



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

CONSOLIDATED ELC NUMBER 1513 OF 2014

FORMERLY CONSTITUTIONAL PETITION NO. 557 OF 2014 &

CONSTITUTIONAL PETITION NO. 1385 OF 2014 (FORMERLY CONSTITUTIONAL PETITION 504 OF 2014)

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 10, ARTICLE 19(2) 20 (1), ARTICLE 21 10 (2), ARTICLE 22(1) AND (2) ARTICLE 35(3), ARTICLE 39, ARTICLE 40, ARTICLE 42, ARTICLE 43, ARTICLE 3 ARTICLE 66, ARTICLE 67, ARTICLE 69, ARTICLE 70, ARTICLE 71, AND ARTICLE 72 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 10, 20, 21, 22, 23, 35, 39, 49, 43, 46, 47, 48, 60, 63, 67, 69, 70 & 71 OF THE 2010 CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT

AND

IN THE MATTER OF: THE TRUST LAND (CAP 288) LAWS OF KENYA

(NOW REPEALED).

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 1969

(As Amended in 1997) SECTIONS 117, 118 (NOW REPEALED)

AND

IN THE MATTER OF: THE AWARD OF OIL AND GAS CONCESSIONARY RIGHTS FOR BADADA WELL BLOCK 2B AND GARSE QOFTU BLOCKS

BETWEEN

HAJI IBRAHIM ALI HUSSEIN & 21 OTHERS.....PETITIONERS

(Suing on their behalf and on behalf of the Badada residents and other

members of Ajuran community of Wajir West Constituency)

AND

CABINET SECRETARY MINISTRY OF ENERGY

JUDGEMENT

Introduction

1. This is a Judgement in respect of two amended consolidated petitions. The first petition is ELC 1385 of 2014 (formerly High Court Petition No. 504 of 2014) Between Ahmed Adan Hefoh & another and Taipan Resource Corporation & 2 others. The second petition is No.1513 of 2014 (formerly High Court petition No. 557 of 2014) between Haji Ibrahim Ali Hussein & 21 others and Cabinet Secretary Ministry of Energy and Petroleum & 6 others.

2. The petitioners are all residents of Wajir West Constituency in Wajir County and they brought these petitions on their own behalf and on behalf of the Ajuran Community a nomadic community in Wajir County. On 17th September 2008, the Government of Kenya and Taipan Resource Corporation (Taipan) entered into a Production Sharing Contract (PSC) authorising Taipan to prospect for oil and gas deposits in Block 2B which covered an area of 5457.9 Sq kilometres. Taipan in conjunction with Lion Petroleum Corporation and Premier Oil PLC embarked on obtaining the necessary permits, approvals and licences from the relevant bodies like National Environment Management Authority (NEMA) and the County Government of Wajir.

3. Taipan and Lion Petroleum Corporation took actual possession of Block 2B on 27th September 2014 where they occupied an area of 36.6 hectares where they cleared the bushes, sunk a borehole, put up a murrum airstrip, brought in their machineries and started the process of gas and oil exploration. It is after these activities that the petitioners moved to court and filed the two petitions.

The first Petition

4. In their amended Petition filed on 4th May 2015, the Petitioners seek the following reliefs:-

i. A declaration that the oil prospection by the Respondents at Badada Block 2 operation constitute a violation of the rights of the petitioners herein in particular and members of the Ajuran community in general to inherent dignity, freedom of movement, right to a clean and healthy environment, right to property and right to participate in cultural life under Articles 28, 39(1), 40, 42 and 44 of the Constitution of Kenya.

ii. An order that the said prospection for oil be halted to allow for greater consultations with the members of the community.

iii. That upon the court declaring that the Petitioners right under Articles 28, 39(1) , 40 , 42 and 44 of the Constitution of Kenya have been violated, this Honourable court do order that the prospection for oil be halted to allow for greater consultations with the Ajuran community.

iv. The decision of the 2nd interested party to grant the Respondent licenses be revoked, set aside or amended.

v. The Honourable court orders a fresh Environmental Assessment Study Report relating to the projects with particular emphasis on unique livelihoods of the petitioners as nomadic pastoralists at the Respondents cost.

vi. Costs of the petition.

The second Petition

5. In their amended Petition filed on 2nd April 2015 , the petitioners seek the following reliefs:-

a. A declaration that due process for setting apart the land in question has never been followed.

b. That a declaration that the Production Sharing Contract (PSC) signed on the 17th September, 2008 and allocation of 5,457 square kilometres of land for the exploratory drilling in Block 2B in Wajir County by the Government and any subsequent allocations by the County Government in favour of the 4th 5th and 6th Respondents was unconditional, illegal, null and void ab initio.

c. A declaration that the exploratory drilling in Block 2B in Wajir County is illegal, null and void.

d. An order of Mandamus compelling the Government to make full and complete disclosure of each and every agreement or arrangement entered into or made with the 4th 5th and 6th Respondents severally or jointly.

e. That a declaration be issued under Article 71 that the concession agreement for the subject project is a transaction subject to ratification by parliament since it grants the interested parties herein a right or concession to exploit natural resources of Kenya and without such ratification the said agreement is null and void ab initio.

f. That a declaration be issued that the 1st Respondent and the 4th 5th and 6th Respondents' failure to seek and obtain a consultative prior Social and Environmental Assessment Study report as per 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.

g. A declaration be issued directing the 1st and 2nd Respondents to ensure the rule of law is followed in oil and gas exploration agreements, plans, activities and programmes.

h. An order do issue directing the 1st, 2nd respondents to recall, rescind, and or set aside the concession agreement until there is compliance with the law.

i. A conservatory order be issued restraining the 4th, 5th and 6th Respondents whether by themselves whosoever from entering into or being upon, or taking possession of or remaining upon or digging or excavating soil therefrom or constructing any structure upon, or doing anything on the subject project area known as Badada Well 2B and Garse Qoftu Block pursuant to the tender to explore ,process store and dispose of oil and gas awarded to the interested parties or any other tender that may have been or that may have been done until the Respondents give just compensation to the Petitioners and or proper consultation and concurrence.

j. A conservative Order and/or injunction do issue restraining the interested parties from pursuing the signing of the benefit sharing agreement or any other set of agreement with officials of the Ministry of Energy aimed at drilling oil and extracting gas in Bada well 2B on the strength of the tender to explore, extract, process and dispose of oil and gas awarded to them or any other tenders that may have been awarded to them in disregard of the constitutional provisions relating to access to information , equitable sharing of benefits accruing from exploitation of natural resources , inclusiveness, participation of people , transparency and accountability.

k. That a declaration do issue that the local residents of the project area shall not be evicted and or relocated until there is a proper consultation and or concurrence on the manner, place, time modalities and prior compensation.

l. That a declaration do issue that before any eviction/relocation and or restriction to their nomadic lifestyle of the petitioners occurs, there be a proper valuation of their parcels of land and the compensation thereof by a competent committee duly constituted in accordance with the law in a participatory manner.

m. An order of the court guaranteeing members of the Arjuran Community the unfettered right to practice their traditional substance activities by removing their traditional substance activities by removing the airstrip, base camp and unnecessary access roads that inhibit / restrict access to their grazing land.

n. A mandatory Order compelling the 4th, 5th and 6th Respondents to remove all types of machineries ,structures, explosives, crude liquid waste, or biodegradable waste and other hazardous substances and reforest area deforested by the Respondent when clearing trails, and camp sites for the seismic survey on their grazing land.

o. Such other or further orders the court deems just and equitable to grant.

p. Costs of the Petition.

Petitioners' case.

6. It is the petitioners' case that they come from the Arjuran Community who are nomads. The community shares grazing areas and they are concentrated in an area called Badada which in their community means prosperity. They therefore argue that by Taipan and the companies moving to the area and starting gas and oil exploration, they have interfered with their way of life and movement and that the cordoning of parts of their communal land, Taipan and its sister companies activities will degrade the environment as there is clearance of bushes, construction of roads and airstrip and there is likelihood of oil spillage which will pollute the environment.

7. The Petitioners also argue that during the early seismic survey, Taipan and the other companies dug small holes which were left uncovered. As a result of this, their animals and the residents were injured and their animals died. They also argue that there was no public participation and if any was carried out, then it was done in secrecy. They further argue that they were not involved in the tendering process and that their protest letters were never responded to.

8. The Petitioners also contend that there was no setting apart of land for purposes of oil and gas exploration as per the Trust Land Act (Now repealed) and that the provisions of the old constitution on setting apart of land was never followed. There is no compensation given to the affected residents and that there is likely to be mass evictions from the project area yet there are no plans for re-location. The petitioners further argue that there was no disclosure on the kind of agreements signed between Taipan and the Government of Kenya. The Petitioners further argue that there was no study done to establish the level of harmony of the residents considering that the co-existence of the Ajuran clan harmony will deteriorate due to the Project. The Petitioners further argue that there was no ratification of the agreement between Taipan and the Government of Kenya.

9. The Petitioners therefore argue that their constitutional rights have been violated or are likely to be violated. The articles of the constitution of Kenya which they state have been violated or are likely to be violated are Articles 47, 60, 63, 40, 42, 43, 66, 67, 35, 10, 28, 39, 71 and 44. The Petitioners also contend that Article 27 of the Universal Declaration of Human Rights, Article 15 of the International Covenant on Economic, Social and Cultural Rights and Article 24 of the African Charter on Human and Peoples Rights have been violated.

The Attorney General's Case.

10. The Attorney General on behalf of the 1st and 2nd Respondents in Petition No. 1513 of 2014 and as interested party in Petition No.1385 of 2014 opposed the petitioners' petition based on a replying affidavit sworn on 27th November 2014. The affidavit was sworn by Eng. Joseph K Njoroge, MBS, Principal Secretary, Ministry of Energy and Petroleum. He deponed that contrary to the allegations by the Petitioners that no care was taken by Taipan and the other companies, there was an Environmental Social Impact Assessment Study (ESIA) which was carried out in order to fulfil the obligation under Article 42 of the Constitution.

11. The companies involved in the oil and gas exploration obtained all the requisite permits and licences. The community concerned was consulted and were fully involved when the ESIA study was being carried out. The deponent stated that there were very many short term benefits which would come as a result of the project like employment, income to transporters, access to water and that at national level, the Government would get taxes and if oil was found, the economy of the country will improve.

12. The Attorney General further argues that the exploration period was expected to take a period of two years commencing on 2nd June 2013 and ending on 1st June 2015. The Attorney General therefore argues that stopping the Project will be disastrous and will not be in keeping with the Government's intention to achieve its objective under vision 2030.

The 3rd Respondent's case.

13. The 3rd Respondent opposed the petitioners' petition through grounds of opposition filed in court on 20th March 2015 and a replying affidavit sworn on 15th May 2015. The 3rd Respondent contends that it was wrongly enjoined in the petition and that it has not been mentioned in the petition. The 3rd Respondent further states that it was never involved in the agreement between the Government on the one hand and the 4th to 6th Respondents on the other hand and further that as there was no intention to acquire any land, its joinder in these proceedings was unnecessary.

14. The 3rd Respondent further contends that if the land in issue is community land, then it is not its mandate to initiate the process of setting apart the same. The process of setting apart has to be initiated by other entities like the National Government or County Government. The 3rd Respondent therefore argues that as it has not received any notification from either the National or County Government on the process of setting apart, its joinder in these proceedings does not disclose any cause of action against it.

The 4th, 5th and 6th Respondents' case

15. The 4th, 5th and 6th Respondents opposed the petitioners' petition based on a replying affidavit sworn on 29th October 2014 by Maxwell Birely, the Chief Executive Officer of Taipan and the affidavit of Noella Lubano sworn on 9th December 2014. The affidavit by Noella Lubano who was the then counsel for the 4th, 5th and 6th Respondents introduced documents which were missing from the affidavit of Maxwell Birely. The 4th, 5th and 6th Respondents also relied on the affidavit of Joel Dumaresq, Director of Taipan and Chief Finance Officer and Director of Lion Petroleum Corporation sworn on 22nd January 2015 as well as the affidavits of Gerald Mc Cullough, Community Relations Manager Taipan and Lion Petroleum Corporation sworn on 20/3/2015, 4/5/2015 and 13/5/2015.

16. The Respondents contend that contrary to the Petitioners' allegations that no licenses were obtained, the Respondents obtained licences from NEMA authorising them to undertake seismic operations, drill water boreholes and drill exploratory oil wells on Block 2B. Contrary to the Petitioners allegations that there will be mass eviction of residents from the Block, the Respondents contend that they only cordoned off an area measuring 200x 200 metres where they established a base camp from where exploration wells will be drilled and also serve as the base where personnel will be housed and where drilling equipment will be stored.

17. The Respondents argue that the exploration will be done in phases. As at the time the petitions were filed, the licensing and acquisition phase and the seismic survey operations phase had been completed. The Respondent were about to begin drilling operation phase, then go to the field development phase, the production phase and finally the decommissioning phase. The petitioners therefore have no basis of arguing that their rights to share benefits have been violated as the project is far from that phase.

18. The Respondents also argue that they had obtained all the required licences and permits. They have undertaken an ESIA study for seismic operations, borehole drilling and drilling of exploratory wells. The Respondents engaged an expert to undertake an Environmental Audit (EA Report) for the Project. The ESIA Report and EA Report confirmed that the social economic and environmental impact of the Project if any would be minimal.

19. The Respondents admit that the project site and the neighbouring area are open grazing area but state that there will be no significant impact on the land use. The seismic operations which were carried out by the Respondents avoided cutting down any trees or major vegetation by ensuring that the cutline ran around big trees that fell on the seismic survey line. The clearing line was only two metres wide and the EA Report confirmed that the vegetation which was cleared during the seismic survey was too small to be of any significant effect.

20. The Respondents argue that out of the entire block measuring 5457.9 sq kilometres, the project would cover only 36.6 hectares leaving the rest of the block to the community for grazing. The Respondents argue that they conducted public participation through barazas where the Project received support. During the process of Seismic preparations, meetings were held at Sericho Division in Garbatula District, Habaswein township and Lagboggal between 17th to 20th March 2011. There were other meetings held in 2012 to sensitize members of the public.

21. The holes which were dug during the seismic operation were covered and there is no way holes would have been the cause of animals

which the petitioners claim died as a result of the injuries caused by the open holes. On the allegation by the petitioners that they did not know the contents of the concession agreement, the Respondents state that the agreement signed by the Government of Kenya and Taipan on 17th September 2008 is confidential and that in any case most of what is contained in the agreement is in the ESIA Reports and EA Reports which were published and can easily be accessed through the relevant offices.

22. On the complaint by the petitioners that they were not involved in the tendering process, the Respondents contend that the petitioners did not produce any evidence that they had been licenced to carry out exploration or that they had experience to tender for available contracts and those who qualified were given contracts . The Respondents also tried to ensure that the local clans of Ajuran, Degodia and Ogden benefited from the contracts. To this end, in December 2014, the Respondents established a community liaison committee comprising of 12 people with each clan having equal representation.

23. On the issue of setting apart, the Respondents argue that they had a two year period within which to carry out their activities and that if there is need for setting apart, then the process can be undertaken within the timelines. On the issue of culture of the Ajuran being affected, the Respondents state that EA Report concluded that there was no evidence that the area covered by the project was of any cultural significance. The Respondents also stated that during the initial study, they tried to avoid any area which was found to be of cultural significance to the local people.

Interested party's case in petition 1513 of 2014

24. The Interested party opposed the Petitioners' petition based on a replying affidavit sworn by Abdirizek Sheikh on 16th March 2015. The deponent is the County Secretary of the County Government of Wajir. He stated that contrary to the Petitioner's allegations that there was no public participation, he stated that he had been shown minutes which showed that public sensitization was carried out from the beginning and that when the County Government of Wajir was in place, the County Government was fully involved. The Ajuran clan is well represented in the County Assembly and that he has never heard any complaint raised over the exploration.

25. The project received approval from the local people as it was going to be of great economic value as roads would be opened and trade flourish. He denied that animals died out of the holes left open during the process of seismic survey. He stated that from the pictures of the carcasses, it is clear that the animals died as a result of drought. The deponent further argues that the petitions were brought to serve selfish interests and that there was no possibility of inter-clan conflicts. He urged the court to dismiss the petitions.

Analysis

26. The Petitioners filed their submissions on 21st May 2015. The 3rd Respondent filed their submissions on 29th May 2015. The 4th, 5th and 6th Respondents filed their submissions on 28th May 2015. Directions as to filing of submissions were given by Justice Onguto on 5th May 2015. The matter was fixed for mention on 8th June 2015 for further directions. A perusal of the court record and pleadings reveal that Justice Onguto did not give further directions as the issue of jurisdiction was raised. Justice Onguto was appointed a High Court Judge but was deployed to the Environment and Land Court (ELC). When the issue of jurisdiction was settled, Justice Onguto released the file.

27. The file was then placed before the presiding Judge of the ELC Justice Okong'o who gave directions as to the highlighting of submissions. Justice Okong'o later recused himself from hearing the matter on 28th November 2016. The file was allocated to Lady Justice Gacheru who on 14th December 2016 directed that the parties take a date for highlighting in the new term before any ELC Judge. The file was before the Deputy Registrar for some time for an application to cease acting on the part of the advocates for the 4th, 5th and 6th Respondents.

28. The file was finally placed before me on 14th February 2018 when I reserved a date for Judgement which was to be on 3rd May 2018. As I was preparing to write the Judgement, I noticed that there were two petitions which had been consolidated but only one file was available that is ELC petition 1513 of 2014. ELC Petition No.1385 of 2014 was not available. It took several months before the ELC Petition No.1385 of 2014 could be traced. When the missing file was traced, it turned out that a number of affidavits were missing from the file. It took time for parties to avail copies. Even with these missing copies being availed, still there was one affidavit which was still missing. This is a further affidavit shown by Haji Ibrahim Ali Hussein. I asked my Court Assistant to ask the petitioners' advocate to avail a copy but I was told by my Court Assistant that the petitioners' advocate had said that he did not have the said affidavit. I decided to write this judgement without the benefit of that affidavit but at least I can get the contents of the same from the further affidavit of Gerald Mc Cullough sworn on 26th March 2015 where the contents of the missing affidavit are referred to. I have given the history of this file to explain the delay in writing of this judgement.

29. I have carefully gone through the petitions and the opposition to the same by the Respondents and the interested party. The two petitions were filed in 2014. When the first petition was filed, there were no conservatory orders granted. The second petition was filed on 12th November 2014. On the same day an application for conservatory orders was placed before Justice Odunga who granted interim orders in terms of prayers (b) (c) and (d) of the Notice of Motion dated 12th November 2014 . Those orders stopped the mass eviction which the petitioners were apprehensive about, the implementation of the concession agreement between the Government and the 4th 5th and 6th Respondents and the drilling and gas extraction operations in Block 2B.

30. On 18th November 2014, the 4th 5th and 6th Respondents filed an application seeking variation of the orders given by Justice Odunga. In a ruling delivered on 21st November 2014, Justice Odunga varied his orders of 12th November 2014 to the extent that he allowed the 4th, 5th and 6th Respondents to carry on with exploration activities within the 36 hectares of Block 2B. The orders stopping mass eviction was however left intact until inter-partes hearing of the application. On 10th December 2014, the parties agreed to maintain the orders of 21st November 2014 until hearing and determination of the petitions. This therefore meant that the 4th, 5th and 6th Respondents were to carry on with exploration within the 36 hectares and there were to be no evictions of the residents.

31. On 6th May 2015 the County Government of Wajir received back the land which had been given out for oil exploration. This effectively rendered the Petitioners' concerns in the Petition mute. I will nevertheless proceed to consider the petitions and determine whether the constitutional rights of the petitioners were violated and whether the petitioners are entitled to compensation.

32. In Constitutional Petitions, a Petitioner is supposed to state the provisions of the Constitution which is alleged to have been violated or threatened with violation and the manner in which the right has been violated or threatened with violation. This is what was said in the case of **Anarita Karimi Njeru Vs Republic (1979) KLR 154** where it was held as follows:-

“We would however, again stress that if a person is seeking redress from the High court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

Whether the Petitioners rights under Articles 28, 43, and 45 of the Constitution were violated.

33. Article 28 of the Constitution deals with human dignity, Article 43 deals with economic and social rights. Article 45 deals with language and culture. These are some of the provisions of the Constitution which the petitioners allege to have been infringed. The petitioners have not stated in what manner their rights under these Articles were infringed. There is therefore no basis upon which this court can find that any of the aforesaid provisions of the constitution were violated.

Whether the Petitioners freedom of movement and residence was curtailed.

34. Article 39 of the Constitution provides for freedom of movement and residence. It provides that every person has a right to freedom of movement. In these Petitions, the Petitioners argue that the oil and gas exploration was going to limit their freedom of movement in that the companies involved in the exploration exercise were going to cordon off the area of the oil exploration. The 4th, 5th and 6th Respondents stated that they were not going to limit the movement of the petitioners. This is because the only area which was cordoned off is an area of 200x200 metres. This is the area where they kept their machines and where the workers resided. The rest of the 5,457.9 square kilometres were open to the petitioners. In fact after the petitioners moved to court, they obtained injunctive orders which confined the activities of the companies to an area of 36 hectares. Even with this, the petitioners were free to move except for the small area where the base had been set up. There is therefore no basis for the petitioners to claim that their freedom of movement had been curtailed.

Whether the rights of the Petitioners to clean and health environment were violated.

35. The Petitioners alleged that their right to a clean and healthy environment had been infringed by the activities of the oil exploration companies. Article 42(a) of the Constitution provides as follows:-

“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;

The Petitioners argue that the exploration activities were going to interfere with the environment in that there was going to be clearance of the forest, drilling of the oil wells and construction of roads and airstrip. It is true that there was construction of roads, an airstrip and wells were dug for exploration purposes. There was also clearance of vegetation. This however did not cause any significant impact on the environment. There was an Environmental Impact Assessment Study report carried out. There was also an Environmental Audit which was carried out. These reports found out that there was minimum impact on the environment and there were adequate measures taken by the companies to mitigate the impacts of environmental damage.

36. The holes which were dug during seismic survey were filled up by the company which had been sub – contracted to dig them up. The company which had been contracted to dig up the seismic survey holes was BGP Kenya Limited. This company wrote a letter dated 21st October 2014 which confirmed that they had filled up all the holes which had been dug up during the seismic survey. The holes were small and could not be the cause of the injury to animals and human beings as claimed by the petitioners. The pictures of the dead animals exhibited clearly show that the animals died due to drought and not injury as a result of the holes dug out during seismic survey. There was no evidence of any person who was injured as a result of any of the holes.

37. When the oil and gas exploring companies failed to get any gas or oil, they surrendered back the land to the County Government of Wajir as confirmed by letter dated 6th May 2015 from the County Government of Wajir. The letter confirmed that the land had been surrendered and all materials and waste removed. The land had been restored to its natural state except the airstrip and a water borehole and pump which were donated to the County Government. This being the case, I therefore find that the petitioners' constitutional rights to a clean and healthy environment were not violated.

Whether the Petitioners rights were violated due to failure to carry out the process of setting apart of the land in issue.

38. The Petitioners contend that the provisions of the old constitution and the Trust Land Act (Now repealed) were violated. There has been considerable submissions by the parties herein on whether the land in issue was trust land or not. The petitioners argue that the land in issue was held for their benefit by the then Wajir county council the predecessor of the County Government of Wajir. On the other hand, the Respondents argue that the petitioners have failed to prove that the land is trust land. My position is that the land in issue is trust land and as at the time the exploration started, the land was governed under the Trust Land Act (Now repealed) Under the Act any trust land could only be alienated by the process of setting apart which was protected under the old constitution under sections 114 , 115 and 116.

39. There is no contention that the process of setting apart had not been done. As I have already indicated hereinabove, the land was surrendered back to the County Government of Wajir on 6th May 2015. The exploration licence had been given for two years. It was to expire on 1st June 2015. The oil exploration companies moved out before the expiry of the period. The process of setting apart is not time bound. The process would have been done any time. It would not have made any economic sense for the process of setting apart to be done during the exploration stage, compensate the land owners only for it to turn out that there is no oil or gas as was the case herein. Setting apart would only have made sense if the oil exploring companies had struck oil and gas. I therefore find that there was no violation of the Petitioners' rights under the old Constitution.

Whether the Petitioners rights under Article 40 of the Constitution were violated.

40. The Petitioners allege that their rights under Article 40 of the Constitution were violated. They do not say in what manner their rights under this Article were violated. The court is therefore left to speculate. The land in issue is held in trust for the petitioners by the County Government of Wajir. As I have said in the preceding paragraphs the contract between the Government and Taipan was entered into on 17th September 2008. If the petitioners expected to be compensated this should have only been possible if the land in issue was to be compulsorily acquired. The contract which was signed between the Government and Taipan is confidential. It was not annexed to any of the replying affidavits. The land is now back to the County Government of Wajir who are holding it on behalf of the petitioners and can now only be dealt with as per the provisions of the Community Land Act No.27 of 2016 which came into force on 21st September 2016. As there was no issue of compulsory acquisition, I find that the Petitioners' rights under Article 40 of the Constitution were not violated.

Whether the Petitioners rights under Articles 60, 66, and 67 of the Constitution were violated.

41. Article 60 deals with principles of land policy. Among the principles of land policy is that there should be sound conservation and protection of ecologically sensitive areas. Article 66 (2) provides that parliament shall avail legislation ensuring that investments in property benefit local community and their economies. Article 67 provides for the functions of National Land Commission which include monitoring and overseeing responsibilities over land use planning throughout the country. The petitioners have not demonstrated in what manner any of their rights in the aforementioned Articles have been infringed. The oil and gas exploring companies involved NEMA in all the stages of their activities and NEMA provided all the required licences upon studies being carried out which confirmed that the damage to environment if any was minimal. The Petitioners have not demonstrated that NLC did not carry out its mandate as required. If the issue of compulsory acquisition would have come in, then NLC would have acted in accordance with the law upon being asked to do so by either the National Government or County Government. There is no evidence that NLC was ever asked to start the process of compulsory acquisition. I therefore find that the Petitioners' rights under Articles 60, 66 and 67 were not violated.

Whether the Petitioners rights under Article 35(1) of the Constitution were violated.

42. Article 35(1) of the Constitution provides as follows:-

Every citizen has the right of access to—

a. information held by the State; and

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

There can be no violation of the right to access to information if a person seeking the information has not made a request for the same. This was the holding by Justice Mumbi Ngugi in the case of **Nairobi Law Monthly Company Ltd Vs Kenya Electricity Generating Company and 2 others (2013) eKLR** where the Judge stated as follows:-

“...what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for such information”.

43. In the instant case, there is no evidence that the Petitioners sought for information regarding the concession agreement signed between the Government and Taipan. The Petitioners in their submissions have indicated that the request for information was made through letters annexed to the affidavit of the Petitioners dated 11th November 2014. I have looked at the said letter and cannot see any request made to either Taipan or the cabinet secretary Ministry of Energy and Petroleum. There is a letter dated 8th September 2014 addressed to Taipan and two other companies. On page 3 of the letter, the writer only says that there was lack of disclosure to the community of the content of the oil exploration contract and the area of coverage of the Block. There is no evidence that there was a request made and that the same was denied.

44. In the replying affidavits which followed, the companies involved in the exploration disclosed that the acreage of the block was 5457.9 square kilometres. They went on to say that the PSC was confidential and it could only be released with permission of the Government. There is no evidence from the petitioners that they tried to get the details of the PSC from the Government. There is therefore no basis upon which the petitioners can argue that their right to information was violated.

Whether the Petitioners rights to fair administrative action were violated.

45. Article 47 of the Constitution provides as follows:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

The Petitioners contend that their rights under Article 47 of the Constitution were violated. There is no evidence that the rights of petitioners were violated under this Article. Before the project started, there was public participation which was conducted. This is documented. It is confirmed by the ESIA report and EA report which gave details of what happened. The petitioners are merely arguing that if there was public participation, then it was not adequate. I have looked at the ESIA Report and the EA Report. These reports give a detailed account of what went on. The people who were consulted and the dates are given in the documents provided by Taipan and the two other companies. I am satisfied there was adequate public participation and there is therefore no basis upon which the petitioners can allege that their rights under Article 47 of the Constitution were violated.

Whether the concession agreement signed between Taipan and the Government was ratified by Parliament.

46. The Petitioners argued that the concession agreement signed between Taipan and the Government was not ratified by the Parliament and therefore the same was null and void as it contravened Article 71 of the Constitution. The Petitioners argued that as the agreement was for exploitation of natural resources, the agreement ought to have been subjected to ratification by Parliament. The production sharing contract between Taipan and the Government was signed on 17th September 2008. The Natural Resources (Classes of Transactions Subject to Ratification) Act No 41 of 2016 was assented to on 13th September 2016 and commenced on 4th October 2016. Under this Act, transactions which are subjected to ratification by Parliament include any contract authorizing extraction of crude oil or natural gas.

47. Section 16 of the aforesaid Act provides as follows:-

“ A transaction that is subject to ratification by parliament, which was lawfully entered into on or after the effective date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament”.

The effective date is the date when the Constitution 2010 came into effect that is 28th August 2010. The agreement between Taipan and the Government having been signed before the effective date, there was therefore no wrong committed by Taipan as there was no requirement for ratification then and in any case any contract lawfully entered into before 4th October 2016, the date the aforesaid Act commenced is deemed to have been lawfully done.

Conclusion.

48. It is clear that none of the constitutional rights of the petitioners were violated. The EA licences given were given in accordance with the law. There is a procedure under EMCA which provides on how any person aggrieved with grant of licence by NEMA should follow. This process was never followed. In any case, the licences issued by NEMA were given in accordance with the law. This being the case and given that most of the prayers in the petitions have been rendered mute, I find that the two Petitions should be dismissed. I hereby proceed to dismiss the two Petitions. Each party shall bear their own costs.

Dated, Signed and delivered at **Nairobi** on this 5th day of **May, 2020.**

E. O. OBAGA

JUDGE

In the virtual presence of:-

Mr Motari for 1st and 2nd Respondents

Court Assistant: Hilda

E.O. OBAGA

JUDGE