London Distillers (K) Limited v National Environment Management Authority & 2 others (Environment and Land Appeal E010 & E011 of 2022 (Consolidated)) [2023] KEELC 19076 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19076 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E010 & E011 OF 2022 (CONSOLIDATED)

A NYUKURI, J

JULY 24, 2023

BETWEEN

LONDON DISTILLERS (K) LIMITED ..... APPELLANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

ERDERMANN PROPERTY LIMITED ..... 2ND RESPONDENT

KATRINA MANAGEMENT CONSULTANTS LIMITED ..... 3RD RESPONDENT

(Appeals against the judgment of the National Environment Tribunal delivered in Nairobi on 23rd March, 2022 in Tribunal Appeal No. NET No. 47 of 2020: London Distillers (K) Limited vs. National Environment Management Authority & 2 Others)

Regulation 4 of the Air Quality Regulations which provided for ambient air quality study does not apply to a proposed residential project intended to be introduced in a mixed-use zone

In the instant case a residential project was proposed to be introduced in a mixed zone. The court held that while by virtue of the fact that the 2nd respondent's proposed project was for residential use with no expected toxic emissions, and they were exempted from ambient air quality study under regulation 4 of the Air Quality Regulations, that provision did not apply in regard to a proposed residential project intended to be introduced in a mixed use zone where there were already existing industries licenced to pollute to permitted levels.

Reported by Kakai Toili

Environmental Law *- air quality of a project site - safety of the air quality of a project site – requirement to conduct an ambient air quality study - whether a project proponent had an obligation to ascertain and protect the safety of the air quality of a project site - whether an ambient air quality study was required in regard to a proposed residential project intended to be introduced in a mixed-use zone where there were existing industries licenced to pollute to permitted levels - Air Quality Regulations, regulation 4.*

Environmental Law *– environmental principles – precautionary principle – what was the nature of the precautionary principle.*

Environmental Law *– environmental impact assessment - environmental impact assessment reports – matters to be considered in environmental impact assessment reports - whether perennial conflicts between a project proponent and a project affected person ought to be considered in environment impact assessment reports - Environmental (Impact Assessment and Audit) Regulations, 2003, regulation 18(q).*

Constitutional Law *– national values and principles of governance – public participation - public participation in environmental matters - what was the role of a project proponent and the National Environment Management Authority in regard to public participation on a project's impact on the environment.*

Jurisdiction *– jurisdiction of the National Environment Tribunal - jurisdiction to issue an automatic stay in the absence of an application for such an order -whether the National Environment Tribunal had jurisdiction to issue an automatic stay in the absence of an application for such an order - Environmental Management and Co-ordination Act, Cap 387, section 22; Interpretation and General Provisions Act, Cap 2, section 22.*

Brief facts

As part of the preparation of an environmental impact assessment study report (an EIA study report) for the construction of Greatwall Gardens Phase 4 (the project), the 3rd respondent on behalf of the 2nd respondent, invited the appellant being a project affected person and other members of public to a public consultative meeting. The appellant, dissatisfied with the 3rd respondent's intention to carry out a public consultative meeting reacted to that invitation by filing a suit at the National Environment Tribunal (the Tribunal). Subsequently, the appellant served the 3rd respondent with a letter emphasizing the import of section 129(4) of the Environmental Management and Co-ordination Act indicating that they had an automatic stay stopping the intended consultative meeting. The 3rd respondent proceeded with the consultative meeting, prepared an EIA study report and invited comments on the project. Consequently, an EIA licence for the project was issued to the 2nd respondent.

Aggrieved with the issuance of the EIA licence to the 2nd respondent, the appellants filed an appeal at the Tribunal challenging the issuance of the EIA licence to the 2nd respondent on grounds that the same was unlawful because the EIA study report was based on a public consultative meeting which was null and void by dint of an automatic stay and the pendency of the suit at the Tribunal. The appellants also argued that public participation held by the respondents was inadequate and ineffective for *inter alia*, non-participation of the appellant. Further that the respondents failed to carry out comprehensive baseline study ambient air quality status report.

The Tribunal partially allowed the appeal and ordered that the 2nd respondent conduct an ambient air quality study within 90 days in accordance with the applicable provisions of the Environmental Management and Co-ordination Act and the Regulations thereof and satisfy the 1st respondent, National Environment Management Authority (NEMA), that the maximum permissible emissions from the appellant were not a threat to the health of the residents of the proposed project. Aggrieved, the instant consolidated appeals were filed,

Issues

i. Whether an ambient air quality study was required in regard to a proposed residential project intended to be introduced in a mixed-use zone where there were existing industries licenced to pollute to permitted levels.
ii. Whether a project proponent had an obligation to ascertain and protect the safety of the air quality of a project site.
iii. What was the nature of the precautionary principle?
iv. Whether perennial conflicts between a project proponent and a project affected person ought to be considered in environment impact assessment reports.

v. What was the role of a project proponent and the National Environment Management Authority in regard to public participation on a project's impact on the environment.

vi. Whether the National Environment Tribunal had jurisdiction to issue an automatic stay in the absence of an application for such an order.

Held

1. The jurisdiction of the court to hear and determine an appeal from the judgment of the Tribunal was provided for in section 130(1) of the Environmental Management and Co-ordination Act. The power of the court to grant relief in its appellate jurisdiction in regard to an appeal emanating from the Tribunal was provided for under section 130(4)(a) to (d) of the Environmental Management and Co-ordination Act. The court while sitting on appeal in regard to a decision by the Tribunal, had the duty to reanalyze and reconsider the evidence presented before the Tribunal, so as to determine whether the conclusions arrived at by the Tribunal were to stand or not and give reasons either way.
2. By dint of Statute Law (Miscellaneous Amendments) Act No. 4 of 2018, section 129(4) of the Environmental Management and Co-ordination Act which previously provided for automatic stay, was amended. Although that provision was stayed, it remained in the statute books and therefore, by virtue of the amendment in May 2018, there was no automatic stay as the amendment repealed the previous provision.
3. Section 22 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provided that where a law was repealed, it ceased to be in force when the repealing law came into force. Thus, the amendment done in 2018 in respect of section 129(4) of the Environmental Management and Co-ordination Act fully repealed the previous provision that provided for automatic stay, and therefore any party desirous of obtaining stay or orders of maintenance of status *quo* upon filing an appeal before the Tribunal ought to apply for the same before the Tribunal. There was no stay or status *quo* order applied for and or issued by the Tribunal during the pendency of NET 26 of 2020.
4. The previous automatic stay under section 129 of the Environmental Management and Co-ordination Act was predicated on a filed appeal in regard to matters mentioned under section 129(1) and (2) of the Environmental Management and Co-ordination Act, which referred to decisions of NEMA, its agents or officers. The proceedings in NET Appeal No. 26 of 2020 were premature as no decision under section 129 had been made to warrant filing an appeal before the Tribunal.
5. Even if there were automatic stay orders in place, NET Appeal No. 26 of 2020 did not amount to an appeal to call for automatic stay orders as those proceedings were not challenging the decision of NEMA but were meant to stop a public consultative meeting which was part of ESIA study by the 2nd respondent. In the premises, there was no order staying the ESIA study by the 2nd respondent, consequently, there was no contempt on the part of the 2nd and 3rd respondents in conducting the public consultative meeting on June 27, 2020.
6. Section 59 of the Environmental Management and Co-ordination Act provided for a project proponent to provide reasonable opportunity for the public and those affected by the proposed project to give their informed views on the project. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 provided for public participation. The import of section 59 as read with regulation 17 was to ensure adequacy and effectiveness both qualitatively and quantitatively in public participation undertaken by a project proponent by ensuring that all those that may be affected by a proposed project were aware of the proposed project and its impacts and that their submitted views counted. It was the responsibility of the project proponent and NEMA to offer a facilitative role and ensure the process undertaken for public participation was effective.
7. The programme chosen to conduct public participation should have the flexibility and versatility that was necessary to meet the required standard of effectiveness and adequacy. The minimum was that it must avail in a user friendly form, all the necessary information concerning the project for purposes of obtaining the most informed views on the project and taking into account the participants' views, but

bearing in mind that not every view should be reflected in the project, but allowing the collected views to enrich the perspectives of the technical entity collecting the views.

8. While the law required that anyone who was likely to be affected by a project ought to be given opportunity to give their views in regard to the project, the role of the project proponent and NEMA was to facilitate a reasonable opportunity for the participation of members of public and the project affected persons so that they had access to all the relevant information and were able to give their views concerning the proposed project.

9. By availing opportunity to the appellant to give their views and informing the appellants of the date, time and venue of the public consultation meetings, the respondents facilitated reasonable opportunity for public participation to the appellant. In addition, not only were notices issued to affected persons, but there were also advertisements both in print and by audio inviting comments from the public on the EIA study report. The respondents met the threshold for effective and adequate public participation.

10. Proper and well thought out land use planning was key in attaining the much-needed equilibrium and synergy in mixed use zones for purposes of achieving sustainable development. Proper land use planning allocated land to different uses in a particular landscape in a manner that balanced economic, social and environmental considerations.

11. The change of user and land use planning in the proposed project area was a function of the county government. The issue as to whether in considering an application for change of user, considerations of the impact of one use on the other and on the environment was made, was a matter that was not clear. Therefore, while a project proponent had to interact with different regulators in the exercise their proprietary rights protected under article 40 of the Constitution, the regulators remained fragmented with the consequence that there was no coordination geared towards achieving sustainable development.

12. One of the fundamental principles and tools of sustainable development was the precautionary principle which had been defined under section 2 of the Environmental Management and Co-ordination Act as being the principle that where there were threats of damage to the environment whether serious or irreversible, the lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation. That principle was a determinative norm that guided the court in interrogating the probability of environmental degradation and the resulting harm that may ensue from a proposed project. The key words being threats of damage, or risk. As long as there existed a reasonable threat, then it mattered not whether the threat was inconclusive, tentative or even disputed.

13. The 2nd respondent planned to construct hundreds of residential units which would sit side by side with the appellant's industry, and therefore the threat of harm to human health from permitted emissions of the appellant was not a matter to be overlooked. That was because even under part IX of the Air Quality Regulations, an owner or operator of a facility licenced to emit air pollutants was obligated to comply with occupational air quality guidelines to protect their employees from exposure to harmful emissions. That meant that there was an apparent harm in any form of air pollution, which may require mitigation measures.

14. By arguing that they had no obligation to ascertain and protect the safety of the air quality of the project site, the 2nd respondent was advancing the position that the health of the residents of the proposed project was essentially none of their business; a posture that could not be countenanced under Kenya's constitutional and environmental regimes as captured in the preamble to the Constitution, that as a people, Kenyans were respectful of the environment, which is their heritage, and were determined to sustain it for the benefit of future generations.

15. While the legal requirements for considerations to be made in an EIA report majorly focussed on the impacts of a proposed project on the environment, regulation 18(q) of the Environmental (Impact

Assessment and Audit) Regulations made it clear that the parameters given for the matters to be considered in the making of environmental impact assessment were not exhaustive, as NEMA had the latitude to consider other matters it deemed necessary.

16. From the evidence on record, the conflict between the appellant and the 2nd respondent regarding their coexistence within the project area had been perennial and a matter within the knowledge of NEMA. Therefore, that conflict ought to have informed part of the demands and requirements by NEMA on how the 2nd respondent intended to address or mitigate the concerns raised by the appellant, so as to erase, once and for all, the dark cloud of conflict that had persistently and obnoxiously hovered over the two parties' coexistence.

17. While by virtue of the fact that the 2nd respondent's proposed project was for residential use with no expected toxic emissions, and they were exempted from ambient air quality study under regulation 4 of the Air Quality Regulations, that provision had no bearing on, and did not apply in regard to a proposed residential project intended to be introduced in a mixed use zone where there were already existing industries licenced to pollute to permitted levels.

18. The instant case presented a unique situation not envisaged under the provisions of the Air Quality Regulations. Under regulation 3 of the Air Quality Regulations, the object of those Regulations was to prevent, control and abate air pollution for the sole purpose of ensuring clean and healthy ambient air. In essence therefore, the Regulations were focused on polluters and not non-polluters. In other words, the Regulations addressed sources of pollution as opposed to impact of licenced pollution on non-polluters.

19. The right to a clean and healthy environment protected under article 42 of the Constitution was a right that ought to be enjoyed by the residents of the proposed project. In that regard, it was upon the 2nd respondent who was the project proponent and the applicant of the EIA licence and having changed user of the project property from industrial to residential, to ensure that the premises of the proposed project were fit for its use which was residential and would not expose the residents thereof to health risks. The 2nd respondent's obligation by virtue of being the project proponent to ensure that the project site was safe for human health, could not be transferred to the appellant who already had a licence to emit air pollutants to permitted levels and who preceded the 2nd respondent in the project area.

20. The 2nd respondent's reliance on the exemption under the Air Quality Regulations as a basis for wriggling out of its constitutional obligation to cooperate with State organs and other persons, for purposes of protecting and conserving the environment and ensuring ecologically sustainable development envisaged under article 69 of the Constitution, could not be countenanced under Kenya's laws that enjoined the court to be guided by the precautionary principle as a fundamental tool for promoting sustainable development.

21. Pollution, even where it may be limited and licenced, like in the case of the appellant, may result in complex environmental issues involving scientific uncertainty and inexplicit health risks. While not all perceived threats to environmental harm should attract the application of the precautionary principle, as long as there existed reasonable articulable grounds for suspicion in regard to threats of environmental harm, then the court ought to apply the principle.

22. The precautionary principle, which was a tool for sustainable development ought to be employed by NEMA in the exercise of its licensing power whenever it was demonstrated that there was a reasonable articulable ground for suspicion of environmental harm. In view of the fact that there was an existing conflict where the 2nd respondent had accused the appellant of pollution while the appellant had faulted the 2nd respondent's change of user of the project property, the appellant demonstrated reasonable articulable grounds for suspicion that the proposed project may expose the residents thereof to a health risk, which required a precautionary principle approach.

23. NEMA being aware of the fact that the proposed residential project was intended to be constructed in an area with industries, and in view of the existing conflict between industrial and residential uses, failed to apply the precautionary principle by failing to require the 2nd respondent to conduct an ambient air quality study to satisfy the former that the permitted levels of pollution in the project area was not a threat to human health.
24. The likely threat to human health posed by the appellant's licence to emit ought to have been considered by NEMA before the EIA licence was issued to the 2nd respondent, but that was not done. The Tribunal therefore exercised the power of NEMA by ordering the 2nd respondent to conduct an ambient air quality study.
25. Jurisdiction flowed from the Constitution or statute or both. Under article 10 of the Constitution, whenever the Tribunal was interpreting the Constitution, any laws or implementing public policy decisions, it was bound by the principle of sustainable development. The Tribunal had power to make a determination by exercising the power of NEMA or making orders to enhance the principles of sustainable development. The Tribunal did not err or act outside its jurisdiction in ordering that the project site ambient air quality study be done by the 2nd respondent and the safety of air quality thereat be ascertained before confirming the impugned licence.
26. The Tribunal having made the decision in accordance to the precautionary principle which was a principle of sustainable development and provided for under article 10 of the Constitution, could not be faulted as having acted without jurisdiction. The orders made by the Tribunal were well within its jurisdiction and its jurisdiction was not based on the Air Quality Regulations, but the on the Constitution and section 129(3) of the Environmental Management and Co-ordination Act. In the premises, no justification had been placed before the court to warrant the court's interference with the conclusions arrived at by the Tribunal.
27. Section 3(5)(f) of the Environmental Management and Co-ordination Act enjoined the court in exercising its jurisdiction, to be guided by the precautionary principle. The Act used the term "shall" in directing the court to indicate that the court was obligated to be guided by the precautionary principle.

Appeals dismissed.

Orders

i. *The 2nd respondent to conduct an ambient air quality study within 90 days in accordance with the applicable provisions of the Environmental Management and Co-ordination Act and the Regulations thereof and satisfy NEMA that the maximum permissible emissions from the appellant were not a threat to the health of the residents of the proposed project.*
ii. *NEMA to ensure compliance with order (i) above.*
iii. *In the event that the 1st and 2nd respondents did not comply with orders (i) and (ii) above, the EIA Licence No. NEMA/EIA/PSL/9665 dated November 3, 2020 shall stand cancelled.*
iv. *Each party to bear its own costs.*

Citations

Cases

Kenya

1. *County Government of Kiambu v The Senate & others* Civil Appeal 200 of 2014; [2017] KECA 459 (KLR) - (Followed)
2. *County Government of Nyeri & another v Cecilia Wangechi Ndungu* Petition 1 of 2014; [2015] KEELRC 1142 (KLR) - (Followed)
3. *Diani Business Welfare Association and others v County Government of Kwale* Petition 39, 45, 61 & 63 of 2014; [2015] KEHC 1968 (KLR) - (Followed)
4. *Harpece General Contractors Limited v National Environment Tribunal* Petition No. E11 of 2020 - (Applied)

5. *Independent Electoral and Boundaries Commission (IEBC) v Ndii* Civil Application E291 of 2021; [2021] KECA 33 (KLR) - (Applied)
6. *Josephine Koki Raymond v Philomena Kanini Maingi (Personal representative of Maingi Musila Mutava (Deceased) & Another* Environment & Land Case 345 of 2011; [2018] KEELC 4756 (KLR) - (Applied)
7. *Katiba Institute & 2 others v Attorney General & another; Judicial Service Commission & 10 others (Interested Parties); Changgui & 20 others (Intended Contemnors)* Petition 268 of 2018 & 251 of 2017 (Consolidated); [2021] KEHC 3953 (KLR) - (Followed)
8. *Kinyanjui, Stanley Kangethe v Tony Ketter & 5 others* Civil Application 31 of 2013; [2013] KECA 378 (KLR) - (Mentioned)
9. *Kipkemoi Tere v John Langat & 3 others* Election Petition 1 of 2013; [2013] KEMC 47 (KLR) - (Followed)
10. *Law Society of Kenya v Kenya Revenue Authority & another* Petition 39 of 2017; [2017] eKLR - (Followed)
11. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of energy & 17 others* Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR) - (Followed)
12. *Mwamlole Tchapu Mbwana v Independent Electoral and Boundaries Commission (IEBC) & 7 others* Election Appeal 4 of 2017; [2018] KECA 629 (KLR) - (Followed)
13. *Nairobi Metropolitan Psv Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Civil Appeal 42 of 2014; [2014] KECA 95 (KLR) - (Mentioned)
14. *Okoiti, Okiya Omtatah v National Land Commission* Petition 15 of 2018; [2019] KEELC 1541 (KLR) - (Applied)
15. *RM Suing Thro Next Friend JK & 2 others v Attorney General* Civil Case 1351 of 2002; [2006] KEHC 3485 (KLR); [2006] 2 KLR 697 - (Applied)
16. *Shiloah Investments Limited v National Environment Tribunal & 7 Others* ? 44 of 2017; [2018] KEELC 1295 (KLR) - (Applied) å

South Africa

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India

Vellore Citizen Welfare forum v Union of India (1996) 5 SCC647; 1996 AIR SCW 3399, (1996) 5 COMLJ 40, (1996) 7 JT 375 (SC) - (Explained)

Texts

Professor Gitanjali Nain Gill (2019), *Precautionary Principle, its interpretation and application by the Indian Judiciary: "When I use a word it means just what I choose it to mean- neither more nor less* Humpty Dumpty, Environmental Law Review, Volume 21, Issue 4

Statutes

Kenya

1. Constitution of Kenya articles 10 (2) (d); 40; 42; 69- (Interpreted)
2. Environmental (Impact Assessment and Audit) Regulations, 2003 (cap 387 Sub Leg) regulation 11; 16; 17; 18 (q); 21 (2)- (Interpreted)
3. Environmental Management and Co-ordination (Air Quality) Regulations, 2014 (cap 387 Sub Leg) Schedule 2; 5; regulations 3; 4; part 9- (Interpreted)
4. Environmental Management And Co-Ordination Act (cap 387) sections 1; 2; 3 (5) (f); 59; 63; 129 (3) (4); 130 (1) (4)- (Interpreted)
5. Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009 (cap 387 Sub Leg) – (Cited) In general

6. Interpretation And General Provisions Act (cap 2) section 22- (Interpreted)
7. Prevention of Torture Act (cap 88) section 29- (Interpreted)

South Africa

Constitution of South Africa - (Cited) In general

Advocates

Ms Misiati holding brief for Prof. T. Ojienda Senior Counsel for 2nd Respondent

JUDGMENT

Introduction

1. The judgment by the National Environment Tribunal (hereinafter referred to as NET or Tribunal) delivered on March 23, 2022 in regard to an appeal filed by London Distillers Kenya Limited, in NET Appeal No 47 of 2020 provoked two appeals to this court. The first appeal is Appeal Number E10 of 2022 which was filed by London Distillers Kenya Limited, while the second appeal is Appeal Number E11 of 2022, filed by Edermann Property Limited. The two appeals were consolidated on September 28, 2022, the lead file being ELC Appeal No E10 of 2022. In the premises, therefore, and for purposes of this judgment, London Distillers shall be referred to as the appellant, National Environment Management Authority (NEMA) as the 1st respondent; Edermann Property Limited as the 2nd respondent; while Katrina Management Consultants Limited as the 3rd respondent. The appeal filed by Erdermann Property Limited shall be deemed as a cross appeal.

Background

2. As part of the preparation of an Environmental Impact Assessment Study Report (hereinafter referred to as an EIA Study Report) for the construction of Greatwall Gardens Phase 4 (herein referred to as the project), Katrina Management Consultants Limited, the 3rd respondent herein on behalf of the 2nd respondent, invited the appellant being a project affected person and other members of public by a Notice dated June 18, 2020 to a public consultative meeting to be held on June 27, 2020. The appellant, who were dissatisfied with the 3rd respondent's intention to carry out a public consultative meeting reacted to that invitation by filing Nairobi NET No 26 of 2020 *London Distillers (K) Limited v The National Environment Management Authority, Katrina Management Consultants Limited, Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi*, on June 27, 2020. On even date, the appellant served the 3rd respondent with a letter dated June 26, 2020 emphasizing the import of section 129(4) of the *Environmental Management and Co-ordination Act* (herein after referred to as EMCA) indicating that they had an automatic stay stopping the intended consultative meeting scheduled for June 27, 2020. The 3rd respondent proceeded with the consultative meeting on June 27, 2020, prepared an EIA Study Report and by an advertisement in the Standard Newspaper of August 18, 2020, they invited comments on the project. Consequently, an EIA Licence for the project was issued to the 2nd respondent, being EIA Licence No NEMA/EIA/PSL/9665.

3. Again, aggrieved with the issuance of the EIA licence to the 2nd respondent, the appellant filed a Notice of Appeal together with Grounds of Appeal and attendant documents *vide* Nairobi NET No 47 of 2020 on November 23, 2020 challenging the issuance of the EIA licence to the 2nd respondent on grounds that the same was unlawful because the EIA Study Report was based on a public Consultative Meeting which was null and void by dint of an automatic stay by virtue of section 129(4) of *EMCA* and the pendency of NET No 26 of 2020. They also argued that public participation held by the

respondents was inadequate and ineffective for *inter alia*, non-participation of the appellant. Further that the respondents failed to carry out comprehensive baseline study ambient air quality status report and that the report by the 2nd respondent did not have measures to counter impacts associated with industrial activities that may affect the residents of the project and mitigation measures to make the project site safe; that the 1st respondent having in vain sought from the ministry of lands and council of governors the need to develop guidelines, policies and regulations for mixed use areas, zoning policy and repeal of change of user policy, ought not to have rushed to issue the impugned EIA Licence.

4. In the appeal before NET, the appellant sought the following orders;

    a. A declaration that the Environmental Impact Assessment Study Report dated August 12, 2022 for the construction of the proposed gated residential development on plot LR No 12581/163 off Mombasa Namanga Road Interchange, Mavoko, Machakos prepared by the 3rd respondent for the benefit of the 1st respondent in contempt of section 129(4) of the *Environmental Management and Co-ordination Act* No 8 of 1999 in view of the pendency of Nairobi NET No 26 of 2020 *London Distillers (K) Limited versus The National Environment Management Authority, Katrina Management Consultants Limited, Paul Mungai Kimani, Charles Maina Muriuki and George Nyoro Waigi* is therefore null and void.

    b. A declaration that the officers of the 1st respondent in receiving and acting on the Environmental Impact Assessment Study Report by the 3rd respondent dated August 12, 2020 for the construction of the proposed gated residential development on plot LR No 12581/163 off Namanga Road Interchange, Mavoko, Machakos acted in contempt of section 129(4) of the *Environmental Management and Co-ordination Act* No 8 of 1999 in view of the pendency of Nairobi NET No 26 of 2020 London Distillers (K) Limited versus The National Environment Management Authority, Katrina Management Consultants Limited, Paul Mungai Kimani, Charles Maina Muriuki and George Nyoro Waigi.

    c. The decision of the 1st respondent to issue the Environmental Impact Assessment Licence No NEMA /EIA/PSL/9665 dated 03:11:2020 to the 2nd respondent for the construction of the proposed gated residential development on Plot LR No 12581/163 off Mombasa Namanga Road Interchange, Mavoko, Machakos be revoked.

    d. A declaration be issued citing the 3rd respondent Katrina Management Consultants Limited as not being competent to be licenced as Environmental Impact Assessment Experts on account of their partiality in the execution of their duty and preparation of dubious Environmental Impact Assessment Study Reports.

    e. Such further or other consequential orders as the Tribunal deems fit.

    f. The appeal be allowed with costs to the appellant.

5. The 1st respondent filed a reply to the Notice of appeal and argued that since the disputed EIA was issued to Paul Mungai Kimani, Charles Maina Muriuki and George Nyoro Waigi on 3rd November who transferred it to the 2nd respondent, the transferee can only assume future liabilities from the effective

date and cannot be liable for transferor's omissions before the licence. That the 1st respondent did not issue the EIA licence to the 1st respondent but to the three persons above who are not party to this appeal and that therefore the EIA licence cannot be impeached without their participation. Lastly that the operation of section 129(4) of *EMCA* did not commence on filing of NET 26 of 2020 as the said appeal was premature and did not meet the criteria set out in section 129 of *EMCA* and that the same was eventually struck out by NET.

6. The 2nd respondent filed a reply to the appeal arguing that the 2nd respondent constructs low cost residential and commercial developments across the country, having so far constructed Great Wall Gardens Estate Phases 1,2, and 3 in the same area as the contested project; that the area where the project is to be constructed is a mixed user area for residential, commercial and industrial and is currently home to several residential developments including Hillcrest Estate, Sunset Boulevard Apartments, Everest Park, Coloho Mall, Jam City Estate, Safaricom Staff Pension Schemes Estate and others. It maintained that the 3rd respondent complied with all the required processes under EIA regulations from preparation of Terms of Reference, Public Participation and others. On public participation the response was that the appellant was invited to attend the public consultative meetings but instead filed NET No 26 of 2020 challenging the 1st respondent's decision allowing the 2nd respondent to carry out ESIA report. They stated that there were no orders from NET stopping ESIA Study and that on September 7, 2020 NET No 26 of 2020 was dismissed for having been filed prematurely. That as there were administration of questionnaires, interviews, audio and media advertisement, there was compliance with Regulation 17 of *EIA Regulations* on Public participation; that 2nd respondent bought the property from Paul Mungai Kimani, Charles Maina Muriuki and George Nyoro Waigi after issuance of the licence and the licence procedurally transferred to the 2nd respondent; that the project being in a mixed use zone the ESIA Report addressed potential Environmental impacts and proposed mitigation measures; that the project if for residential use and does not require ambient air quality study as per the *Environmental Management and Co-ordination (Air Quality) Regulations*, 2014, as the project does not emit toxic fumes to require an ambient air quality study.

7. On the part of the 3rd respondent, in response to the appeal their grounds of opposition were that they are a duly licensed firm of experts having been registered on August 20, 2008; they denied conducting half-baked and non-exhaustive reports as stated by the appellant and that it did a thorough work; that it complied with *EMCA* in the preparation of ESIA Study report, submitted it to the 1st respondent, who upon perusal raised questions seeking clarifications and subsequently the EIA licence was issued to the 2nd respondents; that the transfer of the licence was duly executed and after the same was duly assessed by the 1st respondent it was accordingly implemented; that the area in dispute being a mixed zone area, the ESIA report provided both positive and negative impacts and mitigation measures; that the project being a residential did not require a baseline ambient air quality study in terms of the relevant regulations as it does not emit any toxic fumes; that although there were previous complaints between the parties herein, there can be no inference that the complaints were disregarded; and that it is the source of the pollutant that ought to be addressed.

8. Upon hearing the appeal by way of *viva voce* evidence and submissions, the learned Honourable Tribunal entered Judgment as follows:

    a. The appeal partially succeeds and partially fails;

    b. The 2nd respondent does conduct an ambient air quality study within the next 90 days in accordance with the applicable provisions of *EMCA* and the Regulations thereof and satisfy the 1st respondent that the maximum

permissible emissions from the appellant are not a threat to the health of the Residents of the proposed project;

c. The 1st respondent to ensure compliance with order (b) above;

d. In the event that the 1st and 2nd respondents do not comply with orders (b) and (c) above, the EIA Licence No NEMA/EIA/PSL/9665 dated November 3, 2020 shall stand cancelled;

e. Each party shall bear own costs save for the 3rd respondent whose costs shall be met by the appellant.

9. That decision provoked ELC Appeal No E010 of 2022 and ELC Appeal No E011 of 2022 before this court, which were both filed on April 21, 2022.

Appeal No E010 of 2022

10. The appellant being aggrieved by the Judgment of NET above, filed their Memorandum of Appeal dated April 20, 2022 based on the following 18 grounds:

1. The Honourable Tribunal erred in law and in fact in finding that the appellant's Appeal dated 23/11/2020 partially succeeds and partially fails.

2. The Honourable Tribunal erred in failing to consider and or appreciate the fact that the respondents were aware of the pendency of Nairobi Net No 26 of 2020: London Distillers (K) Limited -vs- The National Environmental Management Authority, Katrina Management Consultants Limited, Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi and in view of the provisions of section 129(4) of the *Environmental Management and Co-0rdination Act* of 1999 whose purport is to the effect that there was an automatic stop order which was in place with effect from 26/06/2020 for the purposes of the resultant Environment Impact Assessment Study Report in respect of the proposed developments of Great Wall Housing Development Phase 4 on Plot LR No 12581/163.

3. The Honourable Tribunal erred in law and in fact in failing to find as against the contention of the respondents that there were no stop orders in place as against the project proponents in NET No 26 of 2020: *London Distillers (K) Limited v The National Environmental Management Authority, Katrina Management Consultants Limited, Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi* whereas the spirit, purport, meaning, tenor and effect of section 129(4) of the *Environmental Management and Coordination Act* of 1999 predicates an automatic stop of any action in furtherance of an impugned decision upon the institution of an Appeal and the provisions could not then be deemed to apply retrospectively.

4. The Honourable Tribunal erred in law and in fact in failing to find that both the Noise Baseline Study and Ambient Air Quality Study under section 63 of the *Environmental Management and Co-ordination Act* of 1999 as read with the *Environmental Management and Co-ordination (Nosie and Excessive Vibration) (Control) Regulations*, 2009 and the *Environment Management and Co-ordination (Air Quality) Regulations*, 2014 are a prerequisite to

the issuance of an Environmental Impact Assessment Licence by the 1st respondent for any intended project.

5. Having found that no Noise Baseline Study and Ambient Air Quality Study had been carried out by the 3rd respondent, prior to the issuance of the Environmental Impact Assessment Licence No NEMA/EIA/PSL/9665 of the proposed developments of Great Wall Housing Development Phase 4 on Plot LR No 12581/163 by the 1st respondent to Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi and which was thereafter transferred to the 2nd respondent or at all, the Honourable Tribunal erred in law and in fact in failing to find that the consequence of this contravention of section 63 of the *Environmental Management and Co-ordination Act* of 1999 as read with the *Environmental Management and Co-ordination (Noise and Excessive Vibration) (Control) Regulations*, 2009 and the *Environment Management and Co-ordination (Air Quality) Regulations*, 2014 rendered the same null and void and was for cancellation.

6. Having found that no Noise Baseline Study and Ambient Air Quality study had been carried out by the 3rd respondent, the Honourable Tribunal erred in law and in fact in failing to find that the consequence of this contravention of section 63 of the *Environmental Management and Co-ordination Act* of 1999 as read with the *Environmental Management and Co-ordination (Noise and Excessive Vibration) (Control) Regulations*, 2009 and the *Environment Management and Co-ordination (Air Quality) Regulations*, 2014 was that the Environment Impact Assessment Licence No NEMA/EIA/PSL/9665 issued by the 1st respondent to Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi and which was thereafter transferred to the 2nd respondent for the proposed developments of Great Wall Housing Development Phase 4 on Plot LR No 12581/163 was thus null and void and for cancellation and that it was not open to it to extend timelines for purposes of compliance.

7. The learned Honourable Tribunal erred in law and in fact by failing to make a finding that the 1st respondent did not convince itself that the proposed site was sage for housing construction given the long history of air pollution complaints from the 2nd respondent against the appellant prior to the issuance of the Environment Impact Assessment Licence No NEMA/EIA/PSL/9665 for construction of Great Wall Housing Development Phase 4 on Plot LR No 12581/163.

8. The Honourable Tribunal erred in law and in fact in failing to make a finding that the lack of strict compliance and adherence by the respondents with the mandatory procedures and requirements as stipulated by the provisions of the *Environmental Management and Co-ordination Act* of 1999 as read with the *Environmental (Impact Assessment and Audit) Regulations*, 2003, as part of the process of preparation of the Environmental Impact Assessment Study Report dated 12.08.2020 prior to the issuance of the Environment Impact Assessment Licence No NEMA/EIA/PSL/9665 issued by the 1st respondent to Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi and which was thereafter transferred to the 2nd respondent by the 1st respondent

for construction of Great Wall Housing Development Phase 4 on Plot LR No 12581/163, rendered the same as null and void and for cancellation.

9. The Learned Honourable Tribunal erred in misinterpreting and misapplying the provisions of law applicable, by giving questionable orders not sought for and without hearing the appellant in respect thereof thereby condemning it unheard, to the effect that the 2nd respondent conducts an ambient air quality study within the next 90 days in accordance with the applicable provisions of *EMCA* and the *Regulations* thereof and to satisfy the 1st respondent that the maximus permissible emissions from the appellant are not a threat to the health of the residents of the proposed project.

10. The Learned Honourable Tribunal erred in ordering the 2nd respondent to conduct an ambient air quality study so as to satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project, ignored the fact known to it and the parties that by tis final report, the Departmental Committee on Environment & Natural Resources of the National Assembly on the investigations into the complaints of alleged environmental pollution by the 2nd respondent against the appellant's distillery tabled before the National Assembly and adopted on 30.09.2021 had actually exonerated the appellants from allegations of environment pollution and made final findings to the effect that the appellant had exceeded the expected compliance level of 80% by installing state of the art technology to mitigate air and solid waste management, and that the parameters for ambient air quality, stack and effluent assessments had been controlled to the set standards and that by ordering another study on the appellant's operations on an issue that was now moot acted *ultra vires* its jurisdiction by usurping the powers of the National Assembly.

11. The Learned Honourable Tribunal erred in ordering the 2nd respondent to conduct an ambient air quality study so as to satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project, ignored the final findings contained the final report of the Departmental Committee on Environment & Natural Resources of the National Assembly on the investigations into the complaints of alleged environmental pollution by the 2nd respondent against the appellant's distillery tabled before it and adopted on September 30, 2021 and by which the appellant had actually been exonerated from the allegations of environment pollution by the final findings made to the effect that the appellant had exceeded the expected compliance lever of 80% by installing state of the art technology to mitigate air and solid waste management, and that the parameters for ambient air quality, stack and effluent assessments had been controlled to the set standards and that by ordering another study on the appellant's operations absent of involvement by the appellant, on an issue that was now moot, and in view of the litany of false accusations against the appellant by the 2nd respondent, it was again opening up a fresh avenue for conflict between the parties.

12. The Learned Honourable Tribunal by ordering the 2nd respondent to conduct an ambient air quality study so as to satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project, proceeded to sanitise the issuance of the Environmental Impact Assessment Licence No NEMA/EIA/PSL/9665 issued by the 1st respondent to Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi and which was thereafter transferred to the 2nd respondent for construction of Great Wall Housing Development Phase 4 on Plot LR No 12581/163, absence of compliance with the mandatory provisions of the law applicable.

13. The Learned Honourable Tribunal by ordering the 2nd respondent to conduct an ambient air quality study so as to satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project, proceeded to sanitise the issuance of the Environmental Impact Assessment Licence No NEMA/EIA/PSL/9665 issued by the 1st respondent to Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi and which was thereafter transferred to the 2nd respondent for construction of Great Wall Housing Development Phase 4 on Plot LR No 12581/163.

14. The Learned Honourable Tribunal erred in ordering the 2nd respondent to conduct an ambient air quality study so as satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project failed to appreciate the fact that air pollutants falling on the proposed site of the project are not confined to the appellant but equally other industrial undertakings in the neighbourhood of the impugned project.

15. The learned Honourable Tribunal in ordering the 2nd respondent to conduct an ambient air quality study so as to satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project failed to appreciate that the proposed site for the project is likely to be a fallout area for pollutants from many other industries located away from the project area and not only limited to the appellant and therefore erred in not holding that the baseline survey or ambient air quality should be confined to the proposed project site and not the appellant's land.

16. The Learned Honourable Tribunal erred in ordering the 2nd respondent to conduct an ambient air quality study so as satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project and in so doing failed to appreciate that once the parameters of the air quality on the project site are measured they should be traced to the emitting source which may not be the appellant.

17. The Learned Honourable Tribunal erred in ordering the 2nd respondent to conduct an ambient air quality study so as to satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to

the health of the residents of the proposed project and in so doing failed to appreciate that merely measuring ambient air on the appellant's property is not an accurate indicative of the source of air pollution on the impugned project site for the construction of Great Wall Housing Development Phase 4 on Plot LR No 12581/163.

18. On the whole the decision of the Honourable Tribunal is arbitrary, unreasonable, irrational and contrary to the pleadings, evidence submissions and not sound in law.

11. Consequently, the appellant sought the following orders:

a. The appeal be allowed and the decision of the Honourable National Environment Tribunal delivered on 23:03:2022 be vacated and or set aside substituted with an order allowing the appeal with costs;

b. The appellant be awarded costs of the Appeal.

Appeal E011 of 2022

12. On the other hand, the 2nd and 3rd respondents filed a Memorandum of Appeal dated April 21, 2022 which is predicated on the following 8 grounds:

a. The Honourable tribunal erred in law and in fact in partially allowing the Appeal and making orders that;

i. The Appeal partially succeeds and partially fails;

ii. The 2nd respondent does conduct an ambient air quality study within the next 90 days in accordance with the applicable provisions of *EMCA* and the *Regulations* thereof and satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project.

iii. The 1st respondent to ensure compliance with order (b) above.

iv. In the event that the 1st and 2nd respondents do not comply with order (b) and (c) above, the EIA license Licence No NEMA/EIA/PSL/9665 dated November 3, 2020 shall stand cancelled.

b. The development being a residential property is not a source of primary pollutants as per the 2nd Schedule of the *Environmental Management and Co-ordination (Air Quality) Regulations*, 2014 and hence does not require ambient air quality study.

c. The Honourable Tribunal erred in law and in fact in failing to find and hold that regulation 4 of the *Environmental Management and Co-ordination (Air Quality) Regulations*, 2014 provides for exemptions on its application to various activities as provided in the Fifth Schedule of these

Regulations including residential and domestic activities whose expected fumes or emissions are not largely hazardous.

d. The Honourable Tribunal in issuing the order requiring the Applicant to carry out ambient air quality study goes against the express provisions of the *EMCA* and the *Environmental Management and Co-ordination (Air Quality) Regulations*, 2014. The tribunal is legislating and creating a requirement for ambient air quality study where it is expressly exempted.

e. The Honourable Tribunal erred in law and in fact in ignoring the submission of the 1st respondent, which has the mandate of ensuring compliance with the air quality standard, at paragraphs 21-25 they submitted that the project being a residential property did not require the proponent to undertake ambient air quality study.

f. The zoning of the area is that of mixed use where both residential and light industries like the appellant can with compliance co-exist. The appellant being an industry is the expected pollutant and as such the requirement on compliance with *Environmental Management and Co-ordination (Air Quality) Regulation*s, 2014 lies on it. The proposed project is exempted from the requirement to carry out air quality tests.

g. The Honourable Tribunal erred in law in failing to demonstrate consistency with its previous decisions and departing therefrom without any reference thereto or proffering any reasons thereof.

h. The decision of the Honourable Tribunal is arbitrary, unreasonable, irrational and contrary to the pleadings, evidence submissions and not sound in law.

13. The 2nd and 3rd respondents sought the following prayers;

a. This appeal be allowed and the decision of the Honourable National Environment Tribunal delivered on March 23, 2022 requiring that the appellant does conduct an ambient air quality study within the next 90 days in accordance with the applicable provisions of *EMCA* and the *Regulations* thereof and satisfy the 2nd respondent that the maximum permissible emissions from the appellant are not a threat to the health of the residents of the proposed project, be vacated and or set aside and substituted with an order dismissing the appeal filed on November 23, 2020 with costs.

b. The appellants be awarded costs of this appeal.

14. Both appeals were disposed by both written and oral submissions. Filed on record are the appellant's submissions dated September 22, 2022 and the 2nd and 3rd respondents' submissions dated September 28, 2022 and July 19, 2022. Oral submissions were made on February 28, 2023 by the parties' respective counsel.

appellant's Submissions

15. Counsel for the appellant submitted that by dint of section 129(4) of *EMCA*, whose import was that there was an automatic stop order. That the said order was in place with effect from 26th June 2020, therefore, no valid consultative meeting could be held on 27th June 2020; for purposes of

resultant Environmental Impact Assessment Study Report for the proposed development of Great Wall Housing Development Phase 4 on Plot LR No 12581/163. Counsel argued that this was in view of the existence of Nairobi NET 26 of 2020: London Distillers (K) Limited v National Environment Management Authority, Katrina Management Consultants Limited, Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi.

16. Reliance was placed on the case of *Okiya Omutata Okoiti v National Land Commission* [2019] eKLR, for the proposition that the import of section 129(4) of *EMCA* was that once an appeal is filed, the status quo of any matter or activity which is subject of the appeal shall be maintained until the appeal is determined.

17. It was further submitted for the appellant that the mandatory steps to be undertaken in the publication of an Environmental Impact Assessment Study Report provided in section 59 of *EMCA* as read with regulation 21 (2) of the *Environmental (Impact Assessment and Audit) Regulations*, 2003, were not complied with by the respondents. Counsel maintained that the 1st respondent did not sufficiently convince itself that the proposed site was safe for housing construction in view of a long history of disputes of and claim by the 2nd respondent against the appellant for air pollution. The appellant's counsel took the position that for want of compliance in the preparation of the Environmental Impact Assessment Study Report and the subsequent issuance of the Environmental Impact Assessment Licence, ought to be declared null and void and the licence cancelled.

18. The court was referred to the decisions in the cases of *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR and *Josephine Koki Raymond v Philomena Kanini Maingi (Personal Representative of Maingi Musila Mutava (Deceased) & Another* [2018] eKLR for the proposition that an arguable appeal is one that need not necessarily succeed but one which ought to be argued fully and an arguable appeal should not be rendered nugatory.

19. It was contended for the appellant that NET ought to have considered the final findings contained in the final report of the Departmental Committee on Environment and Natural Resources of the National Assembly on the investigations into the complaints of alleged Environmental pollution by the 2nd respondent against the appellants distillery tabled before Net and adopted on September 30, 2021 in which the appellant had been exonerated from allegations of environmental pollution as it had exceeded the compliance level of 80% by installing state of the art technology to mitigate air and solid waste management and that the parameters of ambient air quality, stack and effluent assessments had been controlled to the set standards, and that an order for another study without the appellant's participation , was a way to open fresh conflict between the parties.

20. The position taken by counsel was that the decision by NET in ordering the 2nd respondent to conduct an ambient air quality study so as to satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the Residents of the proposed project, was merely to sanitize the issuance of the impugned Environmental Assessment Licence No NEMA/EIA/PSL/9665 issued to Paul Mungai, Kimani Charles, Maina Muriuki and George Nyoro Waigi and subsequently transferred to the 2nd respondent for construction of the impugned project. Counsel argued that the need for conducting an ambient air quality, failed to appreciate that the proposed site is likely to be a fallout area for pollutants from many other industries located away from the project area and not only limited to the appellant. That this resulted in an error by NET in not holding that the baseline survey or ambient air quality should be confined to the proposed project site and not the appellant's land.

21. Besides, counsel argued that merely measuring ambient air on the appellant's property is not an accurate indicative of the source of air pollution on the impugned project site. Counsel submitted that if the judgment of NET is not stayed, the appeal will be rendered nugatory because of the absence

of Noise baseline study and Ambient air quality hence the impugned Licence was null and void and issued in contravention of section 63 of *EMCA* as read with the *Environmental Management and Co-ordination (Air Quality) Regulations*. Counsel argued that the appellant had an arguable appeal and that the decision of NET should be stayed.

Submissions by the 2nd and 3rd respondents

22. In response to the Appeal filed by London Distillers, Counsel for the 2nd and 3rd respondents submitted that the Appeal was fatally and incurably defective contrary to the general principles of justice and amounts to an abuse of court process.

23. On the applicability of section 129(4) of *EMCA*, counsel submitted that for an appeal to be lodged under section 129, there must be a decision by NEMA and that where NEMA is yet to make a decision, then an appeal cannot lie. Counsel pointed out that on September 7, 2020 NET delivered a ruling on the respondents' preliminary objection in Nairobi NET No 26 of 2020 *London Distillers (K) Limited v The National Environment Management Authority, Katrina*, where the Tribunal held that it had no jurisdiction to entertain the appeal as there was no decision capable of being appealed. That in dismissing the appeal, the Tribunal found that no decision had been made by NEMA capable of being appealed before the Tribunal.

24. Reliance was placed on the case of *Shiloah Investments Limited v National Environment Tribunal & 7 Others* [2018] eKLR for the proposition that the jurisdiction of the Tribunal sprouts from the decision made by NEMA. Counsel took the view that as that Appeal was premature, the appellant could not invoke the automatic stay orders under section 129. Counsel maintained that the appellant could only lodge an appeal after NEMA had made a decision to issue the 2nd respondent with an Environmental impact assessment Licence. Counsel added that in the Tribunal's ruling of September 7, 2020, the Tribunal did not issue any stop orders stopping the 2nd respondents who were the project proponents from carrying out the EIA Study of the proposed development.

25. On the second limb on the applicability of section 129(4) of *EMCA*, counsel submitted that when NEMA made a decision to issue the Environmental Impact Assessment License No NEMA/EIA/PSL/9665 on November 3, 2020, the operation of section 129(4) of *EMCA* had been suspended by the Constitutional court at Nairobi in Petition No E11 of 2020, *Harpece General Contractors Limited V National Environment Tribunal*. Counsel took the view that the automatic orders alleged to have been violated, were suspended by a court of competent jurisdiction and cannot therefore be a basis of an appeal. Counsel defended the decision made by NEMA arguing that it was based on the law and that the appellant cannot fault non-existent stay orders to fault NEMA' s decision.

26. Counsel submitted that section 129(4) was first amended in 2017 by section 29 of the *Prevention of Torture Act* 2017 but the amendments were stayed *vide* High Court petition No 251 of 2017 *Okiya Omutata v National Assembly of Kenya* to section 129 (40 through Statute Law (Miscellaneous Amendment) Act No 4 of 2018 And that as the petition was pending, parliament introduced a fresh amendment but even those amendments were stayed in High Court Petition No 268 of 2017. Counsel submitted that the import of the amendments was that parliament wanted to do away with automatic stay. Further that the Tribunal would only issue stay upon application by a party where the Tribunal is satisfied that a stay ought to issue. Counsel also argued that where automatic stay had been issued before the commencement of the amendment, lapsed unless the Tribunal issues fresh orders upon application by a party.

27. It was contended for the 2nd and 3rd respondents that once an amendment has been stayed, the law does not revert to the position that it was before the amendment, but that Parliament must take action in

order to resuscitate, revive or reenact 129(4) of *EMCA*. To buttress their argument counsel referred the court to the Court of Appeal decision in *Independent Electoral and Boundaries Commission v David Ndii & Others* Civil Appeal No E291 of 2021 for the proposition that revival of a previous provision of statute is the work of the legislature and cannot be implied or derived from the judicial pronouncement of the unconstitutionality of the amending provision. Counsel therefore implored the court to find that automatic stay orders relied upon by the appellants do not exist in Kenya and that the appellant ought to have moved the Tribunal in NET Appeal No 26 for stay orders. Counsel faulted that ground of appeal arguing that the same was a misinterpretation of the law.

28. On whether there was need for a baseline Ambient Air quality study, counsel submitted that the 2nd respondent's development being a residential property is not a source of primary pollutants, which does not emit toxic fumes as per the second schedule of the *Environmental Management and Co-ordination (Air Quality) Regulations* 2014 (hereinafter referred to as Air Quality Regulations), and that therefore it does not require ambient air quality study. In addition, counsel argued that Regulation 4 of the aforesaid *Regulations* provides for exemptions on its applications to several activities as provided in the 5th Schedule, which includes residential and domestic activities whose expected fumes are not largely hazardous. Counsel referred to the findings of the Tribunal in NET No 21 of 2019, London Distillers (K) Limited v National Environment Management Authority & Another , where the Tribunal noted that the 2nd respondent's project is for construction of residential apartments in a defined area, where the impact is localized and that it was not disputed that the residential houses do not carry the risk of emitting toxic and noxious fumes that may exceed the approved levels of ambient air quality for industries like the neighboring industry.

29. On whether the acquisition of the EIA Licence was in compliance with the *Environmental (Impact Assessment and Audit) Regulations*, 2003, counsel argued that there was sufficient compliance. Counsel contended that also in compliance with Regulation 11 of the aforesaid *Regulations*, the 2nd respondent prepared a Terms of Reference Report for the study to ascertain the scope of work to be undertaken in the delivery of the Environmental Impact Assessment study, primary data collection requirements and methodologies for the field work and assessments of impacts for the construction, operational and decommissioning phases of the proposed project. That the Terms of Reference Report was therefore submitted to the 1st respondent, for review and subsequent approval, which approval was signed on 21st April 2020.

30. Counsel also argued that the 2nd respondent, cannot fault the impugned licence for want of public participation, when it chose to ignore an invitation by the 2nd respondent. It was argued for the 2nd and 3rd respondents that the 2nd respondent ensured adequate public participation and consultation was undertaken, by providing notices for meetings through posters around the community. Further that the 2nd respondent wrote to every neighbour within the proposed project. Counsel also pointed out that on 18th June 2020, the 2nd respondent served the appellant with an invitation to carry out a public consultation, but that the appellant chose not to attend the forum.

31. Reference was made to the case of *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of energy & 17 Others* Constitutional petition No 305 of 2012, and submitted that what constitutes the minimum basis for adequate public participation is basically availing a reasonable opportunity to members of the public and all interested parties to know about the issues in regard to a proposed project and to have an adequate say.

32. Counsel contended that the respondents complied with the requirement of public participation by providing notices and letters with date, time, venue of the proposed public consultation and taking into consideration views of those who were present. Further reliance was placed on the cases of

Nairobi Metropolitan PSV Saccos Union Limited & 25 Others v County Government of Nairobi & 3 Others [2013] eKLR and *Diani Business Welfare Association and Others v County Government of Kwale* [2015] eKLR for the proposition that it matters not how public participation is conducted a s long as the public is accorded some reasonable level of participation, that is sufficient and that where an interested person ignores an invitation to participate in consultations requested by a project proponent, they ought not to fault the process of public participation.

33. In support of their own cross appeal, the 2nd and 3rd respondents regurgitated their arguments above and argued that in requiring an ambient air quality study, the Tribunal ignored the express provisions of section 4 of the *Air Quality Regulations*, as well as the Second Schedule thereof; effectively legislating and creating a requirement for ambient air study where it is expressly exempted.

34. It was further submitted on behalf of the 2nd and 3rd respondents that the Honourable Tribunal ignored recognized canons of statutory interpretation, resulting in unprecedented finding. The court was referred to the holdings in the cases of *County Government of Kiambu v The Senate & Others* [2017] eKLR and *County Government of Nyeri & Another v Cecilia Wangechi Ndungu* [2015] eKLR for the proposition that in interpreting statute, the language of the statute is the starting point and in the absence of express legislative intention to the contrary, the language must ordinarily be taken as conclusive. Counsel also made reference to the findings in the cases of *Mwamlole Tchapu Mbwana v Independent Electoral and Boundaries Commission (IEBC) & 7 Others* [2018] eKLR, *R.M (Suing through next friend J.K her Mother) v The Attorney General and CRADLE, COVAW and FIDA* [2006] 2 KLR 697 to contend that the duty of the Judge is to apply the law as it stands and not to usurp the legislative functions of parliament so that where there is a gap, the remedy lies with parliament in amending such legislation. On that basis, counsel emphasized that in passing regulation 4 of the *Air Quality Regulations*, parliament exempted residential places from the requirement of conducting ambient air quality study; that hence the Tribunal went on its own frolics in ignoring parliament's intention.

35. The view held by counsel was although the zoning of the area where the project is to be undertaken is for both residential and light industries like the appellant, with compliance the two can co-exist. Counsel argued that the appellant being the expected pollutant, the requirement on compliance under the *Air Quality Regulations*, lies on them. Counsel argued that although the Tribunal found that the proposed project was residential with no toxic emissions, it nevertheless proceeded to unjustifiably create an obligation on the 2nd respondent where none exists in law. The court was referred to the findings in the cases of *Kipkemoi Tere v John Langat & 3 Others*, Election Petition No 1 of 2013 and *Law Society of Kenya v Kenya Revenue Authority & Another* [2017] eKLR for the proposition that it is not the duty of the court to enlarge the scope of legislation and construe the law to bring out what parliament ought to have legislated for the obvious reason that courts have no power to legislate.

Analysis and Determination

36. I have carefully considered the two consolidated appeals, the entire record as well as the well-articulated submissions made orally and in written by counsel on both sides. In my considered view, the following issues arise for determination;

    a. Whether there were in place automatic stay orders in view of the lodging of NET Appeal No 26 of 2020.

    b. Whether the Environmental Impact Assessment Licence No NEME/EIA/PSL/9665 was issued in compliance with the law.

    c. Whether NET had jurisdiction to make orders for an ambient air quality study.

d. Who should bear the costs of this appeal.

37. The jurisdiction of this court to hear and determine an appeal from the judgment of NET is provided for in section 130(1) of *EMCA* as follows;

> "Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court."

38. The power of this court to grant relief in its appellate jurisdiction in regard to an appeal emanating from NET is provided for under section 130(4)(a) to (d) of *EMCA* as follows;

> Upon the hearing of an appeal under this section, the environment and Land Court may-
>
> a. Confirm, set aside or vary the decision or order in question;
>
> b. Remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
>
> c. Exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
>
> d. Make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

39. In view of the above legal provisions, this court while sitting on appeal in regard to a decision by NET, has the duty to reanalyze and reconsider the evidence presented before NET, so as to determine whether the conclusions arrived at by the Tribunal are to stand or not and give reasons either way.

40. On whether there was automatic stay, it is not disputed that NET No 26 of 2020 was filed on June 26, 2020 and the same was challenging an alleged 1st respondent's decision allowing Paul Mungai Kimani, Charles Maina Muriuki and George Nyoro Waigi to carry out the proposed Environmental and Social Impact Assessment for the proposed project.

41. By dint of Statute Law (Miscellaneous Amendments) Act No 4 of 2018, section 129(4) of *EMCA* which previously provided for automatic stay, was amended to provide as follows;

> "Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issue fresh orders maintaining the status quo in accordance with subsection 3 (a)."

42. Although the said provision was stayed, it remains in the statute books and therefore, my view is that by virtue of the amendment in May 2018, there is no automatic stay as the amendment repealed the previous provision. section 22 of the *Interpretation and General Provisions Act* cap 2 Laws of Kenya provides that where a law is repealed, it ceases to be in force when the repealing law comes into force. Thus, the Amendment done in 2018 in respect of section 129(4) of *EMCA*, fully repealed the previous provision that provided for automatic stay, and therefore any party desirous of obtaining stay or orders of maintenance of status quo upon filing an appeal before the Tribunal ought to apply for the same

before the Tribunal. Having said that, it is not disputed that there was no stay or status quo order applied for and or issued by the Tribunal during the pendency of NET 26 of 2020.

43. In any event, the previous automatic stay under section 129 of EMCA was predicated on a filed appeal in regard to matters mentioned under section (1) and (2) of *EMCA*, which refer to decisions of NEMA, its agents or officers. As was rightly pointed out in the decision of the learned Tribunal in NET Appeal No 26 of 2020, those proceedings were premature as no decision under section 129 of *EMCA* had been made to warrant filing an appeal before NET. That being the position, even if there were automatic stay orders in place, NET Appeal No 26 of 2020 did not amount to an appeal to call for automatic stay orders as those proceedings were not challenging the decision of NEMA but were meant to stop a public consultative meeting which was part of ESIA study by the 2nd respondent. In the premises I find and hold that there was no order staying the ESIA Study by the 2nd respondent, consequently, there was no contempt on the part of the 2nd and 3rd respondents in conducting the Public consultative meeting on June 27, 2020.

44. On whether there was compliance with the law in the issuance of the impugned EIA licence, the appellant raised two main issues, namely insufficient public participation and lack of baseline ambient Air quality study.

45. On the question of public participation, section 59 of EMCA provides for a project proponent to provide reasonable opportunity for the public and those affected by the proposed project to give their informed views on the project as follows;

> Public participation
>
> 1. During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
>
> 2. In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—
>
> a. Publicize the project and its anticipated effects and benefits by—
>
> i. Posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
>
> (ii) publishing a notice on the proposed project for two successive weeks in

a newspaper that has a nationwide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

b. Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

c. Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

d. Ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

46. Regulation 17 of the *Environmental (Impact Assessment and Audit) Regulations*, 2003 provides for public participation as follows;

Public participation

3. During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

4. In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—

a. Publicize the project and its anticipated effects and benefits by—

i. Posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities

of the proposed project;

(ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

b. Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

c. Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

d. Ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

47. The import of section 59 of *EMCA* as read with regulation 17 of the *EIA & A Regulations* is to ensure adequacy and effectiveness both qualitatively and quantitatively in public participation undertaken by a project proponent by ensuring that all those that may be affected by a proposed project are aware of the proposed project and its impacts and that their submitted views count. It is the responsibility of the project proponent and NEMA to offer a facilitative role and ensure the process undertaken for public participation is effective.

48. I associate with the reasoning in the case of *Doctors' for Life International V The Speaker National Assembly and Others* (CCT12/05) (2006) ZACC 11) where the South African court defined what facilitation of public involvement is as follows;

> "The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are

"facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1) (a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he *Constitution* calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the *Constitution* is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

49. Principles for public participation are now well settled. The programme chosen to conduct public participation should have the flexibility and versatility that is necessary to meet the required standard of effectiveness and adequacy. The minimum is that it must avail in a user friendly form, all the necessary information concerning the project for purposes of obtaining the most informed views on the project and taking into account the participants' views, but bearing in mind that not every view should be reflected in the project, but allowing the collected views to enrich the perspectives of the technical entity collecting the views.

50. The import and texture of an effective and adequate public participation was aptly captured in the reasoning in the case of *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] e KLR, where the court held as follows;

> 97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:
>
> a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
>
> b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth.

In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

> "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (M*inister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006* (2) SA 311 (CC)."

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No 374 of 2012). In relevant portion, the Court stated:

> "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.

d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation

programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

51. In the instant appeal, the appellant complained that the public participation done by the respondents was inadequate for having excluded them when they were among those that are affected by the proposed project. In response, the 2nd and 3rd respondents argued that they complied with all the requirements for public participation including sending invitation notices and advertisements in both print and audio. I have considered the evidence on record and I note that from the Notice of Appeal filed before NET, the appellant stated that on 18th June 2020, they received invitation from the 3rd respondent to attend a public Consultative meeting scheduled for June 27, 2020. The appellant reacted to that invitation by not only failing to attend the meeting, but also filing NET No 26 of 2020 challenging the holding of that meeting. The appellant's argument therefore is that the ESIA report was done without their participation.

52. While the law requires that anyone who is likely to be affected by a project ought to be given opportunity to give their views in regard to the project, the role of the project proponent and NEMA is to facilitate a reasonable opportunity for the participation of members of public and the project affected persons so that they have access to all the relevant information and are able to give their views concerning the proposed project. The appellant does not suggest whatsoever that the notice for the consultative meeting was insufficient. The appellant's argument is that they did not take part in the public participation, although they admit that they were invited to attend the public participation

forum but decided not to attend. In these circumstances, my view is that having invited the appellant and other members of the public, to attend the consultative meeting of June 27, 2020, the respondents could not compel the attendance of the appellant or any other person whose views were necessary. Therefore, the appellant's non-attendance of the public consultative meeting on June 27, 2020 cannot be blamed on the respondents as the latter availed a reasonable opportunity for the appellant to participate in the public consultative forum, but they instead ignored the invitation. It is clear, and I find, that by availing opportunity to the appellant to give their views and informing the appellants of the date, time and venue of the Public Consultation meetings, the respondents facilitated reasonable opportunity for public participation to the appellant. In addition, having considered the evidence on record, it is demonstrated by the respondents that not only were notices issued to affected persons, but there were also advertisements both in print and by audio inviting comments from the public on the EIA study report. For those reasons therefore, I find and hold that the respondents met the threshold for effective and adequate public participation.

53. On the question of Ambient Air quality study, the appellant argued that the same was required before issuance of the EIA licence as the residents of the proposed project ought to reside in a safe environment that may not adversely impact their health, which may set a stage for future conflicts between the appellant and the residents of the proposed project. Further that the order by NET directing the ambient air quality study was intended to sanitize an unlawful EIA licence. On the other hand, the 2nd and 3rd respondents argued that the Ambient air quality study was not required before issuance of the EIA licence, as the proposed project would not be emitting toxic fumes; that the 2nd respondent is exempted from the requirement of conducting ambient air quality study and therefore that NET exceeded its jurisdiction by ordering an ambient air quality study as that is not provided for in the *Regulations* or *EMCA*.

54. It is not in dispute that the proposed project is within a mixed use zone for residential and industrial use. Therefore, this dispute has brought to the fore the conflict arising from haphazard land use planning in mixed use zones in the context of competing proprietary interests. As admitted by the parties in this suit, they have had many conflicts which have found their way before NET, the courts and even the National Assembly. The conflicts have majorly revolved around the 2nd respondent's allegations that the appellant is polluting the environment around the proposed project area, on one hand; while the appellant accuse the 2nd respondent of constructing residential development in a zone dominated with industries without ascertaining whether that locality is safe for human health and therefore creating a possibility of future conflict between the appellant and the residents of the proposed project.

55. Proper and well thought out land use planning is key in attaining the much needed equilibrium and synergy in mixed use zones for purposes of achieving sustainable development. Proper land use planning allocates land to different uses in a particular landscape in a manner that balances economic, social and environmental considerations. The Food and Agriculture Organization, in their Article "Land use Planning" (2018), rightly point out that in a highly polarized public context where decisions on land use is a source of conflict and tension, the purpose of land use planning, is to identify in a given landscape, the combination of land uses that is best able to meet the needs of stakeholders, while safeguarding resources for the future. They maintain that effective land use planning provide direction on the manner in which land use activities ought to be done encouraging synergies between the different uses and points out that this requires coordination of planning and management across the often many sectors concerned with land use and land resources in a particular region.

56. In the instant case the appellant faulted the change of user granted to the 2nd respondent for changing use of the project property from industrial use to residential use. The change of user and land use planning in the proposed project area is a function of the County Government. And, the issue as to

whether in considering an application for change of user, considerations of the impact of one use on the other and on the environment is made, is a matter that is not clear. Therefore, it is clear that while a project proponent has to interact with different regulators in the exercise their proprietary rights protected under article 40 of the *Constitution*, the regulators remain fragmented with the consequence that there is no coordination geared towards achieving sustainable development.

57. Having said that, it is clear that the dispute herein turns on whether the obligation to ensure the project site is safe for human health lied with the appellant or the 2nd respondent, in view of the threat to the health of the residents of the proposed project posed by the appellant's licence to pollute. In other words, was the 2nd respondent being the project proponent required to include in their EIA Study, the status of the ambient air quality of the proposed project area in view of the fact that the appellant already has a licence to pollute to permitted levels having preceded the 2nd respondent in the project area?

58. The Tribunal, while invoking the precautionary principle, ordered the 2nd respondent to conduct an ambient air quality study so as to satisfy NEMA that the same is safe for human health in view of the permitted levels of pollution from the appellant. The 2nd respondent's cross appeal was based on the argument that under the *Air Quality Regulations*, they are exempted from air quality study as they are not expected to emit toxic emissions.

59. Article 10(2)(d) of the *Constitution* has elevated sustainable development to a national value and principle of governance and provides that all state organs, state officers, public officers and all persons are bound by the principle of sustainable development whenever they apply or interpret the *constitution*, enact, apply or interpret any law, and make or implement public policy decisions.

60. One of the fundamental principles and tools of sustainable development is the precautionary principle which has been defined under section 2 of *EMCA* as being the principle that where there are threats of damage to the environment whether serious or irreversible, the lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation. This principle is a determinative norm that guides this court in interrogating the probability of environmental degradation and the resulting harm that may ensue from a proposed project. The key words being threats of damage, or risk. As long as there exists a reasonable threat, then it matters not whether the threat is inconclusive, tentative or even disputed like in this case where the 2nd respondent disputes the threat of harm to human health arguing that it is merely speculative.

61. In his Article "*Precautionary Principle, its interpretation and application by the Indian Judiciary: "When I use a word it means just what I choose it to mean- neither more nor less*' Humpty Dumpty, Environmental Law Review, Volume 21, Issue 4, December 2019, Professor Gitanjali Nain Gill rightly argues that, while the pursuit of sustainable development goals is mainly driven by evidence based policy and decision-making anchored on scientific knowledge, supported by environmental governance and the rule of law, limits on current scientific certainty and understanding raise more questions than answers which then requires the guidance of the precautionary principle; which assists decision-makers to act promptly and determine if appropriate cost effective measures have been put in place to prevent environmental degradation and damage to human health.

62. In the instant case, the 2nd respondent plans to construct hundreds of residential units which will sit side by side with the appellant's industry, and therefore my view is that the threat of harm to human health from permitted emissions of the appellant is not a matter to be overlooked. I take that view because even under part IX of the *Air Quality Regulations*, an owner or operator of a facility licenced to emit air pollutants is obligated to comply with occupational air quality guidelines to protect their

employees from exposure to harmful emissions. This means that there is an apparent harm in any form of air pollution, which may require mitigation measures.

63. By arguing that they had no obligation to ascertain and protect the safety of the air quality of the project site, the 2nd respondent was advancing the position that the health of the residents of the proposed project is essentially none of their business; a posture that cannot be countenanced under our Constitutional and environmental regimes as captured in the preamble to our *Constitution*, that as a people, we are respectful of the environment, which is our heritage, and are determined to sustain it for the benefit of future generations.

64. While the legal requirements for considerations to be made in an EIA report majorly focus on the impacts of a proposed project on the environment, regulation 18 (q) of the *EIA & A Regulations*, makes it clear that the parameters given for the matters to be considered in the making of environmental impact assessment are not exhaustive, as NEMA has the latitude to consider other matters it deems necessary. From the evidence on record, it is evident that the conflict between the appellant and the 2nd respondent regarding their coexistence within the project area has been perennial and a matter within the knowledge of the 1st respondent. In my view therefore, this conflict ought to have informed part of the demands and requirements by the 1st respondent on how the 2nd respondent intends to address or mitigate the concerns raised by the appellant, so as to erase, once and for all, the dark cloud of conflict that has persistently and obnoxiously hovered over the two parties' coexistence.

65. While I agree with the 2nd respondent's submission that by virtue of the fact that their proposed project is for residential use with no expected toxic emissions, and that they are exempted from ambient air quality study under regulation 4 of the *Air Quality Regulations*, in my view, that provision has no bearing on, and does not apply in regard to a proposed residential project intended to be introduced in a mixed use zone where there are already existing industries licenced to pollute to permitted levels. This case presents a unique situation not envisaged under the provisions of the *Air Quality Regulations*. I take that position because under regulation 3 of the Air *Quality Regulations*, the object of those *Regulations* is to prevent, control and abate air pollution for the sole purpose of ensuring clean and healthy ambient air. In essence therefore, the regulations are focused on polluters and not non-polluters. In other words, the *Regulations* address sources of pollution as opposed to impact of licenced pollution on non-polluters. In the instant matter, I take the view that the right to a clean and healthy environment protected under Article 42 of the *Constitution* is a right that ought to be enjoyed by the residents of the proposed project. In that regard, it is upon the 2nd respondent who is the project proponent and the applicant of the EIA licence and having changed user of the project property from industrial to residential, to ensure that the premises of the proposed project are fit for its use which is residential and will not expose the residents thereof to health risks. I therefore find and hold that the 2nd respondent's obligation by virtue of being the project proponent to ensure that the project site is safe for human health, cannot be transferred to the appellant who already has a licence to emit air pollutants to permitted levels and who preceded the 2nd respondent in the project area.

66. In the premises, it is my considered view that the 2nd respondent's reliance on the exemption under the *Air Quality Regulations* as a basis for wriggling out of its constitutional obligation to cooperate with state organs and other persons, for purposes of protecting and conserving the environment and ensuring ecologically sustainable development envisaged under article 69 of the *Constitution*, cannot be countenanced under our laws that enjoin this court to be guided by the precautionary principle as a fundamental tool for promoting sustainable development.

67. I take the view that pollution, even where it may be limited and licenced, like in the case of the appellant herein, may result in complex environmental issues involving scientific uncertainty and inexplicit

health risks. While not all perceived threats to environmental harm should attract the application of the precautionary principle, in my opinion, as long as there exist reasonable articulable grounds for suspicion in regard to threats of environmental harm, then the court ought to apply the principle. In the Indian case of *Vellore Citizen Welfare forum v Union of India* (1996) 5 SCC647 at 658, the court declared that the precautionary principle involves there conditions, namely; that state government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation; where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; and the onus of proof is on the actor or developer or industrialist to show that the actions are environmentally benign.

68. Therefore, the precautionary principle, which is a tool for sustainable development ought to be employed by NEMA in the exercise of its licensing power whenever it is demonstrated that there is a reasonable articulable ground for suspicion of environmental harm. In view of the fact that there is an existing conflict where the 2nd respondent has accused the appellant of pollution while the appellant has faulted the 2nd respondent's change of user of the project property, I am satisfied that the appellant demonstrated reasonable articulable grounds for suspicion that the proposed project may expose the residents thereof to a health risk, which required a precautionary principle approach.

69. In view of the above analysis I find and hold that NEMA being aware of the fact that the proposed residential project was intended to be constructed in an area with industries, and in view of the existing conflict between industrial and residential uses, failed to apply the precautionary principle by failing to require the 2nd respondent to conduct an ambient Air Quality study to satisfy the former that the permitted levels of pollution in the project area is not a threat to human health.

70. The likely threat to human health posed by the appellant's licence to emit ought to have been considered by the 1st respondent before the EIA licence was issued to the 2nd respondent, but this was not done. The learned Tribunal therefore exercised the power of NEMA by ordering the 2nd respondent to conduct an ambient air quality study.

71. Jurisdiction flows from the *Constitution* or statute or both. Under article 10 of the *Constitution*, whenever the Tribunal is interpreting the *constitution*, any laws or implementing public policy decisions, it is bound by the principle of sustainable development. In addition, under section 129(3) of *EMCA*, the Tribunal in determining any appeal filed before it, has power to;

    a. Confirm, set aside or vary the order or decision in question.

    b. Exercise any of the powers which could have been exercised by NEMA in the proceedings in connection with which the appeal is brought; or

    c. Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

    d. If satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

    e. If satisfied upon application by any party, review any orders made under paragraph (a).

72. Therefore, the Tribunal has power to make a determination by exercising the power of NEMA or making orders to enhance the principles of sustainable development. As the learned Tribunal made a decision that NEMA ought to have made but failed to, it is my finding that the tribunal did not err or

act outside its jurisdiction in ordering that the project site ambient air quality study be done by the 2nd respondent and the safety of air quality thereat be ascertained before confirming the impugned licence. The learned Tribunal having made that decision in accordance to the precautionary principle which is a principle of sustainable development and provided for under article 10 of the *Constitution*, cannot be faulted as having acted without jurisdiction. My view is that the orders made by the learned Tribunal were well within its jurisdiction and its jurisdiction was not based on the *Air Quality Regulations*, but the on the *Constitution* and section 129(3) of *EMCA*. In the premises, no justification has been placed before this court by the parties herein to warrant the court's interference with the conclusions arrived at by the Tribunal.

73. section 3(5)(f) of EMCA enjoins this court in exercising its jurisdiction, to be guided by the precautionary principle. The *Act* uses the term "shall" in directing the court to indicate that this court is obligated to be guided by the precautionary principle.

74. In the premises, and for the reasons given above, the court upholds the decision of the Tribunal, with the result that both appeals filed herein are hereby dismissed. For avoidance of doubt this court makes the following orders;

    a. The 2nd respondent to conduct an ambient air quality study within the next 90 days in accordance with the applicable provisions of EMCA and the Regulations thereof and satisfy the 1st respondent that the maximum permissible emissions from the appellant are not a threat to the health of the Residents of the proposed project.

    b. The 1st respondent to ensure compliance with order (a) above.

    c. In the event that the 1st and 2nd respondents do not comply with orders (a) and (b) above, the EIA Licence No NEMA/EIA/PSL/9665 dated November 3, 2020 shall stand cancelled.

    d. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Misiati holding brief for Prof. T. Ojienda Senior Counsel for 2nd respondent

No appearance for appellant

Abdisalam – Court Assistant