



**Mereka & another v Director General, National Environment Management Authority
& 2 others (Cause 22 of 2019) [2022] KEELC 3137 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
CAUSE 22 OF 2019
LN GACHERU, J
JUNE 9, 2022**

BETWEEN

DAVID MEREKA 1ST PLAINTIFF

JOHN MBOTE 2ND PLAINTIFF

AND

**DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST DEFENDANT**

AFRIMAC NUT COMPANY LIMITED 2ND DEFENDANT

MAZINGIRA & ENGINEERING CONSULTANTS LTD 3RD DEFENDANT

JUDGMENT

- 1 The Plaintiffs filed this suit against the Defendants vide a Plaint dated 3rd July, 2019. Subsequently, the Plaint was amended on 5th August 2019, whereby the Plaintiffs sought for ORDERS that:
 - a. A Declaration that the Plaintiffs’ right to clean and healthy environment has been violated and being violated by the 2nd Defendant.
 - b. A Declaration that the Environmental Impact Assessment (EIA) Report No. NEMA PR/5/2/MRG/008 /1239 submitted by the 3rd Defendant and executed on 13th December, 2018, was obtained without public participation and therefore null and void
 - c. The 2nd Defendant to stop immediate operations of charcoal briquettes plant on the said LR No. Nginda/ Samar/ Block 11/955, Murang’a South Sub County, Murang’a County
 - d. The EIA licence No. PR/1239/0054554 dated 6th February 2019, issued to the 2nd Defendant be cancelled and revoked
 - e. That the 2nd Defendant do decommission the plant



- f. That the 2nd Defendant give an undertaking to the Plaintiffs and the neighbors with respect to any potential damage to their health, that of their animals and the environment arising out of the operations of the said plant
 - g. That the Plaintiffs be awarded costs of this suit
 - h. Any further or other relief that this Honorable Court may deem fit to grant
- 2 It is the Plaintiffs case that the 2nd Defendant operates a Charcoal Briquettes Plant which became operational on or about April/ May, 2019. That the 2nd Defendant employed the 3rd Defendant in 2018 to carry out an Environmental Impact Assessment(EIA) and acting on the said instructions, the 3rd Defendant prepared and executed an EIA Report No. NEMA PR/5/2/MRG/008/1239, and subsequently, the 1st Defendant issued a licence being No. PR/1239/0054554 to the 2nd Defendant. The Plaintiffs contend that the report was obtained without their involvement as required by law. The Plaintiffs further averred that the plant emits excessive smoke, with acrid smell and produces excessive and unbearable noise creating an environmental hazard to the neighborhood. They further contended that they reported the issue to the 1st Defendant, who sent a notice to the 2nd Defendant stopping the operation of the plant, but the 2nd Defendant neglected and or failed to honor the notice.
 - 3 Additionally, the Plaintiffs averred that the 2nd Defendant never obtained a change of user, in order to operate the plant and if any, it was illegally obtained. The Plaintiffs have also alleged that the EIA was obtained negligently, unlawfully, unprocedurally and illegally as enumerated in paragraph 12 of the Plaint. The Plaintiffs' claim is that the plant is posing a health risk to both the environment and human. The Plaintiffs relied on the precautionary principle. That they filed a claim at Tribunal being NET No. 15 of 20198, but they could not prosecute the same as the widow period required under Section 129(1) of Environment Management and Coordination Act(EMCA) had lapsed.
 - 4 The 2nd and 3rd Defendants filed a joint statement of Defence dated 13th September 2019, in opposing the suit. The 2nd & 3rd Defendants averred that they lawfully put up the project and followed the due procedure, and they conducted a public participation. That in respect of the Plaintiffs, they did so through their representatives who live on their respective properties and invites the Plaintiffs to strict proof to the contrary. It is their case that while an emission occurred, the same was rectified and was attributable to a manufacture's defect on one of the machines and that subject to the Plaintiffs complaint, the operation of the plant has not resumed.
 - 5 In response to the illegality and unlawfulness of the project as enumerated in paragraph 12 of the Plaint, the 2nd & 3rd Defendants averred that they applied and obtained the necessary approval for the change of user and procedurally carried out an EIA.
 - 6 The 2nd & 3rd Defendants denied that the Plant causes environmental hazards and have averred that the same is important for environmental conservation and preservation. Moreover, that they have put in place mitigation measures that were approved by the 1st Defendant. It is their case that the plant has in no way infringed on the Plaintiffs' rights and their claim is therefore unnecessary as it raises no reasonable cause of action. In the end, the 2nd & 3rd Defendants denied the jurisdiction of this Court and affirmed that the claim falls within the realm of the National Environment Tribunal(NET) or the Liaison Committee of the approving authority.
 - 7 The 1st Defendant filed its Statement of Defence dated 16th November 2020, elaborating its role towards the project. It the 1st Defendant's case that it issued the license based on the submissions by the 3rd Defendant, which is a licensed environmental expert. That it covenants to institute criminal proceedings against the 2nd and 3rd Defendants, should it be established that they provided false



information. It is the 1st Defendant's case that the 2nd Defendant shut operations after issuance of notice as per their inspection and invites the Plaintiffs to strict proof to the contrary.

- 8 Further that if the plant is still operational, the 1st Defendant will institute criminal charges against the 2nd Defendants. The 1st Defendant maintained that it did that which is allowable under EMCA, and in any event, if there was misrepresentation in obtaining the license, the 2nd and 3rd Defendants are liable. The 1st Defendant further averred that it addressed the environmental hazard alluded to by the Plaintiffs when it requested the 2nd Defendant to submit additional Environmental Management Plan. In the end, it averred that having closed the plant, the Plaintiffs right to clean and healthy environment was protected, and thus there is no claim against the 1st Defendant.
- 9 Parties filed their respective witness statements and documents to be relied upon. The matter was set down for hearing and the Plaintiffs' case commenced on the 22nd September, 2021.

Plaintiffs' Case

- 10 PW1, DAVID MEREKA testified that in 2018, the 2nd Defendant employed the 3rd Defendant to conduct an EIA on LR No. Nginda/ Samar/Plot 2 Block 11/955, after which a report was prepared and subsequently a license issued to the 2nd Defendant to open a charcoal briquettes factory. That the said factory borders his land being Block 11/951, and that of the 2nd Plaintiff being Block 11/ 949. That, the operation of the plant was accompanied by very excessive noise, smoke and smell, which was harmful to the neighborhood as well as the flora and fauna. Further, that the Plaintiffs reported the matter to NEMA- Murang'a Branch, who ordered the 2nd Defendant to stop operations of the plant and which operations has ceased to date.
- 11 It was his further testimony that he sold the land to the 2nd Defendant, which was an agricultural land, but the 2nd Defendant applied for a change of user where he obtained authority to change the land to commercial purpose. Further that the entire processes of obtaining EIA and change of user were irregular and devoid of procedure. That they were not directly involved and their employees did not have their consents to sign any documents on their behalf, and as a result, there was no public participation. He produced the bundles of documents attached to his pleadings in support of his case as P.Exhibits.
- 12 On cross examination by Counsel for the 1st Defendant, he testified that the plant operated 24 hours, and despite of not living thereon, he was informed of the pollution by his employees and neighbors. He informed the Court that the EIA report did not have a study report, and he confirmed that he was aware of the requirements for both reports. He also confirmed that NEMA acted on their complaint and stopped operations thereon.
- 13 Counsel for the 2nd & 3rd Defendants cross-examined him on his complaints and he stated that he did not personally experience any pollution. He maintained that his employee, Margaret Nyambura was cheated into signing the documents.
- 14 PW2 John Mbote Kamau, adopted his written statement and produced the documents attached to his pleadings as exhibits. He told the Court that he is the owner of L.R No. 949, wherein he has put up a residential house. That the persons who filled the questionnaires were his casual laborers and it was his evidence that they did not have his authority to do so as they were persons he had employed only to build his house.
- 15 On pollution, he told the Court that the effects of it had led to death of their livestock and that children have been experiencing persistent coughs. It was his further testimony that he was not aware



- of the change of user, and he maintained that the area is a residential cum agricultural area, but not commercial or industrial. In the end, he stated that the plant should be decommissioned.
- 16 On cross examination by Counsel for the 1st Defendant, he maintained that he was never informed about the project at inception and the fact that his employees assisted in the construction of the plant was illegal. He also reiterated the effects of pollution to livestock.
- 17 On cross-examination by Counsel for 2nd & 3rd Defendants, he testified that he did not experience the effects of the pollution, but his employees did, as at that time he was not residing on the land in 2019. He confirmed to this Court that he did not have a report showing the adverse effects of the pollution on the livestock.
- 18 On the 15th December 2020, the Plaintiffs requested for a site visit which was conducted on the 15th February 2021, and a report was filed in this Court by the Deputy Registrar. The report espoused the details on the layout of the project. The result of the project was that the project is dormant.
- 19 PW3 John Kaguma Maina, adopted his witness statement dated 6th March 2021, as evidence. He further testified that he is the registered owner of land parcel No. 950, while the 2nd Defendant is the owner of parcel No. 955. He told the Court that he resides on his property and was not involved in any public participation. That he only saw smoke being emitted from the factory(plant). Further that the neighborhood became concerned because the plant was noisy and produced foul smell, despite this being a residential and agricultural area, which resulted in the death of some livestock.
- 20 `On cross- examination by Counsel for 1st Defendant, he affirmed that together with his family, they live in the neighborhood. He reiterated that neither he nor his family was consulted and also that his livestock died as a result of the pollution, though he did not have a report to back his claim.
- 21 On cross-examination by Counsel for the 2nd & 3rd Defendants, he confirmed his earlier testimony save to add that their comfort was affected because of the plant.
- 22 PW4 Margaret Nyambura, adopted her witness statement dated 2nd September 2021, as her evidence in chief. It was her testimony that in February 2019, some people visited the property of PW1, where she was an employee, and informed her that they were agricultural researchers who were undertaking interviews on planting of avocados which PW1 had done so on the farm. That based on their misrepresentation, she signed the documents which she was given and shown where to sign of which she did not read or retain a copy. That at the signing of the document, she was not told about the factory.
- 23 On cross-examination by Counsel for the 1st Defendant, she confirmed having signed the document and that she did not inform PW1, because she thought they had been send by him. She told the Court that she never read the documents and that she was **not** threatened into signing the same.
- Thereafter the Plaintiffs closed their case.

Defence Case

- 24 DW1Patricia Mumbi Wambua, the Principal Environment Officer at NEMA headquarters, stated that when the dispute arose, she was in charge of NEMA Murang'a County, and she is aware of the facts founding the suit. She confirmed having received a complaint dated 13th May 2019, about pollution by the plant, which they had issued a licence over and after, an inspection was done on 14th May 2019, which resulted to a stop order being issued. That the 2nd Defendant was asked to take the necessary measures to curb smoke emission, which was to be communicated to NEMA.



- 25 On public participation, she told the Court that it was important and NEMA only relied on the information given by the 3rd Defendant who is an environment expert.
- 26 On cross-examination by Mr. Mereka for the Plaintiffs, she stated that she had no reason to doubt the credibility of the 3rd Defendant. She explained their role as NEMA towards the project and confirmed that the 2nd Defendant had breached the Environmental Management plan contained in the EIA Report. She also confirmed that the licence was to run for two years as at the time she was testifying, the same had expired. She also confirmed that the 2nd Defendant had not done any Environmental Audits as required, but she was not aware whether they had complied with the conditions of the Stop order. Additionally, that in case an issue arose, the proponents of a project should indemnify NEMA. She further told the Court on what guides issuance of license is a project and not a study report and that they were satisfied that a public participation was conducted. She also confirmed that the 2nd Defendant stopped operations of the project.
- 27 On re-exam, she testified that NEMA ensures compliance with Environmental Management Report, as well as ensuring an audit is done. Further, that they received complaints in cases where EIA is unprocedurally acquired.
- 28 DW2 Isaac Waititu, told the Court that he is General Manager of the 2nd Defendant and adopted his witness statement dated 21st May, 2021, and the documents contained in his pleadings as exhibits. He also testified that the smoke was as a result of a manufacture defect which they acted on. Further, that emission occurred once and it was only moment that an emission occurred. He also confirmed that the plant ceased operation since the stop order was issued.
- 29 On cross-examination, he told the Court that their offices are located in Parklands and also on the suit property. He explained that the walls of the plant have soot because of the emission of one event that led to the closure of the plant. He also told the Court that they had experts who handled the plant, but who left after the plant stalled. He further explained the procedure of how the macadamia husks were heated and also gave reasons why there was an emission.
- 30 He also testified that he employed the services of the 3rd Defendant in 2018, who prepared the EIA Report. That they were issued with a licence dated 6th February 2019, by the 1st Defendant, and which licence has not expired. Further, that they made an application for change of user at the Murang'a Municipal Council and which application was advertised in the People's Daily Newspaper. That he was not aware whether the neighbors were in the meeting. That the allegations were untrue and should the licence be restored, the 2nd Defendant would continue with the project.
- 31 Further, he told the Court that NEMA did not have to approve the change of user. About the emission, he maintained that the same was an unexpected occurrence which did not last throughout the day and that it did not cause any harm to the environment or the livestock.
- 32 On re-exam, he explained the measures that 2nd Defendant took after the emission and maintained that the same was environmentally sound.
- 33 DW3 Ephantus Nderitu Kihoro, testified that he works at the Physical Planning office at Kenol but previously worked at Mathioya, and told the Court that their office held a meeting for the change of user on 17th July, 2018, and thereafter the process begun and there has been no complaint filed.
- 34 On cross examination, he testified that he was not present when the change of user was done. That the same should be advertised in the Daily Newspapers and that the Advert or Notice should also be put at the site.



- 35 DW4 Simon Mathenge Wanyutu, a Director of the 3rd Defendant and a lead Environment Expert registered by the 1st Defendant. It was his testimony that their office prepared the EIA Report and went ahead to explain how the same was prepared and the considerations they put in place as required by law. He also told the Court that the effects of the project were production of smoke and carbon dioxide, which is harmless to the environment, but harmful to the workers. He testified that they carried out public participation and interviewed the workers of the neighbours and not the owners, He also added that these workers worked at the project site.
- 36 On cross-examination, he confirmed that the area is residential and also that he neither left the questionnaires with the workers nor contacted the owners of the adjacent properties. He also told the Court that he did not visit the project after the emission, and was thus not aware whether there was compliance with his report or not. Additionally, that he gave adequate mitigation measures which if adhered to, would not result in any negative impact.
- 37 On re-exam, he testified that he opted for the workers because they were the ones occupying the adjacent properties.
- 38 At the close of *viva voce* evidence, the Court directed parties to file and exchange their written submissions. The Plaintiffs filed their written submissions dated 14th December 2021, on 2nd February, 2022. They submitted on the relevance of the precautionary principle and cited a number of cases where the Courts had expounded on the applicability of this principle to guarantee the right to clean environment. Reliance was placed on the case of Kenya Association of Manufactures & 2 Others Vs Cabinet Secretary- Ministry of Environment & Natural Resources & 3 Others {2017}: where the trial Court reproduced the provisions of Section 3 of EMCA and the principles that guide the Court in determining the right to clean environment which includes the precautionary principle. The Plaintiffs also relied on the following cases:-
- 39 - *Isaiab Luyara Odando & Another vs National Management Environmental Authority & 2 Others, County Government of Nairobi & 5 Others (Interested Parties)* {2021}: where the trial Court pronounced itself on the importance of the precautionary principle which is meant to prevent environmental harm where there is no conclusive scientific evidence.
- 40 - *Ken Kisinga vs Daniel Kiplgat Kirui & 5 Others* {2015}: where the trial Court opined that where procedure for environmental protection is not followed, an assumption is drawn that the project violates the right to clean environment. Additionally, the trial Court held that the burden of proving precautionary principles ought to be the proponents of the project.
- 41 The Plaintiffs further submitted that the act of the 1st Defendant of issuing a stop order meant the project had some environmental effects and the 2nd Defendant never lead any evidence to show compliance.
- 42 The Plaintiffs maintained that there was no public participation undertaken before the project commenced and the alleged public participation was done to hoodwink the 1st Defendant to issue a licence. That the 3rd Defendants did not demonstrate the efforts it made to reach out to the Plaintiffs who are the registered owners of the properties.
- 43 In submitting that there was no public participation the Plaintiffs invited this Court to the reasoning in the following cases. *Okiyah Omtaatab Okotti vs County Government of Kiambu* {2018}: wherein the Court quoted the case of Robert N Gakuru and held that a Court should determine whether the degree of involvement is as required by *the Constitution*. Mui Coal Basin Local Community & 17 Others vs Permanent Secretary Ministry of Energy & 15 Others {2015}, where the trial Court observed what



- would amount to public participation and held that there should be evidence of intentional inclusivity and take account of those most affected by the policy.
- 44 The Plaintiffs submitted that public interests supersedes the commercial interest of the 2nd Defendant, which is a principle this Court should protect.
- 45 Reliance was placed on the case of *National Environmental Authority vs Gerick Kenya Ltd* {2016}, where the Court found that the public interest outweighed the private individual interest. Further the Plaintiffs submitted that the 2nd Defendant produced no evidence to demonstrate the benefits of the project, but conceded that the stopping of the project, will conserve the environment.
- 46 The Plaintiffs also noted in their submissions that despite the County Government of Murang'a not being party to the suit, it could be established that the change of user was not done well. In the end, the Plaintiffs submitted that they have proved their case on a balance of probabilities and urged this Court to rest the project and order the 2nd Defendant to decommission the said project.
- 47 The 1st Defendant filed its written submissions dated 24th November, 2021 and raised five issues for determination by the Court.
- 48 On whether public participation was done, the 1st Defendant further submitted that the same was done in accordance with the provisions of EMCA. The 1st Defendant further submitted that the questionnaires filed was conclusive evidence of public participation and the same was inclusive and summarized the issues discussed. Reliance was placed on the case of *Minister of Health vs New Clicks South Africa (PTY) Ltd & Others* (2006) (2) SA 311 where the Court opined that what mattered is that an opportunity was accorded to members of the public.
- 49 The 1st Defendant further submitted that the questionnaires were adequate and should it be found that they are not and in breach of section 58 of EMCA, the 3rd Defendant should be held liable. That public participation should be qualitative and quantitative as was held by the Court in the case of *Robert N Gakuru & Others vs The Governor Kiambu County & 3 Others*[2013]eKLR,
- 50 Further, the 1st Defendant submitted that they acted expeditiously after a complaint was lodged and stopped the operations of the plant.
- 51 On the change of user, it was the 1st Defendant's submissions that the Plaintiffs ought to have complied with the provisions of section 13 of the Physical Planning Act which required a complaint being filed within sixty days of the decision. That having failed to so, the Plaintiffs filed this claim in Court to mitigate their delay and also it also painted the Plaintiffs as negligent and absentee landlords. Further ,that the burden of proving the loss suffered rested on the Plaintiffs who failed to adduce any evidence as to warrant grant of special damages. It invited this Court to the holding of the Court in *Douglas Kalafa Ombeva vs David Ngama* [2013]eKLR, where the Court held that where there is no evidence on special damages, the same cannot be granted.
- 52 The 2nd & 3rd Defendants filed their written submissions dated 22nd April 2022, and raised four issues. They submitted that the Plaintiffs failed to demonstrate that their right to clean and healthy environment was violated. That the Plaintiffs must have demonstrated there was ongoing or imminent threat or harm as was held by the Court in the case of *African Center for Rights and Governance (ACRAG) & 3 Others vs Municipal Council of Naivasha*.
- 53 That the burden of establishing violation rested with the Plaintiffs as was found in the case of *Lawrence Mungai Munyua & 16 others v National Environment Management Authority & 3 others; Kenya National Commission on Human Rights (Interested Party)* [2021] eKLR, and 2 other cases cited in the submissions.



- 54 That the pollution if any, was not experienced firsthand by the Plaintiffs as they did not reside on their properties. Additionally, that none of the Plaintiffs disputed that the pollution was one time and this was attributed to a manufacture's defect which was rectified.
- 55 On public participation, the 2nd & 3rd Defendants maintained that they carried out adequate participation based on the circumstances on the ground to wit absentee landlords. They relied on the cases of Minister of Health vs New Clicks South Africa, Poverty Alleviation Network & Others vs President of the Republic of South Africa & 19 Others and *Luo Council of Elders & 8 Others vs County Government of Bomet & 24 Others*, where the trial Courts determined the standard and test of public participation. They urged this Court to disregard the submissions of the 1st Defendant on allegations that the 3rd Defendant failed to interrogate the quality of the questionnaires. Therefore that having established that public participation was adequate and that there was nothing abnormal about acquisition of the licence, the 2nd Defendant's licence should not be revoked.
- 56 On change of user, it was their submissions that the same was obtained procedurally as per the evidence of DW2. In the end, the 2nd & 3rd Defendants submitted that the plant is environmentally sound and the benefits of it are for public interest which this Court must safeguard and not disregard based on one unforeseen event. They relied on the case of *Kenya Medical Supplies Agency (KEMSA) vs. Mavji Kanji Hirani & 8 Others*{2018}, on balancing between private and public interest where the later should be upheld for the advancement of public good.
- 57 This Court has considered the pleadings, the evidence in Court, the witness statements and exhibits attached thereto, the rival written submissions and the authorities cited by parties. The Court finds the issues raised therein touch on the environment, which is a substratum of the jurisdiction of this Court.
- 58 It is undisputed that the plant in issue is situated within an agricultural and/ or residential area. It is not in dispute that the Plaintiffs own land that is adjacent to the demised land which is housing the plant, and which plant is currently closed due to pollution that occurred. The question as to whether the said pollution was one time or continuous pollution can only be determined later.
- 60 Chapter five of *the Constitution* makes provisions on land and environment. Article 69(1) enumerates State's obligation with respect of the environment which include inter alia encourage public participation in the management, protection and conservation of the environment, establish systems of environmental impact assessment, environmental audit and monitoring of the environment and eliminate processes and activities that are likely to endanger the environment. The citizenry have a duty by application of Article 69(2) to cooperate with the State to protect and preserve the environment and which citizenly includes the Plaintiffs and the Defendants.
- 61 The environment is multifaceted and to ensure discharge of the aforementioned obligations, the State can easily achieve this through creation of institutions including the 1st Defendant.
- 62 The 1st Defendant is established under section 7 of the *Environmental Management and Conservation Act, (EMCA)* with its' mandate outlined under Section 9 of the said Act. The 1st Defendant is the principal organ tasked with implementation of policies related to the environment with its' overall role being to exercise general supervision and co-ordination over all environmental matters.
- 63 This Court has the jurisdiction to hear and determine issues and matters that touch on environment. This is one such a matter.
- 64 The jurisdiction of this Court to determine this suit was affirmed by its ruling of 27th January, 2020. Having stated as above, the Court finds the issues for determination are; ,



- i. Whether the Environmental Impact Assessment Report was acquired procedurally
- ii. Whether the plaintiffs right to clean and healthy environment was violated
- iii. Whether the change of user was done procedurally
- iv. Whether the 2nd Defendant's Licence should be revoked
- v. Who should bear the cost

i. Whether the Environmental Impact Assessment Report was done procedurally.

65 *The Constitution* under Article 69(1) (f) places obligations on the state to establish systems of environmental impact management. This obligation is met under EMCA and Section 58 makes it compulsory for a proponent of a project to first obtain an EIA. It states:

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, carried out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
2. The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.
3. The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

66 What the section envisions is that a project report is first prepared giving details of the intended project. The report is then presented to the 1st Defendant(NEMA) and the proponent shall prepare an EIA Report, where after the Authority shall examine the two reports to determine whether the intended project is environmentally sound and establish the mitigating measures laid out by the proponent. These reports are prepared by experts duly appointed by the 1st Defendant(NEMA) as required under sub-section 5 of the aforementioned section.

66 The 3rd Defendant is alleged to be a licensed expert in preparations of EIA's. DW4 testified that he is lead expert in environmental matters and a Director of the 3rd Defendant, responsible for the demised EIA Report, which he produced as evidence before this Court. Page 96 of the 2nd & 3rd Defendants' list of documents is a licence issued to the 3rd Defendant registration no. 1734. Therefore at the time of carrying out the EIA the 3rd Defendant was duly licensed. An examination of the EIA, Report dated 13th September, 2019, gives details of the proposed project as entailed in the report in pages 30-32, the anticipated effect on the environment, pages 32-33 and the mitigation measures adopted, page 34, 36-39, giving rise to Environmental Management Plan in page 41.

67 Regulation 18 of the Environmental Impact Assessment and Audit) *Regulation, 2003* makes provisions on what a report should contain. A reading of the regulation and the EIA Report produced in this Court shows that the same was done accordingly.



- 68 The regulations, 21, as well as the EMCA, section 59, requires that the 1st Defendant shall within 14 Days of receiving the EIA cause it to be published in a gazette of “wider circulation inviting the public to give views on the project”. Undoubtedly, this was not done, but DW1 testified that it was not compulsory to advertise a study report. This issue came up at the hearing, but was not pleaded.
- 69 The Plaintiffs dispute the EIA Report on the basis that there was no public participation and that they are directly affected by the project and it was prudent that their views be obtained.
- 70 This Court has perused the EIA Report and the annexures thereto as contained in pages 84-91 of the 2nd & 3rd Defendants’ list of documents. A total of eight(8) people filled the questionnaires. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted the case of *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, stated as follows: -
- the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances.
- 71 Apart from enjoying Constitutional protection, the concept of public participation is a principle recognizable under EMCA, which is an important principle that informs environment decision making. Public participation is viewed as a tool, intended to inform planning, organizing or funding of activities, measure attainable objectives, evaluate impact, and identify lessons for future practice. The right to public participation may also be perceived of as human right, or as manifestation of the right to freedom of association and freedom of assembly. Regulation 17 of EIAAR requires that a proponent shall at the time of conducting EIA take the views of the public.
- 72 There is no legislative document on the measure and standard of public participation in Kenya. However, it is acknowledged as an important aspect of governance. The Court in the case of *Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy and 17 others* [2015] eKLR came up with some principles for public participation rephrased by this Court to wit.
- a. Modalities for conducting the public participation which must be qualitative and quantitative,
 - b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. The only test the Courts use is one of effectiveness
 - c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information
 - d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. 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.
- 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.

73 PW4 one of the persons who signed the questionnaires testified that she did not know what she was signing and that she was misled into signing the said document. The Defendants maintained that all the persons who were interviewed were explained for and they understood the reasons for signing the questionnaires. Interestingly, the registered proprietors of the adjacent parcels of land were not involved, despite being closely affected by the project. The Plaintiffs herein are owners of the adjacent parcels of land and were not contacted to participate.

74 This Court respectfully does not agree with DW4 that the employees of the Plaintiffs refused and or failed to share their employers contacts. It is anticipated that those mostly affected ought to have been given consideration and to have a qualitative outcome, it was fair for the proponents of the project to attempt and seek audience with the land owners. While the views of the interviewees mattered, those of the Plaintiffs who live and own the adjacent properties were relevant to demonstrate inclusivity, since they were directly affected by the project.

75 This Court concurs with the findings in Mui Charcoal Case to the extent that “Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition”.

76 There is no adequate reason adduced in Court as to why the Plaintiffs were not involved in the process and thus the Court cannot be persuaded otherwise than to fault the process of public participation. This Court has been well guided by the case laws cited by all the parties and more so the scope of public participation in Robert Gakuru Case.

77 It follows therefore that the EIA Report of 13th September, 2018, was devoid of the Constitutional and Statutory requirement on public participation and cannot be sustained.

ii. Whether the plaintiffs right to clean and healthy environment was violated

78 The Stockholm Declaration of 1972, recognized that man has the right to clean and healthy environment and placed responsibility on man to ensure that this right is sustained for the present and future generation. This was re-affirmed in the Rio Declaration of 1992, and which placed obligation on states to ensure compliance. This saw the Constitutional inclusion in Kenya in 2010 under Article 42, which provides:

- 79 Every person has the right to 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.
 - b. To have obligations relating to the environment fulfilled under Article 70.



80 Section 3(3) of EMCA, gives this Court the statutory powers to hear and determine cases of allegations on infringement of the right to clean and healthy environment and make orders listed therein. It is anticipated in section 3(4) that

(4) A person proceeding under subsection (3) of this Section shall have the capacity to bring an action notwithstanding that such a person cannot show that the Defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action:-

a) Is not frivolous or vexatious; or

b) Is not an abuse of the Court Process.

81 The 1st Defendant (NEMA) admitted in evidence that it received a complaint concerning the plant herein and this Court has seen an acknowledgement letter dated 13th May, 2019. There is also a letter by Mereka Co. Advocates dated 31st May, 2019, addressed to the 3rd Defendant citing environmental pollution. The 1st Defendant acted on the complaint and issued a stop order and this Court is sufficiently guided that the project is not operating. There was a site visit by the Deputy Registrar of this Court and a report of the said visit is that the project is dormant.

82 The results of the site visit observed that there was soot smeared on the wall of the bigger building. Also there was an admission of pollution by the 2nd Defendant, which was attributed to a manufacture's defect. There was no evidence placed before this Court to buttress this claim. The Court notes from the site visit report that the activities carried out on the project premises and appreciate the gravity of it to the environment. The EIA report detailed the proposed Environmental Management Plan, to avert the effect of the project on the environment and on smoke, the report gave two mitigation measures including recycling and monitoring.

83 This Court is equally alive to the precautionary principle entrenched in the EMCA, as one of the principles of environmental issues. This principle is recognized under Principle 15 of the Rio Declaration, which required that where there are serious or irreversible threats of damage to the environment, immediate, urgent and effective measures must be taken to prevent environmental degradation even in the absence of full scientific certainty on the threat. The 2nd Defendant has not demonstrated whether it acted on the cause of pollution or that there are available remedies to doing so. There is no evidence that the same can be mitigated or not.

84 It is trite that he who alleges that his constitutional right has been infringed must adduce evidence before Court to warrant the grant of orders sought. It is the Plaintiffs' case that the project resulted in pollution of the environment and which effects resulted in loss of livestock and diseases in children. No evidence in the form of a LiveStock report from the relevant authority or medical evidence to substantiate the claim. This Court draws the conclusion that there was a pollution that occurred, but the 1st Defendant acted promptly and averted the damage. The wording of section 3(3) is that it must be established that the right has been, is being or is likely to be contravened. If the right to clean environment was contravened, the same was acted on accordingly by the 1st Defendant within the powers issued under EMCA.

85 Even so, this Court acknowledges the holding in *Ken Kasinga vs. David Kiplagat & 5 Others* (2014) eKLR, where the Court held:-

...where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed



and the end result is that the project has been given clean bill of health or its benefits are found to far outweigh the adverse effects to the environment”

86 Having analysed the evidence and issues as above, the Court finds and holds that the Plaintiffs’ right to clean and healthy environment was infringed, and the Plaintiffs need protection.

iii. Whether the change of user was done procedurally

87 As mentioned above, the area within which the project is situated is a residential/ agricultural area. Article 66 of *the Constitution* mandates the state to regulate the use of land or any land use planning. Parliament by application of Article 68 shall enact legislation to regulate the manner in which any land may be converted from one category to the other. The Physical and Land Use Planning Act makes provisions for the planning, use, regulation and development of land and for connected purposes.

88 This Act repealed the Physical Planning Act Cap 286 Laws of Kenya and in line with devolution, it established National Physical and Land Use Planning Consultative Forum, under section 6(1) and the County Physical and Land Use Planning Consultative Forum under section 14(1). Their respective functions are well spelt out under the said Act and include *inter alia* developing the Physical and Land Use Development Plan.

89 Section 57 of the *Physical and Land Use Planning Act*, makes it mandatory for any person to obtain development permission from the Local Authority. It provides that, “A person shall not carry out development within a county without a development permission granted by the respective county executive committee member” The Development Application is done according to section 58, which is made to the respective County Executive Committee (CEC). under the old regime, However, under the old regime, the same was under Section 31 Physical Planning Act, and was made to the clerk of the Local Authority.

90 Where there is a change of user, the third Schedule of Physical and Land Use Planning Act requires of the Local Authority to notify the relevant Board. It provides:

If any development application requires subdivision or change of user of any agricultural land, the county government shall require the applicant to obtain consent from the relevant Board.”

91 The Land Control Board will then advise the Authority whether to reject or accept and shall give reasons for its recommendations. Once an application is made, the Local Authority may grant or refuse to grant the application.

92 A person obtaining development permission must notify the public of the proposed development plan. There is also established a County Physical and Land Use Planning Liaison Committee under section 76 which shall have power under section 78 of the said Act to *inter alia*

- a. Hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- b. Hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;

93 A reading of the Act requires that a complaint be filed within 14 days of the decision of the CEC to the County Physical and Land Use Planning Liaison Committee. If aggrieved, the complainant is allowed by section 61(4) to move this Court as an appeal Court “An applicant or an interested party who files



an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court”.

- 94 There is no provision on what happens at the lapse of 14 days before a complaint is filed. but a reading of section 78 above, shows that a party may file a complaint to the County Liaison Committee. It is therefore clear that this Court cannot be the first instance, but stands as an Appeal Court.
- 95 The Plaintiffs are bound by the doctrine of exhaustion and this Court ought to have been a means of last resort. The Plaintiffs opted not to include the County Government of Murang’a which is the Local Authority in charge of change of user.
- 96 Order 1 Rule 3 allows for joinder of Defendants and the cause of action being acquisition of license which stemmed from a changer of user, it was prudent to include the County Government of Murang’a. The Plaintiffs’ ought to have exhausted the available remedies as stated above. The Court in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR held:
- 97 The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.
- 98 However, a party may be exempted from exhausting such available remedies for the interest of justice, but must demonstrate that he is deserving of such an exemption. See the case *Ndiara Enterprises Ltd vs. Nairobi City County Government* [2018] eKLR, where the Court of Appeal agreed with the trial judge that a party can only be exempted if it has established that it is in the interest of justice, that the applicant did not exhaust the remedies available. It is only fair and just that the Plaintiffs exhaust the available remedies before moving this Court. Therefore, this Court cannot make any pronouncement on the issue of change of user until it is procedurally before it.

iv. Whether the 2nd Defendant’s Licence should be revoked

- 99 According to the NEMA licence issued to the 2nd Defendant the same was to stay valid for a period of 24 months effective from 6th February, 2019. The license is already spent and there was an admission by the 1st Defendant to that effect. There is therefore nothing capable of being revoked by this Court. The 2nd Defendant averred that their license has not expired. The evidence notwithstanding, it invited this Court to balance between public and private interest and finds in their favor. The project belongs to the 2nd Defendant for a commercial purpose and there is nowhere indicated that it belongs to members of the public. This Court appreciates the impact the project will have including job creation, but the right to clean and healthy environment outweighs that. The balance does not tilt in their favor, but in that of the Plaintiffs.
- 100 However, this Court appreciates the fact that it has established as above that the procedure for acquiring the license was devoid of public participation, and the project cannot therefore stand. Section 28 of EMCA gives the 1st Defendant power to revoke a license if for reasons including “it is established that the information or data given by the proponent in support of his application for an environmental impact assessment licence was false, incorrect or intended to mislead”.
- 101 It is no doubt that the 1st Defendant cannot be faulted for the manner in which the public participation was done and therefore retains its powers to revoke such a license. This Court can exercise that power on appeal on application of section 130(4)(c) and when it is established that the same was devoid of



procedure. The upshot of the foregoing is that the EIA license issued to the 2nd Defendant by the 1st Defendant be and is hereby cancelled.

v. Who should bear costs for the suit

- 102 It is trite that costs shall follow the events, and that the successful party be awarded costs. It is no in doubt that the Plaintiffs are the successful party and this Court has no reasons not to exercise its discretion their favour.
- 103 Having considered the available evidence and the submissions thereon, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities that there was indeed a breach of their right to clean and health environment by the emission of pollution by 2nd Defendant herein.
- 104 For the above reasons, the Court enters judgment for the Plaintiffs herein against the Defendant jointly and severally in the following terms;-
- a. A Declaration be and is hereby issued that the Plaintiffs' right to clean and healthy environment has been violated by the 2nd Defendant.
 - b. A Declaration that the Environmental Impact Assessment Report No. NEMA PR/5/2/MRG/008/1239 submitted by the 3rd Defendant and executed on 13th December, 2018 was obtained without public participation and therefore null and void.
 - c. The 2nd Defendants stops immediate operations of charcoal briquettes plant on the said LR No. Nginda/Samar/Block 11/955, Murang'a South Sub-County, Murang'a County.
 - d. The EIA licence No. PR/1239/0054554 dated 6th February 2019, issued to the 2nd Defendant be and is hereby cancelled and revoked
 - e. The Plaintiffs are awarded costs of the suit.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9THDAY OF JUNE 2022.

L GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

M/s Njoroge HB for Mr Mereka for the Plaintiffs

N/A for the 1st Defendant

M/s Waititu HB for Mr Mahinda for the 2nd and 3rd Defendants

L GACHERU

JUDGE

9/6/2022

