



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 14 OF 2017

IN THE MATTER OF: ARTICLES 22 (1) & 2(C), 5(1), AND 258(1) & (2) (C) OF CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENshrined IN ARTICLES (1); 2(1) (2)& (3); 3(1); 4(2); 10(2); 69; 70; 71; 73(1) (B); 232(1) (D) & E (F) AND 259(1) & (3) OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT; AND SECTION 6 OF THE STATUTORY INSTRUMENT ACT.

IN THE MATTER OF: THE OBLIGATION ON THE PRIVATE SECTOR TO REALISE RIGHTS AND FUNDAMENTAL FREEDOMS, AND THE NEED FOR A HUMAN RIGHTS IMPACT ASSESSMENT REPORT ON THE PROPOSED LAMU COAL FIRED POWER PROJECT

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF ENVIRONMENTAL IMPACT ASSESSMENT REPORTS ISSUED UNDER THE ENVIRONMENTAL

MANAGEMENT AND CO-ORDINATION ACT (CAP 387) AND THE JURISDICTION OF THE NATIONAL ENVIRONMENT TRIBUNAL TO ENTERTAIN

PROCEEDINGS FILED IN DEFENCE OF ARTICLES 42, 69, 70 AND 71 OF THE CONSTITUTION

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

=VERSUS=

1. KENYA POWER AND LIGHTING COMPANY.....1ST RESPONDENT

2. LAMU POWER COMPANY LIMITED.....2ND RESPONDENT

3. ENERGY REGULATORY COMMISSION.....3RD RESPONDENT

4. PRINCIPAL SECRETARY,

THE NATIONAL TREASURY.....4TH RESPONDENT

5. PRINCIPAL SECRETARY MINISTRY

OF ENERGY AND PETROLEUM.....5TH RESPONDENT

6. HON ATTORNEY GENERAL.....6TH RESPONDENT

7. THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....7TH RESPONDENT

AND

SAVE LAMU.....1ST INTERESTED PARTY

THE KENYA NATIONAL COMMISSION

OF HUMAN RIGHTS.....2ND INTERESTED PARTY

THE KENYA HUMAN

RIGHTS COMMISSION.....3RD INTERESTED PARTY

THE NATIONAL ENVIRONMENT TRIBUNAL...4TH INTERESTED PARTY

RULING

BACKGROUND

1. On or about 4th July 2017, the Petitioner Okiya Omtatah Okoiti moved to the Constitutional and Human Rights Division of the High Court at Nairobi and filed therein a Constitutional Petition dated 30th June 2017. The said Petition was filed contemporaneously with a Notice of Motion also dated 30th June 2017 brought under certificate of urgency seeking various conservatory orders to issue against the 7 Respondents named therein. Some four parties were also named in the Petition and the Motion as Interested Parties.

2. In the Motion, the Petitioner prays for Orders as follows:-

1.....

2. That pending the inter-partes hearing and determination of this application and/or the Petition herein the Honourable Court be pleased to issue a conservatory order prohibiting the Energy and Regulatory Commission from issuing the Electricity Generation Licence for the Lamu Coal Fired Power Plant.

3. That pending the inter-partes hearing and determination of this application and/or the Petition herein the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the Respondents, whether by themselves, or any of their employees or agents under their authority from proceedings to give effect, in any way whatsoever, to the Electricity Generation Licence for Lamu Coal Fired Power Plant if the same has been issued.

4. That pending the inter-partes hearing and determination of this application and/or the Petition herein the Honourable Court be pleased to issue a conservatory order suspending the Environmental Impact Assessment Licence for the lamu Coal Fired Power Plant.

5. That pending the inter-partes hearing and determination of this application and/or the Petition herein the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever, to the Environmental Impact Assessment Licence for the Lamu Coal Fired Power Plant.

6. That pending the inter-partes hearing and determination of this application and/or Petition herein, the Honourable Court be pleased to issue a mandatory order compelling the respondents to make discovery of and produce the following information and documents requested by the Petitioner in his letters to them dated 8th and 27th June 2017.

a. A copy of the Power Purchase Agreement (PPA) signed between Kenya Power (or the GOK) and Amu Power Company Ltd.

b. Details of any loans the Power Purchase Agreement has been used to secure or guarantee.

c. Details of any loan guarantees by the Government of Kenya or any of its agencies for the Lamu Coal Power Plant.

d. Whether or not the Energy Regulatory Commission has issued the Electricity Generation Licence for the Lamu Coal power Plant.

e. Whether or not the Energy Regulatory Commission's Acting Director General Panel Robert Oimeke, who is not a registered engineer, is competent to issue the Electricity Generation.

f. Under what circumstances the Electricity Generation Licence was issued given it is in the public domain that

Engineer Joseph Ng'ang'a, the former substantive Director General of the Energy Regulatory Commission, declined to issue the said licence.

g. The report by the Environment Regulation Commission's Electricity Generation Licensing Committee approving the Lamu Coal Fired Power Plant.

h. The Environmental Regulation Commissions' minutes approving the issuance of the licence to Lamu Coal Fired power Plant.

7. That this Honourable Court be pleased to certify that the Petition herein raises a substantial question of law and forthwith refer the Petition to His Lordship the Chief Justice for appointment of a bench of three or five Judges pursuant to Article 165(4) of the Constitution of Kenya, 2010.

8. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and Orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

9. That the costs of this Application be provided for.

3. On or about 5th July 2017, the Motion was placed before the Honourable Mativo J who, upon consideration thereof directed as follows:-

a. That the Petitioner be and is hereby directed to serve all the suit papers upon all the Respondents.

b. That the Applicant shall be required to address the Court on the issue of jurisdiction.

c. That without prejudice to the above the Petitioner will be required to address the Court on why the suit should not be transferred to the High Court of Kenya at Malindi being the nearest High Court with jurisdiction to hear the matter.

4. The Court then directed that the matter be mentioned after service upon the Respondents on 20th July 2017. On the given date, the parties appeared in Court and addressed the Court on the question of jurisdiction. The Learned Judge then determined that the Petition had not only been filed in the wrong High Court Registry but also in a Court which lacked jurisdiction to hear the same. Accordingly, the Court directed that the file be transferred to the ELC at Malindi for hearing and determination.

5. Subsequently on 27th July 2017, the file was mentioned before me in Malindi for directions. On the same day, the Energy Regulatory Commission(3rd Respondent) filed a Notice of Preliminary Objection dated 26th July 2017 seeking the dismissal of both the Petition and the Motion on the grounds that:-

i. The Application and Petition offend mandatory provisions of the law.

ii. The Application and Petition flout Section 26 of the Energy Act No. 12 of 2006; and

iii. Consequently, the Court lacks jurisdiction to entertain the Application and Petition as currently framed.

6. On that same day, the National Environment Management Authority (7th Respondent) equally filed a Notice of Preliminary Objection dated 26th July 2017 stating that both the Petition and the Application are fatally defective and should be struck out for reasons:-

i. That the same have been filed in contravention of Sections 129(1) & (2) and 130(1) of the Environmental Management and Coordination Act, Cap 387 and this Honourable Court lacks the jurisdiction to determine the matter in the first instance;

ii. That both the Petition and the Application are filed in contravention (of) the doctrine of sub judice (as) the subject matter is pending before a judicial forum of competent jurisdiction;

iii. That the Petition and the Application have been filed in disregard of the provisions of Section 129(4) of the Environmental Management and Co-ordination Act, Cap 387 and the Petitioner is guilty of material non-disclosure; and

iv. That the Petition and Application are therefore an abuse of the Court process, frivolous, scandalous and vexatious.

7. In view of the two Preliminary Objections, the parties agreed to file written submissions thereon and to proceed to highlight the same on 16th October 2017. Instead, on 31st August 2017, the Kenya Power & Lighting Company Limited(1st Respondent) filed another Notice of Preliminary Objection stated to be on a point of law to the effect:-

i. That the Honourable Court in Nairobi High Court Constitutional Petition No. 334 of 2017 having determined that it did not have jurisdiction to hear and determine the matter could not in the circumstances purport to transfer this matter to this Honourable Court; and

ii. That in the premises, this matter is not properly before this Honourable Court and therefore this Court lacks jurisdiction to hear and determine the same.

8. At the same times, on 18th September 2017, the Petitioner filed herein under certificate of urgency another Notice of Motion application dated 28th August 2017 seeking the following Orders:-

i.

ii. **That the Honourable Court be pleased to set aside the Orders/directions it gave on 27th July 2017 directing that the Preliminary Objections filed herein by the 3rd and 7th Respondents be heard and determined in priority to any other issue herein.**

iii. **That as a matter of urgency and utmost priority to any other, this Honourable Court be pleased to hear and determine Prayer No. 7 of the Petitioner's Notice of Motion dated 30th June 2017 on whether the Petition raises a substantive question of law.**

iv. **That this Honourable Court be pleased to enjoin the Energy Tribunal herein as the 5th Interested Party.**

v. **That upon enjoining the Energy Tribunal herein as the 5th Interested party, this Honourable Court be pleased to allow the Petitioner to amend the Petition accordingly; and**

vi. **That consequent to the grant of the prayers above, the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.**

9. Arising from the foregoing, on 16th October 2016, directions were given that the Preliminary Objections raised by the 3rd and 7th Respondents be heard and disposed off first together with the issues arising from the Prayer No. 3 of the Petitioner's application dated 18th September 2017 as to whether or not this matter raises a substantive question of law and should therefore be referred to an even bench of Judges for determination. The objection by the 1st Respondent was therefore abandoned.

10. I have considered the detailed submissions filed herein by the respective parties and the authorities I was referred to. The two objections and the petitioner's application aforesaid raise two major issues for my consideration. These are:-

i. Whether this Court has jurisdiction to entertain this suit; and

ii. If the answer to (i) is yes, whether the Petition herein raises a substantial question of law to require its reference to his Lordship the Chief Justice for appointment of a bench of three or five Judges for hearing and disposal.

11. Arising from the above, I will accordingly proceed to look at the issues as framed hereinabove, one after the other.

i. Whether this Court has jurisdiction to entertain this suit.

12. The locus classicus on jurisdiction is the celebrated case of Owners of the *Motor Vessel "Lillian S"* –vs- *Caltex Oil(Kenya) Ltd (1989) KLR 1* where Justice Nyarangi of the Court of Appeal stated that:-

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

13. Commenting on the decision in Owners of Motor Vessel "Lillian S"(above), the Court of Appeal in *Karisa Chengo & 2 Others –vs- Republic (Criminal Appeal Nos. 44, 45 and 76 of 2014 (2015)eKLR* had this to say:-

"Assumption of jurisdiction by the Courts is a subject regulated by the Constitution, by statute law and by principles laid down in judicial precedent. The classical decision in this regard is the Owners of Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1....."

The 'Lillian S' case establishes that jurisdiction flows from the law, and the recipient Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity....."

14. In the Petition filed herein, the Petitioner seeks a number of declarations to be made in regard to a Power Purchase Agreement (PPA) which the Petitioner states was and/or appears to have been signed between the 1st Respondent and Amu Power Company Ltd (the 2nd Respondent) for the building of a proposed 1,050 MW coal fired electric generating unit (power plant) in Lamu County.

15. It is the Petitioner's case that the alleged 25 years agreement commits Kenyan taxpayers to pay about Kshs 36 billion per year as capacity charges for the plant. According to the Petitioner the Lamu Coal Powered Power Plant is a scandal of monumental proportions that does not make sense as there is already an overproduction/oversupply of electricity in Kenya. The Petitioner is therefore aggrieved that:-

a. The affected members of the public were not given adequate notice and the opportunity to participate in the consideration of the impugned Power Purchase Agreement yet Section 5(2) of the Statutory Instruments Act requires a regulation making authority to consult and draw on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and to ensure that persons likely to be affected by the proposed statutory instrument have an adequate opportunity to comment on its proposed content; and

b. A draft of the impugned Power Purchase Agreement ought to have been published and subjected to public participation so that the affected members of the public could be given adequate opportunity to meaningfully and qualitatively participate in its consideration.

16. In addition, the Petitioner is aggrieved that the mandatory environmental impact assessment reports issued under the Environmental Management and Co-ordination Act (EMCA), and upon which the State licences development projects, are inadequate for purposes of protecting the rights and fundamental freedoms enshrined in Article 42 of the Constitution of Kenya.

17. The Petitioner is further aggrieved that, whereas the National Environment Tribunal lacks the jurisdiction under the Constitution to entertain proceedings filed pursuant to Articles 3(1), 22 and 258 in defence of Articles 42, 69, 70 and 71 of the Constitution, the Tribunal continues to act as it did under the repealed Constitution as the Court of first instance for challenging decisions of NEMA to licence projects which impacts on the enjoyment of rights and fundamental freedoms protected by Article 42 of the Constitution.

18. The Petitioner avers that the Tribunal's purported jurisdiction over Constitutional proceedings is expressly ousted by Article 70 as read with Articles 22, 23, 42 and 258 of the Constitution, and Section 7(1) of the Sixth Schedule to the Constitution.

19. Accordingly and in addition to the declarations sought, the Petitioner invites this Court inter alia to quash the Environmental Impact Assessment Licence for the Lamu Coal Fired Power Plant, the Electricity Generating License Plant as well as the Power Purchase Agreement.

20. It is however the Respondents case that the Petition as filed together with the Application are improperly before the Court and that the Court therefore lacks jurisdiction to entertain the same.

21. Section 26 of the Energy Act states that:-

“A person aggrieved by a decision of the (Energy Regulatory) Commission may appeal to the Tribunal within 30 days of the decision.

Provided that the Tribunal may entertain an appeal after the expiry of the thirty day period if it is satisfied that there was sufficient cause for not filing it within that period.

22. Section 107 of the Energy Act on the other hand provides that:

“Where under this Act the provision is made for appeals from the decisions of the Commission, all such appeals shall be made to the Energy Tribunal, in accordance with the provisions of this part.”

23. The said Energy Tribunal is established under Section 108 of the said Act as follows:-

“ For the purpose of hearing and determining appeals in accordance with Section 107 and of exercising the other powers conferred on it by this act, there is established a tribunal to be known as the Energy Tribunal, hereinafter referred to as the “Tribunal.”

24. From a perusal of the record herein and more so the Affidavit of Cyrus Kirima sworn on 26th July 2017 on behalf of the 2nd Respondent in reply to the Petitioner's main Motion dated 30th June 2017, it emerges that there is pending before the National Environment Tribunal (the 4th Interested party) a dispute filed by Save Lamu (1st Interested Party) against the 2nd and 7th Respondents (being Tribunal Appeal No. NET/196/2016) wherein the 1st Interested Party challenges both the Environment Impact Assessment Study(ESIA Study) as well as the Environment Impact Assessment Licence(EIA Licence) issued in regard to the Lamu Coal Fired Plant Project.

25. It is further clear from the record that following the filing of the said appeal before the 4th Interested Party, a STOP order was issued against the Project and the status quo was thereby maintained pending the hearing and determination of the Appeal.

26. From the affidavit of the said Cyrus Kirima, it is further clear that the 1st Interested Party lodged an objection against the issuance of the Electric Power Generation Licence by the Energy Regulatory Commission (3rd Respondent) to the 2nd Respondent and the same was dismissed by the 3rd Respondent vide a decision published in the Kenya Gazette Notice No. 1256 dated 24th February 2017. No appeal was filed against the decision to the Energy Regulatory Tribunal within the 30 days period as stipulated within Section 26 of the Energy Act and the Tribunal proceeded to issue an Electric Power Generating Licence Ref. No. G 101 17 dated 3rd March 2017.

27. It is the Respondents case that the Petitioner has never challenged the proposed Project either before the 3rd Respondent or the 4th Interested Party.

28. According to the Petitioners however, the Constitution at Section 7 (1) of the Sixth Schedule clearly states that all laws in force continue in operation but must be read in conformity with the Constitution. In this regard, all laws like the Environmental Management and Co-ordination Act (EMCA) must be read in accord with the Constitution.

29. The Petitioner submitted that under Articles 23 and 258 of the Constitution, any threats to his rights can only be litigated under this Court. It is his case that Article 42 of the Constitution entitles him to a clean and healthy environment and that this Petition challenges the jurisdiction of Tribunals to deal with matters in the Bill of Rights.

30. The Petitioner questioned the impartiality of tribunals citing the appointment process which he termed as skewed and meant to allow the Executive to have its way. Such tribunals, the Petitioner argued have no capacity to interpret and apply the Constitution.

31. He likened the Preliminary Objections filed herein to an attempt to oust his rights under Article 70 of the Constitution which entitles him to approach this Court when his right to a clean and healthy environment is threatened or violated. It was the Petitioner's case that none of the Prayers in the Petition can be granted by the Tribunal.

32. The Petitioner was supported by both the 1st and 2nd Interested Parties who equally argued that the National Environment Tribunal has no jurisdiction to deal with the issues raised herein.

DETERMINATION

33. From the pleadings filed herein, it is apparent that the dispute herein arose from the issuance of an Environmental Impact Assessment (EIA) Licence as well as an Environmental & Social Impact Assessment (ESIA) Study issued in regard to the Lamu Coal Fired Power Plant Project. As it were the 1st Interested Party herein lodged an objection to the issuance of an Electric Power Generation Licence by the Energy Regulatory Commission (the 3rd Respondent) to the 2nd Respondent herein. That objection was dismissed and no appeal was filed against the decision. The 1st Interested Party however lodged an appeal with the National Environment Tribunal (4th Interested Party) challenging the ESIA Study and EIA Licence which appeal remains pending determination by the Tribunal.

34. From the various reliefs sought by the Petition in both the Petition and the Notice of Motion dated 30th June 2017, the Petitioner is inter alia, challenging the following:-

i. The construction of the proposed 1050 MW Coal Fired Power Plant in the Manda Bay area of Lamu County by the 2nd Respondent;

ii. The validity of the ESIA Study dated 10th July 2016 prepared by the 2nd Respondent and submitted to the 7th Respondent as a precondition prior to the approval of the Proposed Coal Fired Power Plant;

iii. The EIA Licence dated 7th September 2016 issued by the 7th Respondent upon the ESIA Study to the 2nd Respondent to enable it to undertake the proposed Power Plant;

iv. The Electricity Generating Licence for the Lamu Coal Fired Power Plant issued by the 3rd Respondent; and

v. The Power Purchase Agreement (PPA) purported to have been signed between the 1st and 2nd Respondents.

35. The National Environment Management Authority (NEMA, the 7th Respondent) is in law mandated to issue an EIA Licence pursuant to Section 63 of the Environmental Management & Co-ordination Act No. 8 of 1999 (EMCA). Such a licence is issued to a Project proponent subject to compliance with certain requirements set out under Section 58 of EMCA which, among other things, require a proponent to a Project to prepare and submit for the 7th Respondent's approval an ESIA Study.

36. Section 125 of EMCA establishes the National Environmental Tribunal which Tribunal is tasked with inter alia resolving disputes arising from the issuance of a licence or permit pursuant to Section 129 of the Act which provides that:-

“129 (1) Any person who is aggrieved by:-

a. The grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or regulations made thereunder;

b. The imposition of any condition, limitation or restrictions on his licence under this Act or regulations made thereunder;

c. The revocation, suspension or variation of his licence under this Act or regulations made thereunder;

d. The amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

e. The imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder;

May within 60 days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

37. Section 30 of the EMCA provides that any person aggrieved by a decision or order of the Tribunal may within 30 days of such decision or order appeal against such decision or order to the Environment and Land Court.

38. On the other hand, the grant of the Electric Power and Generation Licence by the 7th Respondent is governed by the Energy Act (No. 12 of 2006). Section 28 thereof requires that an application for a licence or permit shall be made to the Energy Regulatory Commission (ERC- the 3rd Respondent) in the form and manner prescribed under the Act. Such a licence is granted upon the fulfilment of certain conditions set out under the Act.

39. From the record, it is apparent that the 3rd Respondent put out an advert in the Daily Nation and Taifa Leo Newspapers on 12th September 2016 notifying the public of an application by the 2nd Respondent for an Electricity Generation Licence. It is further apparent that the 1st Interested Party in response to the said advertisement lodged an objection. The said objection was heard and was dismissed thereafter by a decision made on 24th February 2017.

40. Section 26 of the Energy Act provides that:-

“A person aggrieved by a decision of the Commission may appeal to the Energy Tribunal within thirty days of the decision.

Provided that the Tribunal may entertain an appeal after the expiry of the thirty-day period if it is satisfied that there was sufficient cause for not filing it within that period.”

41. It would appear that upto the time of filing this Petition, no party, including the Petitioner had appealed against the 3rd Respondent's decision.

42. Based on the foregoing, the 3rd and 7th Respondent have challenged the jurisdiction of this Court to hear the matter. It is their submissions that the matter should have first been heard in the first instance by the National Environment Tribunal or the Energy Tribunal and hence both the Petition and the Application before me go against Section 26 of the Energy Act No. 12 of 2006 and Sections 129(1) and (2) and 130(1) of the Environmental Management and Coordination Act, Cap 387. In addition the 7th Respondent further submits that the Petition as filed goes against the provisions of Section 129(4) of the EMCA aforesaid.

43. It was however the Petitioners submissions as supported by the 1st and 2nd Interested Party that the nature of the Petition and the reliefs sought are beyond the scope of either of the Tribunals. It was their case that the jurisdiction of both Tribunals is limited while this Court has both the original and appellate jurisdiction. In this regard the Petitioners cited Article 22(1) of the Constitution which allows anyone to approach the High Court (and by extension this Court) to seek redress on a violation of the Constitution or where any right in the Bill of Rights is threatened with violation.

44. As was stated in *Patrick Musimba –vs- National Land Commission & 4 Others (2016) eKLR:-*

“...the State under Article 69 of the Constitution is enjoined to ensure sustainable development. (See also the preamble to the Constitution). The State is also to ensure that every person has a right to a clean and health environment. However physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a Constitutional and Statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (“the EMCA”) has laid out certain statutory safeguards to be observed when a person or the State initiates any physical development.

At the core is the Environmental Impact Assessment and Study which is undertaken under Section 58 of the EMCA and the regulations thereunder. Under Regulation 17, the Environmental Impact Assessment Study must involve the public. The inhabitants of any area affected by a physical development must be given an opportunity to air their views on the effects of any such development. After the Environmental Impact Assessment Study report is compiled, the same report must be circulated to the affected persons.”

45. In the matter before me, the Petitioner argues that the affected members of the public were not given adequate notice and opportunity to participate in the proposed 1050 MW Coal Fired Electricity Generating Plant set to be built in Lamu County. It is his further contention that the Environmental Impact Assessment Study Report, upon which the Environmental Impact Assessment Licence for the Plant was issued, was conducted by a conflicted expert hired by the proponent of the project.

46. From the material placed before me, it is apparent that the Government through the Ministry of Energy and Petroleum commenced the activities complained about herein way back in 2013 when the Requests for Expression of interests were first published. The Environmental and Social Impact Assessment Study was released for public comment in June 2016. By an advertisement in the Daily Nation and Taifa leo Newspapers, of 12th September 2016, the 3rd Respondent herein notified the public of the 2nd Respondent's application for an Electricity Generation Licence. In response to the said advertisement, only the 1st Interested Party submitted an objection to the 3rd Respondent on 20th October 2016. Thereafter a public hearing was held in Lamu on 6th December 2016 to hear the said objection. The said objection was after consideration dismissed as per the Gazette Notice published on 24th February 2017.

47. In view of the foregoing, it would appear that the Respondents by and large complied with the statutory framework established for a project of this nature. That being the case, the complaints raised by the Petitioner herein in my view ought to have been raised as an objection after the Public was notified of the application for the Licence through the advertisement in the Newspapers. Otherwise as the Court of Appeal held in *Republic –vs- NEMA Exparte Sound Equipment Ltd CACA No. 84 of 2010 (2011)eKLR*:-

“.....challenges to Environmental Impact Assessment Licences should be made to the National Environment Tribunal established for that purpose under Section 125 of the EMCA. Rather than come to this Court, the Tribunal should have been given the first opportunity and option to consider the matter. We agree with Mr. Gitonga for the 3rd Respondent that the Tribunal is the specialized body with the capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licences.”

48. In my view, the same reasoning must of necessity apply to an aggrieved party under Section 26 of the Energy Act. As the Constitutional and Human Rights Division of the High Court held in *Patrick Musimba –vs- National Land Commission & 4 Others(2016)eKLR*:-

“....where there is procedure for redress (for violations of Constitutional rights and freedoms) available elsewhere that redress must be pursued within the rubric provided. This Court must exercise restraint and first give an opportunity to the relevant bodies or State Organs to deal with the dispute as provided in the relevant statute. Such has been the gist of such cases like *The Speaker of the National Assembly –vs- Karume(2008)1 KLR 426*. In *Narok County Council –vs- Trans Mara County Council & Another, Civil Appeal No. 25 of 2000*, the Court of Appeal expressed itself as follows in this regard; Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his Statutory duty; it is where the Statute is silent on what is to be done in the event of a disagreement.... Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit..... If the Court acts without jurisdiction, the proceedings are a nullity...”

49. Accordingly, I am satisfied that in a case such as this one where the law provides for a procedure to be followed, the parties are bound to follow the procedure provided by the law before they can invoke the jurisdiction in this Court.

50. The contention by Mr. Omtatah, the Petitioner herein, that Tribunals cannot be independent given their mode of appointment was neither supported by evidence nor the law. In *Samson Chembe Vuko –vs- Nelson Kilimo & 2 Others (2016)eKLR*, the Court of Appeal citing other previous decisions on the subject observed that:-

“ It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed....This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes....It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a Statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159(2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation and traditional dispute resolution mechanisms. The use of the word “Including” leaves no doubt that Article 159(2) (c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear Constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the limited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner....

We are therefore satisfied that the Learned Judge did not err by striking out the appellant’s suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanism he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the Constitutional objective behind Article 159(2) (c) and the very *raison d’être* of the mechanisms provided under the two Acts...”

51. Accordingly and on the whole, I am satisfied that there is merit in the two Preliminary Objections and I uphold the same.

52. Consequently, I hereby strike out both the Petition and the Notice of Motion application dated 30th June 2017.

53. Each Party shall bear their own costs.

Dated, signed and delivered at Malindi this 21st day of March, 2018.

J.O. OLOLA

JUDGE