



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC PETITION No. 8 OF 2021

(FORMERLY MIGORI ELC PETITION No. E001 OF 2020)

**IN THE MATTER OF ENVIRONMENT DAMAGE AND VIOLATION OF THE RIGHTS
TO CLEAN AND HEALTHY ENVIRONMENT AND THE RIGHT TO PROPERTY**

AND

IN THE MATTER OF REDRESS FOR VIOLATION OF RIGHTS

UNDER ARTICLES 27, 40(3), 42,43,47,54 AND 70 OF THE

CONSTITUTION OF KENYA, 2010

BETWEEN

PRISCA ALUOCH ODONGO.....1ST PETITIONER

GAUDENSIA AKINYI ODONGO.....2ND PETITIONER

ALOICE ODHIAMBO ODONGO.....3RD PETITIONER

DANIEL OTIENO ODONGO.....4TH PETITIONER

MICHAEL OCHARA ODONGO.....5TH PETITIONER

GORDON OMOLO ODONGO..... 6TH PETITIONER

BRIAN JODE ODONGO.....7TH PETITIONER

BYRON TABU ODONGO.....8TH PETITIONER

AND

NATIONAL IRRIGATION AUTHORITY.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2ND RESPONDENT

CABINET SECRETARY in charge of

MINISTRY OF LANDS AND PHYSICAL PLANNING.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

JUDGMENT

A. INTRODUCTION

1) Article 22 (1) and (2) of the Constitution of Kenya, 2010 (The Constitution herein) reads, inter alia:

“ (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.

(2) In addition to a person in their own interest, court proceedings under clause (1) may be instituted by-

a) a person acting on behalf of another.....

b) a person acting as a member of, or in the interest of, a group or class of persons

c) a person acting in the public interest; or

d) an association.....”

2) In Article 258 of the Constitution, too, every person has the right to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention.

3) Under Article 260 of the Constitution, the term “**person**” includes a company, association or other body of persons whether incorporated or unincorporated. Further, in the **Black’s Law Dictionary 10th Edition at page 1325** the term “personable/personable entity” means having the status of a legal person (and thus the right to plead in court, enter into contracts, et cetera).

4) In that regard, the 1st to the 8th Petitioners initiated this petition dated 25th September 2020 and amended herein on 2nd February 2021 on their own behalf as former inhabitants of Sagama Village, Ageng’a sub location, Central Kadem Location, Nyatike Sub County of Migori County alleging violation of their right to property, the right to clean and healthy environment, the right to equal protection and equal benefit of the law and the right to fair administrative action as spelt out in the Constitution. Therefore, they have mounted this petition against the Respondents for both protection and redress against continued and or further violation.

5) The principal property in the present petition is the whole of land parcel number North Kadem/Kanyuor/1051 (The suit land herein) within Kanyuor Adjudication in name of the 1st Petitioner’s deceased husband.

6) On 18th October 2021, 20th January 2021 and 22nd March 2021, the court encouraged the parties to embrace Alternative Disputes Resolution (ADR) methods with a view to resolving the issues in this petition further to **Article 60 (1) (g) and 159 (2) (c) of the Constitution**. Apparently, the parties failed to give a shot at any of the ADR methods.

7) Originally, this petition was lodged at Migori Environment and Land Court. However, since the matter had proceeded substantially before me and parties had duly filed submissions herein, Kullow J based at that court, directed that it be transferred to this court with effect from 16th September 2021 for further directions.

8) On 9th March 2021, after hearing learned counsel for the petitioners and learned counsel for the 1st Respondent, the court directed that the petition be heard by way of written submissions. Further, the court allowed counsel to highlight the submissions and the same was done on 8th November 2021.

9) Notably, the court allowed addition of parties as petitioners herein following an application by way of a notice of motion dated 1st October 2020. Upon the said addition, the 2nd, 5th and 7th Petitioners filed a notice of intention to act in person and a notice of withdrawal from the petition both dated 1st April 2021 on 8th April 2021, Pursuant to Order 25 Rules 1 and 2 of the Civil Procedure Rules, 2010, the notices are in order and the withdrawal allowed accordingly. Therefore, the 2nd, 5th and 7th petitioners are excluded from this petition.

B. THE GIST OF THE PETITIONERS’ CASE

10) The 2nd to 8th Petitioners are all Kenyan adults, and are co-wife, sons and step sons to the 1st Petitioner in that order and all are family members of the late Wilson Odongo Ochara-deceased. As noted in paragraph herein above

11) As noted in paragraph 9 herein above, any reference in the Petition and amended petition to the petitioners shall and should be deemed to mean the 1st, 3rd, 4th, 6th and 8th Petitioners collectively.

12) The Petitioners are represented by the firm of Omondi Abande and Company Advocates.

13) By a sixty-one (61) paragraphed petition dated 25th September 2020, amended 2nd February 2021 and duly filed in court on 3rd February 2021, the Petitioners are seeking the following reliefs;

a) A declaration that the ongoing rice growing activities introduced by the 1st respondent at Block 3-A, Sagama Village, Ageng'a Sub location, Central kadem Location, Nyatike Sub county of Migori County, which has displaced the 1st to 8th petitioners from the suit land , has infringed, continues to violate and/or has threatened the 1st to 8th Petitioners right to a clean and healthy environment contrary to Article 42 , right to property as project Affected Persons contrary to article 40(3) of the Constitution.

b) A declaration that the acts of 1st, 2nd, 3rd and 4th Respondents as complained of in this petition has violated and continues to violate, threaten and infringe on the 1st to 8th petitioners rights under Articles 27, 40(3), 42, 43 (1) (a) and (b), 47 and 54 of the Constitution and violates the Constitution and other written laws.

c) Damages and compensation for violation of rights be awarded to the 1st to 8th petitioners against the 1st Respondent and an compelling the 1st Respondent, National Irrigation Authority and or all the Respondents to pay such damages to the 1st to 8th petitioners for violation of rights, including the rights under Articles 27, 40(3), 42 and 43(1) 9a) and (b), 47 and 54 of the Constitution as enumerated in this petition on terms and in such quantum and proportion as the court shall determine.

d) The value of the 1st Petitioners house as shown in the valuation report filed herein.

e) An order compelling all the Respondents jointly and or severally and in proportions as the court shall determine, to pay damages to the petitioner for violation of rights under Article 27, 40(3), 42, 43(1) (a) and (b), 47 and 54 of the Constitution.

f) Damages be paid to the 1st to 8th petitioners for trespass to the suit land and the resultant damages under the Principle in Rayland's versus

Fletcher and the polluter pays principle for loss and damages to property consequent upon the documented destruction of properties as against the 1st Respondent.

g) Costs of alternative land and replacement costs of resettlement on terms pleaded be paid to each of the 1st to 8th petitioners and or as the court shall determine, deem fit and just to grant.

h) An environment restoration order against the 1st Respondent in respect of the suit land and an order compelling the 2nd Respondent, National Environment Management Authority to ensure that the environment in Sagama village BLOCK 3-A, is protected, safe and healthy or in lieu thereof full and adequate compensation in terms of the valuation report availed and filed by the petitioner to finance a resettlement action plan and a livelihood restoration plan for all the petitioners.

i) Compensation under section 152(2) of the Land Act for loss, deprivation and diminution of rights, interest and injurious affection of ownership and occupation of the suit land be paid to each of the petitioners.

j) Costs of this Petition

k) Interest on damages, compensation and costs.

l) And the Petitioner will further and forever continue praying to this court for appropriate reliefs as this court may deem fit and just to grant over and concerning the 1st Respondents activities over the suit land and the 2nd Respondents refusal to ensure a clean and safe environment and the 3rd and 4th Respondents refusal to follow the law to ensure compensation and payment of damages.

14) The amended petition is anchored on a 22-paragraphed supporting affidavit sworn on 2nd February 2021 by the 1st Petitioner for and behalf of the other petitioners and herself. She deposed in part that the activities of the 1st respondent on the suit land have internally displaced the petitioners who are all members of one family and rendered them homeless. Annexed to her affidavit, are copies of public notice (PAO1), investigation report on the alleged human rights violations at Lower Kuja Irrigation Scheme (PAO 2) and letter addressed to the 1st respondent by the 2nd respondent (PAO 3), in support of the amended petition.

15) In a nutshell, the petitioners complain that they have been living on and in occupation of the suit land which is a matrimonial property hence hold recognizable rights, interests including beneficial interest and ownership thereon to the exclusion of the respondents. That the 1st respondent conceived and propagated an irrigation project known as Lower Kuja Irrigation Development Project (The project herein), first by constructing an intake point/a weir along the river at a place known as Orango which it appears to have completed. Thereafter, the 1st respondent embarked on the construction of the main canal which was partially done and abandoned but completely interfered with natural storm drains, vegetation and healthy environment in the area where the suit land is situated.

16) The Petitioners contended that in August 2019, the 1st respondent blocked and put gates along the natural storm water drains at a place called Gunga and directed their irrigation water to the suit land where the petitioners' home stood. That the suit land became swampy and caused internal displacement of the petitioners who have been rendered homeless and destitute. That the 1st petitioner is a person with disabilities, aged, frail and sickly. That the 1st respondent forcefully and without notice and or compensation took over the suit land and laid public rights of way thereon in the nature of the project. It thus, provoked the instant petition.

17) By a further affidavit sworn on 19th October 2020 by the 1st Petitioner for on behalf of other petitioners and herself and duly filed in court on 25th October 2020 pursuant to orders of this court granted on 18th October 2021, the petitioners pleaded with this court to allow the petition and grant them appropriate remedies. In further support of the petition, it is deposed therein, inter alia, that the petitioners are

involuntarily internally displaced by the project activities of the 1st Respondent on the suit land. That the 1st respondent has without following the Constitution and the law, compulsorily acquired the suit land which is their customary land and implemented the project thereon without an Environmental Impact Assessment (EIA) licence.

18) On 17th March 2021, learned counsel for the Petitioners filed submissions of even date and orally highlighted the same on 8th November 2021 as pointed out in paragraph 8 hereinabove. Counsel urged this court to apply the Constitution and grant appropriate reliefs in the circumstances in exercise of its inherent powers as donated by the law in the interest of justice. Counsel submitted, inter alia, that the activities of the 1st respondent on and around the suit land has degraded the environment as the same has been turned into a swamp which cannot sustain life and livelihood. That the 1st respondent trespassed into the suit land and that the overt acts of the 1st respondent are unchallenged and uncontroverted. That the illegal digging of the canal has not been attributed to the petitioners who are bound to be affected by the project. That this court has the jurisdiction to entertain the petition.

19) To buttress the submissions, counsel cited, among others, **Articles 27, 28, 40,42, 43,50 (1), 54, 65, 69, 70 and 258 (1)** of the Constitution, **section 3 (1) of the Trespass Act (Cap 294), sections 143 (2), 144 (4),145 (4), 146 and 148 (1) and (4) of the Land Act, 2016 (2012), Clerk and Lindsell on Torts 18th Edition at paragraph 18-01 and the Halsbury's Laws of England 4th Edition volume 45 para 26 1503 and Principle 15 of the Rio Declaration on Environment and Development.** In addition, counsel adopted and relied on the decisions in **Adrian Kamotho Njenga-vs-Council of Governors and 3 others (2020) eKLR, Martin Osano Rabera and another-versus-Municipal Council of Nakuru and 2 others (2018) eKLR, Zinji Limited-vs-Attorney General and 4 others (2014) eKLR and Arnacherry Limited-vs-Attorney General (2014) eKLR**, among other authorities.

C. THE GIST OF THE 1ST RESPONDENT'S CASE

20) The 1st respondent is the National Irrigation Authority established pursuant to the provisions of section 7 of the Irrigation Act, No 14 of 2019 and it is the successor to the National Irrigation Board, which had been established pursuant to section 3 of the Irrigation Act, cap 347 of the laws of Kenya since then repealed.

21) By a memorandum of appearance dated 12th October 2020 and filed in court on 28th October 2020, the firm of Otieno, Yogo, Ojoro and Company Advocates was on record for the 1st Respondent. Currently, the 1st Respondent is represented by the firm of G & A Advocates LLP pursuant to a notice of appointment of Advocates dated 22nd October 2020 herein.

22) The 1st Respondent opposed the amended petition and sought that the same be dismissed with costs. The opposition thereto is contained in the replying affidavit sworn on 26th October 2020 by Daniel N Atula and another replying affidavit sworn 27th October 2020 and duly filed in court on 28th October 2020 by Eng. Nesline Ogwe as well as the replying affidavit sworn on 19th March 2021 by Joel Tanui.

23) Briefly, it is deposed in the replying affidavits that the 1st Respondent has been experiencing obstruction in the implementation of its planned activities due to interference from the canal way leave affected persons whose parcels of land had not been valued for compensation when the project was being carried out. That the survey and valuation exercise on the suit land was put on hold due to the COVID-19 pandemic. That the petitioners' claim is premature as the process of survey, valuation and compensation ought to be completed. Copies of letters annexed thereto and marked as "NO 1" to "NO 4" and others, are in support of the said affidavits.

24) In a 32- paragraphed supplementary affidavit sworn on 19th March 2021 and filed in court on 22nd March 2021 by Daniel M. Atula (supra) accompanied by copies of documents marked as "OMA-1" and "OMA-2", the 1st Respondent reiterated and adopted the 1st Respondent's sworn on 26th October 2020. The 1st Respondent opposed the petition on the principal grounds infra;

- a) The jurisdiction of this Honourable Court has been wrongly and prematurely invoked.
- b) The grievances set out in the Amended Petition relate to the recourse available for Project Affected Persons. The prescribed forum for consideration of such grievances is the National Environment Tribunal which has both the legal mandate and subject matter expertise.
- c) The Amended petition as presented offends the doctrine of exhaustion of remedies. The Petitioners have not sought and obtained leave for exemption from their requirements of section 9 (40) of the Fair Administrative Action Act and in fact no cogent grounds exists to warrant such a consideration.
- d) The Amended petition seeks to introduce and rely on a Report indicated to have been issued by the Kenya National Commission of Human Rights during the subsistence of the proceedings. The purported reliance on the report in violation of various evidentiary requirements as will be demonstrated.
- e) The Amended Petition merely seeks to impede the performance of lawful mandates specifically vested on the agencies named as 1st to 4th Respondents.
- f) The effect of the Amended Petition and prayers sought, if entertained, would be to deprive the greater public of the benefits arising from the project including:
 - i) Land reclamation;
 - ii) Security;

iii) Enhancement of the value of land; and

iv) Improved economic conditions of the residents.

g) The Amended Petition proceeds on the erroneous premise that there has been compulsory acquisition of the Petitioner's land as to merit compensation in the manner sought.

25) By written submissions dated 19th March 2021 and duly filed in court on 22nd March 2021 and oral highlights of 8th March 2021, learned counsel for the 1st Respondent asked this court to consider the three (3) replying affidavits and a further affidavit on the part of the 1st respondent and find that the petitioners' grievance is not legitimate as the 1st respondent is not undertaking detrimental rice farming activities. That the project is being undertaken in compliant with the Constitution and law. Counsel framed six (6) issues for determination including whether the jurisdiction of this Honourable court has been prematurely and prematurely invoked and whether the petitioners are deserving of the orders sought in the petition. In the analysis of the issues, counsel submitted that this court is devoid of jurisdiction in respect of this petition. That in the circumstances of the case, interest of justice and equity, the amended petition be dismissed with costs.

26) To fortify the submissions, counsel made reference to **section 7 (1) of the Irrigation Act No. 14 of 2019, sections 68, 69 and 125 of the Environmental Management and Coordination Act (EMCA), The Environmental (Impact Assessment and Audit) Regulations, 2003, section 48 of the Evidence Act Chapter 80 Laws of Kenya, The Judges and Environmental Law and A Handbook for the Sri Lanka Judiciary, Environmental Foundation Limited at page 125, among others.** To further reinforce the submissions, counsel relied upon the decision in **Speaker of the National Assembly-vs-Hon. James Njenga Karume (1992) eKLR, Michael Moragia Nyachae and another-vs-Buddies Kisii Limited and 2 others (2006) eKLR, Chalsity Investment Limited and 14 others-vs-Kenya Railways Staff Retirement and Benefits Scheme and another (2019) KLR and Republic-vs-NEMA Exparte Sound Equipment Ltd (2011) eKLR.**

D. THE GIST OF THE 2ND, 3RD AND 4TH RESPONDENTS' CASE

27) The 2nd Respondent is the National Environment Management Authority (NEMA) established pursuant to section 7 of the national Environmental Management and Coordination Act, Act No 8 of 1999 as amended in the year 2015.

28) The 3rd Respondent is the Cabinet Secretary for the time being responsible for lands and Physical Planning and has a statutory role and duties in the creation of public rights of way pursuant to sections 164 of the Land Act, 2016(2012).

29) The 4th Respondent is the National Land Commission is a constitutional commission established pursuant to **Article 67(1) of the Constitution** and operationalized by the provisions of the National Land Commission Act. The 4th Respondent is the custodian of the Land Compensation Fund established **pursuant to section 153(1) of the Land Act, 2016 (2012).**

30) The 2nd, 3rd and 4th Respondents were duly served with the amended petition on 2nd March 2021 as shown in paragraphs 3, 4 and 6 of the affidavit of service sworn on 4th March 2021 by Peter Ochara Anam, a court process server.

31) Interestingly, the 2nd, 3rd and 4th Respondents failed to enter appearance and or file any response to the petition.

E. ISSUES FOR DETERMINATION

32) It is trite law that the issues for determination in a suit flow from either the pleadings or as framed by the parties for the court's determination; see the case of **Galaxy Paints Limited vs Falcon Grounds Limited (2000) 2 EA 385 and Order 15 Rules 1 and 2 of the Civil Procedure Rules, 2010.**

33) The terms "suit" and "petition" are assigned meaning under **section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya and the Concise Oxford English Dictionary 12th Edition page 1073** respectively. Their definitions are borne in mind accordingly herein.

34) I have anxiously considered the amended petition, the 1st Respondent's replying affidavits, the petitioners' further affidavit, the 1st respondent's supplementary affidavit, written and oral submissions including the issues and authorities cited therein by the petitioners' counsel and the 1st respondent's counsel in their entirety. So, the issues for determination boil down to whether:

a) This court is seized of the jurisdiction over the instant petition,

b) Depending on the outcome in issue number (a) hereinabove, the respondents have violated, denied or infringed the rights of the petitioners and

c) The petitioners deserve the orders sought in the amended petition.

F. DISCUSSION AND DISPOSITION

35) As regards the 1st issue, the **Halsbury's Laws of England (4th Edition) Volume 9 at page 350**, defines "Jurisdiction" as;

"...the authority which a court has to decide matters that are litigated before it or take cognizance of the matters presented in a formal

way for decision.....”

36) It is trite law that jurisdiction denotes whether the adjudicatory body has the power to entertain the proceedings; see the Supreme Court of Kenya decision in **Benson Ambuti Atega and 2 others-vs-Kibos Distillers Limited and 5 other (2020) eKLR**.

37) The Supreme Court of the Republic of Kenya in the case of **Samwel Kamau Macharia and another –vs-Kenya Commercial Bank Limited and others (2012) eKLR**, also held -

“A court’s jurisdiction flows from either the Constitution or legislation or both.....It cannot arrogate itself jurisdiction.....”

38) The jurisdiction of this court flows from **Article 162 (2) (b) of the Constitution and sections 4 and 13 of the Environment and Land Court Act, 2015 (2011) (The ELC Act herein)**

39) No doubt, this court has the jurisdiction to deal with any Constitutional issue as provided for orders section 13(3) of the ELC Act; See **United States International University-vs-Attorney General and 2 others (2012) KLR**

40) In the case of **Hussein Khalid and 16 others-vs-Attorney General and 2 others (2020) eKLR**, the Supreme Court of the Republic of Kenya also observed that a court or body cannot confer jurisdiction to itself where there existed none. That nothing can divest a court of jurisdiction which it possessed under the law.

41) It is important to note that assumed jurisdiction is a nullity; See **Desai-vs-Warsama (1967) EA 351 and Republic –vrs- Karisa Chego and 2 others (2017) eKLR**.

42) The 1st Respondent opposed the amended petition. It is deposed in the supplementary affidavit at paragraph 3 (a) that:

“The jurisdiction of this Honourable court has been wrongly and prematurely invoked.”

43) In his written and oral submissions, learned counsel for the 1st Respondent stated that this court is devoid of jurisdiction as pointed out in paragraph 41 hereinabove. That under section 129 of the EMCA as read with rule 46 (1) (f) of the Environmental (1A and A) Regulations 2003, the proper forum for challenging the Environmental and Social Impact Assessment (ESIA) licence issued to the 1st Respondent by the 2nd Respondent is at the National Environment Tribunal (NET) and not this court. That the NET is mandated with the requisite technical and scientific expertise to deal with the questions raised by the petitioners in the amended petition. Counsel relied upon, inter-alia, **Speaker of National Assembly, Michael Moragia Nyachae and Charlsity cases** (supra). That therefore, this court is divested of jurisdiction to handle the issue.

44) At paragraphs 19, 32, 41, 43, 44 and 46, among others, the issues of licence to the 1st Respondent by the 2nd Respondent, is brought into question in the petition. Paragraph 19 of the 1st petitioner’s supporting affidavit and annexed document by NEMA marked as (PAO-3), speak to the same.

45) In the Petition, supporting affidavit of the 1st petitioner at paragraphs 11 and 12 affirms the 1st Respondent’s on activities on the suit land. At paragraph 3 of the replying affidavit of Engineer Ogwe for the 1st Respondent, there is an admission that activities are carried out thereon. That the process of survey, valuation and compensation thereof, is alive.

46) Section 9 of the EMCA sets out the objections and functions of NEMA. The request made in the form of “PAO-3” falls within the purview of NEMA.

47) Section 129 of EMCA provides for appeals to NET which is established under Section 125 of the Act. Section 125 1(a) thereunder, is in respect of grant of a licence or permit or refusal to grant a licence or permit or the transfer of a licence or permit under this Act or Regulation made thereunder.

48) Section 128 of EMCA stipulates that the quorum for hearing or determining any case or matters before the NET under the Act, shall be 3 members

49) Under Section 126 (6) of the EMCA, any person who is a party to the proceedings before NET may appear in person or be represented by an advocate. Thus, I subscribe to the Court of Appeal decision in **Butt-vrs-Rent Restriction Tribunal (1979) eKLR** that the litigants and their professional advisors are the best judges in their affairs.

50) Notably, Sections 31 and 32 of the EMCA has established the NECC (infra). Its functions and powers are spelt out at sections 33 of the Act. NECC is mandated to undertake public interest litigation on behalf of citizens in environmental matters as stated in Section 32 (bb) of the EMCCA.

51) It is settled law that a party may raise a preliminary objection on a point of law which has been pleaded or which raises by clear implication out of the pleadings. Examples are an objection to jurisdiction of the court and a submission; see the considered view of Law JA in the case of **Mukisa Biscuits Manufacturing Company Limited-vs-West End Distributors (1969) EA 696**.

52) It must be appreciated that where there are properly constituted institutions that are mandated to hear and determine the issues as raised

in this petition, this court can't arrogate itself Jurisdiction to hear and determine them. The issues herein are within this court's purview intertwined with other issues which are rather obviously not within the jurisdiction of this court which could be effectively determined by legislatively established bodies, among them, the NET, the NEMA and the National Environmental Complaints Committee(NECC); **See also Alice Weru Ngai vs Kenya Power and Lighting Company Limited (2015) eKLR.**

53) In the light of Petitioners' allegations, the functions and powers of the NEMA, the NET and NECC as stated in the foregone, this court has no jurisdiction to hear and determine the petition in the first instance. Thus, the court has no mandate to issue appropriate remedies worthwhile. Any determination made thereof shall be void ab initio, as held in **Karisa Chengo case** (supra).

54) This Court is bound to invoke the doctrine Judicial Deference as well as the Abstention Doctrine as held in **Pullman-England-vrs-Louisiana State Board of Medical Examiners 375 US 411 (1964)**, in the best interest of justice.

55) The Exhaustion Principle is also applicable in the obtaining scenario. This court does not have original jurisdiction over the petition as the petitioners did not exhaust the prescribed available avenues in the first instance.

56) In **Daniel Kaloki Kioko and another-versus-Willy Muasya Kioko (2009) eKLR, Lenaola J**, now SCKJ noted that:

"...there is nothing more to say as where jurisdiction is wanting, all other issues cannot have any meaning."

57) On that score, it is settled law that the more favorable relief is to reserve the Constitutional issues on the rights to a clean and healthy environment pending the determination of the issue with regards to the issuance of licences to the 1st Respondent by the 2nd Respondent. The court should reserve the issues pending the outcome of the decision(s) of the statutory bodies including NET, thereby affording any aggrieved party the opportunity to appeal to the court. The court would then have to determine the reserved issues alongside any of the appealed matter, if at all, thus, ensuring the parties' right to a fair hearing under Article 50 of the Constitution was protected as I subscribe to **Benson Adega case** (Supra).

58) Wherefore, this petition dated 25th September 2020 and amended herein on 2nd February 2021, is hereby stuck out.

59) The Petitioners are at liberty to seek appropriate remedies in statutorily established organs as stated herein above.

60) Constitutional issues under Articles 42 and 70 of the Constitution pending the outcome of the decision on issues of licence regarding the 1st respondent's activities on the suit land are reserved accordingly.

61) Each party to bear its own costs of the petition given the nature of the Petition and by dint of the **proviso to section 27(1) of the Civil Procedure Act Chapter 21 Laws of Kenya** as well as the decision in **Samwel Macharia case** (supra)

62) It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT HOMA BAY THIS 16TH DAY OF DECEMBER, 2021.

G.M.A ONGO'NDO

JUDGE

IN THE PRESENCE OF:

PETITIONERS: (1ST AND 3RD) –PRESENT

RESPONDENTS -ABSENT

MS. OKAL HOLDING BRIEF FOR OCHOLA LEARNED COUNSEL FOR THE 1ST RESPONDENT

COURT ASSISTANT -OKELLO