



**Legal & 2 others v Six Zero Zero Six Investment Limited & 7 others (Environment & Land Petition 2 of 2022) [2023] KEELC 20869 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20869 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT & LAND PETITION 2 OF 2022**

**AK BOR, J**

**OCTOBER 16, 2023**

**BETWEEN**

**RAMISON TUMBES LEGAL ..... 1<sup>ST</sup> PETITIONER  
KERESI MBATIA KITONGA ..... 2<sup>ND</sup> PETITIONER  
KEEN MARAI OLE SAITABAU ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SIX ZERO ZERO SIX INVESTMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT  
CONSERVATION EQUITY LIMITED ..... 2<sup>ND</sup> RESPONDENT  
COUNTY LAND REGISTRAR, LAIKIPIA COUNT ..... 3<sup>RD</sup> RESPONDENT  
COMMUNITY LAND REGISTRAR, LAIKIPAI COUNTY .... 4<sup>TH</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF LAIKIPIA ..... 6<sup>TH</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 7<sup>TH</sup>  
RESPONDENT  
JONATHAN KIPKORIR NTEERE ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioners, who are members of Il Ngwesi Community and live in Laikipia County filed this petition in court on 25/11/2022 regarding the land known as Laikipia/Il Ngwesi II/1 owned by the community, measuring approximately 8,675.5 hectares (ha). They pleaded that the Il Ngwesi Community was rich in indigenous culture that was inseparable from their environment, and that they were keen to preserve the integrity of their indigenous environment while engaging in legitimate



income generating opportunities for the community to reduce over reliance on livestock and promote conservation friendly eco-tourism.

2. They averred that the Il Ngwesi Community continues to experience the effects of severe drought and climate change generally, and has had to shift from over reliance on pastoralism to agriculture as one of the strategies to reduce the impact of drought and the unpredictable rain patterns. Further, that the community developed a holistic land use management approach which has the Il Ngwesi conservancy, a member of the Northern Rangelands Trust and which is divided into settlements and conservation areas to reduce the impact of drought with pastoralists being allowed into the conservation areas to graze their livestock during the dry season.
3. The Petitioners' claim is that on or about 6/12/2019, the officials of Il Ngwesi Community Land Management Committee negotiated and signed a lease agreement on behalf of the Il Ngwesi Community over a 200-acre portion of the land comprised in Laikipia/ Il Ngwesi /II/1 while giving the 1<sup>st</sup> Respondent exclusive tourism rights over part of the conservancy measuring 1,000 acres for 50 years without the Il Ngwesi Community ratifying the lease as required under the [Community Land Act](#). Additionally, they contended that the lease contravened the Il Ngwesi Community Land Constitution which limits the term of leases the community can enter into with investors to 20 years.
4. They averred that the lease grants the 1<sup>st</sup> Respondent the right to construct and maintain an airstrip and other buildings within the conservancy and to use the conservancy's natural water resources. The lease also allows the 1<sup>st</sup> Respondent to construct and maintain a fence around the portion of land within the conservancy which would effectively exclude the Petitioners and other members of the Il Ngwesi Community from using that part of their land. They contended that information regarding the lease was not provided to the community.
5. The Petitioners claimed that the 7<sup>th</sup> Respondent conducted an environmental impact assessment (EIA) and granted an EIA licence to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to commence construction on the community land without consultation or the public participation of the Il Ngwesi community which is likely to be affected by the proposed construction.
6. Contemporaneously with the filing of the petition, the Petitioners filed the application dated 22/11/2022 seeking conservatory orders to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their directors, employees, servants, agents or anybody working under them from taking control of, or occupying the 200-acre portion of land comprised in land reference number Laikipia/Il Ngwesi II/1 pending hearing and determination of the application and the petition. The Petitioners also sought to have the Honourable Chief Justice empanel a bench of three Judges to hear this petition.
7. When the matter came up on 25/11/2022, the court directed the Petitioners to serve the application for inter parties hearing on 20/12/2022. On 20/12/2022, parties addressed the court at length on what the status quo prevailing on the land at the time entailed. The court recorded that the status quo prevailing on the land was that the 1<sup>st</sup> Respondent had delivered building materials on the 200-acre parcel of land but had not commenced construction. The court directed that that position was to be maintained until 6/2/2023 when the court would issue further orders. Further, the court directed the 1<sup>st</sup> Respondent not to pay the annual rent to the community which was due, until it gave further directions.
8. The court fixed the application for conservatory orders for hearing on 6/2/2023 and directed parties to file and exchange responses and written submissions on that application. The prayer seeking to have the Honourable Chief Justice empanel a bench of three Judges to hear the petition was argued and vide the ruling dated 13/3/2023, this court declined to grant that application. The directions the court gave were that it would hear the preliminary objections before hearing the application dated 22/11/2022.



9. Upon serving the petition on the Respondents, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 6<sup>th</sup> Respondent and the 7<sup>th</sup> Respondents raised preliminary objections to the petition. The objection by the 7<sup>th</sup> Respondent firstly, is that the Petitioners are seeking a determination of the question of the Environmental Impact Assessment (EIA) licence and related issues in the wrong forum since under Section 129 (1) (a) of the Environmental Management and Coordination Act (EMCA), an applicant must approach the National Environment Tribunal (NET) through an appeal challenging the alleged grant or violations of the conditions of the EIA licence. Secondly, that following the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submission of the project report and approval, the issue was not ripe for determination by this court in exercise of its original jurisdiction of the environmental matter.
10. In a nutshell, the 7<sup>th</sup> Respondent's objection is that the Petitioners should first have litigated the issuance of the EIA licence before NET before approaching this court as a way of ensuring that the internal mechanisms for appeal or review and all remedies available under other written laws were first exhausted. It urged the court to strike out the petition on the basis that it violates Section 9 (2) and (3) of the Fair Administrative Actions Act.
11. The 6<sup>th</sup> Respondent's objection was that the court lacked jurisdiction to entertain the petition because it was filed without regard to the available statutory dispute resolution mechanisms thereby offending the doctrine of exhaustion. The 6<sup>th</sup> Respondent contended that the petition was a nonstarter, misguided and an abuse of the court process. Further, that it was not a proper party in the proceedings because no grievance was levelled against it and no relief was sought against it. It therefore urged the court to strike out the petition.
12. The objection by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is based on Section 129 of EMCA and Rule 3 of the National Environment Tribunal Rules of 2003 and is to the effect that the issue of the legality of the EIA licence was improperly before this court. In the grounds of opposition filed in court on 19/12/2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the Petitioners were disgruntled minority members of Il Ngwesi Community who were frustrating the benefits to the community at large on tourism revenue, employment and environmental incentives. They urged that the lease was negotiated through consultative meetings with all the community members and once approved, it was signed by the community leaders.
13. Before the court could hear the application for conservatory orders or dispose of the preliminary objections, the Petitioners brought the application dated 29/3/2023 under certificate of urgency seeking an injunction to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from continuing with the tendering process for construction works and materials relating to the development of the 200-acre portion of Laikipia/Il Ngwesi II/1 pending the hearing and determination of the application and petition. They sought conservatory orders to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their agents from commencing construction works on the 200-acre portion of land.
14. The application was made on the grounds that despite the orders for the maintenance of status quo being given by this court on 20/12/2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had through their directors and agents, commenced a series of tendering processes with a view to procuring construction works and materials for the development of the 200-acre portion of land which is the subject matter of the petition. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had procured structural engineering and wood science services from Harley Timber Engineering services at the consideration of Kshs. 12 million for the provision of design, fabrication and erection services to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the 200-acre portion of land. They added that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had been sending constructors to the site with a view to laying the ground works for the commencement of the project.



15. The Petitioners contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions threatened the preserved status of the 200-acre portion of land because suppliers had been invited to submit bids, prequalification had begun and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had made payment to the contractors. They contended that if the acts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were not halted they would render the petition nugatory and if the court were ultimately to determine the petition in their favour, then the court's decision would amount to pyrrhic victory.
16. Keresi Mbatia Kitonga swore the affidavit in support of the application dated 29/3/2023 and annexed copies of the Proposed Il Ngwesi Lodge Development for the 2<sup>nd</sup> Respondent, tender documents and the Contractors' prequalification assessment and Evaluation Scoring Matrix. He also exhibited evidence of the transfer of Kshs. 12 million to Harley Timber Engineering Services. He annexed photographs to support the claim that there were armed police officers and contractors inspecting the 200-acre portion of land.
17. Titus Muia swore the replying affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in opposition to the Petitioners' application dated 29/3/2023. He averred that he was one of the directors of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and was conversant with this matter. He deponed that the application was brought in bad faith to protract the matter unnecessarily, and contended that the Petitioners had not tendered any tangible evidence to show that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had breached the order for the maintenance of status quo made on 20/12/2022. He reproduced the order and stated that it was clear and unambiguous regarding the delivery of construction materials. He argued that the application was speculative and hypothetical while pointing out that the application dated 22/11/2022 did not raise any complaint on the tendering process and that there was no prayer to stop the tendering process. He contended that the Petitioners were now seeking to introduce new prayers which were not in the original pleadings.
18. Mr. Muia admitted that the 1<sup>st</sup> Respondent was in the process of prequalifying tenders which commenced in early March 2023 and clarified that the internal work on the tenders had been going on even before this matter was brought to court. He maintained that the Petitioners would not suffer any loss or damage as a result of the tendering process. He clarified that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had neither taken more building materials to the suit land after the court gave the order nor had they sent their servants or employees to visit the site with a view to laying ground works for the commencement of the project contrary to the allegations made by the Petitioners. He emphasised that the photographs exhibited by the Petitioners did not show any development or excavation works or timber being delivered to the site. He raised concern about the device used to capture the images and pointed out that the person who took the photographs was not named added onto the fact that the people appearing on the photographs were unknown. He urged that the photographs were inadmissible as evidence in this case.
19. He emphasised that there was no evidence to show that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had breached or were about to breach the orders issued by the court on 20/12/2022 for the maintenance of the status quo. He added that the Petitioners had not satisfied the conditions laid out in *Giella v Cassman Brown* (1973) E.A 358 to warrant this court's intervention. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were law abiding and would always uphold the authority of the courts. He reiterated that the 1<sup>st</sup> Respondent's internal mechanisms for evaluating tenders for the proposed project would neither affect the Petitioners nor the suit land and that even if the court were to allow the petition, the financial loss would not impact the Petitioners.



20. The court directed parties to file written submissions in respect of the application dated 29/3/2023 and the preliminary objections. The application would be argued between the Petitioners and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents only. Parties filed and exchanged submissions which the court considered.
21. The 7<sup>th</sup> Respondent submitted that it was established as a statutory body under Section 7 of EMCA and bestowed the mandate specified in Section 9 of that Act. It submitted that in the petition, the issue of construction plans and approvals and the EIA licence had been bundled up with the question of control of alleged community land and branded as a constitutional petition without supporting evidence. The 7<sup>th</sup> Respondent contended that this court was not the right forum in which the matter should be litigated and that the question of the EIA licence should be disregarded so that the Petitioners could approach the right forum to canvass that issue.
22. NEMA contended that the Petitioners were seeking a determination of the question of the EIA licence and related issues in the wrong forum since under Section 129 (1) (a) of EMCA the Petitioners should have lodged an appeal before NET challenging the grant of the licence or violation of the conditions of the EIA licence following the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submission of the project report and approval. It urged that the issue was not ripe for determination by the Environment and Land Court (ELC) in exercise of its original jurisdiction on environmental matters pursuant to Section 130 of EMCA.
23. Further, NEMA contended that the internal mechanisms or remedies available under other written laws should have been exhausted and argued that the petition or part of it should be struck out for violating Section 9 of the Fair Administrative Actions Act.
24. The 7<sup>th</sup> Respondent went on to add that under Section 129 (3) and (4) of EMCA, NET was empowered to issue conservatory orders or injunctive orders while exercising its mandate. Further, that NET's jurisdiction arose from the administrative actions of the Director General or NEMA which they submitted was of a judicial review nature in relation to the licensing powers of NEMA. It contended that the Petitioners were complaining about the EIA licence it granted pursuant to application reference number NEMA/EIA/PSR/29635 granted under approval licence number NEMA/EIAPSL/20733 which falls under the jurisdiction of NET, a remedy which the Petitioners had failed to exhaust. It submitted that Section 129 of EMCA was relevant to the extent that the Petitioners were challenging the exercise of NEMA's administrative powers.
25. NEMA stressed that this matter fell under Section 129 (2) of EMCA because any actions arising from its administrative actions should be heard by NET and not by this court. It implored this court to decline to entertain the petition. Further, it argued that inviting this court to entertain the petition was tantamount to asking it to look into the social issues surrounding the issuance of such licences which was akin to asking the court to usurp NEMA's powers to issue EIA licences and consider applications by parties seeking to undertake development activities or projects. The 7<sup>th</sup> Respondent urged this court to allow NET to exercise its powers in accordance with Section 129 of EMCA.
26. The 7<sup>th</sup> Respondent submitted that jurisdiction was everything without which a court of law or tribunal acted in vain and relied on the decision in *Republic v Transport Licensing Appeal Board & 2 others Ex-parte MNGN Sacco Ltd* [2017] eKLR where the court stated that jurisdiction could not be granted by craft or consent of the parties because it was a creature of legal or constitutional instrument; and that where it was exercised by a tribunal or judicial body which did not possess it, the body is said to have acted in excess of its jurisdiction or ultra vires.
27. The 7<sup>th</sup> Respondent cited *Kibos Distillers Limited & 4 Others v Benson Ambuti Adegwa & 3 Others* [2020] eKLR where the Court of Appeal found that the learned judge of the ELC erred in deciding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the



- jurisdiction of NET and the National Environment Complaints Committee (NECC). Further, that a party or litigant could not be allowed to confer jurisdiction on a court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings.
28. The 7<sup>th</sup> Respondent also cited *United Millers Limited v Kenya Bureau of Standards & 5 Others* [2021] eKLR while urging that the Supreme Court had determined that even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to the relevant persons, bodies, tribunals or other quasi-judicial authorities and organs to deal with the dispute as provided in the relevant parent statute.
  29. The 7<sup>th</sup> Respondent submitted that its preliminary objection raised a pure point of law and that there were no facts in contention because the Petitioners were challenging the grant of EIA licence by it to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It cited decisions supporting the position that a preliminary objection should raise a point of law which must not be blurred with factual details likely to be contested and which require proof through processes of evidence. Further, that the objection is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.
  30. The 6<sup>th</sup> Respondent submitted that it was improperly joined to these proceedings and sought to be removed from the petition. It argued that there was no nexus showing why it was made a party to the petition and that no reliefs were sought against it.
  31. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that this court lacked jurisdiction to entertain this petition pursuant to Section 129 (1) of EMCA and argued that the Petitioners should first have approached NET established under Section 125 of EMCA, which had the original jurisdiction to entertain and determine the dispute. They urged that the Petitioners had not adhered to the doctrine of exhaustion of remedies.
  32. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on Section 129 of EMCA and Rule 3 of NET Procedure Rules, 2003. They emphasised that the doctrine of exhaustion had been hackneyed before the court time and again. They submitted that where other sufficient and adequate avenues or fora to resolve a dispute exist, a party ought to pursue those avenues or fora and not invoke the court process. Further, that the Supreme Court held in *Kibos Distillers Limited and 4 Others v Benson Ambuti Adegga & 3 Others* [2020] eKLR that matters touching on the validity of EIA licences could be sufficiently handled by NET or NECC and that they should only find their way to court on appeal. They contended that the 7<sup>th</sup> Respondent exercised its legal mandate when it issued the EIA licence to them in accordance with the law and that no person had challenged the grant of the EIA licence as stipulated in Section 129 of EMCA.
  33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on *Papinder Kaur Atwal v Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 in which Lenaola J (as he then was) remarked that *the Constitution* was a solemn document and should not be a substitute for remedying emotional personal questions or mere control of excesses within administration processes. The Judge noted that not every pain could be addressed through the Bill of Rights or allegations of its violation.
  34. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were emphatic that they had not breached the orders for maintenance of status quo as the Petitioners' contend. They urged that there was no evidence to suggest that they had breached the orders made on 20/12/2022 to warrant the injunctive orders which the Petitioners seek. Regarding the photographs, they contended that the legal requirements under Section 106 (B) of the *Evidence Act* on admissibility of photographs including the need for a certificate. Further, they pointed out that the source of those photographs was not disclosed.



35. In any event, they contended that the impugned exhibits neither showed delivery of materials for construction on the suit land, nor construction works being undertaken on the site that would imply breach of the court orders for the maintenance of status quo. They invited the court to be guided by the principles laid down in *Giella v Cassman Brown* and contended that no prima facie case had been established with a probability of success. Additionally, that the Petitioners had not shown how they stood to suffer irreparable injury if the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not curtailed from carrying on the procurement or prequalification of contractors.
36. On the limb dealing with the balance of convenience, they submitted that it tilted in their favour because granting the orders sought would open the floodgates for similar applications to be brought at the whim of the Petitioners, which they argued would delay the expeditious determination of this petition. They urged this court to decline to grant the orders sought in the instant application because it had already made orders for the status quo to be maintained. They sought to have the application dismissed with costs awarded to them.
37. Regarding the application dated 29/3/2023, the Petitioners submitted that through their directors and agents, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had commenced the tendering process with a view to procuring construction works and materials to commence construction on the suit land. Further, that the contractors had visited the site in what the Petitioners believed to be an assessment of the site in readiness to commence development of the land in dispute. The Petitioners wondered whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were oracles who could foretell that the final settlement of this petition would be in their favour which is why they were acting in a manner that suggests that the continued prosecution of the petition did not impede their interest in the suit land.
38. They submitted that it must be borne in mind that the petition raises issues of illegal and irregular registration of the lease instrument which purports to transfer the proprietary rights in the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. They added that the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents placed the inherent authority of the court at cross roads. They went on to argue that the order for the maintenance of status quo not only precluded the Respondents from actual interference with the preserved status of the suit property, but that it also precluded them from doing anything that had a direct nexus to the preserved status of the suit property. They emphasised that initiating the tender process and prequalification of suppliers with a view to procuring materials to develop the suit land showed their attitude towards the Petitioners and contempt towards the court.
39. The Petitioners relied on decisions on the prerequisites for the grant of injunctive relief and argued that having filed a petition which is awaiting determination by this court vide which they seek to protect certain rights, any attempt or arrangement of anything on the suit property contrary to the court orders threatened their rights and those of the Il Ngwesi community members over the suit land.
40. They expressed fear that if the orders sought were not granted, the Respondents by their very conduct, would take full control of the suit land before the conclusion of this matter. That if the orders were not granted, the petition would be rendered nugatory because the proprietary rights in the suit land and the attempted transfer of those rights to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents formed the foundation of the petition. Further, that if the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were to proceed to deal with the suit land and the petition is determined in their favour, it would amount to nothing.
41. They contended that granting the conservatory orders would serve the interest of the public particularly the Il Ngwesi community members who are closely monitoring the matter and that when they see contractors on site it upsets their expectations with respect to the court process. The Petitioners



- were apprehensive that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents may commence actual development of the suit land and urged the court to grant the conservatory orders.
42. They relied on Centre for Rights Education and Awareness (CREAW) & Another v Speaker of the National Assembly & 2 Others (2017) eKLR where the court stated that conservatory orders would normally be issued where there is a real impending danger to violation of *the Constitution* or fundamental rights and freedoms with the consequence that a petitioner or the public at large would suffer prejudice unless the court intervened and granted the orders.
  43. With regard to the preliminary objections, the Petitioners invited the court to take note of the fact that the existence of the contested lease agreement was not denied by the Respondents. They claimed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had annexed to their pleadings a fundamentally different lease instrument from the duly registered lease. Additionally, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had provided the court a lease instrument executed by different parties and different times which in their view confirmed the illegalities and constitutional violations complained of thus requiring proper investigations by the Petitioners.
  44. The Petitioners submitted that they brought the petition under Article 22 with the aim of addressing questions of violations of *the Constitution* and threatened violations of fundamental rights and freedoms under the Bill of Rights. That as such, the petition did not only raise questions relating to the EIA licence. They added that in as much as the petition sprang from a disputed lease instrument, it exposed violations of *the Constitution* under Articles 10, 27, 40, 42, 47, 63, and 69.
  45. The Petitioners pointed out that the reliefs they seek include a declaration of rights under Article 23(3) (a) of *the Constitution* and that such reliefs could only be granted by this court and not any other fora suggested by the Respondents. They pointed out that the petition was anchored on Articles 42 and 70 of *the Constitution* and Section 23 of the *Climate Change Act*, which not only give this court jurisdiction to hear and determine the petition but also clothes the Petitioners with the requisite locus standi to file the petition before this court.
  46. They contended that both Article 70 of *the Constitution* and Section 23 of the *Climate Change Act* empowered them to apply to this court for redress where it is alleged that a person had acted in a manner that has or was likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change. They pointed out that paragraphs 74 and 105 of the petition brought out the import of Article 42 and 70 of *the Constitution* and Section 23 of the *Climate Change Act*. They reiterated that what was before this court was a petition alleging violations of rights in *the Constitution* and that the objections raised by the Respondents were premised on a misunderstanding of the issues raised in the petition.
  47. They submitted that once a petitioner approached the court under the auspices of Article 70 (1), the court automatically assumed jurisdiction because *the Constitution* does not provide any other forum for adjudication of matters arising from Articles 42 and Article 70 of *the Constitution* which is also buttressed by Section 23 of the *Climate Change Act*. They maintained that this court had the requisite jurisdiction to hear determine and the violations complained of.
  48. The Petitioners relied on Attorney General & 2 Others v Okiya Omtata Okoiti & 14 Others [2020] eKLR where the Court of Appeal held that the jurisdiction of the specialised courts to interpret and apply *the Constitution* was limited to constitutional issues which arose in the context of disputes on employment and labour relations, or the environment and land matters.
  49. Further, that whereas both the *Community Land Act* and EMCA provided avenues for alternative dispute resolution in the first instance, matters of constitutional violations and outright illegalities



- could not be mediated upon. They went on to urge that where questions of constitutional contraventions and illegalities were raised such as in the petition before court, such questions automatically overrode all other considerations including subjecting a matter to alternative dispute resolution.
50. On this point, they relied on *County Government of Isiolo & 10 Others v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 Others* [2017] eKLR where the court held that a legal question could not be the subject of alternative dispute resolution and that once a question of illegality was raised, it overrode all other considerations such as subjecting the matter to alternative dispute resolution. Further, that it befell the court in which such an issue was raised to deal with the question of illegality before any other consideration.
51. The Petitioners argued that it should not be lost to the Respondents that the crux of the petition is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents illegally negotiated and ratified the impugned lease agreement outside the legal framework and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents registered the lease in violation of Articles 10(2), 40 and 63 of *the Constitution*. That without proof of public participation, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not have the legal mandate to register the lease over the suit property, which they contend was an outright violation of *the Constitution*. They added that such illegalities and constitutional contraventions were questions of law that could not be subjected to alternative dispute resolution mechanisms. They maintained that the court had jurisdiction and urged it to dismiss the objections.
52. The main issues for determination are:- firstly, whether this court has jurisdiction to hear the petition or whether the dispute relating to the EIA licence falls within the ambit of NET's jurisdiction; secondly, whether the Petitioners should have exhausted the legal avenues for dispute resolution under the *Community Land Act* before filing the petition in court; thirdly, whether the 6<sup>th</sup> Respondent was improperly joined in these proceedings; and lastly, whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents breached the orders this court issued on 20/12/2022 vide which it directed the parties to maintain the status quo which was prevailing on the suit land on .
53. Looking at the petition before this court, it seeks to have the 3<sup>rd</sup> and 4<sup>th</sup> Respondents provide the community land register and details relating to the registration of the lease over the suit land to the 1<sup>st</sup> Respondent; production by NEMA of materials and documentation regarding the process followed in granting the EIA licence and construction approvals to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; and a declaration that the registration of the lease over the suit property violated Articles 40 and 63 of *the Constitution* regarding the protection of the Il Ngwesi Community's right to property. Further, the Petitioners seek a declaration that the activities which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents propose to undertake on the 200-acre portion of land constitutes a threat to their rights and those of the Il Ngwesi Community to a clean and healthy environment under Article 42 of *the Constitution* and Section 23 of the *Climate Change Act*. They also seek orders for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to vacate the 200-acre portion of land owned by the Il Ngwesi Community.
54. At the outset, it is necessary to ascertain the mandate of NET under the law vis-à-vis that of this court under *the Constitution* and other laws. NET is established by Section 125 of EMCA. Upon a written appeal being made to it in relation to EMCA, NET is mandated to inquire into the matter and make an award, orders, decision or give directions on the appeal and notify the parties concerned, NEMA or its committee as the case may be.
55. Section 129(1) gives the nature of the appeals which may be made to NET. Any person aggrieved by the grant, or the refusal to grant, or the imposition of conditions on the grant of a licence or permit under EMCA may within 60 days of the date of the occurrence of the event which that person is dissatisfied with, appeal to NET in the manner prescribed by NET. Where it is not expressly stated in EMCA and



- the Act empowers the Director General of NEMA, NEMA or its committees or its agents to make decisions, such decisions may be subject to an appeal to NET in accordance with NET's established procedures pursuant to Section 129(2) of EMCA.
56. The powers bestowed upon NET when dealing with appeals under Section 129(3) are that it may confirm, set aside or vary the decision in question; it may exercise any of the powers which NEMA should have exercised in the proceedings the appeal relates to; make such other orders including orders to enhance sustainable development and orders for costs; and it may also make orders for maintaining status quo until the appeal is heard. NET is empowered by Section 129(3) (e) to review its own orders where it had confirmed, set aside or varied a decision if satisfied on an application being brought by any party. Section 130 gives a party aggrieved by NET's decision the right to appeal to the ELC within 30 days of the date of the decision.
  57. Part VI of EMCA deals with integrated environmental impact assessment. Section 58 gives the procedure on how an application for approval, permit or licence is to be made by a proponent of a project before financing, commencing or carrying out the activities set out in the second schedule to EMCA. That section deals with the whole gamut of how the application for EIA is to be made to NEMA and gives the powers of NEMA and the experts to be involved, among other provisions. Upon receipt of the EIA study report, NEMA is required by Section 59 to cause the publication of a notice giving details of the project in at least two newspapers circulating in the area of the project and over the radio. The notice should give a summary of the description of the project, its location, where the EIA assessment study report may be inspected and the time within which oral or written comments may be made. The comments are to be made within 60 days but NEMA has the power to extend the time to afford reasonable opportunity to an applicant to submit comments on the EIA report.
  58. NEMA's preliminary objection is technically premised on Section 129 of EMCA following its exercise of the powers under Part VI of EMCA. NEMA is basically arguing that its grant of the EIA licence to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to develop the project and construct an airstrip within the Il Ngwesi conservancy should have been challenged before NET under Section 129 of EMCA. An appeal to NET under Section 129 (1) of EMCA should have been lodged within 60 days of the date NEMA granted the licence to the 1<sup>st</sup> Respondent. NEMA does not disclose when it granted the EIA licence to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which makes it difficult to determine if the Petitioners are still within time to lodge an appeal under Section 129 (1) of EMCA.
  59. NET has held in various decisions including in *David Awori & 2 Others on behalf of Gigiri Village Association v Director General (NEMA) & 2 Others* [2018] eKLR that the period for challenging the grant of an EIA licence by NEMA under Section 129(1) cannot be extended. Challenges to the grant of EIA licences by NEMA can only be taken up under Section 129(1) of EMCA. Previously, it was unclear under what provision such challenges could be taken but the position was clarified by the amendments made to EMCA in 2015.
  60. If this court were to agree with NEMA that the Petitioners should first have lodged an appeal with NET, the Petitioners were to appeal to NET against the grant of the EIA licence to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents at this point, their appeal would be summarily dismissed because it would have been filed outside the 60-day period stipulated by Section 129(1).
  61. Section 59 of EMCA requires NEMA to publish a notice of a proposed project in the Gazette, at least two newspapers circulating in the area of the proposed project and over the radio. NEMA is also required to put a summary of the report on its website. A critical question to ask here is, would the members of Il Ngwesi community, who practice the pastoralist way of life and some of whom are illiterate, be said to have had notice of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' proposed project on the Il Ngwesi



conservancy merely because it was published in the Kenya Gazette, newspaper and put on NEMA's website? That may not be the case.

62. Where a party wishes to challenge the grant of an EIA licence by NEMA for the development of a project on grounds that the project may be harmful to the environment or for the protection and conservation of the environment, and such party learns of the grant of the licence or approval more than 60 days after the licence or approval was issued, the time limit of 60 days for challenging the grant by NEMA of EIA licences and approvals for development before NET under Section 129(1) of EMCA is contrary to the obligations *the Constitution* imposes on the State under Article 69(1) (g) to eliminate processes and activities that are likely to endanger the environment. The time limit in Section 129 (1) deprives a person of components of the right to a clean and healthy environment and curtails the enforcement of environmental rights under Articles 42 and 70 of *the Constitution*.
63. Article 69 (1)(f) imposes on the State the duty to establish systems of EIA, environmental audit and monitoring of the environment as one of the State's obligations in respect of the environment. Section 129 (1) of EMCA therefore needs to be amended to align it with Articles 42 and 69 so that it can give effect to the realisation of all the components of the right to a clean and healthy environment enshrined in *the Constitution*.
64. The Petitioners relied on Section 23 of the *Climate Change Act* which deals with the enforcement of rights relating to climate change and allows a person to apply to the ELC pursuant to Article 70 of *the Constitution* if they allege that a person has acted in a manner that has or is likely to affect efforts towards mitigation and adaptation to the effects of climate change. The court notes that NEMA is required to integrate climate risk and vulnerability assessment into all forms of assessment and to seek the technical advice of lead agencies. NEMA has to give effect to this provision and the *Climate Change Act* in its entirety when it is discharging its mandate under EMCA especially when issuing EIA licences and approvals for development to ensure the proposed projects do not hamper but rather enhance efforts towards mitigation and adaptations to the effects of climate change.
65. Part 3 of chapter four of *the Constitution* deals with specific application of rights at Article 56 requires the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life, and that they develop their cultural values and practices. Further, that they also have reasonable access to water, health services and infrastructure. The Petitioners who are members of the Il Ngwesi community fall within the bracket of minorities and marginalised groups, hence this specific constitutional provision would apply to them and the State which acts through entities like NEMA, is required to be sensitive to this provision and to give effect to this constitutional imperative.
66. EMCA came into force on 14/1/2000 and has had several amendments made to it. With the promulgation of *the Constitution* in 2010, the landscape of environmental law in Kenya changed significantly with *the Constitution* giving prominence to the environment by mentioning respect for the environment as our heritage and our determination to sustain it for future generations in the preamble, and by dedicating part 2 of chapter five to the environment and natural resources. *The Constitution* introduced the right to a clean and healthy environment for every person to the Bill of Rights.
67. When discharging its mandate under the law, NEMA is bound by the national values and principles of governance set out in Article 10 when it is applying or interpreting *the Constitution* or EMCA or when it is making or implementing public policy decisions. *The Constitution* gives a plethora of the values and principles that include the rule of law, democracy and participation of the people, human dignity, equity, inclusiveness, human rights, protection of the marginalised, good governance, integrity, transparency and accountability and sustainable development.



68. Turning to the jurisdiction of the ELC, Article 23 of *the Constitution* grants the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights. Article 165 which establishes the High Court expressly divests the High Court of jurisdiction with respect to matters falling within the jurisdiction of the courts contemplated in Article 162 (2) at sub-article 5 (b). Pursuant to Article 162(2), Parliament enacted the *Environment and Land Court Act* which established the ELC and through Section 13 of the ELC Act, clothed it with the original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title to land in accordance with Article 162(2)(b) of *the Constitution* as well as those under the ELC Act or any other written law relating to the environment and land. The ELC has powers under Section 13 (7) of the ELC Act to grant interim or permanent preservation orders including injunctions, prerogative orders, award of damages, compensation, specific performance, restitution, declaration or costs.
69. Based on Articles 23(1), read with Articles 165(5)(b) and Article 23(3) of *the Constitution*, the ELC is the court mandated to hear and determine applications for redress of a violation or infringement of, or threat to the right to a clean and healthy environment enshrined in Article 42 and may grant reliefs including a declaration of the rights, injunction, conservatory orders as well as a declaration invalidating a law that denies, violates, infringes or threatens the right to a clean and healthy environment which is not justified under Article 24. The ELC may also make an order for compensation and an order for judicial review in proceedings for the enforcement of the right to a clean and healthy environment.
70. Article 162 of *the Constitution* sets out the system of courts in Kenya and describes subordinate courts at sub-article (4) as those courts established under Article 169 or those established by Parliament. Subordinate courts are defined at Article 169 as the Magistrates courts, Kadhi's courts, Court Martial and any other court or tribunal which Parliament may establish but not the courts established under Article 162 (2) of *the Constitution*.
71. NET therefore falls under the category of subordinate courts envisaged by Article 169 (1)(d) of *the Constitution* and exercises the jurisdiction, functions and powers conferred on it by EMCA. NET's jurisdiction under Sections 126 and 129 of EMCA is limited to appeals made to it by any party or a referral by NEMA to it on any matter relating to EMCA. Going by the jurisdiction bestowed on NET and the powers it can exercise upon considering the appeals made to it, it lacks the jurisdiction to handle applications based on allegations that the right to a clean and healthy environment protected by Article 42 has been denied, violated, infringed or threatened. The orders or directions to be made by the ELC pursuant to Articles 23 and 70(2) of *the Constitution* fall outside the purview of NET's powers under EMCA.
72. In determining the court contemplated by Article 70 of *the Constitution* to hear applications for the enforcement of the right to a clean and healthy environment, it is important to consider the jurisdiction conferred on magistrates. Article 23(2) of *the Constitution* enjoined Parliament to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights. Parliament enacted Section 8 of the Magistrates Court Act, Act No. 26 of 2015 (MCA).
73. It is worthwhile to reproduce Section 8 of the Magistrates Court Act.
- “ Claims relating to violation of human rights
1. Subject to Article 165(3)(b) of *the Constitution* and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and



determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

2. The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of *the Constitution*.
3. Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.
4. The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's court under this section."

74. Article 165 (3) (b) of *the Constitution* reads as follows:

"Subject to clause (5), the High Court shall have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened."

Article 165 (5) divests the High Court of jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court and the courts contemplated in Article 162(2) which is the ELC and the Employment and Labour Relations Court.

75. Despite Article 23(2) of *the Constitution* envisaging that Magistrates would hear and determine applications for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights, when Parliament enacted the Magistrates Court Act, it limited the power of Magistrates to only determine applications relating to the right to the non-limitation of the freedom from torture and cruel, inhuman or degrading treatment or punishment, and freedom from slavery or servitude.
76. Section 8(3) of MCA effectively strips magistrates of the jurisdiction to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement or denial of a right or fundamental freedom in the Bill of Rights. If Magistrates cannot award compensation, it is tautological to stipulate in Section 8(1) of the MCA that their power to determine claims for violation of fundamental rights and freedoms is subject to the pecuniary jurisdiction under Section 7 of that Act.
77. Looking at the preceding paragraphs, there is no doubt that a simpler way of drafting would make it clear and straightforward what jurisdiction Parliament granted to Magistrates in terms of dealing with allegations of violations of human rights and fundamental freedoms enshrined in *the Constitution*.
78. It is evident from a reading of Section 8 of the MCA that the magistrates' courts lack jurisdiction to hear and determine applications relating to allegations that the right to a clean and healthy environment has been or is likely to be denied, violated, infringed or threatened and to provide compensation for any victim of a violation of the right to a clean and healthy environment.
79. In opposing the preliminary objections, the Petitioners argued that their claim was grounded on Articles 22, 42 and 70 of *the Constitution*. They cited various articles of *the Constitution* in support of their petition including Articles 10, 20, 27, 28, 35, 40, 42, 47, 63, 69 and 70. They also relied on the provisions of the *Community Land Act* and the *Climate Change Act* and gave particulars of alleged violations of their constitutional rights and fundamental freedoms under Articles 35, 40 and 42 of *the Constitution*.



80. Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment. This incorporates the following components:
- i. a person's entitlement to a clean and healthy environment;
  - ii. the right to have the environment protected for the benefit of present and future generations through legislative and other measures and in particular to have the State meet its obligations under Article 69;
  - iii. the right to have the obligations relating to the environment under Article 70 fulfilled. This entails the right to apply to court for redress where a person alleges that the right to a clean and healthy environment guaranteed by Article 42 has been, is being, or is likely to be denied, violated, infringed or is threatened. Notably, this is in addition to any other legal remedies available in respect to the same matter;
81. Section 3 of EMCA expounds on this right. It stipulates that every person in Kenya is entitled to a clean and healthy environment in accordance with *the Constitution* and relevant laws and has the duty to safeguard and enhance the environment. That entitlement includes access by any person in Kenya to the various public segments of the environment for recreational, educational, health, spiritual and cultural purposes. Every person is required to cooperate with State organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources. This means that the State organs should take the lead in protecting and conserving the environment and a person's duty is to cooperate with the State organs including NEMA, the body charged with implementation of all policies relating to the environment by Section 9 of EMCA.
82. Article 69 of *the Constitution* sets out the obligations in respect of the environment and places a heavier burden on the State while requiring every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
83. Article 69 enjoins the State to discharge various obligations including to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources and to ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes likely to endanger the environment and utilise the environment and natural resources for the benefit of the people of Kenya.
84. Article 70 grants the right to a person alleging the denial or likely denial of, or violation or infringement or threat to the right to a clean healthy environment to apply to a court for redress and other legal remedies available. The court may make any order or give directions the court considers appropriate to prevent, stop or continue any act or omission that is harmful to the environment; to compel a public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; to provide compensation for any victim of a violation of the right to a clean and healthy environment. Article 70(3) buttresses the right to approach a court by stipulating that the applicant moving the court regarding violation of the right to a clean and healthy environment need not demonstrate that any person has incurred loss or suffered injury.
85. Section 3 of EMCA goes further to list the orders, writs or directions the ELC may give when dealing with claims alleging violation of the right to a clean and healthy environment, and set out the principles of sustainable development which are to guide the ELC in the exercise of its jurisdiction in proceedings



- under Section 3(3) of EMCA. Section 3 of EMCA makes it clear that it is the ELC mandated to hear and determine disputes touching on the entitlement to a clean and healthy environment.
86. The Respondents relied on *Kibos Distillers & 4 Others v Benson Ambuti Adegwa & 3 Others* [2020] eKLR in which Asike Makhandia, JA, began his judgment by affirming the right to a clean and healthy environment guaranteed under Article 42 of *the Constitution* and asserted that he would not shy away from directing polluters of the environment to follow constitutional, statutory and regulatory norms. In the suit before the ELC, the petitioners sought declarations that their right to a clean and healthy environment guaranteed by Articles 42 and 43 of *the Constitution* had been violated; a declaration that the three respondents illegally acquired EIA licences for Kibos Sugar & Allied Factory; a permanent injunction to restrain the respondents from continuing with operations of their factories or milling sugar cane; a declaration that the failure by NEMA and the County Government of Kisumu to stop the degradation of the environment by Kibos Distillers Limited, Kibos Power Limited and Kibos Sugar & Allied Industries Limited was unconstitutional, illegal and contravened Section 108 of EMCA and Articles 3, 10 and 47 of *the Constitution*; and lastly, compensation for violation of their right to a clean and healthy environment guaranteed by Articles 43, 46 and 47 of *the Constitution*. Kibos Companies challenged the jurisdiction of the ELC to hear the matter and argued that the issues raised by the petitioners could only be channelled through a judicial review or NET or the NECC.
  87. The Court of Appeal faulted the ELC Judge for holding that where a claim was multifaceted a court had jurisdiction despite the existence of another forum, institution or agency that had been legislatively conferred jurisdiction to determine the matter. Further, that the Judge erred in law in finding that the ELC had jurisdiction over the matter simply because some of the prayers sought in the petition were outside the jurisdiction of NET or NECC. The court found that even if a court had original jurisdiction, that did not oust the jurisdiction of other competent organs with the legislative mandate to hear and determine a dispute.
  88. The Court of Appeal affirmed the dicta in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR on the point that where a clear procedure for the redress of a particular grievance was prescribed by *the Constitution* or a statute, that procedure should be strictly followed. The Court of Appeal stated that a court could not arrogate itself original jurisdiction simply because the claims and prayers in the petition were multifaceted.
  89. Regarding Section 129(3) of EMCA, the Appellate Court observed that the subsection conferred power upon NET to exercise any power which could have been exercised by NEMA or make orders it deemed fit, and that it was therefore an all-encompassing provision that conferred jurisdiction in the first instance on NET to consider the prayers in the petition. The Court observed that the key dispute before the trial court was whether the three petitioners were polluting the environment and whether their EIA licences were lawfully procured.
  90. When the petitioners lodged *Benson Ambuti Adegwa & 2 Others v Kibos Distillers Limited and 5 Others* [2020] eKLR in the Supreme Court the respondents challenged the jurisdiction of that Court to hear the appeal. The Supreme Court upheld the preliminary objections on the basis that pursuant to Article 163 (4)(a) of *the Constitution*, it could only exercise jurisdiction over issues involving the interpretation or application of *the Constitution* yet what was being challenged was the jurisdiction of the ELC to hear a matter which fell within the mandate of NET and the NECC pursuant to EMCA and not whether the ELC had determined issues pertaining to constitutional interpretation.
  91. The Supreme Court stated that the challenge was not on ELC's powers conferred by Articles 70, 165(3) or 258 of *the Constitution*, but whether it could adjudicate on the case presented to it pursuant to the provisions of EMCA. The Supreme Court noted that the ELC held that it had jurisdiction to hear



- and determine the petition by dint of Sections 129(1) and 130 of EMCA and not by dint of Article 162(2)(b) of *the Constitution* and Sections 4 and 13 of the ELC Act. The Supreme Court delved into the doctrine of judicial abstention which provides that although it may be vested with the requisite and sweeping jurisdiction to hear and determine certain cases presented before it for determination, a court should nevertheless exercise restraint and refrain from making such a determination if there were other appropriate legislatively mandated institutions and mechanisms.
92. The Supreme Court observed that the more favourable relief that the superior court should have issued was to reserve the constitutional issues on the right to a clean and healthy environment pending determination of the issue regarding the issuance of the EIA licences by NEMA to the 1<sup>st</sup> to 3<sup>rd</sup> respondents.
  93. The Supreme Court expressed the view that once the Court of Appeal had established that the ELC did not have jurisdiction, it should have issued appropriate remedies including remitting the matter to the appropriate institutions for deliberation and determination. The Supreme Court struck out the petition but stated that the petitioners were at liberty to pursue their claims at the appropriate forum taking guidance from its decision and the judgment of the Court of Appeal.
  94. The facts of this petition are distinguishable from those in the Kibos case. What was being challenged in the Kibos case was the issuance of EIA licences under EMCA while the main issues to be determined in this petition are whether the protection of the Il Ngwesi Community's right to property under Articles 40 and 63 of *the Constitution* and the Petitioners' right to a clean and healthy environment under Articles 42 and 69 of *the Constitution* have been violated or are threatened. A determination of the questions relating to the lease of the Il Ngwesi Community land to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents must precede the challenge of the EIA licence because if the court were to find that the lease of a portion of the Il Ngwesi Community's land was unlawful, then the issue of the EIA licence would be a moot point.
  95. The Petitioners seek to have NEMA compelled to avail materials and relevant documentation showing the process followed in granting the EIA licences and for NEMA to explain the circumstances under which it issued the EIA licence and construction approvals to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  96. The import of Section 3A of EMCA is that NEMA has a duty to supply to every person any information that relates to the implementation of EMCA that is in its possession upon application and payment of the prescribed fee. The Petitioners contend that NEMA issued the EIA licence to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without regard to the fact that the Il Ngwesi Community members were neither consulted nor involved in the process culminating in the grant of the EIA licence to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the proposed development on the community's land.
  97. The 6<sup>th</sup> Respondent's objection is that it is not a proper party in this suit. It contends that no grievances or reliefs are sought against it. To determine if the 6<sup>th</sup> Respondent is a necessary party to the petition which challenges the lease of part of the Il Ngwesi community land to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, one needs to establish if a county government plays any part in the management or dealings with community land.
  98. Land in Kenya is classified either as public, community or private. Article 61 of *the Constitution* states that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Under Article 63, community land vests in and is to be held by communities identified on the basis of ethnicity, culture or similar community of interest. It is not disputed that the subject matter of this petition is community land registered in the name of the Il Ngwesi community. Article 63(4) bars the disposal of, or use of community land except in terms of the legislation specifying the rights of



members of each community individually and collectively. Parliament enacted the [Community Land Act](#) pursuant to Article 63.

99. The Petitioners' contention in this petition is that the land owned by the Il Ngwesi community was unlawfully leased to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by its leaders in contravention of the [Community Land Act](#) and without any public participation. They also challenge the term of the lease and contend that it is in breach of the Community's constitution.
100. A decision to dispose of or alienate community land requires the support of 2/3 of the registered adult members of the community under Section 15(5) of the [Community Land Act](#). Section 19 requires a registered community on its own motion or at the request of the county government to submit to the county government a plan for the development, management and use of the community land administered by the registered community for approval. This section confirms that the 6<sup>th</sup> Respondent plays a role in the management and use of community land. A county government plays a critical role in the proper management of the environment within that county.
101. At the hearing of the petition, the court will have to determine if the community assembly for Il Ngwesi complied with Section 19(2) (a), (b), (c), (d) and (e) of the [Community Land Act](#). The law requires that before submitting the plan to the county government, the registered community is required to consider any conservation, environmental or heritage issues relevant to the development, management or use of the land and indicate in the plan that it has considered these issues when drawing up the plan. The registered community is enjoined to consider any environmental impact plan pursuant to existing environmental laws besides complying with the values and principles of [the Constitution](#). Public participation is one such principle of governance. Section 19(2)(e) stipulates that the registered community shall seek ratification from the members of the registered community.
102. A registered community is required by Section 21 to seek and obtain the approval of 2/3 of the assembly in a special meeting convened for that purpose before community land can be converted into another category of land. The law recognises the grazing rights of pastoral communities under Section 28 of that Act by stipulating that community land in a pastoral community should be availed for use by members of the community for the grazing of their livestock subject to the conditions specified in subsection 2. It also prohibits the erection or occupation of any structure on designated grazing land or the obstruction of access to any watering place on the land or prevention of the watering of stock at a watering place except with the written authority of the registered community.
103. The Petitioners contend that the leasing of the 200-acre portion of the Il Ngwesi community land to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the grant of exclusive use of 1000 acres of the conservancy within the community's land will deprive them of grazing land. This is one of the issues to be determined in the petition. Land use is inextricably linked to the environment. In this petition, the court is being invited to determine whether the rights of the Petitioners to a clean and healthy environment have been violated through the actions of the Respondents. The definition of environment at Section 2 of EMCA includes the physical factors of the surroundings of human beings including water, atmosphere, the biological factors of animals and plants as well as the natural and built environment.
104. "Health" is defined in Black's Law Dictionary, 10<sup>th</sup> Edition as the quality, state or condition of being sound or whole in body, mind or soul. Another definition is the relative quality, state or condition of one's physical or mental wellbeing, whether good or bad. "Clean" is defined by the Oxford Advanced Learner's Dictionary as not dirty or not harmful in terms of being free from harmful or unpleasant substances. The determination of whether the Petitioners' right to a clean and healthy environment protected in [the Constitution](#) has been violated or is threatened as they allege in this petition will have to be made in the context of the environment in which the Petitioners live in Il Ngwesi as pastoralists and



must be seen through their lenses in light of their way of life. The right cannot be perceived through the same lenses as those of a person living in an apartment in Nanyuki even though both are within Laikipia County because their environments are very different.

105. The Respondents contended that the Petitioners should have exhausted the dispute resolution mechanisms under the [Community Land Act](#) before filing this petition. Part VIII of the [Community Land Act](#) sets out different mechanisms for resolving disputes and conflicts involving community land. Section 39 gives the registered community the option to use traditional dispute and conflict resolution mechanisms in appropriate cases. Disputes between members of a registered community or two different registered communities are to be resolved using the internal dispute resolution mechanisms in the community's by-laws. Section 39(3) goes further to provide that where a dispute or conflict relating to community land arises, the registered community is to give priority to alternative methods of dispute resolution while subsection 4 enjoins the court or other dispute resolution body to apply the customary law prevailing in the area of jurisdiction of the parties, as long as it is not repugnant to justice and morality or inconsistent with [the Constitution](#).
106. Parties to a dispute relating to community land may agree to refer the dispute to mediation or arbitration under Sections 40 and 41 of the [Community Land Act](#) respectively. The powers of the mediator are given and the agreement reached is to be signed after being reduced to writing. If the parties agree to refer the matter to arbitration but cannot agree on the arbitrator, the [Arbitration Act](#) of 1995 is to apply.
107. Since the Petitioners have not agreed with the Respondents to refer this dispute to mediation or arbitration, Sections 40 and 41 are not applicable leaving Section 39 which advocates for alternative methods of dispute resolution where it is appropriate.
108. If all the efforts to resolve the dispute under the Act fail, a party to the dispute may refer the matter to court under Section 42, which provides that the court may confirm, set aside, amend or review the decision which is the subject of the appeal or make any order in connection with the matter as it may deem fit. It is not clear what role the court is to apply under Part VIII of the [Community Land Act](#) and what decision it is to confirm, set aside or review because subsection 1 merely states that where efforts to resolve a dispute under the Act fail, a party may refer the matter to court.
109. The provisions in the [Community Land Act](#) relating to dispute resolution are ambiguous. Section 39(4) mentions that the court is to apply the customary law prevailing in the area if it is not repugnant to justice and morality and is not inconsistent with [the Constitution](#).
110. The dispute resolution mechanisms mentioned in the [Community Land Act](#) would not be appropriate in resolving the subject matter of this petition since the Respondents are not members of Il Ngwesi community and are therefore not bound by [the constitution](#) and by-laws of that community. Further, traditional dispute and conflict resolution mechanisms cannot be used to resolve claims relating to allegations of contravention of rights to property and to a clean and healthy environment contained in the Bill of Rights in [the Constitution](#) nor can they deal with claims alleging breach of the provisions of the [Community Land Act](#). Claims touching on violations of the right to own property in the form of land and the right to clean and healthy environment brought under Articles 40 and 42 and 70 of [the Constitution](#) fall for determination by the ELC established under [the Constitution](#) and the ELC Act.
111. As the court stated in *County Government of Isiolo & 10 Others v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 Others* [2017] eKLR, matters of illegality cannot be mediated upon. Further, that a legal question on whether a party had the legal mandate to perform an act that they did cannot be the subject of alternative dispute resolution. The court went on to state that once a question of illegality was raised, it overrode all other considerations including that



- of subjecting the dispute to alternative dispute resolution and the court dealing with the matter must consider the question of illegality before any other consideration. It is this court that is to determine the allegations of illegality in the manner in which the lease over the 200-acre portion of the Il Ngwesi Community land was negotiated, ratified and registered.
112. Section 8 of the *Land Registration Act* requires a community land register to be maintained in each registration unit. A cadastral map showing the extent of the land and identified areas of common interest, a register of members of the community, the user of the land, the identity of members of the group registered as group representatives of the community, the names and identity of the members of the group as well as other requirements under the law relating to community land are the details to be kept in the community land register. The court will have to make a determination on whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents acted within the law when they registered the impugned lease over the Il Ngwesi community land.
  113. Marginalised communities, which category the Petitioners and other Il Ngwesi members fall under, are protected under *the Constitution* and it is expected under Article 21 that they will be given more prominence in the implementation of rights and fundamental freedoms. Article 21(3) imposes a duty on all State organs and all public officers, which in this case include the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents, to address the needs of vulnerable groups within society including women, older members, persons with disabilities, children, youth, members of minority or marginalised communities and members of particular ethnic, religious or cultural groups.
  114. Under Article 56 of *the Constitution*, the State is required to put in place affirmative action programmes to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life. When this is read alongside Article 69(1)(d) which requires the State to encourage public participation in the management, protection and conservation of the environment, then it becomes clear that public participation by members of the Il Ngwesi community is an imperative that cannot be wished away. The Petitioners contend that there was no public participation before the decision to lease the community's land was taken and that is one of the issues that falls for determination in the petition before this court.
  115. The application dated 29/3/2023 seeks to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from continuing with the tendering process for construction works and materials for the development of the proposed project on the suit land and commencing construction. Further, it seeks to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from taking control of the 200-acre portion of land comprised in Laikipia, Il Ngwesi II/ I pending the determination of the petition. The documents exhibited relate to the tendering process and photographs of some people and police officers. Nothing was placed before the court to establish that the people in the photographs are on the 200-acre portion of land undertaking activities that go against the orders for status quo which this court gave on 20/12/2022. The court directed that the status quo on the land that was prevailing on that day, which was that the 1<sup>st</sup> Respondent had delivered building materials on the 200-acre piece of land, was to be maintained until the court issued further orders. The Petitioners have not demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have disobeyed that court order.
  116. The preliminary objections taken by the 1<sup>st</sup> and 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents lack merit and are dismissed with costs to the Petitioners.
  117. The court declines to grant the orders sought in the application dated 29/3/2023. Each party which participated in the application will bear its costs for the application.

**DELIVERED VIRTUALLY AT NANYUKI THIS 16<sup>TH</sup> DAY OF OCTOBER 2023.**



**K. BOR**

**JUDGE**

In the presence of: -

Mr. Alphonse Barrack for the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners

Mr. Samuel Njuguna for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Timothy Larpei for the 8<sup>th</sup> Respondent

Ms. Stella Gakii- Court Assistant

No appearance for the 1<sup>st</sup> Petitioner and the 3<sup>rd</sup> to 7<sup>th</sup> Respondents

