London Distillers (K) Limited v National Environment Management Authority & another (Environment and Land Appeal E007 of 2020) [2023] KEELC 19075 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19075 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E007 OF 2020

A NYUKURI, J

JULY 24, 2023

BETWEEN

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

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

ERDERMANN PROPERTY LIMITED ..... 2ND RESPONDENT

(Being an appeal against the judgment/Order of the National Environment Tribunal at Nairobi dated 30th September 2020 in NET No. 21 of 2019, London Distillers (K) Limited v National Environment Management Authority and Erdermann Properties Limited)

JUDGMENT

Introduction

1. The appellant herein having been aggrieved by the decision of the National Environment Tribunal delivered on September 30, 2020, dismissing its appeal filed vide NET No. 21 of 2019, filed the instant appeal before this court vide an undated memorandum of appeal filed on October 21, 2020. They listed the following 19 grounds as the basis of their appeal;

    1. The Honourable Tribunal erred in law and in fact in dismissing the Appellant's Appeal filed on August 14, 2019.

    2. The Honourable Tribunal erred in failing to consider and or to find that the 2nd Respondent not being the registered owner of LR. No. 12581/13 as at all material times prior to the issuance of the impugned Environmental Impact Assessment Licence and upto the time of the filing of the Appeal was not the project proponent within the meaning of section 58 of

the *Environmental Management and Co-ordination Act* of 1999 as read with regulations 4, 7, 8, 9 and 10 of the *Environmental (Impact Assessment and Audit) Regulations*, 2003, of the Environmental (Impact Assessment and Audit) Regulations, 2003.

3. The Honourable Tribunal erred in law and in fact in failing to find that in the circumstances of the Appeal before it, the law applicable to the conduct of the Environmental Impact Assessment Study by the 2nd Respondent were the provisions of section 58 of the *Environmental Management and Co-ordination Act* of 1999, as read with regulations 7, 8, 9 and 10 of the Environmental (Impact Assessment and Audit) Regulations, 2003, prior to the amendments by Legal Notice No. 32 of April 30, 2019.

4. The Honourable Tribunal erred in law and in fact in failing to find that the amendments by way Legal Notice No. 32 of April 30, 2019 after the Environmental Impact Assessment Study had been conduct by the 1st Respondent and the Environmental Impact Assessment Study Report submitted to the 2nd Respondent on April 11, 2019 the same were inapplicable for the purposes of the Appeal before it.

5. The Honourable Tribunal erred in law and in fact in retrospectively applying the Legal Notices No. 32 of April 30, 2019 to section 58 of the *Environmental Management and Co-ordination Act* of 1999, as read with Regulations 7, 8, 9 and 10 of the Environmental (Impact Assessment and Audit) Regulations, 2003, in the circumstances of the Appeal.

6. The Honourable Tribunal erred in law and in fact in failing to consider and or find that the 2nd Respondent having failed to prepare and submit to the 1st Respondent a Project Report in compliance with Section 58 of the *Environmental Management and Co-ordination Act* of 1999, as read with regulations 7, 8, 9 and 10 of the Environmental (Impact Assessment and Audit) Regulations, 2003, the Environmental Impact Assessment Licence issued by the 1st Respondent to the 2nd Respondent was null and void.

7. The Honourable Tribunal erred in law and in fact in failing to find that there was no strict compliance on the part of the Respondents with the provisions of Section 59 of the *Environmental Management and Co-ordination Act* of 1999, as read with regulations 21(2) of the *Environmental (Impact Assessment and Audit) Regulations*, 2003 which provides for the mandatory steps to be undertaken in the publication of an Environmental Impact Assessment Study Report.

8. The Honourable Tribunal erred in law and in fact in failing to find that the 1st Respondent's own County Officer having raised issues and reservations which were to be taken into consideration by the 1st Respondent prior to the approval of the Environmental Impact Assessment Study Report, the 1st Respondent was in error in endorsing the conduct of Katrina Agencies in dismissing and disregarding the same said issues having also been raised by the Appellant.

9. The Honourable Tribunal erred in law and in fact in failing to find that the 1st Respondent did not provide proof that the letter seeking comments from the Lead Agencies on the Environmental Impact Assessment Study in compliance with the provisions of section 60 of the *Environmental Management and Co-ordination Act* of 1999, as read with regulation 20 of the *Environmental (Impact Assessment and Audit) Regulations*, 2003 was actually served upon them.

10. The Honourable Tribunal erred in law and in fact in failing to find that in the circumstances of the case where the 2nd Respondent was not the owner of the suit property, and equally that the

1st Respondent's own County Officer having raised issues and reservations similarly raised by the Appellant, and which the lead consultants Katrina Management Consultants Limited did not take into consideration by the 1st Respondent prior to the approval of the Environmental Impact Assessment Study Report, the 1st Respondent irrationally exercised its discretion in not carrying out a public hearing pursuant to regulation 22 of the *Environmental (Impact Assessment Audit) Regulations,* 2003.

11. The Honourable Tribunal erred in law and in fact in failing to find that taking into consideration the objections raised by the 1st Respondent having failed to provide evidence that it actually served the Lead Agencies with the letter seeking their comments and equally having failed to show that it sent a reminder to the said Lead Agencies did not therefore comply with section 60 of the *Environmental Management and Co-ordination Act* of 1999, as read with regulations 20 of the *Environmental (Impact Assessment and Audit) Regulations,* 2003.

12. The Honourable Tribunal erred in failing to find and hold that in the absence of a Noise Baseline Study and Ambient Air Quality study having been carried out by Katrina Management Consultants Limited the Environmental Impact Assessment Study Report was not adequate and that the Environmental Impact Assessment Licence granted to the 2nd Respondent by the 1st Respondent was null and void and issued in contravention of section 63 of the *Environmental Management and Co-ordination Act* of 1999, as read *Environmental Management and Co-ordination (Noise and Excessive Vibration) (Control) Regulations,* 2009 and the *Environment Management and Co-ordination (Air Quality) Regulations*, 2014.

13. The Honourable Tribunal erred in failing to hold that there was no strict compliance and adherence by the Respondents with mandatory procedures and requirements stipulated by the provisions of the *Environmental Management and Co-ordination Act* of 1999, as read with *Environmental (Impact Assessment and Audit) Regulations*, 2003 prior to the issuance of the Environmental Impact Assessment Licence to the 2nd Respondent for construction of Greatwall Housing Development Phase 3.

14. The Honourable Tribunal erred in not applying the precautionary principle to bar the continued development of Greatwall Housing Development Phase 3.

15. The Learned Honourable Tribunal erred in misinterpreting and misapplying the provisions of law applicable. The Learned Honourable Tribunal erred in law and in fact in failing to hold that the Environmental Impact Assessment Licence issued to the 2nd Respondent was irregular and thus invalid having been issued outside the prescribed timelines.

16. The Honourable Tribunal in failing to consider the depth evidence adduced by the Appellant as well as the forceful submissions made before it, erred in holding that the Appellant did not prove the allegations against the Respondents and thereby fatally misdirected itself in dismissing the Appeal.

17. Having found that the Appeal as lodged by the Appellant was not based on frivolous grounds, the Honourable Tribunal erred in law and in fact in not awarding the Appellant costs.

18. 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 therefor.

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

2. Subsequently the appellant sought the following orders;

   a. This appeal be allowed and the decision of the Honourable National Environment Tribunal delivered on September 30, 2020 be vacated and/or set aside substituted with an order allowing the appeal filed on September 14, 2020 with costs.

   b. The appellant be awarded costs of this appeal.

Background

3. On March 21, 2019, Katrina Management Consultants Limited, on behalf of the 2nd Respondent, submitted to the 1st Respondent Terms of Reference (TORs) for a proposed construction project known as Greatwall Gardens Housing Development Phase 3. Those TORs were approved by the 1st Respondent on March 26, 2019. Thereafter the Environmental Impact Assessment Study was done and the Report thereof submitted on April 12, 2019 to the 1st Respondent who issued an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/8263 on July 17, 2019, paving way for the 2nd Respondent to proceed with the proposed project.

4. The Appellant, aggrieved with the issuance of the Environmental Impact Assessment Licence (hereinafter referred to as the EIA Licence) to the 2nd Respondent, appealed to the National Environment Tribunal (hereinafter referred to as NET or the Tribunal) vide an appeal filed on 14th August 2019 contending that the preparation of the Environmental Impact Assessment Study Report (EIA Study Report) and the subsequent issuance of the EIA Licence were not done in compliance with the provisions of the Environmental Management & Co-ordination Act (EMCA) and the Regulations made thereunder. The appellant's case was that the EIA Study Report was null and void due to the absence of a Project Report contrary to section 58 of EMCA and Regulations 7 to 10 of the Environment (Impact Assessment & Audit) Regulations (hereinafter referred to as the EIA & A Regulations). They further argued that the 2nd Respondent's EIA Study Report was submitted on April 12, 2019, before Regulation 7 was amended vide legal Notice No. 32 of April 30, 2019, with the effect that high risk project required project reports and therefore that the amendment had no retrospective application. They also faulted the EIA Study Report for want of proof of land registration of the project property in the name of the 2nd Respondent and argued that the 2nd Respondent was therefore not the project proponent. In addition, they faulted the EIA Licence on grounds that there was no proper and effective public participation contrary to Regulation 17 of the aforesaid Regulations and that the appellant's objections were not considered. They also asserted that there was no involvement of lead agencies contrary to section 60 of EMCA. Lastly that the 2nd Respondent having failed to carry out the baseline study to be satisfied on the issues of noise pollution and water adequacy and the ambient air quality study, ought not to have been granted the EIA licence.

5. The matter proceeded by way of viva voce evidence and both parties presented witnesses who testified before the Tribunal. Parties also filed written submissions in support of their respective cases. Upon hearing all the parties, the Tribunal delivered its judgment on September 30, 2019 and found that there was no requirement for the 2nd Respondent to conduct a Strategic Environmental Assessment prior to issuance of the impugned licence. It further held that the appellant's views and objections to the proposed project were considered before issuance of the impugned EIA Licence. The Tribunal also observed that the fate of the health of the residents of the project living side by side with industries is a matter that ought to be addressed, and pointed out with regret, that it would have wished for the parties to provide cogent scientific evidence on the permissible emission levels of the Appellant's distillery and evidence as to whether such permissible levels are detrimental to human health. Subsequently

the Tribunal found that the Appellant failed to prove its allegations against the Respondents and proceeded to dismiss the appeal with an order that each party bears its own costs.

6. It is that decision that provoked the instant appeal. The appeal was canvassed by both oral and written submissions. The Appellant filed their written submissions dated April 17, 2023 and the 2nd Respondent's written submissions were dated April 11, 2023.

Appellant's Submissions

7. Counsel for the Appellant submitted that the lack of a Project Report rendered issuance of the impugned EIA Licence to the 2nd Respondent unlawful as it was in contravention of section 58 of EMCA as read with Regulations 7 to 10 of the EIA & A Regulations. Counsel relied on the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others (2012) e KLR to contend that the above Regulations were in place at the time of submission of the 2nd Respondents EIA Study Report on April 12, 2019 as the amendment by legal Notice No 32 of April 30, 2019 could not be applied retrospectively.

8. Counsel faulted the Tribunal for not reaching a finding that as Regulation 7 of the above Regulations was couched in mandatory terms, the EIA Licence issued to the 2nd Respondent was null and void. It was further argued for the Appellant that the Tribunal erred by failing to refer, mention or distinguish the matter before it with the decisions made in the cases of Sam Odera & 3 Others v The National Environment Tribunal & Another (2006), Ken Kising'a v Daniel Kiplangat Kirui & 5 Others (2015) eKLR and Douglas Omboga & 3 Others, where it was decided that a Project Report was a mandatory precursor to an EIA Licence.

9. Submissions were also made for the Appellant that under section 58 of EMCA as read with Regulations 7 to 10 of the EIA & A Regulations, it is only a project proponent who must prepare and apply for approval of the Project Report before undertaking an EIA Study. Counsel submitted that section 24 of the *Land Registration Act* No. 3 of 2012 provides that registration of proprietorship vests in the registered proprietor absolute land ownership and that evidence on record showed that at the time of preparation and submission of the EIA Study Report, the land upon which the project was to be constructed was in the name of Neoplan (Kenya) Limited and that the same was only transferred to the 2nd Respondent thereafter. Therefore, counsel submitted that the Tribunal erred in failing to make a finding that the 2nd Respondent, was not the project proponent for want of registration of the project land in their name, hence the issuance of the impugned licence was unlawful.

10. It was further contended for the Appellant that the Tribunal failed to pronounce itself on whether public participation undertaken by the 2nd Respondent was proper and effective before issuance of the impugned licence. Counsel argued that section 59 of EMCA and Regulations 17, 21 and 22 of the EIA & A Regulations, requiring publication of Notices for two weeks in Nationwide circulation newspapers, radio announcements and public hearings were breached as there was a multiplicity of complaints of serious environmental conflict and the 2nd Respondent did not have registration of the land for the project and therefore the 1st Respondent wrongly exercised its discretion in not holding a public hearing. Reliance was placed on the cases of Sam Odera & 3 Others (supra), J.S. Muiru & 2 Others v Tigoni Treasures Limited & 2 Others (2014) e KLR and Ken Kising'a (Supra) and Maraba Lwatingu Residents Association & 2 Others v NEMA & 3 Others (2019) EKLR; in regard to the value of views of persons most likely to oppose a project, parameters for public participation, and consequences of noncompliance thereof.

11. It was also submitted for the appellant that the manner the Respondents attempted to involve lead agencies was questionable and did not meet the requirements set out in section 60 of EMCA as read

with Regulation 20 of the EIA & A Regulations, and that the same was not sufficient for purposes of public participation. Counsel took the position that from the evidence on record, there was no proof that the letter dated 12th April 2019 together with the EIA Study Report was ever received by the lead agencies and that therefore the Tribunal fell into error in finding that the failure by the lead agencies to respond was not a barrier to the 1st Respondent's decision to move the process forward. Counsel argued that the Tribunal ignored evidence brought forth about collusion between the 2nd Respondent and some public agencies including MAVWASCO and EPZA in the destruction of the Appellant's sewer line leading to loss of revenue with a view to blackmail and arm-twist it so as to dissuade it from protesting the 2nd Respondent's change of user from industrial to residential and all the while complaining of pollution by the Appellant. It was submitted for the Appellant that in public participation, the most affected must have a bigger say and their views taken into account.

12. On the jurisdiction of this court, counsel relied on the case of Jackson Kaio Kivuva v Penina Wanjiru Muchene [2019] eKLR, and submitted that this court being the first appellate court, its mandate was to rehear, reevaluate and reconsider the evidence afresh and make its own determinations, giving reasons thereof. In conclusion, counsel urged this court to overturn the decision of the Tribunal on the basis that it was erroneous.

Submissions by the 2nd Respondent

13. Counsel for the 2nd Respondent submitted that it is too late to challenge issuance of the EIA Licence as paragraph 2 of the said licence provided that its lifespan was 24 months from the date of issuance of July 17, 2019. It was counsel's position that following the dismissal of NET Appeal No. 21 of 2019 on September 30, 2020, the 2nd Respondent lawfully resumed its construction works as per the terms of the EIA Licence, was issued with Certificates of Practical Completion and Occupation on June 15, 2021 and June 30, 2021 respectively, and subsequently sold the resulting units and transferred the same to bonafide purchasers for value who now held their individual titles. Counsel took the position that as the 2nd Respondent was no longer the sole owner of the subject property, known as L.R NO. 12581/13 situated in Athi River, Machakos County, the substratum of the appeal having been wholly overtaken by events, this Honourable court is not capable of granting the orders sought.

14. On whether the 1st Respondent followed due process of the law in issuing the impugned EIA Licence, counsel submitted that it is not disputed that Katrina Management Consultants Limited, a firm of environmental impact assessment/audit experts, duly licensed by the 1st Respondent to conduct environmental assessments/audits, prepared a comprehensive EIA Study Report dated April 11, 2019, which was submitted to the 1st Respondent for scrutiny and evaluation. That subsequently the 1st Respondent issued the impugned EIA licence. Counsel argued that the 1st Respondent duly discharged its legal mandate and followed due process of law and all legal requirements governing conduct of EIA Study, and scrutiny of the Report before issuance of the contested licence.

15. It was the submission of the 2nd Respondent's counsel that the legal regime for issuance of an EIA licence was anchored on Article 69 (f) of the *Constitution* of Kenya 2010 which requires the state to establish systems of environmental impact assessment, environmental audit and monitoring of the environment. Counsel submitted that in issuing the disputed license, the 1st Respondent complied with Part VI (sections 57A, 58, 59, 60, 63 and 67) of EMCA and the relevant provisions of parts 1 and 2 of the Second Schedule of EMCA and Regulations 4 and 6, Part III (Regulations 11 to 17) and Part IV (Regulations 18 to 30 of the EIA & A Regulations).

16. It was further submitted for the 2nd Respondent that according to Regulation 7 (1) of the Regulations, a summary project report, as opposed to an EIA Study Report is submitted in regard to the likely

effects of low risk projects and medium risk projects specified as such under the Second Schedule of EMCA. Counsel submitted that Part II (Regulations 7 to 10) of the EIA & A Regulations relate to a summary project report which was not required in the case of the 2nd Respondent's disputed development project. Counsel maintained that under section 58 (2) of EMCA, the Second Schedule of the Act specify projects that need an EIA Study and Report and that an EIA Study Report was the prescribed form of report for the 2nd Respondent's development project.

17. Counsel argued that legal Notice Number 31 of 2019 amended the Second Schedule of EMCA by deleting undertakings listed therein and substituting them with new ones whereof multi dwelling housing developments exceeding one hundred housing units were classified as high risk projects requiring an EIA Study Report, while legal Notice Number 32 of 2019 amended Regulation 7 of the EIA & A Regulations to require a summary or a comprehensive project report depending on the environmental impacts of a low risk or a medium risk project to be submitted to the 1st Respondent. Counsel submitted that before legal Notice No. 31 of 2019, a development project in the nature of an urban development for the establishment of new housing developments exceeding 30 housing units, such as the 2nd Respondent's, required an EIA Study Report. Counsel maintained that although the 2nd Respondent's EIA Study Report was submitted before the above amendments, the law prior to and after the said amendments required the 2nd Respondent to submit an EIA Study Report and not a summary or comprehensive project report. Counsel emphasized that the requirements under Part III (Regulations 11- 17) and Part IV (Regulations 18-30) of the EIA & A Regulations, which relate to an EIA Study and an EIA Study Report and Licence respectively were met before issuance of the disputed licence.

18. On whether EIA Study Report requirements were met, counsel submitted that section 58 of EMCA and Regulations 4 and 6 – 22 of the EIA & A Regulations were complied with as the 2nd Respondent presented Terms of Reference for the EIA Study to the 1st Respondent on 21st March 2019, the EIA Study was done and the EIA Study Report submitted to the 1st Respondent on 12th April 2019 in accordance to parts III and IV of the EIA & A Regulations.

19. On the question of whether Strategic Environmental Assessment (SEA), provided for under section 57A of EMCA and Regulations 42 and 43 of the EIA & A Regulations was a requirement as regards the 2nd Respondent's project, counsel relied on section 2 of EMCA and submitted that the same was a public policy tool for strategic decisions by lead agencies that necessitate environmental considerations and therefore that SEA was not required in respect of the 2nd Respondent's project as the 2nd Respondent is a private entity. To buttress their argument, counsel relied on the case of Mohammed Ali Baadi & Others v Attorney General & 11 Others [2018] eKLR.

20. It was further submitted that there was adequate public participation before issuance of the disputed EIA Licence. Reliance was placed on Regulation 17 of the EIA & A Regulations and counsel submitted that the Respondents fulfilled the test for adequate public participation as aptly captured in paragraph 97 of the decision of Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR and Save Lamu & 5 Others v National Environmental Management Authority (NEMA) & Another [2019] eKLR. Counsel reiterated the minimum basis for adequate public participation contending that as a programme, it should be fashioned in a manner that accords with the nature of the subject matter; the test to be applied is one of effectiveness; it must include access to and dissemination of relevant information; public participation does not dictate the everyone must give their views; the right of public participation does not guarantee that each individual's views will be taken as controlling; and the right of public participation is not meant to usurp the technical or democratic role of the office holders but to enrich their views.

21. On whether the 2nd Respondent complied with the requirement for adequate public participation, counsel submitted that the 1st Respondent took all the required steps under sections 58 (2), 59 and 60 of EMCA and Regulations 17 and 20 of the EIA & A Regulations to ensure adequate public participation by inviting comments from lead agencies vide the letter dated April 12, 2019; letter dated April 15, 2019 instructing the 2nd Respondent to publish public Notices inviting members of public to make oral and written comments on the EIA Study Report; Advertisements in the newspapers vide the Daily Nation on April 18, 2019 inviting comments from the public; invitation of public comments vide the Kenya Gazette Notice No. 3841 dated April 26, 2019; Letter to the 2nd Respondent dated May 30, 2019 asking the 2nd respondent to address some issues; ensuring a visit to the project site on June 19, 2019 by the 1st Respondent's county officers; which visit confirmed that the site was a mixed use area comprising residential, commercial and industrial projects; and receiving the Appellant's written comments.

22. Counsel also submitted that besides the foregoing, the 2nd Respondent also received views of key stakeholders and neighbours most likely to be affected by the project via various Environmental and Social Impact Assessment (ESIA) feedback forms filled and signed on March 28, 2019 and April 5, 2019. Further that public hearing/sensitization meeting was held on April 5, 2019 to sensitize the public as part of ESIA for the subject development project.

23. Counsel therefore argued that the Appellant participated directly or by representatives in the public participation endeavors put in place by the 2nd Respondent. Counsel relied on the decision in the Save Lamu case to contend that the Appellant's objection to the 2nd Respondent's subject development project was not in itself an automatic veto on the issuance of the EIA Licence, as that decision lies only with the 1st Respondent in line with Regulation 23 of the EIA & A Regulations. Counsel maintained that the quality and quantity of public participation on the EIA Study Report for the 2nd Respondent's project was sufficient and effective. Counsel argued that pursuant to section 60 of EMCA, the 1st Respondent invited comments from lead agencies vide its letter of April 12, 2019 giving a period of 30 days as per Regulation 20 (3) of the EIA & A Regulations, but that the contested licence was given on July 17, 2019, which was after the lapse of time. Counsel also held the view that Regulation 23 (1) and (4) of the EIA & A Regulations requires the 1st Respondent to give its decision in three months of receiving EIA Study Report. Further submissions were made that under Regulations 22 and 23 (30 (c) of the EIA & A Regulations, public hearings are not mandatory but are at the discretion of the 1st Respondent.

24. On whether construction of the impugned project would lead to a conflict, counsel submitted that the area in question is a mixed use zone for both industrial and residential and therefore the appellant's allusion to such is an imaginary conflict, and that in any event, the Appellant itself has residential establishments within its premises and did not require or conduct SEA in that regard. Counsel submitted that the subject development of the 2nd Respondent was for mixed use, namely, residential and commercial projects. Counsel argued that the area in question being a mixed use development area allows for industrial, residential and commercial development projects and that the EIA licence was particularly for an area dominated by residential and commercial development including Hillcrest Estate, Sunset Estate, Everest Park Estate and others.

25. On the question of change of user, it was submitted for the 2nd Respondent that NET had no jurisdiction over change of user of the properties in the disputed area. Counsel submitted that the Appellants selfish quest was to limit the setting up of non-industrial projects in the subject mixed use development zone. Therefore, counsel argued that the Appellant's argument alluding to future conflicts between industrial and non-industrial projects in the area to be selfish, unfounded and an

overreach and that the appellant's attempt to oppose non-industrial developers is a violation of the right to property of the non-industrial developers contrary to Article 40 of the *Constitution*. Counsel insisted that none of the projects in the mixed use development namely industrial, commercial and residential, take precedence over the other as concerns access to natural resources like water and land and that every developer must take responsibility for the legally permissible pollutants arising from what is associated with their development. Counsel contended that since the 2nd Respondent was not likely to cause any air pollution in the area it did not need any ambient air quality study and that therefore the appellant cannot transfer its obligations as concerns air pollution to the 2nd Respondent. Counsel submitted that the 2nd Respondent had put in place a waste treatment plant and an elaborate sewerage infrastructure draining into MAVWASCO plant onwards into Kinanie ponds and ensured supply of water from MAVWASCO and power from Kenya Power and Lighting Company Limited (KPLC). In conclusion, counsel urged the court to find that the EIA licence in dispute was lawfully issued, that the EIA licence has been implemented and that it is too late to challenge the licence. Counsel urged the Honourable Court to uphold the judgment of the Tribunal.

26. The question as to whether the appeal had been overtaken by events and become moot for reasons that the project herein had been completed and housing units thereof sold to third parties, was determined by this court vide its ruling delivered on March 13, 2023 pursuant to the Notice of Motion dated January 13, 2023 filed by the 2nd Respondent. The court held that the appeal was not moot and had not been overtaken by events. Therefore, that issue will not be revisited in this judgment.

Analysis and determination.

27. Having considered the appeal, the submissions and the entire record, in my view, the issues that arise for determination are;

    a. Whether a project report was required for the proposed project.

    b. Whether a strategic Environmental Assessment (SEA) under section 57A was a requirement for compliance by the 2nd Respondent.

    c. Whether the issuance of the EIA to the 2nd Respondent was in compliance with the law for;

        a. Lack of registration of the project property in the 2nd Respondent's name.

        b. Inadequate public participation.

        c. Insufficient involvement of lead agencies.

        d. Failure to consider that the project will result in a conflict between the appellant and the 2nd Respondent.

28. The appellant faulted the issuance of the EIA licence to the 2nd Respondent for want of a project report in accordance to Regulation 7 to 10 of the Environment (Impact Assessment & Audit) Regulations (EIA&A Regulations) The Appellant argued that as at the time of submission of the EIA report, the amendments in legal Notice Number 31 and 32 of 2019 were not in place.

29. Section 58 of EMCA provides for application of an EIA Licence as follows;

    58. Application for an Environmental Impact Assessment Licence

    (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing

or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

(4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.

(5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.

(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.

30. Regulation 7 of the EIA & A Regulations provides as follows;

7. (1) A proponent shall prepare a project report stating -

(a) the nature of the project;

(b) the location of the project including the physical area that may be affected by the project's activities;

(c) the activities that shall be undertaken during the project construction, operation and decommissioning phases;

(d) the design of the project;

(e) the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal;

(f) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project;

(g) an action plan for the prevention and management of possible accidents during the project cycle;

(h) a plan to ensure the health and safety of the workers and neighbouring communities;

(i) the economic and socio-cultural impacts to the local community and the nation in general;

(j) the project budget; and

(k) any other information the Authority may require.

(2) In preparing a project report under this regulation, the proponent shall pay particular attention to the issues specified in the Second Schedule to these Regulations.

(3) A project report shall be prepared by an environmental impact assessment expert registered as such under these Regulations.

31. Essentially, section 58 of EMCA provides for application for an EIA licence and provides that every project proponent must not proceed to execute their project without submitting a project report to NEMA in the prescribed form. For purposes of application of an EIA licence, a project proponent for a project specified in the Second Schedule must undertake a full environmental Impact Assessment Study and submit to NEMA an EIA Study Report before being issued with an EIA Licence.

32. I have looked at regulation 7 of the EIA & A Regulations which was introduced by Legal Notice Number 32 of 2019 which came into effect on April 30, 2019. The same requires a project proponent for a low risk or medium risk project to submit to NEMA a summary project report of the likely environmental effect of the project. Under Regulation 9 of the EIA & A Regulations, upon submission of the project report to NEMA, the latter proceeds to seek comments from lead agencies and the relevant District Environment committee, within 30 days before proceeding to approve the project report where the project will have no significant impact on the environment. However, where there is a significant impact on the environment, with no disclosure of sufficient mitigation measures, then NEMA will require preparation of an EIA Study report.

33. In addition, the 2nd Respondent's proposed project which is in respect of multi dwelling housing development exceeding a hundred housing units, is a high risk project which does not require a summary report but an EIA Report, which is more comprehensive with more requirements in regard to mitigation measures as the proposed project will have a significant impact on the environment as per the second schedule to EMCA, paragraph 3 (g) thereof.

34. Section 2 of EMCA defines a project report to mean a summary statement of the likely environmental effects of a proposed development referred to in section 58 of EMCA, while an Environmental Impact

Assessment to mean a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment. It is therefore clear that a summary report is in respect of low and medium risk projects where the impact on the environment is not significant, while an EIA Report must be submitted in respect of high risk projects, where the impact of the activity on the environment is significant. Legal Notice Nos. 31 and 32 of 2019 came into effect on April 30, 2019. The evidence on record shows that the 2nd Respondent submitted the EIA Report on April 12, 2019, but the licence herein was issued on July 19, 2019 which is after the legal Notices Nos. 31 and 32 of 2019 came into effect. As at the time of issuance of the licence, legal Notices Nos. 31 and 32 were in operation and the 1st Respondent rightly considered the EIA Study report as the basis of issuing the EIA licence.

35. That being the position, the Appellant's argument that a summary report was to be submitted by the 2nd Respondent when in fact the latter's proposed project demands more mitigation measures, by virtue of being a high risk project, is misleading and the same is rejected. Therefore, the Tribunal was right to conclude that it was sufficient for the 2nd Respondent to submit an EIA Study report.

36. On the issue of the Strategic Environmental Assessment, Section 57A of EMCA refers to it as a threshold which all policies, plans and programmes for implementation ought to be tested against. That section provides for Strategic Environmental Assessment as follows;

    1. All policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.

    2. For the avoidance of doubt, the plans, programmes and policies are those that are-

        a. Subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by parliament, government or if regional, by agreements between the governments or regional authorities, as the case may be;

        b. Determined by the authority as likely to have significant effects on the environment.

    3. All entities shall undertake or cause to be undertaken the preparation of strategic environmental assessments at their own expense and shall submit such assessments to the authority for approval.

    4. The Authority shall, in consultation with lead agencies and relevant stakeholders, prescribe rules and guidelines in respect of strategic environmental Assessments.

37. Besides, Regulations 42 and 43 of the EIA & A Regulations provides for Strategic environmental assessment as follows;

    42. Strategic environmental assessment

        1. Lead agencies shall in consultation with the Authority subject all proposals for public policy, plans and programmes for environmental implementation to a strategic environmental assessment to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others.

    2. The assessment carried out under this Regulation shall consider the effect of implementation of alternative policy actions taking into consideration –

        a. the use of natural resources;

b. the protection and conservation of biodiversity;

c. human settlement and cultural issues;

d. socio-economic factors; and

e. the protection, conservation of natural physical surroundings of scientific beauty as well as protection and conservation of built environment of historic or cultural significance.

3. The Government, and all the lead agencies shall in the development of sector or national policy, incorporate principles of strategic environmental assessment.

43. Contents of strategic environmental impact report

1. A strategic environmental impact report prepared under this regulation shall include the following information –

a. the title of the report;

b. a summary of the potential significant impacts of a proposed policy, programme or plan;

c. potential opportunities to promote or enhance environmental conditions;

d. recommendations for mitigating measures; and

e. alternative policy, programme or plan options to ensure compliance with the Act.

2. The proposed policy, programme or plan specified in this Regulation shall state –

a. the purpose and rational of the policy, programme or plan taking into consideration socio-economic, environmental and cultural issues;

b. alternatives and strategies of the policy, programme or plans;

c. areas and sectors affected by the policy, programme, plan, or proposed activities;

d. an environmental analysis covering –

i. baseline information focussing on areas potentially affected;

ii. relevant legislative framework and related policy documents;

iii. summary of views of key stakeholders consulted;

iv. predicted impacts of the policy, programme or plan;

v. alternative policy options and comparison against environmental indicators;

vi. ongoing projects and how they fit in the proposed policy, programme or plan;

e. recommendations outlining –

i. Suggested policy changes;

ii. Proposed mitigation measures;

iii. Strategic environment assessment; and

f. relevant technical appendices such as stakeholders meetings referred to in the assessment.

38. Section 2 of EMCA defines "Strategic environmental assessment" to mean a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives.

39. In this case, the appellant argued that the 2nd Respondent's project had no Strategic Environmental assessment which was a requirement, while the 2nd and 3rd Respondents contended the same is a public policy tool for strategic decisions by lead agencies.

40. Therefore, having considered the provision of sections 2 and 57A of EMCA as read with Regulations 42 and 43 of the EIA &A Regulations, I take the view that strategic environmental assessment is a tool to ascertain the impact on the environment, of policies and actions of lead agencies and other state actors and to determine whether such policies, programmes and actions have succeeded in promoting environmental protection and conservation. Hence, I agree with the submissions made by the 2nd Respondent that the Strategic Environmental assessment is indeed a public policy tool for formulation and approval of policies, plans and programmes to inform strategic decisions by lead agencies that necessitate environmental considerations. I am persuaded by the decision in the case of Mohammed Ali Baadi and Others v Attorney General & 11 Others [2018] e KLR in which the court took a similar view. I therefore hold and find that the strategic environmental assessment being a tool for public actors in environmental governance, was not a requirement for compliance by the 2nd Respondent before issuance of the impugned EIA licence. Consequently, I find and hold that the Tribunal did not err in making a finding that there was no requirement for an SEA to be conducted prior to issuance of the impugned EIA licence.

41. On the question whether issuance of the EIA licence was in compliance with the law, the Appellant raised several matters, these are; Lack of registration of the project property in the 2nd Respondent's name; inadequate public participation; Insufficient involvement of lead agencies.; and failure to consider that the project will result in a conflict between the appellant and the 2nd Respondent.

42. On whether want of registration of the project property in the 2nd Respondent's name, at the time of application of the impugned EIA licence invalided the said EIA licence, the appellant's contention was that under section 58 of EMCA as read with Regulations 7 and 9 of the EIA &A Regulations, it is only a project proponent who must prepare and apply for approval of the project report before undertaking an EIA Study and that section 24 of the *Land Registration Act* vests in a registered proprietor of land, absolute ownership thereof. Counsel for the Appellant contended that the 2nd Respondent having been registered as proprietor of the project property after application of the impugned EIA licence, was not the project proponent and that therefore that invalidated the impugned licence.

43. Section 2 of EMCA defines "proponent" to mean a person proposing or executing a project, program or an undertaking specified in the Second Schedule. Under Regulation 7 of the EIA & A Regulations, it is a requirement that the project report submitted to NEMA ought to specify among other matters, proof of land ownership where applicable. Having considered the law, I do not think that registration is the only proof of land ownership. Under Regulation 7 of the EIA & A Regulations, there is no requirement of proof of registration of ownership under section 24 of the *Land Registration Act*, as a prerequisite for preparation of a project report. In my view therefore, what is required is evidence of

ownership of the project property by the project proponent. I have considered the evidence on record and from the Title produced in evidence which is at page 716 of the record, I note that Neoplan Kenya was registered as owner of parcel L.R NO12581/13 I.R No. 40943 on March 8, 2018, while the 2nd Respondent was registered as proprietor thereof on 2 May 2019. Besides, the EIA licence was issued on July 17, 2019. Therefore, it is evident that at the time of issuance of the EIA licence, the project property was registered in the name of the 2nd Respondent who was the project proponent, although at the time of application for the EIA licence the property was in the name of Neoplan Kenya. The question of ownership having been raised by the Director General of the 1st Respondent and having been answered by the 2nd Respondent who produced title as evidence of ownership, in my view settled the fact that the project property was owned by the 2nd Respondent. In my opinion, the question of ownership would be relevant in these proceedings if the 2nd Respondent's claim of ownership was contested, because what a project proponent is required to demonstrate under EMCA is merely ownership and not necessarily registration. While ownership may be confirmed by registration, it can also be confirmed by other means including an agreement of sale that is not contested by the registered proprietor. In the premises since the 2nd Respondent was the registered proprietor of the project property before issuance of the EIA Licence, I find and hold that failure to demonstrate registration of the project property in the 2nd Respondent's name at the time of application for the EIA licence did not invalidate the EIA Study report.

44. On whether public participation was adequate, section 59 of EMCA provides for public participation as follows;

> 59. Publication of Environmental Impact Assessment
>
> (1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project a notice which shall state—
>
> (a) a summary description of the project;
>
> (b) the place where the project is to be carried out;
>
> (c) the place where the environmental impact assessment study,evaluation or review report may be inspected; and
>
> (d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.
>
> (2) The Authority may, on application by any person extend the period stipulated in sub-paragraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.

45. Regulation 17 of the EIA & A Regulations provides for public participation as follows;

> 17.(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 nation-wide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nation-wide 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. Therefore, the requirement of the above provisions of law are meant to achieve adequate and effective public participation by not providing for a strait jacket approach to engagement with stakeholders and all the project affected persons where a project is to be undertaken. Thus, the law requires that a programme to be undertaken for public participation ought to accord to the nature of the subject matter; and ensure access to relevant information. Public participation does not require that everyone must give their views neither does it guarantee that every view will be taken as controlling as the right to give views does not oust the technical mandate of the officer holding the exercise but it is for purposes of enhancing their views. Therefore, the test to be applied is whether the programme was effective, and not just its form. In the case of Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] e KLR, it was held as follows;

> 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. (Minister 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.

47. In this matter, the Appellant took the position that although the 2nd Respondent complied with other aspects of public participation, the 1st Respondent failed to conduct a public hearing, contrary to Regulation 22 of the EIA & A Regulations, in view of the evidence of serious environmental conflict between the Appellant and the 2nd Respondent. In relying on the decision in the case of Ken Kising'a v Daniel Kiplagat Kirui & 5 Others (2015) eKLR, the appellant urged this court to find that the EIA licence was invalid as the 2nd Respondent in failing to conduct public hearings, was deliberately avoiding engaging persons whom they thought were opposed to the project and more specifically the Appellant. In response, the 1st Respondent's counsel argued that the 1st Respondent fully complied with the requirements of adequate public participation by sending invitations of comments from lead agencies; by letter dated April 15, 2019, instructing the 2nd Respondent to publish public Notices inviting members of public to submit oral and written comments on the EIA Study report; advertisements in the newspaper in the Daily Nation of April 18, 2019 inviting comments on the project report; invitation of public comments on the 2nd Respondent's subject development vide Gazette Notice No. 3841 dated April 26, 2019; writing to the 2nd Respondent on May 30, 2019 asking the 2nd Respondent to address issues arising from the EIA Study report; having its county officers and the 1st Respondent's county Director of Environment Machakos visit the site and confirm that it is a mixed use are comprising of residential, commercial and industrial projects; and receiving the Appellant's written comments (objection letter) on July 12, 2019 on the proposed project. On their part, the 2nd Respondent argued that public participation was adequate as they received views of stakeholders and neighbours most likely to be affected by the proposed project through various ESIA feedback forms filled and signed on March 28, 2019 and April 5, 2019; and that there were public hearings/ sensitization meeting held on April 5, 2019 to sensitize the public as part of ESIA for the subject development.

48. The 2nd Respondent maintained that the Appellant participated by their representatives in the public participation endeavours put in place by the 2nd Respondent in accordance with the provisions of EMCA and EIA &A Regulations. Counsel maintained that the Appellant's objection was not an automatic veto on the issuance of the EIA licence sought by the 2nd Respondent and that the quality and quantity of public participation was adequate and effective.

49. The court has considered the evidence on record, and it is not disputed that the Respondents by newspaper advertisement and notices invited views from the public on the proposed project and one of the participants in that exercise was the Appellant who sent their views through their representative one Amos Kisilu, an Advocate of the High court of Kenya. Mr. Amos Kisilu testified before the Tribunal that upon invitation by the 2nd Respondent, he attended a public participation meeting on April 5,

2019 for the proposed project, where he presented the Appellant's views contained in a questionnaire in which he stated that there was a high potential of conflict between residential and industrial use as demonstrated by the conflict between the appellant and the 2nd Respondent before Parliament. In addition, that witness on April 25, 2019, also wrote to the 2nd Respondent's lead consultants expressing the Appellant's objection to the proposed project on the grounds of the potential conflict in regard to industrial and residential use. Annexure 3 at page 843 to 904 of the record which are questionnaires filled by different participants in the public participation exercise, indeed show that the public was given opportunity to give their views in regard to the proposed project.

50. It is therefore clear that the Appellant had opportunity to give their views, which views they gave, during the public participation process. Regulation 22 of the EIA & A Regulations states that on receiving oral and written comments, NEMA may hold a public hearing. Therefore, the requirement of a public hearing is not couched in mandatory terms. The overall requirement is the adequacy and effectiveness of public engagement in respect of the proposed project. The Appellant has not pointed out the prejudice suffered due to failure by NEMA to conduct a public hearing, noting that it had been able to convey its views accordingly. The allegation that there was evidence of serious environmental conflict, was well captured in both the questionnaire and the letter written by Amos Kisilu Advocate and I do not think that a public hearing would have changed the fact that the Appellant's concerns were that if the proposed project is implemented, there will be conflict in the residential and industrial use in the proposed project area.

51. Public participation does not place on the entity receiving views, to incorporate every person's views in the project, as that would be granting veto to everyone in regard to the proposed project, which is not the object of public participation. What needs to be done is to demonstrate that the views were received and duly taken into account. Having said that, I am satisfied that the public participation done was adequate and effective as reasonable opportunity was availed to the public and project affected persons, including the Appellant.

52. On the question of whether lead agencies were involved, section 60 of EMCA provides for comments from lead agencies as follows;

> A lead agency shall, upon the written request of the Director General, submit written comments on an environmental impact assessment study, evaluation and review report within thirty days from the date of the written request.

53. This therefore means that once a request for comments is done, the time within which comments by lead agencies ought to be made is 30 days. The appellant's contention in this regard was that there was no evidence that comments of lead agencies were sought as there is no evidence of service of the letter inviting comments. I note that the letter dated April 12, 2019 by the 1st Respondent sought lead agencies' comments. There was no evidence that the lead agencies named did not receive the letter and no reason has been given as to why the letter would not be sent to the lead agencies, considering that letters in government offices are not necessarily served by court process servers. The fact that no comments were made does not mean that the letter of invitation was not received. Therefore, in my view, there was compliance with section 60 of EMCA by the 1st Respondent.

54. Moreover, the appellant raised the questions that the 2nd Respondent had no sewer line and that the Appellant's boreholes had dried up upon occupancy of the residents of the 2nd Respondent's phase 2 construction. In that regard, the Tribunal found that the Appellant failed to prove its allegations against the 2nd Respondent. In my view, the question of the boreholes drying up, was a matter of evidence, which the appellant ought to have presented. Having perused the evidence on record, I note that there was no evidence presented by the Appellant to show that its boreholes had dried up due to

the occupancy of the 2nd Respondent's premises and therefore that ground fails. As pertains the issue of the sewer line, page 454 to 456 of the record, being the approved Terms of Reference clearly show that the issue of wastewater was adequately addressed. In addition, the EIA licence provided as one of its conditions, provision for disposal of waste water. Which is at page 603 of the record. For the above reason, the arguments on lack of sewer line and water from boreholes did not have any basis and I therefore find and hold that the Tribunal properly dismissed those allegations.

55. At the core of this dispute, is the Appellant's contention that the fact that the proposed project area is a mixed use zone, there is a conflict of industrial and residential use and that the 1st Respondent ought to have satisfied itself that the permitted levels of pollution by the Appellant and other industries located in the proposed project area are not harmful to human health, before granting the impugned licence. This single dispute which stands out like a sore thumb has been at the root of conflict between the Appellant and the 2nd Respondent before the Tribunal, the courts and Parliament and still remains unresolved. This is manifest from the Report of Chairperson, Parliament's Department Committee on Environment and Natural Resources in respect of an inquiry into complaints of environmental pollution by London distillers Kenya Limited dated October 2018. Therefore, the 2nd Respondent's submissions that the dispute is speculative and hypothetical are not candid, in view of the fact that they have in the past raised complaints of pollution against the Appellants, including the above inquiry. The evidence on record shows that the project property was initially for industrial use, but there was change of user from industrial to residential. Even as the Tribunal dismissed the appeal filed before it, it acknowledged the fact that the fate of the health of the residents of the project living side by side with industries was the real issue of contention between the Appellant and the 2nd Respondent, which must be addressed. In that regard, the Tribunal in its judgment rightly captured this conundrum as follows;

> Reading through the pleadings and listening to the evidence of the parties……., the question of the fate of the health of the residents living side by side with factories is a prominent matter. ….the Appellant's concerns …..are that it may not be conducive for its factory presently operational near the project site and its future factories to be situated in the same area as the residential houses that have been licensed by the 1st Respondent and those that may be licenced in future. It raises a further concern that the owners of land that was purchased for industrial use may suffer losses as they may not be able to utilize their land as anticipated during the time of purchase.

56. The dispute herein manifests the tension resulting from competing interests for property owners in the exercise of their proprietary rights in respect of mixed use zones, in view of the unfortunate fact that in our jurisdiction, no specific policy or law has been made to guide development in such zones in a manner that balances social, economic and environmental values. In the modern world, mixed use is embraced, but in the context of maintaining the equilibrium of sustainable development so that in such landscape, one use is not sacrificed for the other. For instance, in Baltimore city, the Baltimore Zoning Code (Baltimore, MD City Code, Art. 32 ss 6- 2011 (2017)) was updated in 2017 to include a new category of industrial mixed use where both industrial and residential developments would coexist. It provides both considerations to be made and restrictions to be observed in mixed use zones. How states ensure a balance in economic, social and environmental values in mixed use zones will largely depend on whether or not they have a proper mixed use planning in place.

57. The Tribunal regretted not getting evidence on the permitted emissions of the appellant and evidence of whether the same would be harmful to human health; coupled with NEMA's failure to avail technical support to avail such information to the Tribunal. With this regret, the Tribunal proceeded to dismiss the appeal, without addressing the real issue in contention.

58. Under international environmental customary law, which Kenya has domesticated by the enactment of EMCA, the state's obligation of protecting and conserving the environment places on states the basic duty to prevent environmental harm. This duty may require inaction like choosing not to put up a power plant, or operate as a licence to prevent activities that could result in irreversible environmental damage against future generations.

59. In that regard therefore, in environmental governance in Kenya, the State's obligation of conserving and protecting the environment as particularized under Article 69 of the *Constitution of Kenya* is mostly undertaken by NEMA, the 1st Respondent herein being the principle instrument of Government in the implementation of policies relating to the environment and exercising supervision and coordination over all matters touching on the environment as provided for in section 7 of EMCA. Therefore, it is the duty of NEMA in the process of exercising its licensing power to comprehensively interrogate any EIA Study report placed before it, to ensure that the project proponent thereof, satisfies it that the proposed activity will not be a threat to anyone's right to a clean and safe environment protected under Article 42 of the *Constitution*.

60. In the exercise of this power, EMCA has placed at NEMA's disposal the relevant tools to guide it in order to protect and conserve the environment. One of the important tools at NEMA's disposal is the precautionary Principle, which is one of the principles of sustainable development. Under Article 10 (2) (d) of the *Constitution*, sustainable development is one of the national values and principles of Governance binding all state organs, state officers, public officers and all persons in interpreting the law or making public policy decisions. Sustainable development has been defined under section 2 of EMCA to mean development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.

61. The precautionary principle requires that where there is a strong suspicion that a particular activity may have environmentally harmful consequences, it is better to control that activity now than wait for incontrovertible scientific evidence. This principle is well set out in Principle 15 of the Rio Declaration on Environment and Development, 1992 and states as follows;

> In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

62. The Rio Declaration has been domesticated in Kenya. Section 2 of EMCA defines the precautionary principle as the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation. Besides, section 3 (5) (f) of EMCA enjoins the Environment and Land Court in the exercise of its jurisdiction, to be guided by the principles of sustainable development, including the precautionary principle.

63. In the Indian case of Ajay Kumar Negi v Union of India (2015) Judgment 7 of 2015, the National Green Tribunal (NGT) observed that the precautionary principle is a tool for making better health and environmental decisions; and that it aims to prevent harm from the outset rather than manage it after it has occurred.

64. Therefore, the precautionary principle requires that where there is a threat of environmental damage, even if no scientific evidence is available to confirm certainty of the damage, it is upon the state to take deliberate measures to prevent environmental damage. The key ingredient being reasonable suspicion.

65. While in most litigation in an adversarial system, justice demand that whoever alleges must prove, under international environmental customary law, and more specifically under the p recautionary principle, reasonable articulable grounds of suspicion of a threat to environmental damage are sufficient to entitle a party to a relief. Essentially, under the precautionary principle, the burden of proof shifts to the project proponent to demonstrate that there is no threat to the environment. In the case of Vellore Citizens Welfare Forum v Union of India AIR 1996 5 SC 647 at 658, the Indian Supreme court shifted the burden of proof to the developer to show that the intended activity did not pose danger to the environment and declared that the precautionary principle involves the following three conditions;

    a. State government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation.

    b. 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;

    c. The onus of proof is on the actor or developer or industrialist to show the actions are environmentally benign.

66. In the instant case, by virtue of the fact that the Appellant and other industries in the vicinity of the proposed project are licenced to emit pollutants to a certain level and have been emitting pollutants in the atmosphere for several decades, and the evidence of parties herein having had a long standing dispute on whether or not the Appellant, being an industry is polluting the project area, in my view, I find and hold that there is a possible risk to the environment in regard to the ambient air quality on the project property which is next to the Appellant's industry, where the health of the six hundred and sixty-four (664) household are intended to reside. I do not agree with the 2nd Respondent that the conflict in regard to pollution is speculative, hypothetical and futuristic and that we should wait and see how the coexistence of the appellant and the 2nd Respondent will span out in the future. That perspective, in my view, would be an affront to and will fly in the face of the precautionary principle, which binds NEMA and this court. That being the position, the 1st Respondent and subsequently the Tribunal ought to have applied the precautionary principle, but failed to do so.

67. As demonstrated by the objection registered by the Appellant through Amos Kisilu advocate in respect of the conflict arising from the coexistence of residential and industrial use in the project area, and the Appellant having raised the issue before the issuance of the impugned EIA, the 1st Respondent being the licensing body duly capacitated with the necessary expertise, ought to have taken into consideration that weighty concern regarding risk to human health, and interrogated the same by requiring the 2nd Respondent to conduct an ambient air study within the project area. This would have enabled the 1st Respondent to satisfy itself that the project area is safe for human health, or if it was found to be unsafe, then it would have required the 2nd Respondent to provide measures for mitigation of the risk to the 1st Respondent's satisfaction. This would enable NEMA determine whether in endorsing the project to be constructed in the area occupied by the appellant and other industries would be a risk to human health. Human health is a serious consideration and should that matter be overlooked; it may turn out in future to bear serious consequences for future generations using the project premises. While economic development is necessary, it cannot be done without due regard to human health. Under regulation 23 of the EIA & A Regulations, NEMA is given the latitude to consider among others, comments of interested parties and other crucial factors. The 2nd Respondent's change of user from industrial to residential in an area also occupied by industries meant that apart from considering the impact of the proposed project on the environment, the 2nd Respondent was obligation to consider whether the existing capacity (ambient air quality) was able to support the project and more specifically

the residents of the said project. That responsibility remains the responsibility of the project proponent and cannot be shifted to the neighbouring community, project affected persons or any other person.

68. I take the position that the 1st Respondent being a key state actor in environmental governance, cannot be allowed to act as a conveyor belt, where EIA study reports are passed to it for mere endorsement without being adequately interrogated. In the instant matter, the lack of a clear policy on mixed use zone, and the fact that change of user is dealt with by the County Government and not NEMA cannot, in my opinion, be the basis for the casual consideration of weighty matters concerning human health that were raised against the proposed project herein as was the case in this matter.

69. I therefore find and hold that the 1st Respondent failed to interrogate the concerns raised by the Appellant which were well within its knowledge since the dispute between the Appellant and the 2nd Respondent has been persistent.

70. This court is mandated under Article 159 of the *constitution* to facilitate substantive justice by ensuring that it does not only give a decision to the parties appearing before it, but to ensure the real dispute between the parties is addressed. And the real dispute between the Appellant herein and the 2nd Respondent is the threat posed to human health from the permitted emissions from the appellant and other industries who preceded the 2nd Respondent in the project area. I do not agree with the 2nd Respondent that this is an imaginary conflict. Pollution, even in circumstances where it is licensed to permitted levels under EMCA and the Regulations thereto, still pose harm to human health and that is the basis for guidelines for protection of employees of polluting industries as provided for under Part IX of the 5th Schedule to the Environmental Management and Co-ordination (Air Quality) Regulations, 2014.

71. Having found that the 1st Respondent ought to have applied but failed to apply the precautionary principle in the interrogation of the EIA study report submitted by the 2nd Respondent in view of the objection filed by the Appellant, which shifted the burden of proof to the 2nd Respondent being the project proponent, I find and hold that the Honourable Tribunal erred in dismissing the appeal on the basis that the appellant did not have the scientific evidence to show that permitted emissions were a risk to human health; as this amounted to shifting the burden of proof to a person who was not the project proponent and therefore failing to apply the precautionary principle.

72. This court is enjoined by Section 3 (5) (f) of EMCA to apply the precautionary principle in the exercise of its jurisdiction. The Appellant having demonstrated a reasonable suspicion of risk to human health due to licenced emissions neighbouring the project site, and noting that every person's right to a clean and healthy environment protected under Article 42 of the *Constitution*, is a right that requires environmental protection for the benefit of not just this generation, but also for future generations; this court finds and holds that the appeal is partially merited and the same is partially allowed. In view of the provisions of section 130 (4) of EMCA stating the reliefs that this court may grant, the court makes the following orders;

    a. The 2nd Respondent is ordered to conduct an ambient air quality study of the project site within the next 90 days in compliance with 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 default of compliance by the 1st and 2nd Respondents with orders (a) and (b) above, the EIA Licence No. NEMA/EIA/PSL/8263 dated 17th July 2019, issued in respect of application Reference No. NEMA/EIA/SR/1474 shall stand cancelled.

d. Each party shall bear its own costs.

73. Orders accordingly

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