REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. E11 OF 2020

IN THE MATTER OF: ARTICLES 3(1), 10, 19, 20, 22, 23, 42, 69, AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT 2011

AND

IN THE MATTER OF: SECTION 3 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT 1999

AND

IN THE MATTER OF: VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS

BETWEEN

1. OMAR SALIM MWAKWELI.....1ST PETITIONER

2. DAVID KATANA.....2ND PETITIONER

3. KIBWANA MWIJUMA KIBWANA.....3RD PETITIONER

4. MOHAMED JUMA MGALA.....4TH PETITIONER

AND

1. VIPINGO DEVELOPMENT LIMITED.....1ST RESPONDENT

2. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....2ND RESPONDENT

3. KILIFI COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

1. By their Petition dated 15th October 2020 as filed herein on 21st October 2020, Omar Salim Mwakweli, David Pia Katana, Kibwana Mwijuma Kibwana and Mohamed Juma Mgala (hereinafter the Petitioners) pray for the following remedies against the three (3) Respondents- Vipingo Development Limited, the National Environment Management Authority (NEMA) and the County Government of Kilifi: -

a. A declaration that Vipingo Development Limited has breached Article 42 of the Constitution;

b. A declaration that Vipingo Development Limited was mandated to carry out a Strategic Environmental Assessment;

c. A declaration that the 2nd Respondent failed to protect the Petitioners' right to a clean and healthy environment;

d. A declaration that the 3rd Respondent failed to discharge its role in safeguarding the environment;

e. A prohibitory order to restrain Vipingo Development Limited, its agents, employees, associates or any person acting on its behalf from constructing the proposed project on the suitland;

f. An order of mandamus to direct Vipingo Development Limited to remove any parts of the project that have already been constructed on the suitland within 60 days;

g. An order compelling Vipingo Development Limited to restore the degraded environment to its condition prior to the damage; and

h. Such other orders as this Honourable Court may deem just.

2. The above prayers arise from the Petitioners' contention that the 1st Respondent has proposed to construct a Liquefied Petroleum Gas (LPG) Plant at Vipingo area in Kilifi County on LR No. 4393/III/MN. The Petitioners aver that the 1st Respondent thereby intends to clear vegetation and excavate the suitland to provide space and support for the LPG tanks which action will lead to soil erosion and environmental degradation of the suitland and its environs.

3. The Petitioners further aver that the 1st Respondent intends to transport the LPG tanks from Mombasa Port to the Project Site at Vipingo and that he same shall not only cause congestion and interruption along the highway but will also lead to oil leakages from the trucks. The Petitioners aver that the suitland holds shrubs, sedges and various types of grass on fossilized coral rock outcrops as well as a sisal plantation. The Petitioners accuse the 1st Respondent of intending to clear the vegetation and interfere with the coral rock to provide space for the project, an activity which they state shall negatively affect the ecosystem around the suitland.

4. The Petitioners further assert that the massive amounts of construction materials to be used in the project will generate huge amounts of waste and shall lead to the deterioration of the suitland and its environs. Similarly, the transportation of the construction materials will pollute the sea whenever the transport vessels run aground during low or rough tides.

5. The Petitioners further contend that the 1st Respondent's project includes the construction of a jetty and that the same will produce a lot of dust and noise to the residents neighbouring the suitland and the environs. They state that the excavation of the sea bottom areas during its construction will lead to suspension of sediments that will ruin the quality of water and penetration of light for the ecosystems within the sea water.

6. The Petitioners also assert that the construction of the jetty will lead to fuel and oil spills from the machinery and other types of solid waste and that the same will ruin the fishing grounds which is a source of livelihood for the local population. They also aver that the location of the jetty poses a danger to the fishermen and seafairers as the ships accessing the jetty create a potential for accidents.

7. The Petitioners aver that the project is out of character with its environs and accuse the 1st Respondent of failing to conduct a Strategic Environmental Assessment (SEA) for the Project. They further aver that the 1st Respondent's Master Plan did not disclose that the 1st Respondent intended to construct the LPG Plant and that its Environmental Impact Assessment Report is at variance with the Master Plan. The Petitioners state that the 2nd and 3rd Respondents failed to take into account this material non-disclosure and the potential risks to the environment.

8. Accordingly, the Petitioners assert that the project violates Article 42 of the Constitution on their right to a clean and healthy environment and hence the institution of this Petition for appropriate redress.

9. But in a Replying Affidavit sworn on 18th January 2021 by its Managing Director Kenneth Gitonga Mbae and filed herein on 26th January 2021, the 1st Respondent avers that the Petition is devoid of merit and hence ought to be dismissed. The 1st Respondent avers that it has invested in various parcels of land in Kilifi County in the year 2015 measuring about 10,254 acres- with the intention to spur economic activity in the County. In order to achieve this, the 1st Respondent states that it did apply for change of user of the land from agricultural to mixed use development.

10. The 1st Respondent avers that it developed a strategic plan and a Master Plan zoning the various sections of the properties to ensure that a harmonious, economically productive and sustainable development could be executed. These zones include residential, commercial, agricultural, hospitality, institutional and industrial sections which the 1st Respondent in collaboration with like-minded investors and various stakeholders in Kilifi County intends to develop in phases.

11. The 1st Respondent avers that to date it has already developed the following phases of its projects: -

a. 74 residential housing units known as Awali Estate;

b. 440 apartments known as 1255 Palm Ridge;

c. A three million litres per day Water Desalination Plant which will supply fresh water to all the investors on the properties as well as the neighbouring residents;

d. On a corporate social responsibility basis, the 1st Respondent has built eight classrooms in four schools within Kilifi North and South Constituencies and offered 202 fully paid high school scholarships to bright and needy students from the Vipingo area; and

e. Various infrastructure developments to support the above projects as well as future developments.

12. Thus, the 1st Respondent avers that it has at all times conducted itself as a responsible corporate citizen and all its developments are executed in full compliance with all the statutes and in a consultative manner with not only the relevant authorities but also local residents.

13. The 1st Respondent concedes that it is desirous of constructing and operating a bulk 22,000 MT liquefied petroleum gas (LPG) storage facility as part of its development projects on the suitland and that in that respect, it has reviewed all applicable laws in the Republic and filed an application before the 2nd Respondent for an Environmental Impact Assessment (EIA) License for the Project.

14. The 1st Respondent asserts that in full compliance with Section 58 (1) of the Environmental Management and Coordination Act, it commissioned an Environmental Impact Assessment Report for the project. The said report was prepared by independent experts after carrying out the environmental impact assessment study which process by law included comprehensive public participation to address concerns and views of the local community.

15. The 1st Respondent states that the said report prepared in October 2018 and placed before the 2nd Respondent in the prescribed format outlined the scope and location of the project, activities to be carried out on a 20-acre site, as well as the possible potential environmental impact and the mitigation measures to be taken during and after implementation.

16. The 1st Respondent further states that in compliance with Section 59 (1) of Environmental Management and Coordination Act (EMCA) and the Regulations thereunder, the 2nd Respondent caused to be published in the Kenya Gazette Vol. CXX- No. 137 dated 9th November 2018 a notice on the proposed development inviting members of the public to submit their oral or written comments on the project within 30 days. In addition, an appropriate notice was placed in the Star Newspaper in November 2018 inviting further comments from the public.

17. The 1st Respondent avers that none of the Petitioners or any other member of the public raised any concerns with the project within the stipulated time. On 29th October 2018 the Energy Regulatory Commission (ERC) received a copy of the study report and proceeded to inspect the site on 24th November 2018. By its letter dated 28th January 2019, the Energy Regulatory Commission noted that the proposed layout plans met minimum safety distance and that there were no schools, churches or mosques within 75 metres of the proposed site.

18. The 1st Respondent states that the 2nd Respondent equally visited the proposed project site for the requisite inspection and on 10th December 2019 having received no objection to the proposed project issued the 1st Respondent with an Environmental Impact Assessment Licence. Attached to the License were conditions that the 1st Respondent has to adhere to as it undertakes the LPG Project.

19. The 1st Respondent further asserts that it did submit building plans to the 3rd Respondent and that by a letter dated 6th May 2020, it received the approval of the building plans from the 3rd Respondent. The approval was subject to conditions including submissions of regular and continuous inspection reports.

20. The 1st Respondent avers that the effect of Article 42 of the Constitution is to avail as of right to every person, a constitutional entitlement to a clean and healthy environment protected through legislative and other measures whereas Article 69 and 70 of the Constitution provide more specifically for the obligations of the state with respect to the environment as well as the enforcement of environmental rights. The 1st Respondent avers that it has acted in strict adherence to all laws and regulations in coming up with the project.

21. The 1st Respondent further avers that this Petition would not have been necessary had the Petitioners raised the concerns they have when they were invited to do so by the 2nd Respondent. In any event, the 2nd Respondent in fulfilling its mandate looked into the various ways in which the proposed project could negatively affect the environment against the mitigation measures that were provided before it issued the Licence to the 1st Respondent. It is therefore manifestly unfair for the Petitioners to raise the issues raised herein more than a year after the Environmental Impact Assessment Licence had been issued and two years after the comprehensive public participation was concluded.

22. In addition to the Affidavit in Reply, the 1st Respondent has filed herein a Notice of Preliminary Objection dated 18th January 2021 objecting to the Petition on the grounds that: -

1. This Honourable Court lacks the jurisdiction to hear and determine this matter. Any part that is aggrieved with the decision of the 2nd Respondent with respect to the issuance of the Environmental Impact Assessment Licence is directed by the Environmental Management and Coordination Act (EMCA) to seek redress from the National Environmental Tribunal (NET) or National Environmental Complaints Committee (NECC).

2. The crux of the issues raised in the Petitioners' pleadings is premised on their dissatisfaction with the process leading to the award of the Environmental Impact Assessment License (by) the 2nd Respondent. The process was at all times governed by substantive statutory provisions and any disputes on applicable legal principles therein and the attendant issues of fact can only be litigated before the National Environment Tribunal (NET) or National Environmental Complaints Committee

(NECC).

3. The mere fact of peripheral references to the Constitution does not render the dispute amenable to be determined by the Environmental and Land Court particularly where substantive legal provisions govern the matters under review or dispute and where the said provisions provide the channel for seeking redress.

23. I have considered both the oral and written submissions as well as the authorities placed before me by the Learned Advocates for the parties- Mr. Rosana for the Petitioners and Mr. Musangi for the 1st Respondent.

24. By their Preliminary Objection dated 18th January 2021, the 1st Respondent asserts that this Court lacks the requisite jurisdiction to hear and determine the Petition. As Nyarangi JA stated in the celebrated Case of ***Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989) 1 KLR 1: -***

> "**.....**jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

25. Commenting on the decision in ***Owners of the Motor Vessel "Lillian S"*** (above), the Court of Appeal had this to say in ***Karisa Chengo & 2 Others –vs- Republic (Criminal Appeal Nos. 44, 45 and 76 of 2014 (2015) eKLR: -***

> "Assumption of jurisdiction by the Courts is a subject regulated by the Constitution, by statute law and by principles laid down in judicial precedent. The classical decision in this regard is the **"Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1: ……**
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> The "Lillian S" Case establishes that jurisdiction flows from the law, and the recipient Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endevours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity….. "

26. In the Petition filed herein, the Petitioners urge the Court to make a number of declarations in regard to the proposed construction of a Liquefied Petroleum Gas (LPG) Plant by the 1st Respondent at the 1st Respondent's parcel of land known as LR No. 4393/III/MN situated at Vipingo area in Kilifi County.

27. It is the Petitioners' case that the intended project shall lead to massive environmental degradation of the suitland and its environs due to the expected activities such as clearance of vegetation and excavation of the land, transportation of the LPG tanks and other associated machinery as well as the huge waste to be generated from the project.

28. The Petitioners asserts that the project is out of character with its environs and accuse the 1st Respondent of failing to conduct a Strategic Environmental Assessment (SEA) for the project and to disclose in their Master Plan that the intended project included the construction of the LPG Plant. The Petitioners further accuse the 2nd and 3rd Respondents of failing to take into account the material non-disclosure and the potential risks the project poses to the environment before giving their approval thereto.

29. Accordingly, the Petitioners aver that the project violates Article 42 of the Constitution on their right to a clean and healthy environment and hence the institution of this Petition for appropriate redress.

30. It is however the 1st Respondent's case in a nutshell that the Environmental Impact Assessment (EIA) License issued to itself by the 2nd Respondent was lawful for reasons that: -

i. The 1st Respondent had complied with the zoning and planning requirements applicable to the area where the project is proposed to be situated;

ii. The 1st Respondent provided adequate and sufficient mitigation measures for all the highlighted adverse impacts that the proposed project would have on the environment; and

iii. The 2nd Respondent issued invitations for public participation but the Petitioners failed, refused and/or neglected to raise any objections and participate in the process before the 2nd Respondent issued the 1st Respondent with an Environmental Impact Assessment License approving the project.

31. It is the 1st Respondent's position that any party that is aggrieved by the decision of the 2nd Respondent in respect of the issuance of the Environmental Impact Assessment License ought to seek redress from the National Environment Tribunal (NET) or the National Environment Complaints Committee (NECC) and not the Environment and Land Court in the first instance.

32. In response to that position however, the Petitioners submit that the 1st Respondent has breached their Constitutional right to a clean and healthy environment as guaranteed under Article 42 of the Constitution. The Petitioners assert that the National Environmental Tribunal and the National Environmental Complaints Commitee have no power or mandate to hear and determine Constitutional Petitions such as the one herein and hold that this Court is properly seized of the matter and should proceed to hear and determine the Petition.

33. From the pleadings and the material placed before me, it was apparent that the dispute herein arose following the issuance of the

Environmental Impact Assessment License for the proposed LPG Plant to be constructed by the 1st Respondent at Vipingo area in Kilifi County. The 2nd Respondent –the National Environment Management Authority (NEMA) is in law mandated to issue an Environmental Impact Assessment License pursuant to Section 63 of the Environmental Management & Coordination Act, No. 8 of 1999 (EMCA). Such a license is issued to a project proponent subject to compliance with certain requirements which are set out under Section 58 of the Environmental Management & Coordination Act.

34. Section 125 of EMCA establishes the National Environment Tribunal (NET) which Tribunal is tasked with inter alia resolving disputes arising from the issuance of a license or permit pursuant to Section 129 of the Act. The said Section provides as follows: -

> **"129 (1) Any person who is aggrieved by: -**
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> **a. The grant of a license or permit or a refusal to grant a license or permit, or the transfer of a license or permit, under this Act or regulations made thereunder;**
>
> **b. The imposition of any condition, limitation or restrictions on his license under this Act or regulations made thereunder;**
>
> **c. The revocation, suspension or variation of his license under this Act or regulations made thereunder;**
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> **d. The amount of money which he is required to pay as a fee under this Act or regulations made thereunder;**
>
> **e. The imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder;**
>
> **May within 60 days after the occurrence of the event against which he is dissatisfied appeal to the Tribunal in such manner as may be prescribed by the Tribunal.**

35. Under Section 30 of the EMCA, any person who is aggrieved by a decision or order of the Tribunal is allowed to lodge an appeal against such decision or order within 30 days to the Environment and Land Court.

36. As it were, it was not in dispute that upon commissioning of an Environmental Impact Assessment report for the project by the 1st Respondent in October 2018, the 2nd Respondent caused to be published in the Kenya Gazette Volume CXX- No. 137 of 9th November 2018, a notice on the proposed development. That notice invited members of the public to submit their oral or written comments on the project within 30 days. In addition, another notice was published in the Star Newspaper the same month giving notice of the project and inviting members of the public to submit comments thereon.

37. It would appear that upto and until they instituted this Petition on 21st October 2020, none of the Petitioners had made any submissions or objections on the project with the 2nd Respondent. While the Petitioners accuse the 2nd and 3rd Respondents of failing in carrying out their statutory duties, I was unable to see how they arrived at that conclusion given that they had not made any representations to the said Respondents for consideration.

38. My perusal of the Affidavit filed in reply to the Petition by the 1st Respondent's Managing Director and filed herein on 26th January 2021 reveals that the 1st Respondent by and large complied with the statutory framework established for a project of this nature. That being the case, the complaints raised by the Petitioner herein ought to have been raised as an objection after the public was notified of the application for the License through the advertisement in the Kenya Gazette and the Newspaper.

39. As the Court of Appeal stated in ***Republic –vs- NEMA Ex-Parte Sound Equipment Ltd CACA No. 84 of 2010 (2011) eKLR: -***

> "……. challenges to Environmental Impact Assessment Licenses should be made to the National Environment Tribunal established for that purpose under Section 125 of the Environmental Management & Coordination Act. Rather than come to this Court, the Tribunal should have been given the first opportunity and option to consider the matter. We agree with Mr. Gitonga for the 3rd Respondent that the Tribunal is the specialized body with the capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licenses."

40. I was equally not persuaded by the arguments that the Tribunal had no scope to deal with the issues herein on the guise that the same touch on the Constitutional rights of the Petitioners. The alleged Constitutional infringements appear to me to arise from the failure of the Petitioners to abide by the procedure provided in law to avoid such infringements. As the Court of Appeal stated in ***Samson Chembe Vuko –vs- Nelson Kilimo & 2 Others (2016) e KLR: -***

> "It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed……This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes……It is readily apparent that in those cases the Court was speaking to issues of correct procedure rather than of the correct forum of resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a Statue, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159(2) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article 159(2) (c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear Constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the limited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner……."

We are therefore satisfied that the Learned Judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances where the relevant statues prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanism he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the Constitutional objective behind Article 159 (2) (c) and very raison d'eter of the mechanisms provided under the two Acts……"

41. That was the same position taken by the Constitutional and Human Rights Division of the High Court in ***Patrick Musimba –vs- National Land Commission & 4 Others (2016) eKLR*** where the Court stated thus: -

> **"……where there is procedure for redress (for violations of constitutional rights and freedoms) available elsewhere, that redress must be pursued within the rubric provided. This Court must exercise restrain and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. Such has been the gist of such cases like the** Speaker of the National Assembly –vs- Karume (2008) 1KLR 426**. In** Narok County Council –vs- Trans Mara County Council & Another, Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows in this regard: -**
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> **Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty; it is where the statute is silent on what is to be done in the event of a disagreement….Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minster refuses to give a direction or where in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit… If the Court acts without jurisdiction, the proceedings are a nullity…."**

42. Accordingly, and on the whole, I am satisfied that there is merit in the Preliminary Objection. The mere fact of peripheral references to the Constitution does not render the dispute amenable for determination by this Court where substantive legal provisions govern the matters under dispute and where the said provisions clearly provides the channel for seeking redress.

43. In the premises, I hereby strike out the Petition dated 15th October 2020 as filed herein on 21st October 2020.

44. In order not to punish the Petitioners for being public- spirited, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

J.O. OLOLA

JUDGE