REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CONSTITUTIONAL PETITION NO. 305 OF 2012

IN THE MATTER OF: ARTICLES 2, 10, 22,23,35,47,56,60,69 and 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: PETITION BY PETER MAKAU MUSYOKA, ELIJAH MUTUA MAKANGA, JACOB MBYA MUSYOKA, FRANCIS KITHOME KITHEKA, ANDREW KISEE MWINZI AND NICHOLAS MUNYOKI MWASA CHALLENGING THE CONTRAVENTION AND INFRINGEMENT OF THEIR CONSTITUTIONAL RIGHTS

AND

IN THE MATTER OF: THE AWARD OF MINING CONCESSIONARY RIGHTS TO THE MUI COAL BASIN DEPOSITS

BETWEEN

NAMES EXPUNGED (*Pursuant to an Order by J. Ngugi J., L. Mutende J., and B. T. Jaden J dated 17th March 2014)* (Suing on their behalf and on behalf of the MUI COAL BASIN LOCAL COMMUNITY)

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF ENERGY.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

AND

FENXI MINING INDUSTRY

COMPANY LIMITED…….....….....…….....……1ST INTERESTED PARTY

GREAT LAKES CORPORATION LIMITED.....2ND INTERESTED PARTY

JINGU GROUP CHINA .....3RD INTERESTED PARTY

LIASON COMMITTEE OF MUI BASIN

COAL BLOCKS C & D…….....….....……4TH INTERESTED PARTY

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 34 OF 2013

ERIC MUTUA.....1ST PETITIONER

DR. TITUS KIVAA P.M.....2ND PETITIONER

PROF. PAUL MUMO KISAU.....3RD PETITIONER

DR. GIDEON WATHE NZAU.....4TH PETITIONER

FLORENCE MUTWALI KITONGA.....5TH PETITIONER

PARTICIA KISIO KIMANZI.....6TH PETITIONER

JOSEPH MUTHUI NZUNI.....7TH PETITIONER

MARGARET MUNYOKI.....8TH PETITIONER

SOLOMON KIMANZI KIVOTO.....9TH PETITIONER

EUNICE KELI WAMBUA.....10TH PETITIONER

DAVID KILONZO MAWEU.....11TH PETITIONER

JOHN KIMAKIO MUTIA.....12TH PETITIONER

NZOMO MULATIA.....13TH PETITIONER

THE MUI COAL PROJECT BLOCKS

C AND D LIASON COMMITTEE.....14TH PETITIONER

VERSUS

THE PRINCIPAL SECRETARY .....

MINISTRY OF ENERGY AND PETROLEUM.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF MINING.....2ND RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....3RD RESPONDENT

THE HON ATTORNEY GENERAL.....4TH RESPONDENT

AND

FENXI MINING INDUSTRY

COMPANY LIMITED.....1ST INTERESTED PARTY

GREAT LAKES CORPORATION LIMITED.....2ND INTERESTED PARTY

COMMISSIONER OF MINES & GEOLOGY.....3RD INTERESTED PARTY

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....4TH INTERESTED PARTY

MUI MINES AND MINERAL LIMITED.....5TH INTERESTED PARTY

THE LAW SOCIETY OF KENYA.....6TH INTERESTED PARTY

INSTITUTION FOR LAW &

ENVIRONMENTAL GOVERNANCE.....7TH INTERESTED PARTY

KITUO CHA SHERIA.....8TH INTERESTED PARTY

KITUI COUNTY GOVERNMENT.....9TH INTERESTED PARTY

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 12 OF 2014

(formerly NAIROBI CONSTITUTIONAL PETITION NO. 43 OF 2014)

MUNYWOKI MUTUNGA MALOMBE & OTHERS.....PETITIONERS

VERSUS

FENXI MINING INDUSTRY COMPANY LIMITED.....1ST RESPONDENT

FENXI MUI MINING CORPORATION LIMITED.....2ND RESPONDENT

CABINET SECRETARY MINISTRY OF

ENERGY AND PETROLEUM.....3RD RESPONDENT

CABINET SECRETARY MINISTRY OF MINING.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

INTRODUCTION AND PROCEDURAL BACKGROUND

1. This judgement arises from three consolidated Constitutional Petitions in respect to the prospecting for and extraction of coal deposits in the Mui Basin in Kitui County.

2. The first Petition is No. 305 of 2012dated 13th August 2012 brought by six members of the Mui Coal Basin Land Community.

3. A single Judge *(Justice George Dulu)* initially granted conservatory orders aimed at preserving the *status quo* (practically to guarantee that the mining would not start before the issues had been canvassed *inter partes*). Justice Makhandia (as he then was) handled the matter on various dates before ultimately, at the Petitioners' instance, Petition 305 of 2012 was certified by Justice Lillian Mutende as raising a substantial question of law under Article 165(4) warranting the constitution of a three judge bench to hear the matter. That certification was done in spite of and despite spirited opposition from the interested parties.

4. The Honourable Chief Justice directed that the matter be heard by a three judge bench consisting of Justices Lillian Mutende (Presiding), B. Thuranira Jaden and George Odunga. Due to the absence of Justice Odunga for extended periods owing to his participation in election petitions in Mombasa, the Chief Justice subsequently directed Justice Joel Ngugi to replace the Justice Odunga on the bench of three.

5. On 5th September 2013 the Court heard and granted an application dated 23rd July 2013 to consolidate Petition No. 305 of 2012 with a new Petition filed respecting the same subject matter *(that is, the prospecting for and extraction of coal deposits in the Mui Basin in Kitui County)*. That new Petition was brought by thirteen (13) members of the Community and a Committee styled as "The Mui Basin Coal Project Blocks C and D Liaison Committee".

6. Subsequently, on 17th March 2014, in an application to set aside orders to consolidate the petitions and withdraw Petition No. 305 of 2012, the court declined for the case to be withdrawn but granted orders that the individual Petitioners in 305 of 2012 be permitted to individually withdraw from the Consolidated Petition and for their names to be expunged from further proceedings. The Court also heard and granted an application that Petition No. 12 of 2014 to be consolidated with Petition No. 305 of 2012 and Petition No. 34 of 2013.

7. The three Petitions, having been consolidated, were, thus, heard and determined together.

8. All three Consolidated Petitions are supported by the following documents:

a. Affidavit of Peter Makau Musyoka dated 13th August 2012.
b. 1st Petitioners submissions dated 31st July 2013.
c. 2nd Petitioners written submissions dated 1st July 2014
d. A Supplementary Affidavit sworn by MUNYOKI MUTUNGA dated 14th April 2014
e. 3rd Petitioners skeleton submissions dated the 23rd of May 2014.
f. A Further Supplementary Affidavit sworn by MUNYOKI MUTUNGA dated 5th June 2014
g. 3rd Petitioners Supplementary Submissions dated the 3rd June 2014

9. The following documents are filed in opposition of the Consolidated Petitions:

a. Grounds of Opposition in Petition 305 of 2012 by the 2nd Respondent dated 27th August 2012.
b. Replying Affidavit in Petition 305 of 2012 sworn by PAUL NGATIA dated 15th October 2012.
c. Replying Affidavit sworn by LI YUXIN dated 31st October 2012.
d. Replying Affidavit sworn by YANG WUSHENG filed on 13th November 2012.
e. Replying Affidavit of ENG. JOSEPH K. NJOROGE filed on 4th April 2014
f. 1st and 2nd Respondents in Petition 43 of 2014 replying affidavit sworn by YANG WU SHENG on

24th April 2014

g. 2nd Respondents written submissions filed on 25th April 2014
h. 2nd Respondent in Petition 34 of 2013 Replying Affidavit filed on 3rd June 2014
i. 1st and 2nd Respondents in Petition 43 of 2014 written submissions dated 17th June 2014

10. On 16th July, 2013, this Court invited any groups with special expertise or interest in the matter to join the case so that all matters can be canvassed simultaneously given the polycentricity of the issues and parties involved. In making that invitation, this Court observed that "[G]iven the importance of the case and the public interests involved, leave is given for any groups of individuals with expertise in the matter to come into the case as *amicus curiae*."

11. Consequently, at least two *Amicii* have been permitted into the Consolidated Petition. An application to join the Petition as *Amicus Curiae* was made by the Katiba Institute on the 14th day of October 2013. The application was supported by the Affidavit of WAIKWA WANYOIKE dated 8th October 2013. They filed their written submissions on 30th January 2014.

12. The Fenxi Mining Industry Company Ltd, the 1st interested party filed their written submissions on 21st February 2014.

13. The Law Society, the 6th interested party in Petition No. 34 of 2013filed their writtensubmissions by on 3rd June 2014.

14. The Kituo Cha Sheria, the 8thinterested party in Petition No. 12 of 2014filed their written submissions on 2nd April 2014.

FACTS:

15. Despite much heated arguments in Court and seeming torturous complexity of this case, few facts are in dispute. Indeed, the factual basis of the case can be stated simply: The background to the Consolidated Petitions is succinctly stated in the Replying Affidavit of Eng. Peter K. Njoroge sworn on 3rd of April, 2014. The Ministry of Energy ("Ministry") started coal exploration in the Mui Basin that covers parts of Mwingi East, Mwingi Central, Mutitu and Kitui Central sub-counties of Kitui County in 1999. The aim was to establish the existence of commercially viable coal deposits in the region.

16. For these purposes, the Mui Basin was divided into four coal exploratory blocks each identified by the letters A, B, C and D. The Ministry, then, started drilling coal exploration wells. By 2010, after drilling 73 coal exploration wells spread over the four coal exploratory blocks, the Ministry concretely established existence of commercially viable coal deposits amounting to at least 400 million metric tonnes. Having established this viability, this set the stage for concessioning of the Coal Blocks as the next step in the potential mining of coal from the four blocks. For this purpose, the government set up an Inter-ministerial Committee comprising of the Ministries of Energy, Environment and Natural Resources, Finance, Industrialization, State Law Office and the National Environmental Authority (NEMA)("**Inter-ministerial Committee**"). The charge of the Inter-ministerial Committee was to concession the Coal Blocks for the purpose of "exploration, exploitation and development."

17. After due approval from the Public Procurement Oversight Authority (PPOA) for a specially permitted procurement procedure pursuant to Section 92 of the Public Procurement and Disposal Act, 2005 and on the request of the Ministry pursuant to the prior approval by the Ministry's Tender Committee, the Ministry of Energy invited Expressions of Interest for the concessioning of the Mui Coal Blocks. It is important to note this early on in this judgment that the mode of procurement selected was not challenged by any of the parties to the Consolidated suit.

18. Sixteen firms filed their Expressions of Interest as invited. Of these, three were local (Kenyan) firms: M/s Rift Valley Resource Ltd; M/s Mui Mines and Minerals and M/s PLL-Intex JV. As procedure

dictates, the sixteen Expressions of Interest were subjected to an Evaluation by a specially formed Committee for those purposes and, subsequently, a deliberation by the Ministerial Tender Committee. Only eleven firms qualified to the next stage where they would be issued with Requests for Proposals. Of the three local firms that had filed their Expressions of Interest, only two survived to this stage. Importantly, Ms. Mui Mines and Minerals, a local firm from the Mui Basin, was among the five unsuccessful companies at this first stage. It is important to point out this early on in this decision that none of the unsuccessful firms challenged the decision at that time. Our law is now settled that where a statutory regime (like the Public Procurement Act) sets a regime for dispute resolution, an aggrieved party must exhaust it first before approaching Court. (See, for example, **Narok County Council vs Transmara County Council & Another** (*Civ. App. No. 25 of 2000 (Nairobi)*); **Dickson Mukwelukeni vs Attorney General & 4 Others** (*Nairobi High Court Petition No. 395 of 2012*); and **R vs Ministry of Interior and Coordination of National Government & Others ex parte ZTE Corporation** (*Judicial Review Case No. 441 of 2013)*).

19. Eventually, out of the eleven qualifying firms, only five companies ended up bidding for the concessioning. A Technical Evaluation Committee evaluated the bids and recommended that Fenxi Mining Industry Co. Ltd ("Fenxi") be invited to tender its financial proposals for both Blocks C and D. Thereafter, vide a letter dated 24th August 2011, the Ministry of Energy formally awarded to Fenxi a tender to explore, evaluate, extract, develop, produce, process, store and dispose of Coal and Coal Bed methane in Coal Block C and D in the Mui Basin, Kitui County. This followed an extended period of negotiations as permitted by the PPOA.

20. The coal mining activities are projected to last for the next 42 years and will, in all likelihood, involve relocation of members of the local community in the Mui Coal Basin Community to a new area to give way to the coal mining activities. At a minimum, it will require compulsory acquisition of the land from the local community.

21. During the pendency of the Consolidated Petitions, on 23rd December, 2013, the Government through the Cabinet Secretaries for Energy and Petroleum; Mining; and Treasury, entered into a Benefit Sharing Agreement with Fenxi. As it will emerge shortly, the sufficiency of the benefits to the local people of Mui Basin is one of the issues canvassed in the Consolidated Petitions.

The Petitions:

Petition No. 305 of 2012

22. This was the first Petition filed in Court. In their prayers, the Petitioners asked the Court to determine:

i. If there was any contravention of Article 10 of the Constitution in the award of the tender to explore, exploit, or develop the Mui Coal Basin Blocks C and D and specifically to find that the award was done in secrecy and without due diligence, to confirm the awardee's technical capabilities and in a manner devoid of public participation as envisaged in the Constitution;

ii. That there was contravention of Article 35 of the Constitution (guaranteeing freedom of information) in the manner in which the tendering and concessioning of Mui Basin Coal Blocks was done;

iii. That there was breach of Article 40 of the Constitution (guaranteeing right to private property) based on the apprehension that the Government would compulsorily acquire private property to facilitate the coal mining;

iv. That there was breach of or the likely violation or infringement of the right to a clean and healthy environment contrary to Articles 42 or 70 of the Constitution based on the apprehension that the methods to be deployed in the coal mining would lead to environmental degradation;

v. That there was a threat to health contrary to Article 43 of the Constitution from the effects of coal mining.

Petition No. 34 of 2013

23. In addition to the foregoing prayers in Petition 305 of 2012, the Petitioners in Petition 34 of 2013 asked the Court;

i. To declare that the County Government of Kitui must be involved in the negotiations of the terms and conditions of the Coal Mining Agreement and, in particular, that the County Government must be involved in determining the appropriate levels of sharing of the benefits/profits of the Coal Mining Project;

ii. To declare that the law requires that the Coal Mining Agreement must be approved by Parliament before its execution;

iii. To declare that the Petitioners and the community ought to be involved in the negotiations for the Coal Mining Agreement as part of their right to participation.

Petition No. 12 of 2014

24. Finally, in addition to the prayers in these first two Petitions, Petition 12 of 2014 adds a new prayer: The Petitioners therein asked the Court for a declaration that the failure to seek and obtain an Environmental Impact Assessment report as required by Article 69 of the Constitution as read together with Section 58 of the Environmental Management and Coordination Act before the grant of any concession rights renders the concession invalid, null and void.

The Petitioners' Case in Petition 305 of 2012

25. The Petitioners in Petition 305 of 2012 contend that the award of the tender to explore, exploit or develop the Mui Coal Basin Block C and E to Fenxi contravened Article 10 of the Constitution of Kenya. It is their submission that the Respondents approved the bid of the 1st interested party with questionable speed and without carrying out due diligence on the company.

26. They further contend that Fenxi lacks the technical capacity to carry out coal mining activities. While conceding that several delegations visited China to see the operations of Fenxi, they contend that delegations that visited China did not visit any coal mine managed by the Fenxi but visited only corporate offices. In light of this, they argue, the tender awarded to Fenxi was invalid.

27. Further, Petition 305 of 2012 makes the case that the denizens of Mui Basin, and indeed, all Kenyans had no knowledge of the state of affairs pertaining to the concession and in particular; the Benefit Sharing Agreement, and the process for negotiating it, the investment agreement, coal special (exploration), license and special mining lease. They argued that this was in contravention of Article 35(1) and (3) of the Constitution of Kenya. Arguably, Article 10(2)(a) which includes public participation as one of the Constitutional values is implicated here.

28. Finally, Petition 305 of 2012 makes the case that coal mining posed a serious threat to the health of the people in the local community. They cited statistics from the World Health Organization and environmental groups that estimated the coal mining pollution shortens approximately 1,000,000 lives annually worldwide.

The Petitioners' Case in Petition 34 of 2013

29. The Petition was brought under Article 22 of the Constitution. The Petitioners are 13 persons together with the liaison committee set up to liaise on behalf of the community. They state that they derive their mandate from the community itself and provided annextures to evidence the same (Supporting Affidavit

of Dr. Titus Kivaa Peter Mbiti TK8, TK9, TK10). The liaison committee was gazetted on 24th August 2014 by the then Minister for Energy.

30. They aver that their right to access information as enshrined under Article 35 was violated by the Respondents in the way the concessioning was conducted. They stated that the specific information they asked for is evidenced by the demand letters in pages 11 and 83 of Dr. Titus Kivaa Peter Mbiti Supporting Affidavit annextures. It was their submission that under Article 232(1) of the Constitution and that following the ruling in **Petition 278 of 2011 Nairobi Law Monthly Limited Vs Kenya Electricity Generating Company (eKLR),** the values and principles of public service, a state organ once demanded for information, it is upon them to show reasons why it would not provide the information requested for. In this case, they argued, the Respondents had not demonstrated a valid reason for not releasing the information requested.

31. The primary contention of the Petitioners in Petition 34 of 2013 is that any coal mining agreement ought to be approved by Parliament before its execution. In this, they rely on Article 71 of the Constitution. That article stipulates that:

> ***"(1) A transaction is subject to ratification by Parliament if it-***
>
> > ***(a) involves the grant of a right or concessions by or on behalf of any person, including the national government, to another person for the exploitation of any natural resources of Kenya; and***
> >
> > ***(b) is entered into on or after the effective date.***
>
> ***(2) Parliament shall enact legislation providing for the classes of transactions subject to ratification under clause (1)."***

32. The Petitioners in Petition 34 of 2013 submitted that although Parliament has not yet made legislation to give effect to Article 71, that failure should not be visited on the people of Mui Basin. That the Respondents should have prompted Parliament to act; and that, in any event, there was no reason why the Respondents could not refer the matter to Parliament for ratification. This failure, in the view of the Petitioners in Petition 34 of 2013, was critical and cannot be sanitized or inoculated at this late stage: the concession must be declared null and void unless and until it gets Parliamentary imprimatur.

33. In the same vein, the Petitioners in Petition 34 of 2013 argued that the County Government of Kitui has a right to be involved in the negotiation of the terms and conditions of the coal mining agreement. It was their submission that through article 62(3) of the Constitution the National government shall hold all the minerals in trust for the people of Kenya. In this particular case, they argued, the people of Mui Basin have the greatest interests in the Coal deposits. That the county government of Kitui is the legal personification of the local community and should have a say in any mining contract. This is to ensure that the constitutional provisions of Article 69(1) are realized. That latter section, in pertinent parts, obligates the state to ensure the equitable sharing of the accruing benefits from exploitation of the environment and natural resources. They further submitted that under the Fourth Schedule of the Constitution the functions and powers of the county government includes, control of air pollution, noise pollution, county planning and development; implementation of specific national government policies on natural resources and environmental conservation including soil and water conservation. Since coal mining is likely to affect these functions, it was imperative that the County government was involved and fatal that it was not in the concessioning of Fenxi.

34. On public participation, the Petitioners in Petition 34 of 2013 submitted that Articles 10, 69(1)(d), 174(c) and 227 of the Constitution provided for active citizenry in the running of the county affairs and all matters affecting the public interest. The Petitioners argued that the involvement of the local people in this case did not rise anywhere near the level envisaged in the Constitution. In particular, it was dispositive, they argued, that the local people – including the County government and the Liaison Committee – was not involved when it came to the negotiations for the Benefits Sharing Agreement and

other aspects of coal mining. Lack of public participation in this way, they argued, nullified the concessioning agreement.

35. Finally, the Petitioners in Petition 34 of 2013 adopted the position that the Environmental Impact Assessment needed to have been taken before the concessioning in accordance with the Constitution at Article 69 and section 58 of the Environmental Management Coordination Act (EMCA). They urge the Court to hold that the fact that no Environmental Impact Assessment was done renders the whole transaction illegal and the court should declare it as such.

Petitioners' Case in Petition 12 of 2014

36. The Petitioners in Petition 12 of 2014 raise five main issues all of which simply emphasize those raised by the two previously discussed Petitions. In the interest of doing justice to the, at times different phraseology, hue and legal basis of those arguments, we will briefly rehash them here.

37. First, the Petitioners in Petition 12 of 2014 argue that the Court should take note of the internationally recognized environmental effects of coal mining in general, and those likely to happen in the Mui Basin because of the type of coal found there, and the methods likely to be used to mine it. They argue that it is incontrovertible that coal mining is a pollutant necessitating very careful and robust environmental regulation and management. They relied on three scientific pieces to make this argument:

a. An article: Joan M. Tenge & Others, *An Investigation to Establish the Presence, Quality and Rank of Coal from Parts of Mui Basin in Kenya,* International Journal of Science and Research (IJSR), India Online ISSN: 2319-7064. This article concludes that coal from Mui Basin is ***"basically anthracite coal, bituminous and lignite, which can be suitable for use both as industrial fuel and domestic fuel in power generation, metallurgy and process heat in key industries…"***
b. A publication: Clean Air Task Force, *Cradle to Grace: The Environmental Impacts from Coal*. This publication claims that ***"from mining to coal cleaning, from transportation to disposal, coal releases numerous toxic pollutants in our air, our waters and onto our lands…"*** It ends: ***"There is nothing clean about coal. Everything related to mining, combustion, waste disposal, and each activity in between adversely affects public health and the environment. Coal-fired power plants cause a host of environmental harms…"***
c. An article: Philip Lloyd, *Coal Mining and the Environment*. This article analyses the environmental impacts of coal mining in South Africa and is generally positive about what it calls "benign" effects of coal mining there. It concludes, however, that it is the legislative environment that has contributed to ensuring a generally good environmental performance from the South African Coal mining industry.

38. The conclusion that one can draw from these series of scientific articles is that coal mining poses numerous damaging environmental impacts that occur through its mining, preparation, combustion, waste storage, and transport. Further, the articles conclude that while these adverse effects cannot be completely eliminated, a robust regime of regulating coal mining could meaningfully mitigate the environmental impacts. The Petitioners in Petition 12 of 2014 argue that it is precisely such a regime that is missing in Kenya and that coal mining in the Mui Basin should have awaited the development of such a regulatory regime. Mr. Nzili pointed out that the Ministry of Energy itself envisaged the need for regulations which were to be gazzetted under section 92 of the Mining Act to provide for the exploration, mining and benefits sharing but this never came to pass.

39. The Petitioners in Petition 12 of 2014 hinge their second argument on what their counsel, Mr. Nzili characterized as constitutional access to information rights. He argued that the right to access to information on public projects such as this one is based on Articles 10, 35 and 69 of the Constitution. In his submissions, Mr. Nzili argued that while the Ministry seemed to have a clear sense that a robust information and public awareness programme was needed to engage with the local citizens about the project, the same failed at the implementation stage. As such, the Petitioners in Petition 43 of 2014 are of the opinion that their constitutionally-guaranteed access to information rights was violated. It is not enough, they argue, that the Ministry engaged the Liaison Committee as that would not meet the

constitutional threshold.

40. In their third argument, the Petitioners in Petition 43 of 2014 argue that they are credibly in apprehension that their property rights will be violated. They are well aware that the government can compulsorily acquire property upon payment of adequate compensation – but they are afraid that the acquisition might occur in the absence of compensation. They ground their argument on the fact that a Benefits Sharing Agreement has been signed yet the land is yet to be adjudicated and titles issued.

Honourable Attorney General's and Respondents' Response:

41. The Respondents replied to the Petition by way of a Replying Affidavit sworn by the Principal Secretary, Ministry of Energy and Petroleum, ENG. JOSEPH K. NJOROGE on 3rd April 2014 and through submissions filed on the 25th of April 2014.

42. Eng. Njoroge gave a factual background of the process that led to the signing of the concession agreement. He contends that as a way to address the perennial shortage of power and to establish Commercial Coal deposits, the Ministry of Energy started Coal Exploration in the Mui Basin in the year 1999. As already outlined in the factual background to the Consolidated Petition, Eng. Njoroge elucidates that theMui Basin was divided into 4 Coal exploratory blocks namely A, B,C, and D.

43. On the alleged lack of public participation, it was the Respondents' contention that the Ministry of Energy introduced the Coal Project to the local community by introductory letters to the District Commissioners, District Officers, Chiefs and Assistant Chiefs who at key market centres held regular public meetings to educate the local community on the importance of the project and the progress made. That the Ministry even employed temporary staff from the local community to work within the four blocks.

44. As further proof of the quality and quantity of involvement by the local community, the Respondent argued that, as a way of updating the local community about the Coal Mining Project, the the Ministry of Energy in conjunction with the local Members of Parliament organized a stakeholder's workshop for the Mui Basin on 11th to 13 October, 2011 attended by 300 representatives of the local community. The Respondents contend, and the Petitioners in Petition 305 of 2012 do not refute, that those Petitioners attended that Workshop.

45. Ms. Kariithi for the Second and Third Respondents urged us to refer to paragraph 14 of Dr. Kariithi's affidavit of 24/04/14 which states that given the efforts done to raise awareness of the Coal Mining Project, the Petitioners' lack of public participation must have been by choice. She argued that meetings were done at the local level and was reported in the national press in the last three to four years. Ms. Kariithi also pointed out that public participation will be ongoing according to the BSA – both at the EIA stage and when drawing a resettlement plan.

46. The Respondents also relied on the fact that a Liaison Committee was formed and gazetted. This Liaison Committee, the Respondents argued, was made up of prominent professionals from the region as well as local leaders. It was meant to increase the depth of public participation. The Respondents argued that the Liaison Committee was involved at every step of the way until the concessioning was done – including in the organization of at least two workshops in Nairobi to discuss the projects. Members of the Liaison Committee were also part of the delegation that traveled to China to see Fenxi's operation. The Liaison Committee for Block C and D was elected to work with the government on behalf of the local community on 3rd March 2012 and for Block A and B on 15th June 2012.

47. The Respondents take factual exception to the allegation that the concessioning was done in secrecy and without due diligence. To respond to this salvo by the Petitioners, the Respondents point out that several delegations namely: the Inter-Ministerial Technical Committee; the Parliamentary Departmental Committee on Energy, Communication and Information; the Mui Basin Community Liaison Committees for both clusters of Blocks and representatives of the Kenya Media visited the operations of Fenxi in China to see their coal operations and productions in view of the future development of Kenya coal

mines.

48. In respect to the obligations of the right to environment, Eng. Njoroge deponed that an environmental impact assessment had been initiated and that the legal requirement is that the assessment is undertaken by the proponent of the project. The Respondents further pointed to the requirements stipulated under Part 3, section 3.1.28 of the Benefit Sharing Agreement. That Part is clearly entitled "Conditions Precedent" and in its universal preamble stipulates that "All other obligations of the Parties hereunder shall commence on the date (the "Effective Date") on which the following conditions have been fulfilled…" Then, at the aforementioned section 3.1.28 provides that:

> ***"the Concessionaire having completed the Environmental Impact Assessment to the satisfaction of the relevant government Authorities and having been granted with a license from NEMA in relation to the concession project"***

The Respondents further argue that this position is confirmed in Schedule 1 of the BSA, Part 1 which states that the Concessionaire will conduct and submit Environmental and Social Impact Assessment reports.

49. With regard to benefits to the local community, the Respondents submitted that it was not enough for the Petitioners without any evidence to say that the project will have no benefit to the community. The Respondents through their Replying Affidavit listed the economic benefits of the project to the local community, which they submitted can also be found in the addendum of the Benefit Sharing Agreement.

50. Similarly, the Respondents submitted that there was no iota of evidence and no reasonable basis for apprehending that the local community's right to private property will be violated by the Coal Mining Project. It was their submission that the process of the land adjudication and registration for issuance of Title deeds had begun and that, afterwards, the process of compulsory acquisition will be done in accordance with the provisions of the Constitution.

51. They prayed for the petition to be dismissed with costs.

Amicus Curiae

52. Mr. Lempaa represented *Amicus*, the Katiba Institute in the Petition. In his submission he raised the issue of marginalization of the National Land Commission and the County Government, which both have clear mandates but were not involved in the Project or case.

53. On the issue of *locus standi*, it was his submission that all three Petitions raise matters of a Constitutional nature beyond fundamental rights but under Article 258 there is also a threat to the Constitution.

54. In his submission, Mr. Lempaa drew the courts attention to the issue of the resource curse. It manifests itself in two ways, it leads to internecine war and through poverty.

55. On freedom of information, he submitted that a group of countries have devised a number of best practices or principles in this area. These principles have been cited with approval in a number of cases.

56. In his submissions, on the issue of public participation, as per Article 2(6) of the Constitution provides that International treaties are part of the laws of Kenya, hence Article 25 of the International Convention on Social and Economic Rights, the state is required to encourage Public participation.

57. It was his submission that a set of facts or events that give rise to clear constitutional violations can never be overtaken by events. Such violations must always be set right under Article 2 of the Constitution.

1st Interested Party (Fenxi)

58. Fenxi was represented by Mr. Imende. He concentrated his submissions on five relevant points which I will paraphrase here but not necessarily in the order he presented them.

59. First, Mr. Imende relied on a number of cases in our jurisprudence – some of which are cited here in paragraph 18 – to make the argument that Article 227 of the Constitution sets out the principles and the framework to be applied in procurement of public goods and services. Under the Public Procurement and Disposal Act there is provision for dispute resolution if any person is aggrieved by the process. It is, therefore, not just a statutory preference under the Public Procurement and Disposal Act that such disputes on procurement be brought using the mechanisms provided thereunder but also a Constitutional requirement that any aggrieved person must use and exhaust that process. To the extent that the Petitioners did not raise the issue of procurement at that stage or using the mechanism provided by the statute, they cannot raise the issue of procurement in this suit.

60. Somewhat related, Mr. Imende also frontally addressed the contention that there was secrecy in the concessioning. How could there have been secrecy yet the tenders were publicly advertised in at least two dailies as required by the law, Mr. Imende asked. He pointed out that while the Respondents and Interested Parties had tendered evidence to show public advertisement through the local dailies, the Petitioners had done little to substantiate their charge of secrecy.

61. It was on the question of public participation that Mr. Imende reserved the bulk of his submission. In essence, he made three prongs of arguments in this regard. First, he argued that, on available evidence, it is incontrovertible that the Petitioners were afforded reasonable opportunities to be involved in the process and had an adequate say in the procurement process for the concession rights both individually and directly; through the Liaison Committees; and through their local leaders. Mr. Imende called the Court's attention to paragraphs 457-462 of the Replying Affidavit of Fenxi, a letter dated 5th September 2012 which highlights the process of public participation. It alludes to 655 people who attended a public *Baraza* on the issue. Mr. Imende argued that the list shows that all leaders of the area were invited and attended. He also alluded to the two stakeholders' workshops held on the issue at which more than three hundred people attended. Lastly, Mr. Imende spoke of the visiting delegation from Kenya.

62. It was his submission that public participation must not mean that everyone must be involved. The concept of public participation requires that in governance the people are given information about issues that will affect their lives and that a reasonable opportunity is given to the public to air their views on those decisions. Using the rationale of Sachs J. in **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others** 2006 (2) SA 311 (CC), he stated that public participation cannot be determined with arithmetic precision; a reasonable test must be used. He submitted that the affidavits have shown that there have been a number of *Barazas* and meetings both in Mui and Nairobi involving both the people and their leaders. Parliament has also been involved in part through visits to China. On this issue he concluded that what has been demonstrated is reasonable public participation and that the court should not lose sight of the benefits to inure to the community and the people of Kenya.

63. Secondly, on the issue of public participation, Mr. Imende differed with the interpretation of the Petitioners that the members of the public or their representatives must be involved throughout the process. In this case, some of Petitioners have claimed that their public participation rights were curtailed because the Liaison Committee was not involved in negotiating the Benefits Sharing Agreement even though they concede to being involved at all the earlier stages. Mr. Imende's position here can be simply stated: public participation ends with the opportunity to air one's views on matters that affect one's life and livelihood – at the level of the project viability and design - it does not extend to technical construction of contracts entered into by legitimate government officials under whose mandate the issue belongs.

64. Lastly, on the issue of public participation, Mr. Imende was of the view that there was no requirement that the county government be involved in concessioning minerals. He pointed that all minerals constitutionally belong to the National Government and are, consequently, to be utilized for the benefits of all the people of Kenya – and not just the local people in whose area the minerals are found. Secondly, Mr. Imende argued that in any event the County of Kitui did not exist during the concessioning of the

projects under litigation. The County of Kitui only became legally cognizable after the March 2013 General Elections. Hence, the Court can require that going forward the County be involved in future dealings but cannot be retrospective in that regard.

65. Mr. Imende also addressed the very relevant question of the role of Parliament – and the effects of Article 71 of the Constitution cited above. He largely adopted the view of the Respondents on the question but with the innovative rider: the Court should imply parliamentary approval or ratification vide the visits by the Parliamentary delegation to China to see Fenxi's operations there.

66. Finally, on the issue of EIA, Mr. Imende did not dispute that if coal mining is not done correctly pollution can occur. He explained, however, that an EIA had not yet been done because of the capital intensive nature of EIA in this kind of project. Since no company would invest a colossal amount of money before the investment is secure, the concession is structured so that EIA is done as a condition precedent to the project being undertaken. Mr. Imende pointed out that Benefits Sharing Agreement is clear that the investors are required to bring in international evaluators to carry out an Environmental Impact Assessment.

3rd Interested Party

67. Mr. Ocholla represented the 3rd Interested Party, Jingu Corporation China in the Petition. It was his submission that on the issue of access to information, the court should not stop an entire process because information has not been given. He further submitted that the 3rd interested party had sufficiently explained its relationship with the concessionaire.

68. On the issue of Public Participation, it was his submission that the courts needs to look at three things; (a) The establishment of the Liaison Committee (b) How much the local community was represented in the entire process. (c) Whether the Liaison Committee has effectively carried out its duties. He further submitted on this issue that it is important to look at the Terms of Reference of the Committee. The committee had the mechanisms to raise this issue if they felt that Public Participation had been curtailed.

69. Mr. Ocholla argued that the right to participate in the concessioning process is an unreasonable demand and there is no legal basis for it. He continued that an EIA has not yet been done and the local community still has an opportunity to participate through that.

70. On the right to private property, it was his submission that the issue is hypothetical. He argued that this was a perceived future infringement and that it was not sufficient to allege that information has not been given to raise a reasonable apprehension.

71. With regard to the right to clean and healthy environment, he submitted that there was an existing legal framework, the Mining Act and the Environmental Management Coordinating Act. He argued that it is at the EIA stage that most concerns are taken into account and therefore premature to attack the project on adverse environmental and health impacts.

72. It was Mr. Ocholla's submission that the Petition did not meet the threshold for the grant of prayers sought. As per **Anarita Karimi Njeru v Republic** ***(1976-1980) KLR 1272***, a Petition must be very specific about the infringements and prayers sought.

8th Interested Party.

73. It was their submission on the Role of the county government in mining transactions of this nature is to engender trust in both levels of government in the transaction while minimizing the potential of frustrating development projects of this nature.

74. It was their submission that in cognizance with Article 10 of the Constitution on National Values and principles of good governance, nothing bars the national government from involving the county

administration in the processes for better realization of the development of the county.

75. Despite the literature on the depth and width to the rights under Article 42, 69 and 70 being readily available, it was their submission that the challenge posed in this case and the parties herein is how to innovatively navigate this well strongly fortified right in the constitution.

76. It was their submission that environmental concerns are real and their damaging effects would in some cases be greater than the benefit derived from mining if proper mitigation measures are not put in place. It was their submission that the burden of proof according to Article 70(1) was upon the respondents to satisfy to the court that environmental degradation will not occur.

77. They supported the submission by *amicus curiae*, that inaccessibility of all the information on the proposed mining makes it difficult to fully exhaust this issue.

78. On the right to private property as stipulated under Article 40 of the Constitution, it was their submission that Section 7 of the Mining Act obligates that a consent be obtained before any mining activity is conducted in a private land among others. The court should therefore assess to what extent these provisions have been complied with in the interest of fairness. They asked the court to be guided by the decision in ***Kasigau Ranching (DA) Ltd vs Kihara and 4 others (2006) KLR.***

Issues for Determination:

79. After going through the pleadings and submissions filed in Court and having listened to the at times erudite and eloquent submissions of the attorneys representing the parties before the Court, we can identify the following eight issues raised by the Consolidated Petition:

a. Is the Coal Mining Project legally infirm as a result of failure to follow the rules and procedures of the Public Procurement and Disposal Act in concessioning the Project?
b. Were the tenets of Article 10 of the Constitution violated in the manner in which the Coal Mining Project was conceived, concessioned and executed, and, in particular was the concessioning done in secrecy and without having carried due diligence as to the technical capacity of the winning tender, namely, Fenxi?
c. Was the Constitutional principle of right to public participation adhered to in the Coal Mining Project? Relatedly, was there a need to substantively involve the County of Kitui in the concessioning for this requirement to have been met? Lastly, what is the legal effect of the deficiency to involve the National Land Commission in the concessioning for the Coal Mining Project?
d. Did the Respondents violate the Petitioners' rights with regard to freedom of information as enshrined in Article 35 of the Constitution by withholding the Benefits Sharing Agreement despite requests by the Petitioners to release the same?
e. Have the Respondents violated the Petitioners' rights to property as enshrined under Article 40 of the Constitution or do the Petitioners have a reasonable apprehension that these rights will be violated by the Coal Mining Project?
f. In proceeding with the Coal Mining Project in its current state and design, are the Respondents violating the Petitioners' right to clean and healthy environment as provided for in Article 42 as read together with Article 70 of the Constitution?
g. Did the law require Environmental Impact Assessment to be done before the concessioning of the Coal Mining Project?
h. Was there a Constitutional requirement for Parliamentary ratification for the Coal Mining Project? If so, what is the impact of lack of such ratification?

80. We will address each of the eight issues in *seriatim* below. In our analysis below, we have combined issues raised in (b) – allegations of secrecy and failure to exercise due diligence in the concessioning process and those raised in (c) – public participation. This is because the factual and legal predicates of the arguments are the same.

a. ***Is the Coal Mining Project Legally Infirm for Failure to Follow Public Procurement Laws?***

81. The answer, in short, is in the negative. We begin by noting that we have outlined above in this judgment the procedures that were followed in concessioning the Coal Mining Project and we need not rehash them here. The facts are not disputed by the parties. The point taken by the Respondents and Fenxi is a legal one: if the Petitioners were aggrieved by the procurement process or outcome, they ought to have followed the dispute resolution mechanism outlined in either section 99 or 100 of the Public Procurement and Disposal Act (PPDA). Having failed to do so, the Respondents and Fenxi insist, it is improper for the Petitioners to invoke the Court's jurisdiction to question either the procedural propriety or substantive merits of the procurement process.

82. In agreeing with the position taken by the Respondents and Fenxi on this question, we restate the words of Justice Odunga in **R vs Ministry of Interior and Coordination of National Government & Others ex parte ZTE Corporation** (*Judicial Review Case No. 441 of 2013)* which were recently cited with approval by Justice Mumbi Ngugi in **R vs Chief Registrar of the Judiciary & Others ex parte Riley Services Ltd** thus:

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."***

83. As both Justice Odunga and Justice Mumbi Ngugi explained in their decisions in the two cases cited, the Courts are moved to take this position by prudential and functional reasoning: where the Constitutional and statutory framework cohere and provide a regime for addressing grievances, it serves the public interest and good order for that scheme to be adhered to rather than permit a haphazard bazaar of parallel procedures from which aggrieved persons can shop for a favourable forum.

84. It is important to point out, as Justice Majanja did in **Dickson Mukwelukeni vs Attorney General & 4 Others** (*Nairobi High Court Petition No. 395 of 2012*), that in reaching this position, the Courts are not merely being formalistic or mechanical. The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary."[1] The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system. The dispute resolution mechanism provided under the Public Procurement and Disposal Act represents the first category of dispute resolution mechanism created under a statute envisaged by the Constitution while the procedures by the Commission on the Administration of Justice established under Article 59(4) of the Constitution would represent the latter category.

(b) Has the Coal Mining Project Been Rendered Legally Infirm as a Result of Secrecy in the Concessioning Process, Failure to Exercise Due Diligence and Inadequate Public Participation?

85. While the facts of what happened are not in dispute, the parties are sharply divided on legal signification of the facts as regards the application of Article 10 of the Constitution to the Coal Mining Project. On the one hand, the Petitioners are united in their belief that the process is fatally tarred by Constitutionally impressible secrecy which attended to the process yet a matter of tremendous public interest was involved; by the failure by the responsible authorities to ascertain that Fenxi had the financial and operational wherewithal to carry out the Coal Mining Project in accordance with international best practices in coal mining so as to mitigate the environmentally harmful effects of the project; and, finally, by the failure to adequately involve the public in the concessioning process.

86. On the other hand, the Respondents, and Fenxi are vehement in their belief that the claim of secrecy is baseless; that due diligence was carried – both during the formal tendering process and by sending a delegation to China; and finally, that the mechanisms provided by the Respondents for the public to participate were adequate and reasonable.

87. We will begin, happily, by stating what is not contested by the parties: They all agree that the precepts of Article 10 of our Constitution are established rights which are justiciable in Kenya. Hence, if any of the allegations made by the Petitioners is factually proven, it would lead to an appropriate relief by the Court.

88. As our case law has now established, public participation is a national value that is an expression of the sovereignty of the people as articulated under Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one – indeed one of the corner stones of our new democracy. Our jurisprudence has firmly established that Courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed, it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy on matters of public interest as anathema to our democracy.

89. Having established the right to public participation, it is important to present, as sharply as possible, the divergences of the parties on the different contours of this right. We can delineate five such:

a. Can one plausibly make the claim that the concessioning was shrouded in secrecy?
b. Was there sufficient due diligence on the ultimate winner of the tender to wit Fenxi before the award of the tender?
c. Was the quality and quantity of public participation sufficient to meet the Constitutional threshold established by our case law?
d. Is it fatal that the County of Kitui was not involved in the negotiations?
e. Is it equally fatal that the National Land Commission was not involved in the concessioning?

90. As matters stand, a little dose of International Law and Comparative Law might help us contextualize the right under discussion. Perhaps at a general level we should begin with Principle 10 of the Rio Declaration on Environment and Development, 1992. It defines public participation as follows:

> ***"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision – making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."***

91. On the other hand, Article 2(6) of the Espoo convention on Environmental Impact Assessment in a Transboundary Context, on public participation states that, ***"The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin."***

92. The main question in this context then becomes, what is the test for determining if the threshold of public participation has been met? We are aware that several Courts in Kenya have dealt with the issue. The emerging position in Kenya is exemplified by the decision and reasoning of Justice Emukule in **John Muraya Mwangi& 495 Others & 6 Others V Minister For State For Provincial Administration & Internal Security & 4 Others [2014 eKLR.** Since it demonstrates the emerging consensus, we apologise for quoting at length the reasoning of the Learned Judge thus:

> "The concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one but needs to be given effect both before and after legislative enactment. This may take several forms:-
>
> i. The concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office,
> ii. The right to be engaged in public debate and dialogue with elected representatives at public hearings,
> iii. The duty to facilitate public participation in the conduct of public affairs,
> iv. Ensuring that ordinary citizens the "hoi polloi," the "lala hoi" have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs.
>
> But, this begs the question on the methods or mechanisms for achieving public participation in the conduct of political and economic affairs of the country. Again the South African experience (para. 80 ***Merafong Demarcation Forum and Others V The Republic of South Africa and Others*** (CCT 41/07) [2008] ZACC 10) is of assistance – the obligation to facilitate public involvement maybe fulfilled in different ways. "It is open to innovation" - our emphasis. Legislative procedures are alien to ordinary citizens, more so to rural folk. The County Commissioners, and their deputies … must mobilize their chief agents, the Chiefs and Assistant Chiefs … and inform ordinary citizens of impending legislation that would affect their welfare or the way they conduct their businesses. Such meetings or "barazas" must be documented and reduced into reports to the relevant ministries or state agencies, as records of public participation. The print and electronic media ought to give prominence to such public participation in respect of every County and Sub-County. The media have that mandate under Article 34 of the Constitution on the freedom of the media. Invitation to file memoranda by ordinary citizens, and records thereof be kept. Innovation is the name of the game to give effect to the concept of public participation. There are Rwandan Government documentaries showing H. E. Kagame, the President of Rwanda with shirt sleeves rolled-up attending public barazas at County and even Sub-County levels and listening to questions and issues raised by ordinary citizens, and requiring the relevant technocrat or bureaucrat to answer them. Such occasions are absent among our relevant Cabinet Secretaries, and their Principal Secretaries. Let the Cabinet Secretary go to every County and seek citizen's views on new legislation in particular that which would affect the way they conduct their affairs."

93. Most Kenyan Courts have cited with approval Sachs J. in the South African case of **Minister of Health and Another NO vs New Clicks South Africa(Pty) Ltd and Others** 2006 (2) SA 311 (CC) where at para. 630, he noted that ***"The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."***

94. Taking the same view as **Merafong (Supra)** Emukule J agreed that the obligation to facilitate public involvement maybe fulfilled in different ways and is open to innovation. He added that public meetings must be well documented and turned into records of public participation. We agree and echo this rationale that public participation can be facilitated in different ways; each circumstance is different and hence how to facilitate this is open to innovation. However, it must be well documented and clear records kept.

95. Similarly, in **Doctors' For Life International V The Speaker National Assembly and Others(CCT12/05)(2006) ZACC 11)**the South African court defined what facilitation of public involvement is;

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

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

96. The issue then arises of how we measure what is sufficient. In our determination we agree with the test applied in the **Merafong Demarcation case** and state that,the method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the issue at hand and the intensity of its impact on the public.

97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

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

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

> ***"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and***

the public be afforded a forum in which they can adequately ventilate them."

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

d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

98. If we take these principles into account, can we give the public participation programme designed for the Coal Mining Project a clean bill of health? We think it meets the threshold subject to continuing engagement as we will point out below. In reaching this conclusion, we have taken into consideration some of the materials placed on the record and which are undisputed:

a. The Ministry issued introductory letters to members of the former Provincial Administration (District Commissioners; District Officers; Chiefs and Assistant Chiefs) who held regular public meetings to educate the local communities on the importance of the project and progress made. See paragraph 10 of the Replying Affidavit of Engineer Njoroge. He specifically names some of the key market centres where these public barazas were held to include: Mui, Karunga, Isekele, Kalitini, Lundi, Kathonzweni, Yoonye, Kateiko, Mathuki, Mutitu, Itiku, Zombe, and Kabati. A sample copy of the introductory letter was attached to the Replying Affidavit. These factual assertions were not challenged at all throughout the trial.
b. In addition, the Ministry hired temporary staff from the local community to serve as communication link between the Ministry and the local community. Again, a copy of sample contract of employment letter was attached. This assertion remained uncontroverted throughout the trial.
c. The Ministry facilitated the formation of a Liaison Committee to represent the interests of the local community. The Committee was duly gazetted and it met regularly. It was made up of several prominent professionals from the region plus a few local leaders. By their own admission, the Liaison Committee was involved in the Coal Mining Project and was kept abreast of the goings-on constantly. The Committee's only bitter complain is that they were "sidelined" at the point of negotiating Benefits Sharing Agreement. The Respondents' view is that by the time of negotiating BSA, the work of the Liaison Committee was largely done – and it would not have been proper to involve them in the prosaic, technocratic and lawyerly work of negotiating government contracts. Without expressing too strong a view on the position taken by the Respondents, we agree that in this particular instance and context, the mere non-involvement of the Liaison Committee in the actual negotiations of the BSA only does not negate a finding that the quantity and quality of public participation met the Constitutional threshold.
d. The Liason Committee was facilitated by the Government to visit Fenxi in China as part of the due

diligence. In its own report, the Liason Committee states that the aim of the visit was "to show the delegation the mode of operation of Fenxi in China, in respect of coal industry, for the purposes of:

i. Educating the delegation on Chinese approaches to re-development of estates, resettlement of people, compulsory acquisition of land, preservation of cultural values, extraction of coal, utilization of coal, environmental protection in coal zones and occupational health and safety in coal mines;
ii. Underlining the importance of a scientific and integrated approach to the development of the infrastructure, the real estate and the manufacturing industries motivated by coal mining; and
iii. Giving assurance that the investor, Jingu Group (of which Fenxi is the Kenya branch), is quite capable of and committed to delivering best results in the proposed Mui Coal Industry, if it is given the opportunity."

The observations of the Liaison Committee upon return are quite telling: "Great insights were gained and many fears allayed, particularly on the part of the Chinese investor. Jingu Group appears to have sufficient capacity to extract coal in Mui to facilitate an integrated development of the coal industry in Kitui county…..for the reasons stated [above], [the Committee] supports coal mining in Mui and by the Jingu Group."

e. Three other groups of stakeholders including a group of technical experts from the Ministry who were resolute that "Fenxi has the technical capability and ability to raise funds to implement the Mui Basin Coal Project for the awarded coal Blocks C and D."
f. In similar fashion, a Parliamentary delegation of the Departmental Committee on Energy, Communications and Information visited China and were similarly enthusiastic in their endorsement. In its filed report, after visiting Mui Basin on a fact finding tour, among other findings and conclusions, the Committee was of the opinion that the local community in Kitui County supported the concession "as they envisage gains to be made to their benefit and they are involved in the process of the project, through formation of Liaison Committees…."
g. The last delegation to visit Fenxi was made up of Representatives from the Kenyan Media and they made similar recommendations.
h. Additionally, the Ministry, in collaboration with the Liaison Committee and all the members of Parliament from the area organized a Stakeholders' Workshop held at the Kenya School of Monetary Studies on 11th to 13thOctober, 2011 where 300 stakeholders from the four constituencies covered by Blocks C and D (Mutitu; Mwingi South; Mwingi North and Kitui Central) were represented. A total of 300 representatives from the local community attended the three-day workshop. It is at the conclusion of that workshop that the local leaders in attendance resolved to support the Coal Mining Project and elected members of the Liaison Committee to work with the Government to realize this goal

99. In the presence of all these uncontroverted materials placed before the Court, the Petitioners' only response was that the public participation and due diligence undertaken were not adequate. As the cases before us have noted, it is not possible to come up with an arithmetic formula or litmus test for categorically determining when a Court can conclude there was adequate public participation. However, as we have alluded above, the Courts look at the *bona fides* of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible. Looked against these parameters it is difficult to say that the Government did not meet its burden to involve the public in the Coal Mining Project.

100. Having said that, we take cognizance of the fact that an Environmental Impact Assessment has not been completed. The Court therefore fully expects that the programme of public participation will continue even more robustly in the next phase of EIA. In particular, we expect that upon completion of the EIA the Government will follow the stipulations as directed under Regulation 17 of Legal Notice No. 101, the Environmental (Impact Assessment & Audit) Regulations 2003, and in disseminating the information to ensure that the relevant information is given to the public; these reports should be in a simple language that everyone can understand; the venues of the *Barazas* should be centrally convenient; the dates of the meetings should be known to all well in advance and the County Government should be

involved from now henceforth.

101. One question we are yet to answer but whose answer is suggested by our approach above is whether it is fatal that the Kitui County Government was not involved at all in the Coal Mining Project. What is the proper role of the county government in this process?

102. With the dispensation of the new Constitution, we now have a devolved government in Kenya. At the national level Public participation is enshrined under Article 10 of the Constitution as part of our national values. At the county level, **Article 174 (c)** provides that ***the objects of the devolution of government are to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.*** It is, therefore, the Constitutional expectation that counties will be the forums where public participation is perfected on some of the most pressing issues. Yet, in this case, there was no conscious or even feigned attempt to involve the Kitui County Government in the Coal Mining Project.

103. One answer to this puzzle is the one provided by Mr. Imende: that all minerals found within Kenya, by Constitutional definition, belong to the national government anyway, so it is needless work to involve the counties. Given the text of Article 174(c) of the Constitution just cited above, the non-involvement of a county government on the basis of ownership of resources or even differentiated functions between the two government levels is unconvincing. Mr. Imende himself offered an alternative explanation – perhaps upon the realization that counties are, indeed, laboratories of public participation which cannot be gleefully andinconsequentially ignored: His other explanation was based on temporality: the Kitui County Government was not in existence at the time the most substantive discussions on the Coal Mining Project were taking place. By the time it came into being in March, 2013, and in the face of the Constitutional provisions on the ownership of minerals, this was hardly its priority. It would, therefore, have been politically unrealistic and legally naïve to expect the Kitui County to take the mantle of ensuring public participation on this issue right at its birth in March, 2013. Hence, Mr. Imende was of the opinion that even if the Court came to the legal conclusion that a county government must ordinarily be involved as *de minimis* to cross the Rubicon of public participation, that rule should not apply here for temporal reasons: the Kitui County Government did not exist at the time.

104. We have anxiously considered this point. We are disappointed that the Kitui County Government chose not to participate in the legal proceedings even after we issued several express invitations to it to be represented as a party or amicus in the suit. All our efforts to engage, in view of the polycentricity of the issues, to get the most wholesome analysis were rebuffed by the County so we did not have the benefits of their arguments. We are, however, persuaded by the two-track position taken by Mr. Imende on the issue. An issue involving prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the County Government – even if the primary activity is assigned to the National Government in our scheme of devolution. We believe that this is the logical consequence of the cooperative and collaborative two-tier governance system imposed by our Constitution. This is the future prescribed by the Constitution. Hence, we hope that the National Government will involve the County Governments, as repositories of local priorities and preferences, in public decisions that would affect many of the county citizens. We believe that is the Constitutional imprimatur.

105. We are, however, aware that the Kitui County Government was not in existence during much of the processes that led to the award of the Concessioning Tender. It is true, as the Petitioners and *amicus* repeatedly point out, that the County Government was in place by the time the Benefits Sharing Agreement was being negotiated. It was, therefore, incumbent upon the National Government to involve them at that point, they argue. Given our sentiments in the previous paragraph, the Petitioners and *amicus*, ***might*** have a valid point. However, we note that the Kitui County Government made no efforts at all to be involved and they stoically demonstrated that in their sounds of silence before us. Public participation usually entails a level of proactivity or interest on the part of the beneficiary of the right. No such passing interest was exhibited on behalf of the Kitui County Government. It would, thus, seem mechanistic to now require the County Government to be involved.

106. We do consider this contretemps an ephemeral one: it was occasioned by the transitionary nature of our democracy in the period during which the factual predicates of this suit were being enacted. That transition has since passed: we fully expect, as expressed above, that the National Government must, as a consequence of the requirement of public participation, involve County Governments when it comes to negotiations for all contracts or partnerships to exploit natural resources.

107. In addition, in light of the provisions of section 107 of the County Government Act, we expect the Kitui County Government to take more seriously its role of representing the local community interests in the next phase of the Coal Mining Project i.e. the Environmental Impact Evaluation stage.

(c) Were the Petitioners' Right to Information Violated?

Article 35 (1) of the Constitution provides as follows***:***

Every citizen has the right of access to-

a. ***Information held by the state***
b. ***Information held by another person and required for the exercise of the protection of any right and fundamental freedom.***

109. This is a straightforward right contained in the Bill of Rights. The Petitioners, in unison, wanted to be furnished with a copy of the Benefits Sharing Agreement which had been negotiated between the Government and Fenxi – but the Government, at first, declined to do so. The Government's first argument was that no BSA existed; only a draft under negotiations and it would have been imprudent to share a draft contractual document under negotiations with the world at large.

110. However, in the course of the litigation, the Honourable Attorney General entered a consent order under which he undertook to supply all the parties with copies of the BSA. The only other excitement in the matter was the brief moment when the Honourable Attorney General appeared to waver on that commitment even momentarily considering an application to have it set aside over grounds of impossibility: that the promised BSA did not exist. Any academic doctrine which would have developed out of this episode was nipped in the bud when the Honourable Attorney General changed tack and supplied a copy of the BSA to all parties to the litigation. Thus, the Petitioners' objective and prayer in this regard were accomplished. We therefore see no reason to pursue this analysis further.

111. Indeed the only possible controversy, not taken up in this cause, would have been whether the Liaison Committee, a juridical person – if that – is entitled to rely on the provisions of Article 35 of the Constitution in light of the holding by Justice David Majanja in ***Famy Care Limited v Public Procurement Administrative Review Board and Another Nairobi Petition No. 43 of 2012 [2012] eKLR.*** In the case, Justice Majanja held that ***"the clear intent manifested in the Constitution is that the right of access to information under Article 35(1)is limited by reference to a citizen and is not intended to be exercised by juridical persons."*** None of the parties took up this matter and so, however titillating, its confirmation, extension or distinction beyond the reasoning of Justice Majanja in the ***Famy Care Limited*** decision will await another occasion.

(d) Were the Petitioners' Rights to Private Property Infringed or are there Reasonable Grounds for Apprehending such Infringement?

112. Article 40 of the Constitution provides that;

"40 (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that

property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

113. The Petitioners base their arguments in this regard, not so much on deprivation of private property but what they see as likely deprivation without compensation. They fear that the Coal Mining Project is moving at such a fast pace and that all indications are that the drilling and mining will begin before adequate plans have been made to evaluate, cost and compensate the Petitioners and others whose land will need to be compulsorily acquired. The Petitioners say that their main cause of anxiety is the fact that the Government has proceeded to enter into the BSA which gives mining rights to Fenxi yet their property is still held as community property yet to be subdivided to individual owners and titled. They therefore fear that the Government might simply compulsorily acquire the land and short-circuit their legitimate interests.

114. The Respondents' response is that the Petitioners' apprehension about deprivation of property without compensation is utterly speculative. The Government has, at all times, indicated that it would compensate and even resettle the parties affected by the Coal Mining Project. The Honourable Attorney General pointed out that this position is now crystallized in the BSA at Clause 2.8.1. That Clause provides:

115. 2.8.1 Upon:

2.8.1.1 The confirmation of the Development Area (which shall be set out in the Development Requirements)

2.8.1.2 Government and the Concessionaire agreeing on the terms of the Resettlement Action plan; and

2.8.1.3 Implementation and completion of the Resettlement Action Plan by the Concessionaire (at the cost of the Concessionaire),

Government shall acquire the land constituting the Development Area PROVIDED THAT: (a) where such land is public and /or community land, Government shall set aside part of such public or community land area in accordance with Applicable Law; and (b) where such land is private land, Government shall acquire the land in accordance with the Applicable Laws.

116. The Honourable Attorney General also referred to the provisions of Clause 5.10 of the BSA which relate to the Resettlement Action Plan. The position taken by the Honourable Attorney General is a simple one: any apprehension by any of the denizens of Mui Basin who legally own property either in their private capacity or as community property that their land will be compulsorily acquired without adequate compensation is unfounded.

117. On our part, we have found no concrete evidence placed before us which justifies the apprehension that plans are afoot to compulsorily acquire the property of the Petitioners and those in similar circumstances without following the due process of the law and adequate compensation as stipulated under the Constitution. However, we hasten to remind the Government of its obligations under Article 40 of the Constitution, which, we gladly note are codified in Clause 2.8.1 of the BSA, to follow the due process of the law in compulsorily acquiring the property needed for the Coal Mining Project; and to adequately compensate each of the individuals affected. Each of the individuals affected, or the community as a whole can come back to court if these Constitutional commandments are not adhered to. For now, however, there is no wrong to redress.

(e) Are the Petitioners' Rights to a Clean and Healthy Environment Under Threat?

118. The Constitution of Kenya in Article 42 establishes a right to clean and healthy environment in the following terms:

"Every person has the right to a clean and healthy environment, which includes the right –

a. ***To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and***
b. ***To have obligations relating to the environment fulfilled under Article 70."***

119. On the other hand, in Article 70, the Constitution provides Kenyans with an avenue to process their rights as enshrined in Article 42. In material part, the Article states:

"70 (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter."

120. As paraphrased in the Petitioners' case, the Petitioners base their arguments on the threat that their right to clean and healthy environment will be infringed if the Coal Mining Project is permitted to go ahead. As far as we can tell, their apprehension is predicated on what we can restate as a truism followed by two arguments. The truism is that coal mining is acknowledged the world over as one of the most environmentally-damaging activities man had ever devised. In the first part of this judgment, we explained the scientific basis for these assertions. However, the fact that Coal mining causes environmentally adverse effects is not a self-defining reason not to concession coal mining. This is because there is a need to balance, on the one hand, the need to utilize natural resources sustainably so that they spur economic development since, after all, environmental resources are the capital base of the economy. On the other hand, there is the need to control and manage the use of the environmental resources so that they do not generate unsustainable levels of pollution or waste or unjustified adverse effects on the health of humans. Hence, it fell on the Petitioners to persuade the Court that this delicate

balance has not been struck in the Coal Mining Project. It is important to point out that in assessing "apprehension" of harm to the environment, the accepted international standard now imported to our country is one of precaution:

> When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action.[2]

121. Here, the Petitioners argue that there is enough to worry us to stop the Coal Mining Project on health and environmental grounds. First, they argue that the very fact that an Environmental Impact Assessment (EIA) has not been concluded justifies their apprehension that the assessment might suggest that the adverse effects far outweigh the potential benefits of the project. Second, the Petitioners argue that the places on earth where coal mining's adverse effects have been mitigated are those where there is a robust regime regulating all aspects of mining (see paragraph 37 above). They argue that such a regime is missing here despite the government's promise to have it in place a few years ago. The Petitioners are apprehensive that permitting the Coal Mining Project to begin before a robust regime of regulations is in place will risk adverse effects to the environment.

122. On their part, the Respondents argue that the EIA is under way and that no commercial mining will take place before it is concluded. We have addressed this issue below. As to the second issue, the Honourable Attorney General submitted that there was, already, sufficient legislation and legislative framework to operationalize safe mining of coal in Kenya – and no other regime is needed.

123. Our approach is similar to the one we have taken on property rights: the rights invoked by the Petitioners are real rights and they are justiciable. In an appropriate case, if appropriate apprehension of potential harm to the environment is demonstrated, the Court can move under Article 22 of the Constitution to fashion an appropriate remedy. However, for orders to issue, harm or threatened harm must be proved. That has not happened here. Our position is that this claim is yet to ripen: there is no sufficient material that can even trigger the invocation of the precautionary principle in the presence of the textual guarantees provided in the BSA which include a comprehensive EIA to be conducted. We will address the EIA issue next because of its logical proximity to this issue.

(f) Does the Fact that the Environmental Impact Assessment was NOT Performed Before Concessioning the Project Render the Coal Mining Project Legally Infirm?

124. As established above, the Constitution under Article 42 provides that everyone has a right to a clean and healthy environment. Further, under Article 69(1) (a) of the Constitution, the state shall ensure sustainable exploitation, utilization and conservation of the environment and natural resources, and ensure sharing of the accruing benefits.

125. According to section 58 of EMCA and Environmental (Impact Assessment and Audit) Regulation, 2003, new projects as listed under the 2nd schedule must undergo an Environmental Impact Assessment (EIA) while ongoing projects must undergo Environmental Auditing (EA). The Environmental Impact Assessment Report (EIAR) and Environmental Audit Report (EAR) are then submitted for review by National Environment Management Authority (NEMA) which then approves or disapproves a project.

126. As provided for under Regulation 17 of Legal Notice No. 101, the Environmental (Impact Assessment & Audit) Regulations 2003 when conducting an Environmental Impact Assessment study the proponent must, in consultation with NEMA seek the views of persons who may be affected by the project. The proponent must:

a. publicize the project and its anticipated effects and benefits by: posting posters in strategic public

places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project; publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

b. hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
c. ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
d. ensure, in consultation with the Authority, that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all

127. The Petitioners allege that an Environmental Impact Assessment has not been done by the project proponent, Fenxi. It is their position that EIA must proceed concessioning. The Petitioners vigorously argue that failure to carry out EIA before the concessioning was carried out renders the Coal Mining Project illegal – null and void and it must be declared so. They rely on the express provisions of section 58 of EMCA which provides that:

> ***"58(1) Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee."***

128. The Petitioners are relying on a plain reading of the statute: it clearly states that an EIA must be done before "financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act…." In their view, concessioning goes far beyond the threshold provided by EMCA and should not have happened without an EIA being carried out. When we asked the Petitioners' lawyers what the remedy would be if we adopted that interpretation of EMCA, they suggested that the remedy must be nullify the Coal Mining Project so that it starts afresh.

129. The Petitioners relied on the famous decision by Justice Hayanga: **Rodgers Muema Nzioka & 2 Others Plaintiffs Vs Tiomin Kenya Limited Defendants Civil Case No. 97 Of 2001.** In this case, Justice Hayanga was quite categorical that failure to conduct EIA before the commencement of any activities related to a proposed project offends the terms of section 58 of EMCA.

130. On their part, the Respondents and Fenxi make two related arguments. The first one is that the process of EIA has began and that no mining will take place before it is completed and that this is what was envisaged in the BSA and Concessioning Agreements. Second, they make the implicit argument that in the area of mining where EIA is a colossal investment, EMCA could not have intended that each potential bidder sinks upfront these amounts ahead of the tender award. Such a reading of the statute would be plainly bizarre since it would lead to economic waste or worse: no investors would bid for mining contracts if they were required to perform EIA before they had been awarded the bids.

131. EIA is an obviously important component to this entire process as it is vanguard of the principles of sustainable development. It is from this assessment that we are guided as to the potential or lack of adverse effects of the project on the environment and where the decision will be made as to whether the project should continue or not. Looking at the Benefit Sharing Agreement one of the preconditions before the project can begin is outlined in Clause 3.1.28 which states: ***"the concessionaire having completed the Environmental Impact Assessment to the satisfaction of the relevant government Authorities and having been granted with a license from NEMA in relation to the concession project."***

132. This begs the question: Has Fenxi already run afoul the provisions of section 58 of EMCA merely by responding to an advertisement by the Government of Kenya for Expression of Interest for concessioning of the coal blocks in Mui Basin for exploration and development and then ultimately being adjudged the winning bidder of that process? It seems to us that that would be an absurd reading of the law. It is probably a better view that bidding and winning a tender to mine coal or anything else does not trigger yet the EIA requirements of EMCA. It is in the next phase where the section is triggered: the winning bidder, Fenxi in this case, is obligated under the law to carry out an EIA before commencing any works. In this case, the BSA, in any event, contractually obligates Fenxi to do so in Clause 3.1.28.

133. In view of the controversy over public participation, however, we feel it important to make some observations about how the EIA must be carried out. It is important that any doubts the local community may have about their views being taken seriously in the Coal Mining Project be erased through the EIA process. In particular, Fenxi must undertake to widely disseminate the Environmental Impact Assessment Report upon completion of the assessment and make every effort to reach as many residents of Mui Basin as possible. We wish to remind Fenxi that the public participation requirement is a continuing one – and that, indeed, it has now been heightened. Having sparsely whimpered through the first round, Fenxi would be advised to design a more effective public participation programme in the second phase of Coal Mining Project. Needless to say a member of the local community can invoke their rights in this regard at any time before the actual commencement of the Project. It is in this regard that we deliberately repeat ourselves in observing that the public participation obligation of Fenxi and the Respondent is a continuing one.

(f) Was There A Constitutional Requirement For Parliamentary Ratification For The Coal Mining Project?

134. Finally, this brings us to the final issue. Article 71 of the Constitution provides as follows:

2. *A transaction is subject to ratification by Parliament if it-*

a. *involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya;*
b. *is entered into on or after the effective date*.

3. *Parliament shall enact legislation providing for the classes of transactions subject to ratification under clause (1).*

135. Again, the Petitioners argue that the words of the Constitution are quite plain: all transactions involving the grant of a right or concession for the exploitation of natural resources which is entered into after the effective date (27th August, 2010) requires Parliamentary ratification. The argument is simple: the concessioning of the Mui Coal Mining Project to Fenxi was a "transaction" within the meaning of Article 71(1) of the Constitution, and, as such it is regulated under Article 71(1) and, therefore, needed Parliamentary ratification since it happened after the Effective Date.

136. By all accounts the concessioning of the Coal Mining Project happened after the Effective Date: the public advertisements were done on 17th September, 2010. The Expressions of Interest were opened on 16th November, 2010. The successful bidders from the first round submitted their Requests for Proposals by 14th July, 2011. The Ministerial Tender Committee deliberated and approved the award to Fenxi on 4th August, 2011 – long after the Effective Date.

137. The Petitioners would, on this basis, argue that the whole concessioning process is invalid absent Parliamentary Ratification. However, the Respondents pointed out the provisions of the Sixth Schedule, section 8(3). It provides:

> The provisions of Article 71 shall not take effect until the legislation contemplated under that Article is enacted.

138. The *Amicus*, Katiba Institute, countered that it is incumbent upon the Court to look at the spirit of the Constitution and the general direction of the Constitution and uphold its rights and values. According to Katiba, it would be a patriotic act in aggrandizement of the Constitution to require the Executive to seek Parliamentary ratification for all the kinds of transactions envisaged under Article 71 of the Constitution even as we await the legislation. In other words, Katiba urges the Court to read the words in Sixth Schedule, section 8(3) with a very heavy dose of Constitutional spirit in the absence of the required legislation stipulated in the 5th Schedule. If we do so, Katiba urges, it would be in line with enhancing principles of good governance, transparency and accountability.

139. Be that as it may, even while we agree with the *Amicus* that embracing the Constitutional spirit is a national value and that functional jurisprudence has now been mainstreamed in the Judiciary, we agree with Mr. Mbitta that the spirit of the law cannot completely and cynically empty law of its text. Here, the drafters were clear and advertent and it is easy to think why they temporarily envisaged that agreements involving natural resources would not be affected by Article 71 of the Constitution until Parliament passed the relevant statute. The drafters of the Constitution must have been worried about negotiations on natural resources that were going on even as they put the final touches on the Kenyan Constitution. In providing for a five year period during which the legislation under Article 71(2) providing for the categories of contracts which would require Parliamentary ratification, and then coupling that with the provisions of Section 8(3) of the Sixth Schedule of the Constitution that, basically, the Constitution advertently aimed to inoculate transactions pending Parliamentary action. In this case, then, there is a good reason to believe that the drafters of the Constitution intended to make Article 71 inoperable until the envisaged Act of Parliament is enacted. We therefore find that Article 71 is not a bar to the operationalization of the concessioning agreement.

CONCLUSIONS AND ORDERS

140. In the upshot, following our analysis above, we order as follows:

a. The Consolidated Petition is hereby dismissed without any order as to costs due to the evident public nature of the case.
b. As outlined above, the Respondents, the Attorney General, and Fenxi Mining Industry Company Limited are required to continue to engage with the local community and provide reasonable opportunities for public participation during the process of preparing an Environmental Impact Assessment and the process of Resettlement as outlined in the Benefits Sharing Agreement.

DATED, SIGNED AND DELIVERED this 18TH day of SEPTEMBER 2015.

JOEL NGUGI, Judge

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LILLIAN MUTENDE, Judge

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B. THURANIRA JADEN, Judge

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[1] J.B. Ojwang', ASCENDANT JUDICIARY IN EAST AFRICA, (Strathmore University Press, Nairobi, 2013).

[2]http://www.sehn.org/precaution.html