the materials placed before me, we are not dealing with a dumpsite, but a waste collection Centre, the impact it has on the neighbourhood and the sea – being proximate to it, cannot be gainsaid. The 1st respondent, although it is in the process, of closing completely this site to a place called Kandahari, measures recommended by the 2nd respondent have to be adhered to at this stage of the trial instead of total closure.
36. In an audit done by the 2nd respondent it was recommended through Restoration Orders issued on 15th March 2021 for the 1st respondent to undertake the following:

“As the principal agency of the Government mandated to ensure a clean and healthy environment, NEMA hereby orders you to undertake the following:

- a. Take action to clear the garbage from Kanu and Wiyoni transfer stations within 7 days from the date of receipt of this order.
- b. Ensure the garbage is regularly collected from these sites in order to prevent it from piling huge garbage heaps which will be washed away into the sea.
- c. Take action to relocate the Woyoni waste transfer station away from the sea. It should be relocated further inland out of the reach of the high tides in order to prevent the garbage from being washed into the sea. This should be executed within 14 days from the date of receipt of this order.
- d. Put in place waste receptacles at the transfer stations to prevent waste from spreading everywhere as the disposal continues. You are given 3 months to comply with this order.
- e. Ensure there is a clear plan for garbage collection and disposal in all towns and urban centres within the Municipality.
- f. Submit a commitment letter to the NEMA Lamu Office within 7 days from the date of this letter indicating the appropriate measures that you will put in place to ensure compliance.

Please take note that failure to comply with these orders by NEMA constitutes an offence under Section 143 – Sub Section 2 of EMCA, Cap. 387

37. The 1st respondent in the submissions and averments before this Court stated that the orders by the 2nd respondent are being implemented, and there are ongoing ventures with the Lamu Museum to mitigate environmental degradation.
38. As correctly held by the 2nd respondent closure of dumpsites, if the authorities from the ELC are anything to go by, requires a progressed effort. This court has severally discussed the difficulties encountered in the relocation, decommissioning, or shut down of dumpsites in this Country for instance in Martin Osano Rabera & another v Municipal Council of Nakuru & 2 others [2018] eKLR Ohungo J. held as follows:

“76. However, I have found that the petitioners’ right to a clean and healthy environment under Article 42 has been breached and though the petitioners



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

39. A similar situation arose in the case of the *African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] eKLR where Munyao J. held as follows:

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

40. In *Odando & Another (Suing on their own behalf and as the Registered Officials of Ufanisi Centre) v National Environmental Management Authority & 2 Others; County Government of Nairobi & 5 Others (Interested Parties)* (Constitutional Petition 43 of 2019) [2021] KEELC 2235 (KLR) (15 July 2021) (Judgment), Bor J. held as follows while ordering decommissioning of Dandora dumpsite:

“The ELC is mandated by Section 3 of EMCA to make orders, issue such writs, or give directions it may deem appropriate to prevent, stop, or discontinue any act deleterious to the environment. The court may also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible for the environmental degradation to restore the environment to the position it was in before the damage and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulates that a person bringing a suit regarding the entitlement to a clean and healthy environment does not need to show that the defendant’s act or omission caused him personal injury or loss. All the person needs to show is that his suit is not frivolous, vexatious, or an abuse of the court process. Contrary to what the AG contended, EMCA does not require a person who claims that their right to a clean and healthy environment has been violated to establish a prima facie case with probability of success and show the harm they stood to suffer if the orders were not granted.”

41. Whereas we are dealing with a Waste Collection Centre, the petitioner is of the view that it is being run as a dump site. It cannot be said that since it is a collection Centre the environmental rights to a clean and healthy environment of the petitioner and the neighbouring communities are not being infringed. Whereas a mandatory injunction cannot be issued at this stage, equity and environmental justice unique to environmental matters and its preservation demands that restoration orders will need



to be put in place and re-emphasized in the manner as proposed by the 2nd respondent and reinforced by this Court as follows:

- a. Within one month hereof, the 2nd respondent is to file a comprehensive report detailing the mitigation and implementation measures so far undertaken by the 1st respondent in the rehabilitation of the Kanu Waste Collection Centre following the Restoration Orders issued by it on 15th March 2021.
- b. The Report emphasizes if those Orders have been complied with and if not, whether the sanctions and measures outlined thereon have been implemented.
- c. The current petition be canvassed by way of written submissions.
- d. Costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 31ST DAY OF JANUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Oruenjo for the Petitioner

COURT CLERK: HAPPY

In the Absence of:

Ms. Swaleh for the 1st Respondent

Mr. Gitonga for the 2nd Respondent

