



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION NO. 18 OF 2017

COUNTY GOVERNMENT OF KAKAMEGA.....PETITIONER

VERSUS

JOSEPHAT SHIKORO SHIJENJE.....RESPONDENT

JUDGEMENT

The alleged facts giving rise to this petition are set out in detail in the affidavit of Major Suleiman Sumba, the Executive Committee member responsible for matters of Lands, Housing, Urban areas and Physical Planning within the County Government of Kakamega, the petitioner herein, which is filed in support hereof. That it has now come to the attention of the petitioner that the respondent has commenced and continues to undertake a project for what appears to be the construction of a fuel Service Station on title No. Kakamega/Municipality Block IV/487 within Kakamega County. It has also come to the attention of the petitioner, that the proposed project bears no valid approvals, licenses and or permits from the relevant county planning departments, National Environmental Management Authority or Energy Regulatory Commission and other Government agencies under which the project squarely falls. In particular, the petitioner has alleged that:-

(a) The proposed proponent (the respondent) does not possess a valid Environmental Impact Assessment (EIA) license for the project in contravention of the provisions of the Environmental Management & Coordination Act (EMCA) and the Regulation 24 of the Environmental Management (Environmental Impact Assessment and Audit) Regulations, 2013 and the constructions have been conducted and continue being carried out without the EIA license having been issued.

(b) The respondent does not possess a construction permit to put up a petroleum retail dispensing site in contravention of section 80 (1) of the Energy Act and Regulation 8 of the Energy (Retail Facility Construction and Licensing) Regulations, 2013 (Legal Notice No. 7 of 2013.)

(c) The respondent does not possess a petroleum retail business licence to engage in petroleum retail business in contravention of section 80 (1) of the energy Act and Regulation 8 of the energy (Retail Facility Construction and Licensing) Regulations, 2013 (Legal Notice No. 7 of 2013.)

(d) The respondent has also breached the physical planning (Building and Development) rules, 1998 (the "Rules") in that the details of the proposed project were not advertised prior to the approval of the proposed project's plans by the respondent in at least two local dailies and that there was no notice board (outlining the proposed project's details) for a period of fourteen (14) days.

(e) The proposed development is being undertaken in very close proximity with residential dwellings. In view of the activity proposed to be carried on the site, the proposed development would be a great hazard to the persons dwelling in close proximity and it poses a threat to life and property.

(f) Moreover, taking lessons from the disasters in Sachangwan in Molo and Sinai in Nairobi, which are recent fire calamities in the country whereby fuel was propelled over 100 metres and caused deaths and destruction to properties, this particular project is inappropriately situated since it is directly opposite a national maximum security prison and is separated only by a 36 metre road. In the event of an explosion, the fire would definitely affect the prison and evacuation would be hampered this posing a great danger to lives of the persons in the prison.

(g) No valid change of user for the property has been approved and or registered.

(h) The proposed project does not accord with the laws of the land.

The grounds of the petition are that, Article 20 (1) of the Constitution of Kenya, 2010 provides that Bill of rights applies to all law and binds all State Organs and all persons. Under Article 20 (2) 'every person shall enjoy the rights and fundamental freedoms in the Bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom.' By virtue of Article 22 (1), every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed, or is

threatened. In addition to a person acting in their own interest, proceedings may be instituted by a person acting in the interest of a group of persons. Article 23 grants the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights. The court has jurisdiction to grant appropriate reliefs including those set out at sub Article 3 thereof. By virtue of article 159 (1) (e), the purpose and principles of this Constitution should be protected and promoted. Among the purposes and the principles of the Constitution are the protection of the fundamental rights of individuals including the right to own property, a right to clean environment and the right to fair and lawful administrative procedures. These rights enshrined by the Constitution of Kenya, 2010 among others, have been infringed or and/or have been threatened to be infringed considering the facts set out in the affidavit of Major Suleiman Sumba filed herein and summarized above and the county residents, their health and property are likely to be harmed. The proposed project does not accord with the law and has no valid approval. Even if approval had been granted by the defunct Municipal Council of Kakamega, which is denied, such approval would have been illegal and invalid. No Municipal Council or approving authorities properly directing themselves would grant approvals for construction of a petroleum fuel station in the current location considering the concerns and matters enumerated herein above. In any event, any such approval would be invalidated by effluxion of time. Circumstances on the ground have changed to an extent that no approval to construct a petroleum filling station would be tenable in the circumstances. Even if the approval by the Municipal Council of Kakamega would have been proper which was not the case herein, as no approval was even granted to the proposed project, the approval would have been subject to compliance inter alia the compliance sections 36, 41 and 52 of the Physical Planning Act. The said sections of the Physical Planning Act are as follows:-

Section 36:-

If in connection with a development application a local authority is of the opinion that proposals for industrial location, dumping sites, sewerage treatment, quarries or any other development activity will have injurious impact on the environment, the applicant shall be required to submit together with the application an environmental impact assessment report.

The relevant subsections of Section 41:

- (1) No private land within the area of authority of a local authority may be subdivided except in accordance with the requirements of a local physical development plan approved in relation to that area under this Act and upon application made in the form prescribed in the Fourth Schedule to the local authority.
- (2) The subdivision and land use plans in relation to any private land shall be prepared by a registered physical planner and such plans shall be subject to the approval of the director.
- (3) Where in the opinion of a local authority an application in respect of development, change of user or sub division has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit. (Emphasis added)
- (4) If the local authority receives any objection to, or representation in connection with, an application made under subsection (1) the local authority shall notify the application of such objections or representations in response to such objections or representations.

Section 52

Every notice published in the gazette under any of the provisions of this Act, except the notices published under section 49 and 50, shall be simultaneously published in at least two local dailies, one in English and one in Kiswahili and be displayed at the offices of the chiefs.

The petitioner submits that, there having been no compliance to the above cited provisions of law, any purported approval is not valid for blatant breach of express and mandatory provisions of law. In light of the issues stated above, it would be suitable for the respondent to relocate the project to an alternative site that is environmentally safe (the project having been subjected to a fresh EIA and the requisite national and county regulatory requirements having been fulfilled) and sustainable within the county. If the proposed project is allowed to continue, it poses the following risks; Oil and groundwater contamination. Air pollution caused by petrol and diesel contamination by volatile aromatics, including benzene and middle distillate range hydrocarbons, leakage from underground storage tanks, oily waste discharge into storm drains. Contaminated soil arising from sub-surface soil contamination. Health and explosion risks caused by liquefied petroleum gas (LPG). Fire risk to the persons dwelling in the residential houses and conducting business in the adjacent properties and life and national security in the event of fire affecting the opposite maximum security prison.

The respondent's proposed project falls short of the applicable national laws and those of the County Government of Kakamega as well as the laws, regulations and codes in respect of Lands, Housing, urban Areas and Physical Planning. The respondent intends to undertake a hazardous industrial activity in an area designated as purely commercial and residential in any even without consulting the County Executive Committee which is charged with planning developments within the county and without obtaining relevant approvals, license and permits from other Government regulators. It is patently clear from the above that the current location of the project harmful is not only to the environment but also the health and safety of the inhabitants of the project site, the maximum security prison and to property and therefore not in the best interests of the citizens of the county. It is thus imperative that this honorable court intervenes to issue the reliefs sought to avoid real and eminent catastrophe. The petitioner therefore humbly prays for the following reliefs.

1. A declaration that the proposed project on title No. Kakamega/Municipality Block IV/487 within Kakamega County by the respondent is illegal and constitutes infringement of the right to a clean and healthy environment for the residents of the County of Kakamega.
2. A permanent injunction to restrain the respondent either by himself, his servants, agents, lease, assignees, representatives or any other person from proceeding with any constructions of a fuel service station or any other construction on title No.

Kakamega/Municipality Block IV/487 within Kakamega County.

3. A permanent injunction to restrain the respondent either by himself, his servants, agents, lease, assignees, representatives or any other person from proceeding with any petroleum product supply or retail dispensing activity or the business of a fuel service station on the Title No. Kakamega/Municipality Block IV/487 within Kakamega County.
4. A mandatory injunction directing the respondent to restore the land to its previous condition failing which the petitioner be at liberty to restore the land to its previous condition at the expense of the respondent.
5. Costs.
6. Any other relief the court deems fit.

In answer to the petition and cross petition, the respondent states that Major Suleiman Sumba has no capacity in law to swear an affidavit on behalf of the petitioner and hence his affidavit in support of the petition and notice of motion application is incompetent. The respondent further avers that the petition herein is fatally defective, bad in law and also an abuse of the due process of the court and shall apply at the opportune time to have it struck out with costs. The respondent avers that at all material times he is the registered proprietor of L.R. Kakamega/Municipality/Block IV/487 and that a certificate of lease was duly issued to him on 15/8/2008. That it is the respondent's case that as proprietor of L.R. Kakamega/Municipality/Block IV/487 he leased the plot to Jupiter Oil Limited for construction of a service station with a service bay, supermarket, guest rooms, fast food restaurant and vehicle parking areas, copy of the lease marked JSS 2. The respondent avers that he is one of the directors of Jupiter Oil Limited that was to develop a fuel service station on the suit plot aforesaid, copy of the Memorandum and Articles of Association of the Company and a certificate of Incorporation marked JSS 3. The respondent in response to the petition on purported illegalities states that the development of the service station was lawfully done after obtaining all approvals, licenses and or permits from the defunct Municipal council of Kakamega, National Environment Management Authority (NEMA), Energy Regulatory Commission and all other relevant Government Institutions. The respondents avers that after obtaining a certificate of lease from the Ministry of Lands he submitted his application for change of user which was duly approved by the Municipal Council of Kakamega, copy of the application and a copy of receipt marked JSS 4(a) and (b). The respondent avers that the Municipal Council of Kakamega granted him a development permission of the suit plot, copy of the approval marked JSS5. The respondent also avers that he paid for approval of his development plans to the Municipal Council of Kakamega, copy of the receipt marked JSS 6. The respondent avers further that he submitted an Environmental Impact Assessment Report to the National Environmental Management authority (NEMA) before commencement of the project, copy of the report marked JSS 7. The respondent states that he paid the relevant charges of the said authority vide Jupiter Oil Limited, copy of official receipt marked JSS 8. It is the respondent's case that upon submission of the Environmental Impact Assessment Report and after payment of the requisite fees the National Environmental Management Authority (NEMA) acknowledged receipt of the report as per copy of the said acknowledgement annexed and marked JSS 9. The respondent in due compliance with the law, he advertised the Environmental Impact Assessment Report in the Daily Nation Newspaper and the Standard Newspaper and also in the Kenya Gazette as per copies marked JSS 10, 11 and 12 respectively. It is the defendant's case that after all those advertisements, there was no objection from any individual or government institutions whatsoever and the National Environment Management Authority (NEMA) gave an Environmental Assessment Impact License for the development of the following; Construction of a service station with a service bay. Supermarket. Guest rooms. Fast food restaurant and Vehicle parking areas, copy of the NEMA license marked JSS 13.

The respondents avers that the physical planning department gave its certificate of compliance for the construction of a petrol service station on the suit plot, copy of the said certificate marked JSS 14. The respondent avers further that the Ministry of Lands and Settlement equally gave its approval on subdivision and development of Kakamega/Municipality/Block IV/487, copy of approval is marked JSS 15. The respondent also states that he obtained a Petroleum Business License from the Energy Regulatory Commission annexed hereto marked JSS 16. The respondent further states that he obtained authority from the Ministry of roads to construct acceleration/deceleration lanes to/from plot No. Kakamega/Municipality Block IV/487, copy of the letter of authority marked JSS 17. The respondent avers that after obtaining all development permissions, licenses and or approvals from all relevant government authorities the project took off and the approved developments started in earnest and the service station is complete and ready to start its operations on 1st July, 2014. It is the respondent's case that the petitioner at all material times had knowledge of the development of the suit plot from the records they took over from the defunct Municipal Council of Kakamega and the said development of the service station has continued for over 1 year under their watch without raising any objection until now when they have filed this suit to try and stop the operations of the station when the same is complete and when the respondent has injected over Ksh. 100,000,000/=. The respondent avers that Kakamega County Government is acting maliciously by filing this suit with the intention of frustrating the approved developments of the suit plot on speculative and imaginary hazards. The respondent avers that the project/development of a service station was duly assessed by the National Environmental Management Authority (NEMA) who upon satisfaction granted a development license. The respondent further avers that the petitioner has no jurisdiction to challenge a decision by NEMA and all other government institutions on the development on the suit plot. The respondent equally states that besides the approval licenses under the previous government, the petitioner also approved the development plans on the suit plot and it is the respondent's case that the petitioner cannot bury its head in the sand and deny plans approved by itself and hence the orders sought in the petition are untenable in law.

The respondent states that the petitioner is applying double standards in trying to stop him from operating a petrol station at its current location when there are other petrol stations operating business in Kakamega town under the same environment or circumstances yet the petitioner has not issued any closure notices to them. The petitioner is discriminating against him contrary to the Kenya Constitution 2010 in its open biases against him in its pursuit to close down the petrol station. The respondent avers that the petitioner has used falsehoods in their effort to close down the respondent's intended petrol station on the ground that the petrol station is 36 meters from Kakamega GK Maximum prison and besides reducing the distance, they upgraded Kakamega GK Prison to the status of a Maximum security Prison and their motive being crystal clear, their petition should be dismissed because justice cannot be dispensed with falsehoods.

This cross petition is based on the grounds, that the cross petitioner is the registered proprietor of L.R. Kakamega/Municipality/Block IV/487. The cross petitioner is the Director of Jupiter Oil Limited which has leased the petitioner's property and constructed a fuel service station therein. The cross petitioner has completed constructing the petrol station on the said property and was scheduled to start operating on 1st July, 2014. Prior to construction of the petrol fuel station on the suit property, the cross petitioner obtained all approvals, licenses and or

permits from the defunct Municipal Council of Kakamega, National Environmental Management Authority (NEMA), Energy Regulatory commission and all other relevant Government authorities the respondent included. The petitioner consented to the construction of the fuel service station with a service bay, supermarket, guest rooms, fast food restaurant and vehicle parking areas by the cross petitioner on his property. The cross petitioner took a loan facility to develop his property which he is servicing and the respondent has threatened to stop the operations of the station when the same has been completed and the cross petitioner has injected over Ksh. 100,000,000/= into the project. The petitioner is acting maliciously to frustrate the approved developments of the suit property on speculative and imaginary hazards. The cross petitioner is servicing the loan used to develop the suit property which attracts a high interest and unless the respondent is restrained he stands to suffer massive financial hardship and embarrassment that cannot be compensated easily by the respondent. It is in the interest of justice that the orders sought be granted. The petitioner seeks stoppage of further development of the cross petitioner's petrol station after compliance with all legal requirements hence the cross petition herein.

The cross petitioner prays for the following reliefs:

- (a) A declaration that the petitioner herein (County Government of Kakamega) has no jurisdiction to stop the construction of the cross petitioner's petrol station after all approvals by various governments authorities have been obtained.
- (b) A declaration that the petitioner's effort or act of stopping the cross petitioner's petrol station is a violation of the cross petitioner's constitutional rights to develop and use L.R. Kakamega/Municipality/Block IV/487.
- (c) A declaration that the petitioner herein is discriminating the cross petitioner in pursuing the closure of his petrol station while there are other petrol stations in Kakamega town operating under the same circumstances and or environment and yet the petitioner has not raised any complaint or made any effort to close them down.
- (d) A declaration that the petitioner herein is estopped in law from purporting to stop the operations of the cross petitioner's petrol station after approving its construction plans and after watching the cross petitioner develop the petrol station at a huge cost running upto Ksh. 100,000,000/= (One hundred million shillings)
- (e) That on without prejudice to the foregoing reliefs if the petitioner wants relocation of the petrol station to an undefined location as per their pleadings, this honourable court do order the petitioner to compensate the cross petitioner to the full extent of the value of development, loss of business and for general damages for breach of contract and all interest accrued on the bank loans.
- (f) Costs of this cross petition.
- (g) Any other relief the court may deem just and fit to grant.

This court has considered the petition, cross petition and the submissions therein. The petitioner seeks orders of permanent injunction as against the respondent restraining him, his assignees, servants or any other person from proceeding with the construction of a fuel service station or any other construction on title no. Kakamega/Municipality Block IV/487 within Kakamega County; a declaration order be issued as against the respondent to the effect that the respondent's proposed project on title No. Kakamega/Municipality Block IV/487 is illegal and constitutes infringement of the right to a clean and healthy environment for the residents of the county of Kakamega; and that a mandatory injunction to be directed to the respondent to restore the land to its previous condition failing which the petitioner be at liberty to restore the land to its previous conditions at the expense of the respondent. The petitioner also avers that the proposed project was undertaken in a very close proximity with residential dwellings and that the proposed project development would pose a great hazard to the persons dwelling in close proximity and it poses a serious health hazard. The petitioner further averred that in light of the issues raised herein above, it would be suitable for the respondent to relocate the project to an alternative site that is environmentally safe (the project having been subjected to a fresh EIA and the requisite national and county regulatory requirements having been fulfilled) and sustainable within the County. The respondent's reply to the petitioner's petition is that they have all the relevant approvals.

Issues for determination

From the above factual background, the following issues arise for determination:-

- (a) *Whether the constitutional avenue is available to the petitioner*
- (b) Whether the respondent's proposed construction was done in accordance with the law; and
- (c) Whether the petitioner (in the petition) or the respondent (as per the cross petition) are entitled to the reliefs and orders sought.

Whether the constitutional avenue is available to the petitioner.

Article 42 of the Constitution which provides that;

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

a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

b. to have obligations relating to the environment fulfilled under Article 70."

That **Article 70 of the Constitution** on enforcement of environment rights goes on to provide as follows;

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

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate.

a. To prevent, stop or discontinue any act or omission that is harmful to the environment;

b. to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or

c. to provide compensation for any victim of a violation of the right to a clean and healthy environment.

3. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

That further, **Article 23 (3) of the Constitution** sets out the reliefs the court may grant to include a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under **Article 24**; an order of compensation; and an order of judicial review. The court of law should therefore not shy from issuing closure orders aimed at preventing, stopping or discontinuing harm to the environment in deserving cases. In the case of **National Environment Management Authority & Another vs Gerick Kenya Limited (2016) eKLR**, Mutungi J, held as follows:

“[30] ... In this matter we have a situation where we have competing interest. On the one hand we have the public interest where the Community needs protection against potential harm to the environment through contamination or pollution, and on the other hand, we have the defendant’s private commercial interest where the defendant wishes to develop the site for commercial gain. Where in a case such as the instant one, the public interest as the public interest is pitted against private interest, the public interest overrides the private interest is for the good of the wider public as opposed to the narrow private interest. The public interest no doubt outweighs the private individual interest.”

The case of the petitioner is that there is an infringement of his rights to a clean and healthy environment as provided by Article 42 of the Constitution. If a person is of the view that his right to a clean and healthy environment is being violated, he has recourse to apply to court for redress. The petitioner has presented a list of alleged legislative violations in his petition. Inter alia, that the proposed project bears no valid approvals, licenses and or permits from the relevant county planning departments, National Environmental Management Authority or Energy Regulatory Commission and other Government agencies under which the project squarely falls. It is their view that circumstances on the ground have changed to an extent that no approval to construct a petroleum filling station would be tenable in the circumstances. The respondents have responded to the claims of the petitioner, partly by arguing that this cannot be a proper constitutional petition. It is their view that the petitioner ought to have sought redress through the channels provided by statute, which do provide one with an avenue to challenge a decision of a local authority as per section 41(6) of the Physical Planning Act. Various authorities were tabled to support this position of the respondents.

In the case of *Judy Watiri Wambugu vs Chief Land Registrar & Others, Nakuru High Court, Constitutional Petition No. 49 of 2012*, the petitioner claimed that her rights to own property were violated by the issuance of another title based on a parallel land register to other parties by the Land Registrar. Waithaka L J, was of the view that the matter could not be resolved solely by invocation of the constitution as this will involve statutory determinations based on the provisions of the land statutes. The petition was struck out and the petitioner granted leave to pursue his claim under private law.

Be that as it may in the case of *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others (2016) eKLR*, the court held that;

“I do not think that it is a mandatory position, that where there are alternative remedies under statute, or other procedure under statute, a court can never entertain a constitutional petition. The court has to weigh the matter, and in its discretion, make a decision whether or not to proceed with it, or refer the litigant to the other existing remedies. In the instance of our case, I do think that there are unique features which make me exercise my discretion in favour of entertaining the petition, despite there being alternative remedies and procedures under statute.”

In this case it is my opinion that there are unique features which make me exercise my discretion in favour of entertaining the petition, despite there being alternative remedies and procedures under statute. The allegation by the petitioner that in their view that circumstances on the ground have changed to an extent that no approval to construct a petroleum filling station would be tenable in the circumstances. I will therefore proceed to entertain the petition.

Whether the respondent’s proposed construction was done in accordance with the law and whether the petitioner or the respondent are entitled to the reliefs and orders sought.

The petitioner submits that, there having been no compliance to the provisions of the relevant laws, any purported approval is not valid for blatant breach of express and mandatory provisions of law. In light of the issues stated above, it would be suitable for the respondent to relocate the project to an alternative site that is environmentally safe (the project having been subjected to a fresh EIA and the requisite national and county regulatory requirements having been fulfilled) and sustainable within the county. If the proposed project is allowed to

continue, it poses the following risks.

The respondent avers that at all material times he is the registered proprietor of L.R. Kakamega/Municipality/Block IV/487 and that a certificate of lease was duly issued to him on 15th August, 2008. That it is the respondent's case that as proprietor of L.R. Kakamega/Municipality/Block IV/487 he leased the plot to Jupiter Oil Limited for construction of a service station with a service bay, supermarket, guest rooms, fast food restaurant and vehicle parking areas. The respondent in response to the petition on purported illegalities states that the development of the service station was lawfully done after obtaining all approvals, licenses and or permits from the defunct Municipal council of Kakamega, National Environment Management Authority (NEMA), Energy Regulatory Commission and all other relevant Government Institutions. The respondent has produced the following documentary evidence;

1. Copy of L.R. Kakamega/Municipality/Block IV/487 leased to Jupiter Oil Limited for construction of a service station with a service bay, supermarket, guest rooms, fast food restaurant and vehicle parking areas.
2. Copy of the Memorandum and Articles of Association of the Company and a certificate of Incorporation.
3. Application for change of user which was duly approved by the Municipal Council of Kakamega, (copy of the application and a copy of receipt)
4. The Municipal Council of Kakamega approval granting the respondent development permission of the suit plot, copy of the approval.
5. Payment for approval of his development plans to the Municipal Council of Kakamega, (copy of the receipt).
6. An Environmental Impact Assessment Report to the National Environmental Management Authority (NEMA) before commencement of the project, (copy of the report)
7. Payment of the relevant charges of the said authority vide Jupiter Oil Limited, (copy of official receipt)
8. It is the respondent's case that upon submission of the Environmental Impact Assessment Report and after payment of the requisite fees the National Environmental Management Authority (NEMA) acknowledged receipt of the report (as per copy of the said acknowledgement).
9. The respondent in due compliance with the law, he advertised the Environmental Impact Assessment Report in the Daily Nation Newspaper and the Standard Newspaper and also in the Kenya Gazette (as per copies)
10. National Environment Management Authority (NEMA) gave an Environmental Assessment Impact License for the development of the following; Construction of a service station with a service bay. Supermarket. Guest rooms. Fast food restaurant and Vehicle parking areas, (copy of the NEMA license).
11. The physical planning department gave its certificate of compliance for the construction of a petrol service station on the suit plot, (copy of the said certificate).
12. The Ministry of Lands and Settlement equally gave its approval on subdivision and development of Kakamega/Municipality/Block IV/487, (copy of approval).
13. The Petroleum Business License from the Energy Regulatory Commission (as per copy)
14. The Ministry of Roads authority to construct acceleration/deceleration lanes to/from plot No. Kakamega/Municipality Block IV/487, (copy of the letter of authority).

I find that the respondent obtained all development permissions, licenses and or approvals from all relevant government authorities for the project. It has come out in evidence that the petitioner at all material times had knowledge of the development of the suit plot from the records they took over from the defunct Municipal Council of Kakamega and the said development of the service station has continued for over 1 year under their watch. I find that the petition has failed to adduce any technical evidence to support their claim. NEMA was never enjoined in this suit to provide their technical expertise and indeed no one has challenged their licence on record. This petition must also fail by reason of non joinder of parties. Evidence adduced show that, the project/development of a service station was duly assessed by the National Environmental Management Authority (NEMA) who upon satisfaction granted a development license. I also find that besides the approval licenses under the previous government, the petitioner also approved the development plans on the suit plot. The petitioner has failed to prove his case on a balance of probabilities and I dismiss the same.

In the cross petition, the respondent avers that they have injected over Ksh. 100,000,000/= in the project. The respondent avers that Kakamega County Government is acting maliciously by filing this suit with the intention of frustrating the approved developments of the suit plot on speculative and imaginary hazards. The respondent avers that the project/development of a service station was duly assessed by the National Environmental Management Authority (NEMA) who upon satisfaction granted a development license. The respondent further avers that the petitioner has no jurisdiction to challenge a decision by NEMA and all other government institutions on the development on the suit plot. The respondent states that the petitioner is applying double standards in trying to stop him from operating a petrol station at its current location when there are other petrol stations operating business in Kakamega town under the same environment or circumstances yet the petitioner has not issued any closure notices to them and hence is being discriminatory. The petitioner is discriminating against him contrary to the Kenya Constitution 2010 in its open biases against him in its pursuit to close down the petrol station. I find that no evidence has been

approved to show the expenditure or discrimination and the cross petition must fail and I dismiss the same.

It is the petitioner's contention that, there having been no compliance to the provisions of the relevant laws, any purported approval is not valid for blatant breach of express and mandatory provisions of law. That it would be suitable for the respondent to relocate the project to an alternative site that is environmentally safe. Having found that they do exist a Nema Licence in the instant case, it is my opinion, NEMA must require a new EIA where the situation that has arisen (as described by the petitioner) may lead to a suspension, revocation, or cancellation of the licence issued. Under Regulation 28 of the EIA Regulations, a licence may be cancelled if:

- (a) The licensee contravenes the conditions set out in the licence.*
- (b) Where there is a substantial change or modification of the project or in the manner in which the project is being implemented.*
- (c) The project poses an environmental threat which could not be reasonably foreseen before the licence was issued.*
- (a) If 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.*

In the case of *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others* (2016) eKLR, the court held that;

“85. It is nowhere in the statute, but in my view, a project may be deemed to have substantially been changed or been modified where some of the matters listed in Regulation 18 of the EIA Regulations exist. These include :-

- (a) Change in the proposed location of the project.*
- (b) Change in the national legislative and regulatory framework, baseline information and any other relevant information related to the project.*
- (c) Change in the objectives of the project.*
- (d) Change in the technology, procedures and processes to be used in the implementation of the project.*
- (e) Change in the materials to be used in the construction and implementation of the project.*
- (f) Change in the products, by-products and waste generated by the project.*
- (g) Change in the description of the potentially affected environment.*
- (h) Change in the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short term and long term effects anticipated.*
- (i) Change in the alternative technologies and processes available.*
- (j) Change in the analysis of alternatives including project site, design, and technologies and reasons for preferring the proposed site, design and technologies.*
- (k) Change in the environmental management plan such as changes in measures for eliminating, minimizing, or mitigating adverse impacts on the environment including cost, time frame and responsibility to implement measures.*
- (l) Change in the action plan for the prevention and management of foreseeable accidents and hazardous activities.*
- (m) Change in the measures to prevent health hazards and security in the working environment for the employees and for the management of emergencies.*
- (n) Change in gaps in knowledge and uncertainties.”*

NEMA has the mandate, to weigh whether or not the above circumstances only go to vary the project or whether they go to the very root of the project, in which case the project must be deemed to be a new project, and not a variation of the first project. Where on assessment, the project is deemed to be a totally different project, then NEMA must cancel the existing licence and require a completely new EIA for the new project. NEMA has the mandate to revoke a licence if the circumstances have substantially changed. Indeed it is on record by a ruling dated 16th July 2014 where Justice Chitembwe in allowing the project to proceed except for the guest rooms, had ordered the respondent to provide a second project report to NEMA on the guest rooms of which NEMA would be free to issue a licence on the same. It is the opinion of this court that the petitioner should follow up this matter through and with NEMA who issued the licence in the event that the circumstances have changed with a view to relook at the licence issued and take appropriate action. Each party is to bear their own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE