



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC APPEAL NO. 04 OF 2018**

**FATHER JOSEPH OBANYI .....1<sup>ST</sup> APPELLANT**

**CATHOLIC DIOCESE OF KISII.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PETER A. MUGOYA .....1<sup>ST</sup> RESPONDENT**

**EMANGA ENVIRONMENT**

**DEVELOPMENT GROUP.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal against the Ruling and Order of the National Environment Tribunal delivered in Nairobi on 17<sup>th</sup> October 2014 in Tribunal Appeal No. 99 of 2012)**

**JUDGMENT**

**INTRODUCTION**

1. The decision challenged in this Appeal was made by the National Environment Tribunal (NET) on a Notice of Appeal dated 18<sup>th</sup> September 2012 which had been filed by the Respondents against the Director General National Environment Management Authority (NEMA) and the Appellants herein. In their appeal before the National Environment Tribunal (NET), the Respondents claimed that the National Environment Management Authority (“NEMA”) office in Kisii had authorized the Catholic Diocese of Kisii to excise part of Manga Orotuba community forest without involving them. They complained that their clearance of the community forest and construction thereon following the authorization of National Environment Management Authority (NEMA) had been done without adequate consultation and despite earlier refusals. They therefore sought the following reliefs;

- a. Stoppage of the already commenced development in the forest until the matter is heard and determined by the Tribunal
- b. Cancellation of the Licence issued by National Environment Management Authority (NEMA) and leave (sic) the forest alone.

2. National Environment Management Authority (NEMA) filed a response to the Notice of Appeal on 7<sup>th</sup> January 2013 asserting that it had issued Environment Impact Assessment (“EIA”) License No. 00011635 to the Catholic Diocese after lawful and judicious consideration of its application for the licence. It was the Authority’s case that upon receiving the project report, it delivered copies to lead agencies for consideration and comments but no comments were forthcoming from the recipients. National Environment Management Authority (NEMA) stated that it issued the EIA license based on the fact that it had considered that the project would have no significant adverse effects on the environment that could not be addressed by mitigation measures and the Environmental Management Plan contained in the project report which had been accepted by the Catholic Diocese.

3. National Environment Management Authority (NEMA) averred that in reviewing the project, it had considered comments from the County Director of Environment, Kisii County; Title Deed No. Central/Kitutu/Mwamanwa/1594 and approved architectural designs/plans. It had also taken into account complaints from members of the public and had paid a visit to the site prior to issuing the license and thus urged the Tribunal to dismiss the appeal before it with costs.

4. Father Obanyi, the 1<sup>st</sup> Appellant herein denied, in his reply to the Notice of Appeal, that he had cleared any forest or commenced any construction at Manga Orotuba as alleged. He stated that he had been wrongly enjoined in the appeal as he was the Catholic priest in charge of St. Charles Lwanga Cathedral Kisii and the said Manga Orotuba fell under Kisii Town Parish and not Kisii Cathedral. He also averred that by his own oath of poverty he could not own or develop any property.

5. The Catholic Diocese of Kisii, in its reply dated 25<sup>th</sup> October 2012, denied clearing or destroying the forest as alleged. It stated that the area within which the Carmelite Fathers were constructing a monastery was not community land and that the site was located on L.R. No. Central Kitutu/ Mwamanwa/1594 which was registered in the name of Diocese of Kisii Registered Trustees. The Diocese maintained that the Environment Impact Assessment (EIA) project report by National Environment Management Authority (NEMA) namely NEMA/NY/PR/0861 of April 2012 had analyzed the project and found it to be safe to the environment.

6. The Tribunal's jurisdiction to hear and determine the matter was also challenged on the basis that the matter was pending before the Kisii High Court vide HCCC No. 38 of 2010 between the Diocese of Kisii Registered Trustees and the County Council of Nyamira against Peter A. Mugoya, Jackson Masankwa & Maurice Nyachwaya.

## THE EVIDENCE

7. Being a first Appeal, this court has a duty to analyze the evidence afresh and reach its own conclusion bearing in mind that it did not have the benefit of seeing the witnesses testify. (See *Selle v Associated Motor Boat Company Ltd. [1968] EA 123*).

8. The proceedings show that the matter before the Tribunal was heard in Kisii and in Nairobi. 4 witnesses testified in support of the Appellants' case and 6 witnesses testified in support of the Respondents' case.

9. The 1<sup>st</sup> Respondent, **Peter Mugoya** (Appellant Witness 1) testified that he was the chairman of Kiangoso Environment Committee. He stated that the suit land fell within Kiangoso, in Manga District within Nyamira County and was the subject of HCCC No. 38 of 2010. The witness recalled that sometime in August 2012, he noted that the Catholic Diocese of Kisii had started construction on the suit land which was part of Manga Ortuba escarpment. He discovered that they had been issued with a license to carry on the construction by National Environment Management Authority (NEMA), Kisii Office yet, in his view, the land fell within the mandate of the Nyamira Office.

10. Peter Mugoya testified that he made a verbal complaint to Kisii National Environment Management Authority (NEMA) office who promised to withdraw the license but they did not do so even after he followed up with written complaints. According to him, the area is a hill and a water catchment area. He also claimed that the area stood on fault lines, had been forested by the community and also had cultural sites for the whole Gusii community. He added that rivers from Manga Ortuba joined major rivers which eventually emptied their waters into Lake Victoria.

11. The 1<sup>st</sup> Respondent also stated that it was believed that the area had the grave of the great woman of Omugussi. He claimed that the elders met at sites in the area to make decisions and the area also had what Mugoya termed as *Ngura Muaga* which was a crater with a long cave. He added that the community collected firewood from the area which had flora and fauna, herbs and grass for thatching houses.

12. He stated that he consulted the Public Complaints Committee who gave a report after visiting the site and talking to various stake holders and he had filed the appeal on the strength of the report by the Public Complaints Committee.

13. Peter Mugoya further claimed that despite serving the appellants with a stop order, the project had gone on and was almost complete. He stated that all those who had filled the questionnaires included in the Environment Impact Assessment (EIA) report were members of Kerongo Catholic Church and that the rest of the community and stakeholders had not been consulted. He contended that since the area was a water tower, the Ministry of Water should have been consulted and the Ministry of Culture should also have been consulted due to the cultural sites along the escarpment. He also argued that the Ministry of Forestry ought to have been consulted as the area has a forest.

14. The 1<sup>st</sup> Respondent told the Tribunal that he had complained to the Water Resources Management Authority ("WARMA") which visited the area in August 2012 and compiled a report in which they recommended that Manga Orotuba was an important water catchment area which should be preserved and human encroachment stopped.

15. During cross examination Mugoya admitted that he had heard that the Provincial Director of Environment in Kisumu had directed the Kisii Office to handle the matter but he was of the view that that was improper. He also stated that he had observed that there were no trees outside the fence erected by the Church while there were trees within the fenced portion of land which had no trees before.

16. He also admitted that in the year 2009 he had faced criminal charges in Nyamira Law Courts for creating disturbance, but stated that the case had eventually been dismissed. He also acceded to the fact that the Church had filed a case against him in 2008 and an order had been issued barring him from trespassing onto the land.

17. Peter Mugoya went on to testify that the trees on the land had been planted in 1978 but had been cut down continuously by thieves and grabbers. He however claimed that the watchman he had seen in the area was not there to keep away the thieves but to threaten the community who used the forest to collect herbs, grass and firewood. He testified that from the documents, some members of the community had been interviewed but they were all supporters of the proponent. He also stated that Emanga Ortuba span about 41 kilometres and the area they had visited was hardly 1 kilometre.

18. **Ben Mobisa Ongeri** (Appellant Witness II) testified that he had worked as the chief of Kiangoso location from 1991 to 2002. As the chief, he had, with the help of the government planted trees in both private and community land in the area. He told the tribunal that the trees they had planted were the ones on the upper side at the site they had visited that morning.

19. During cross examination, Ben Mobisa testified that the Catholic Church was allocated land in the area during his tenure as the area chief. He admitted that there were more trees within the Catholic Diocese's fenced compound than the outer area under the Gusii County Council, which was bare. He claimed that during his tenure, the place was a grazing area and the community used to fetch grass for thatching houses and firewood. He recalled participating in the first allocation request by the Church but stated that he was not consulted when the

final allotment was done.

**20. Wilson Nyakundi** (Appellant Witness III) stated that he was the District Forest Officer, Nyamira County. He testified that he had visited Manga Ortuba monastery in August 2012 when he got complaints that a construction was going on in the forest without approvals. He testified that when he got there, the ground was being levelled for foundation construction. They visited the site with the National Environment Management Authority (NEMA) team which had come from Nairobi and made their own observations. On the second visit to the site on the trial day, he noted that the construction which had been at its infancy stage was almost complete.

**21.** He acknowledged that the Kenya Forest Service, Nyamira Office, had written a letter that the area was dominated by schools and churches. He also admitted that there was no government forest in Nyamira and that according to the letter by one Mr. Amimo, Manga Orotuba was not a forest. He however insisted that although it was not gazetted as such, Manga Orotuba is a forest.

**22. Sombe Ole Kiseru** (Appellant Witness IV) testified that he was an employee of Water Resources Management Authority (WARMA) based in Kisii sub-region office. He testified that as a Catchment Management Officer, his duty was to ensure that water catchment areas, existing wetlands and riparian areas falling within the area of his jurisdiction were well protected.

**23.** He testified that in the course of his duty, he received a complaint from Peter Mugoya on 21<sup>st</sup> August 2012. Mugoya came to their officers and narrated his concerns that the Catholic Diocese had cut down trees on Manga ridge/Orotuba forest and that there had been an unlawful allocation of the land by Gusii County Council. Ole Kiseru testified that if human settlement was encouraged on hill tops, it would destroy the recharge of water levels of rivers and springs from Manga forest. He stated that their office analyzed the Environment Impact Assessment (EIA) report from National Environment Management Authority (NEMA) and visited the area in question.

**24.** The witness stated that when they went to the area, they saw the existing structures built by the Catholic Diocese, the Carmelite sisters compound, Orotuba Mixed Secondary School, the SDA Church building and the tea farms belonging to the Catholic Church. He testified that the structures were right on top of the hill.

**25.** They moved down hill and found several springs. The total number of streams they counted in the area was 14. They captured the coordinates and the spring sources. The springs identified were Tema spring which was in Bukia village, Hasiaga spring in Mucheo village, Kerong spring in Keroka village, Kiongoso spring, Kiomonene spring, Morako spring in Morako village, Rianyang'ena spring in Mochewo village, Riobare Spring in Michiebi village, Nyang'ware spring in Muniyiaki village, Rioracho spring, Moneke Spring, Rosioga spring, Keera spring and Getiong'o spring among others.

**26.** He stated that some springs were flowing to the east ending in Kemera and Gucha Rivers which traversed the entire Gucha area, Ndihiwa area in Homabay and drained into Lake Victoria. Kiogo and Omogusi rivers drained into Awach Tende river system which traversed Rachuonyo area and entered Lake Victoria near Kendu Bay. To the west was Cherachemi, Nyabonde, Morani which drained into Omogusi river and finally to Awach Tende river system. They found that the springs were recharged by rain water on Manga Hills. They visited the area on 22<sup>nd</sup> and 30<sup>th</sup> August 2012, to ensure that all springs were captured.

**27.** Ole Kiseru warned that if settlement was encouraged on Manga Hills, it would create run off due to clearance of vegetation. He stated that the fear was that though the construction was good at the time it would eventually affect the ground water sources. That if one development was allowed others would follow. He told the Tribunal that even though they were a lead agency in water conservation in the country, they had not received a copy of the Environment Impact Assessment (EIA) report. He testified that Water Resources Management Authority (WARMA) recommended that Orotuba forest on Manga escarpment should be left intact as a water catchment area He added that the forest should be considered as a water tower, worthy of conservation and gazettelement.

**28.** During cross examination Ole Kiseru admitted that he had not accompanied the Tribunal to the site. He stated that the springs were at the foot of the hill and that the nearest spring was Kiomeme which was about 2 kilometres away.

**29.** He further stated that he had seen the Catholic Church Plot which was partly fenced and in his observation, the Catholic side had more trees than the outside. He also admitted that he did not visit the site before construction and could not describe how the vegetation was before construction commenced. He however stated that from his conversations with the villagers, the local administration and surrounding community, the discharge of water at the springs had decreased tremendously.

**30. Samson Bokea** (1<sup>st</sup> Respondent's Witness I) stated that he was the County Director of Environment Kisii County. On 16<sup>th</sup> May 2012, they received the Environment Impact Assessment (EIA) report for Manga Orotuba Monastery from the Provincial Director of Environment, Nyanza through a letter dated 10<sup>th</sup> April 2012. They were required to review the report and give adequate information for decision making. The proponent, Carmelite fathers, intended to put up a monastery on land parcel No. Central Kitutu /Mwamandwa/1594 which was registered in favour of the Catholic Diocese of Kisii. According to him, Kitutu Central Mwananwa is in Kisii County.

**31.** He stated that the report was also forwarded to physical planning, town clerk, public health, occupation health and district health offices but they did not make their comments on the report. For his part, he sent his comments stating that the site was ideal for the proposed project. The report captured all potential impacts and there was also an environmental management plan which had to be followed to avoid environmental degradation in the area. Bokea testified that when he visited the area, he did not see any negative impact other than the removal of grass. On the site where the project was located, there was grass but no trees. The woodland was nearby and there was a polytechnic, secondary school and an SDA Church in the area.

**32.** He testified that when he visited the area a year before, the only development he noted was the reinforcement of the fence by barbed wire. It was his testimony that he did not see any streams or animals grazing in the area but saw stones, trees and observed that there was a sign of people removing stones. He testified that could not tell a volcanic fault line just by looking at it. He also stated that he was not aware of the cultural significance of the area. He told the Tribunal that when he saw that the proponents had proof of ownership, there was nothing

stopping him from recommending approval of the project. He sent his recommendation of the project to the Provincial Director of Environment on or about 28<sup>th</sup> May 2012. From his observation, the proposed building could co-exist with the forest.

33. Samson Bokea acknowledged that Mugoya had lodged a complaint to National Environment Management Authority (NEMA) headquarters challenging the issuance of the licence to the Church and also questioning why the matter had been handled by the Kisii office yet the land in question was in Nyamira. He testified that in response the Headquarters sent a taskforce to the site to verify the allegations. He stated that the team must have been satisfied by what they saw because an Environment Impact Assessment (EIA) licence was eventually issued on 17<sup>th</sup> October 2012.

34. **Father Joseph Obanyi** (2<sup>nd</sup> Respondent's Witness I), the vicar general for the Catholic Diocese of Kisii reiterated his reply that he was not a proper party to the suit and urged the Tribunal to strike out his name with costs.

35. He testified that he came to learn about the project in September 2012 when the Public Complaints Committee visited the site and asked them for documentation to show that they had permission to construct. They were directed to stop construction until they produced the requisite documents. He testified that the Tribunal had also issued a Stop Order against the project.

36. Father Obanyi stated that he communicated with the Carmelite Fathers in charge of the project to produce the documentation requested for and they did. He sent the documents to the National Environment Management Authority (NEMA) Office and they were given the go ahead to proceed with the construction. Father Obanyi told the Tribunal that in his opinion, the project would have no negative impact on the environment as the Church had selected a site that would not affect the environment at all.

37. **Jeremiah Nyakundi Amunya** (2<sup>nd</sup> Respondent's Witness II) testified that he was the Father in Charge of Kisii Parish. He stated that the Catholic Church had many congregations and Carmelite Fathers was one of those congregations. Father Amunya told the Tribunal that the congregation had been given the land by the Diocese of Kisii which had acquired the land sometime in 2007.

38. He recalled that as they were fencing the land sometime in 2009, some people led by Peter Mugoya came to interrupt them. They had them arrested and taken to Nyamira Law Courts. The matter had however been concluded without their knowledge. In their section of the land, stated Father Amunya, they had trees unlike the open area where trees had been cut down. He testified that he was personally involved in planting trees near the polytechnic and that no trees had been cut during the process of construction.

39. **Father Stephen Nyakundi Mose** (2<sup>nd</sup> Respondent's Witness III) stated that he was a Catholic priest and a disalced Carmelite. He testified that the project was being done for the Fathers who needed a separate house to stay in. Father Nyakundi stated that they decided on the location of the project as Fathers together with the Environment Impact Assessment (EIA) expert as the site had no trees. He stated that contrary to what was alleged, the Carmelites had planted trees as opposed to cutting them down and had guards to take care of the forest in the fenced area. At one point they had to put off a fire in their compound. He stated that the heaps of stones that had been seen in the area were collected by locals before they started fencing and the grass in the area was sometimes used for thatching houses.

40. Father Nyakundi recalled that the Public Complaints Committee had gone to the site and instructed them to stop the construction until the documents requested for were produced. At the time they had the EIA report but had no licence. They stopped the construction and sent the Environment Impact Assessment (EIA) report to National Environment Management Authority (NEMA). They later got a conditional approval to go ahead with the construction. He stated that the Tribunal had also ordered them to stop construction activities which they did. He testified that the Church held the environment in high regard. He was aware of the conditions attached to the licence and he intended to comply with them fully.

41. **Julius Nyerere Katiba** (2<sup>nd</sup> Respondent's Witness IV) identified himself as a registered EIA expert. He stated that he was the one that had made the Environment Impact Assessment (EIA) report for the project in question. He testified that he looked at ownership documents, architectural drawings and visited the site. Public participation sheets were also prepared and distributed at Manga Orotuba SDA Church and at Manga Esaba market. A total of 15 to 20 copies were distributed and the people asked to return the forms to the Father in charge when they filled them. He testified that it was hard to get people to fill the forms and he left some with the Father to contact more people.

42. Julius Nyerere stated that he found that the land was registered under the Diocese of Kisii. The documents presented to him showed that the project was a 5 bed roomed bungalow and a conference hall. The site had no trees but there were eucalyptus trees and one indigenous Cyprus tree in the area. He testified that only grass would be disturbed at the proposed site but no trees would be disturbed. He saw no animals at the site or near the site and did not see any cultural site in the area. He also added that the forest in the area was not gazetted. From his assessment of the project, Nyerere found that it had no negative impacts on the environment and if there were, there they could be mitigated. He prepared his report and delivered it to National Environment Management Authority (NEMA) Kisumu Provincial Office on 4<sup>th</sup> May 2012.

43. When questioned about the involvement of the public, he stated that they got 5 responses which he had included in his report. He was adamant that he could not influence the kind of answers the respondents gave and insisted that he had no interest in the matter since he was SDA and the project was being undertaken by the Catholic Church.

44. One of the respondents who had filed the questionnaires was **Dominic Nyanduka Atambo** (2<sup>nd</sup> Respondent's Witness V). He testified that his home was less than 1 kilometre from the site at Manga Orotuba. He testified that he had been a head teacher for two years and he was of Catholic faith. He recalled receiving a questionnaire on the construction of a residential dwelling house on the land from one of the parents in his school who had gotten the questionnaire from Esaba Shopping Centre. He identified the form he had filled at page 65 of the Environment Impact Assessment (EIA) report. He stated that he had interacted with the community and in his view; the project had no serious negative environmental impacts that could not be mitigated.

45. Dominic Atambo testified that there had been fire outbreaks during the dry spells which he thought were caused by the community so that the grass could grow afresh. He refuted the claim that there any wild animals in the area. He also stated that he had gone to school in the area and was not aware of any cultural site. He also denied that there were any rivers emanating from the area.

## **TRIBUNAL'S DECISION**

46. Having heard both parties, the Tribunal issued its findings on the matter in a ruling dated 30<sup>th</sup> December 2013. It started off by holding that the question of whether the Catholic Diocese had been allocated Trust Land, was an issue pending before the court in Kisii Environment and Land Court Case No. 38 of 2010 and therefore declined to deal with the matter.

47. On whether there had been adequate consultation with stakeholders in the process leading to NEMA's approval and licence of the development, the Tribunal held that Julius Nyerere did not prove that he made efforts to consult with the appellants or members of other churches operating in the area. The Tribunal noted that although the Environment Impact Assessment (EIA) report covered land use, water and other environment related issues, the report was not sent to lead agencies such as Water Resources Management Authority (WARMA), the KFS, the Ministry of Lands. That if proper consultations were undertaken, critical issues concerning the environment in the area could have been properly addressed.

48. The Tribunal also held that the Catholic Diocese failed to obtain change of user of the land from forest to settlement before obtaining NEMA's approval and licence of the project. It stated that National Environment Management Authority (NEMA) had conditioned the approval of the development by the Carmelite Fathers on laws, by-laws and guidelines for development of such a project and that the proponents had failed to comply with one of the key conditions upon which the development was approved.

49. The decision by the Provincial Director of Environment for Nyanza to send the report to the Kisii office yet the project in question was located in Nyamira was also criticized by the Tribunal. It observed that NEMA's Nyamira office was seized of the facts on the ground at all stages and the circumvention of NEMA's Nyamira office was suspect.

50. It was also the Tribunal's finding, based on its site visit and the evidence tendered before it that Manga Orotuba Forest existed and a portion of it had been annexed for the project in question. The Tribunal was of the view that since the community members harvested grass for thatching their houses, from the forest, there was need to consult them before approving and licensing a project thereon.

51. It added that the Environment Impact Assessment (EIA) report referred to water related issues but made no mention of the springs in the area which Water Resources Management Authority (WARMA) stated to be at least fourteen in number. WARMA had indicated in its report that the area ought to be conserved as an important water catchment area. Since the Environment Impact Assessment (EIA) report had not addressed itself to the significance of the forested area as a water catchment area, the report lacked adequate mitigation measures for any negative effects that might be a result of human settlement on the land in question.

52. The Tribunal also held that Environment Impact Assessment (EIA) report was inadequate to the extent that it failed to address the likely cultural impacts of the construction of a Carmelite Father's house on land used for cultural activities and measures to mitigate any negative cultural impacts.

53. National Environment Management Authority (NEMA)'s approval of the Appellant's project was also faulted by the Tribunal for the reason that the provisions of the EMCA had not been adhered to. The Public Complaints Committee had in exercise of powers conferred on it by sections 32 and 33 of EMCA investigated a complaint raised by the 1<sup>st</sup> Respondent and recommended that no construction work should progress without a comprehensive Environment Impact Assessment (EIA) in which the District Environment Committee was fully involved. However, Mr. Bokea, NEMA's Kisii officer proceeded without taking into account the recommendations by PCC that Manga Orotuba forest should be gazetted as a forest reserve among others.

54. The issuance of the licence was also found to be contrary to Section 129 (4) of EMCA for the reason that National Environment Management Authority (NEMA) had issued the Environment Impact Assessment (EIA) licence after an appeal had been filed in the Tribunal and a stop order issued by the Tribunal. The construction had also commenced without issuance of an EIA licence contrary to Section 58 of EMCA.

55. The Tribunal observed that the project proponent as indicated in the EIA project report submitted to National Environment Management Authority (NEMA) was Carmelite Fathers Monastery which was not a legal entity that could be held responsible to implement the required Environmental Management Plan. Hence, the EIA license should have been obtained by the Catholic Diocese on behalf of the Carmelite Fathers.

## **APPELLANTS' SUBMISSIONS**

56. The court directed that the appeal against the Tribunal's decision be disposed of by way of written submissions. The appellant's learned counsel started off by submitting that although the proceedings indicated that there had been a site visit, the Tribunal did not record what it had observed during the visit. Counsel submitted that the Tribunal should have observed that there were no herbs, grass, firewood or carves as Peter Mugoya had claimed. He faulted the Tribunal for ignoring crucial aspects of the evidence given by various witnesses who had appeared before it.

57. For instance, it was submitted that Peter Mugoya had admitted that the trees on the site were owned by the Diocese of Kisii and that the Church had assigned guards to protect its land from thieves who had cut the trees on the land. Fr. Stephen Nyakundi Mose had also testified that the site he chose to put up the house had no trees and also stated that he planted the trees on the land and stationed guards to stop the cutting of the trees on the land. The Nyamira County Forest Officer Wilson Nyakundi had admitted that Manga/ Ortuba was not a forest and had not been gazetted as one.

58. The evidence of Samson Bokea, that Kitutu Central/ Mwamanwa is in Kisii County and not in Nyamira County had also been disregarded by the Tribunal yet there was evidence that the Provincial Environmental office, Kisumu had instructed the Kisii County Office to handle the issue. It was also argued that Julius Nyerere's evidence and Environment Impact Assessment (EIA) report had been disregarded when there was no counter report.
59. The Appellants further urged that the Tribunal dealt with issues that had not been pleaded. They argued that the Tribunal ought to have restricted itself to the primary issues disclosed in the pleadings namely; whether the NEMA office in Kisii had issued authority to the Church to excise part of Manga/ Ortuba Community Forest on LR No. Central Kitutu/ Mwaanwa/1594; whether there was any community forest on the land; and whether there had been prior consultation before National Environment Management Authority (NEMA) issued a license to proceed with construction.
60. The Appellants submitted that the evidence showed that the land on which the construction was being undertaken was registered in the name of the Church and there could not be a community forest on private land. Moreover, the evidence did not show that there was a forest on the disputed site or its neighbourhood and this fact was not disputed.
61. It was also the Appellants' submissions that there was no proof that the site was a water catchment area. Counsel urged that the site visit did not reveal any rivers, streams or springs. He dismissed the explanation by the Water Resources Management Authority (WARMA) Officer that the reason the Tribunal did not find streams was because the Tribunal did not go to the foot of the upland hill because the Tribunal started their journey on foot before ascending to the site. The officer had testified that he had visited a stream which was 1 kilometre from the site of construction after the site visit by the Tribunal and did not accompany the Tribunal to the point of the springs and streams.
62. The Appellant also questioned the authenticity of the report prepared by the WARMA officer as he had admitted that he was not present when the report was prepared. It was also contended that whether the site was a water catchment area was not a ground of appeal and the Tribunal erred in dealing with the issue.
63. The finding that there was no proper consultation was also challenged for the reason that there was evidence to show that the EIA expert had distributed questionnaires at the market and the SDA Church and left others with the Catholic Priest for distribution. Dominic Atambo had testified that he got a copy of the questionnaire and the Tribunal fell into error by discounting his evidence merely because he was of Catholic faith. That it also discounted the evidence to the effect that forms were left at the SDA Church which is on the same land.
64. The Appellants added that there was no proof that Emanga Environment Development Group existed and the finding that the group ought to have been consulted was erroneous. The Tribunal was also faulted for finding that KFS had not been consulted yet there was evidence that there were no gazetted forests in Nyamira.
65. It was further submitted that the Tribunal ought not to have relied on the bare statement by Mr. Mugoya that the area had cultural significance as he had a bone to pick with the Church for causing him to be arrested when he tried to stop them from fencing their land. The Church had also obtained orders stopping him from trespassing on the land and his evidence should therefore have been treated with caution.
66. The Tribunal's finding that the project was in violation of section 58 of EMCA was also challenged on the basis that the proponents had provided a project report to NEMA way back in May 2012 before the letter of approval dated 1<sup>st</sup> August 2012 was issued. The appellants were also aggrieved by the conclusion that the Carmelite Fathers congregation was not a distinct legal personality capable of being sued in light of the fact that the Tribunal had ordered the Carmelite Fathers restore the site of the project.
67. The Tribunal was also said to have misapprehended the law when it found that NEMA had not taken into account questions of change of user yet there was evidence that the Church owned the land and it was not necessary for NEMA to ask the proponent to provide evidence of change of user.
68. The appellants further contended that the Tribunal failed to evaluate the evidence specific to the site of construction and instead generalized the entire area of Manga/Orotuba Escarpment which stretches to over 161 kilometres. That it failed to appreciate that the construction of the 5 bed roomed house would not have a negative environmental impact which could not be mitigated by measures proposed by the Environment Impact Assessment (EIA) expert.
69. The Appellants asserted that the Tribunal had a wrong notion that the Church was not the owner of the land and that it ought to have taken the Certificate of Title to be conclusive proof of ownership. They submitted that the land was private land and had not been gazetted as a Forest as set out in Section 2 of the Forest Act 2005.

## **RESPONDENTS' SUBMISSIONS**

70. The Respondents' counsel submitted in support of the decision made by the Tribunal. He argued that there was sufficient evidence to show that there were no adequate consultations in the preparation of the EIA Report. He argued that the EIA expert had not put in place mechanisms to ensure that any of the people who were likely to be affected were informed of the availability of the questionnaires he allegedly distributed. He pointed out that only Catholic adherents had filled in the form and members of the community, including the SDA Church at Orotuba and other stakeholders had not been consulted. Further, that the input from other government agencies and bodies including the Water and Forest Authorities had not been sought.
71. On whether the area was a Forest as defined under the Forest Act, counsel's position was that the testimony by area's former chief Ben Mobisa that he initiated the planting of the forest on public trust land was sufficient proof of its existence.
72. He also supported the Tribunal's decision that NEMA erroneously sought the input from the Kisii County NEMA Office. He added that the EIA license was issued contrary to section 129 (4) of the EMCA Act as it had been issued after an appeal had been filed in the Tribunal

and stop orders issued against the project. The court was thus urged to dismiss the Appeal

## ISSUES FOR DETERMINATION

73. I have had regard to the record of appeal including the grounds of appeal, the evidence, the challenged decisions and the submissions made by the parties. The issues I discern for determination are as follows:

- i. Whether the Tribunal raised an issue of ownership of the land and ignored evidence that the Diocese of Kisii Registered Trustees was the absolute owner of the subject land;
- ii. Whether the Tribunal erred by holding that there had been no adequate consultation in the preparation of the project report;
- iii. Whether the Tribunal erred by finding that the environmental matters concerning the site ought to have been handled by the NEMA Nyamira Office as opposed to the Kisii or Kisumu office;
- iv. Whether the Tribunal erred by finding that there was a community forest and a water catchment area and thus erred by finding that there was inadequate consultation with lead agencies before NEMA issued an EIA Licence;
- v. Whether the Tribunal misapprehended the law when it found that NEMA had not taken into account the change of user in approving the licence; and
- vi. Whether the Tribunal erred by finding that the Carmelite Fathers was not a legal entity when the same was a non-issue before the Tribunal.

## ANALYSIS AND DETERMINATION

74. The genesis of this matter as captured in the summary of the evidence and submissions set out above is the construction of a monastery on a portion of land parcel no. L.R. Central Kitutu/ Mwamanwa/1594 located at Manga Orotuba area. Aggrieved by the decision of NEMA authorizing the construction of the monastery, the respondents lodged an appeal before the Tribunal contending *inter alia* that there were no adequate consultations before NEMA authorized the construction. The Tribunal's decision to allow the appeal before it is what prompted the matter before this court.

### **a. Whether the Tribunal raised the issue of ownership of the land and ignored evidence that the Diocese of Kisii Registered Trustees was the absolute owner of the subject land;**

75. The Appellants have contended that the Tribunal purported to raise an issue about the ownership of the land without regard to proof that the Diocese of Kisii Registered Trustees was the absolute owner of the land. The appellants were particularly aggrieved by the Tribunal's advice to the respondents that they had a remedy under Article 67 of the Constitution and Sections 5 and 6 of the National Land Commission Act. This finding, according to the appellants, depicted an erroneous notion in the mind of the Tribunal that the land did not belong to the Catholic Diocese.

76. Upon analysing the evidence before the Tribunal, this court found that the question of the ownership of the land on which the construction of the monastery was being undertaken was an issue that arose in the pleadings and came up repeatedly in the course of the trial.

77. In response to the respondents' claim that the construction was being undertaken in a community forest, the Catholic Diocese filed a reply asserting that the site was located on L.R. No. Central Kitutu/ Mwamanwa /1594 which was registered in the name of the Diocese of Kisii Registered Trustees and could not therefore be community land. During trial, the respondents' witnesses testified that there was a dispute over the allocation of L.R. No. Central Kitutu/ Mwamanwa /1594 whereas the appellants' witnesses asserted the Catholic Diocese's title to the land.

78. Copies of the pleadings in Civil Suit No. 38 of 2010 which had been filed in the High Court at Kisii by the Diocese of Kisii Registered Trustees against Peter Atambo Mugoya, Jackson Nyakundi Masankwa and Maurice Nyachwaya were placed before the Tribunal. Based on those pleadings, the Tribunal declined to make a determination on whether the subject land was trust land.

79. I have studied the decision by the Tribunal and did not find any indication of what the appellants claimed to be an erroneous impression in the Tribunal's mind that L.R. No. Central Kitutu/ Mwamanwa /1594 did not belong to the Diocese of Kisii Registered Trustees. The Tribunal simply acknowledged the fact that there existed a dispute over the allocation of the land to the Catholic Diocese and properly left the matter to the determination of the court.

80. From my analysis of the Tribunal's determination, I find that the main focus of the Tribunal's decision was the Appellants' acquisition of an Environmental Impact Assessment (EIA) license for the development of the land; which leads me to the second issue.

### **b) Whether the Tribunal erred by holding that there had been no adequate consultation in the preparation of the project report;**

81. The law governing the issuance of EIA licences at the time was **Section 58** of the **EMCA Act** of 1999. A condition precedent to the issuance of the EIA licence is the submission of a project report which is a summary statement of the likely environmental effects of a proposed development. The Authority would receive the proposal from the proponent, study it and if satisfied that the intended project was likely to have a significant impact on the environment, it would direct that an environmental impact assessment study be conducted.

82. The Appellants' project report was prepared by the EIA expert Julius Nyerere in April 2012. He testified that he inspected the proposed site, analyzed the relevant documentation and prepared a few copies of questionnaires which he distributed at Manga Orotuba SDA Church, Manga Esaba Market, to the people living around the area and left some questionnaires with the Father in charge for distribution. He testified that he incorporated the few responses he got in his report which he submitted to NEMA Kisumu Provincial office on 4<sup>th</sup> May 2012.

83. In my view, this engagement by Julius Nyerere of the community was sufficient. He testified that it was not easy to get people to fill the forms. Dominic Atambo, a resident of the area, stated that a parent at the school he taught in had given him a copy of the questionnaire they got at Manga Esaba shopping centre. The questionnaire he filled out was incorporated into the EIA report among other filled questionnaires.

84. I concur with the finding of the court in *Isaac Gitoho & 2 others (suing as the Chairman, Vice- Chairman and Committee member respectively of the Runda Association) v Director General, NEMA & Another ELC Case No. 50 of 2016 [2017] eKLR* that the duty of a proponent of a project is to ensure that persons to be affected by the project are made aware of the project to enable them give their views if any and not to go after those persons to solicit their views.

85. What Mr. Nyerere was tasked with preparing for the proponent was a project report as opposed to an environmental impact assessment study which would have required a more intricate public participation process involving *inter alia*, having at least three public meetings with affected parties and communities. The finding by the Tribunal that any mosques or temples in the area ought to have been consulted was, in my considered view, superfluous as there was no evidence that such places of worship existed in the area.

86. The Appellants have also submitted that the reliance by the Tribunal on the bare statement of the 1<sup>st</sup> Respondent that the area had cultural significance was flawed since the 1<sup>st</sup> Respondent had scores to settle with the Catholic Diocese which had caused him to be arrested when he tried to stop them from fencing their land. The Church had also obtained orders from the court in Kisii HCCC No. 38 of 2010 stopping him from trespassing on the land.

87. The Tribunal, in its impugned decision, held that the project report was inadequate for the reason that it did not address the likely cultural impacts of the construction of a Carmelite Fathers' house on land used for cultural activities. They relied on the testimony by the 1<sup>st</sup> Respondent that Manga Orotuba forest had an area called "Regina Ryamange" where elders met and made decisions and that there was a tunnel on the land at Nguramwaga where local people were cured of barrenness and mumps.

88. The Tribunal erroneously held that the assertions made by the 1<sup>st</sup> Respondent were not denied as Dominic Atambo who was also a resident of Manga Orotuba testified that he had gone to school in the area and he was not aware of any cultural sites there. Samson Bokea also testified that he was not aware of the cultural significance of the land. The Environment Impact Assessment (EIA) expert, Julius Nyerere similarly stated that no respondent had talked of a cultural site and his investigations did not reveal any cultural site.

89. Where there is conflicting evidence on facts by two witnesses, the court or in this case the Tribunal ought to interrogate the credibility of the witnesses in determining which on the evidence to rely on. In the case of *Hahn vs Singh [1985] K.L.R.* the court held;

*"Where there is conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court hardly interferes with a conclusion made by the trial court after weighing the credibility of the witnesses."*

90. In this case, the Tribunal did not give its reasons for believing the evidence of the 1<sup>st</sup> Respondent over that of Dominic Atambo, Samson Bokea and the EIA expert. There is no evidence that cultural sites were shown to the Tribunal during its visit to the site. The Appellants' contention that the Tribunal gave undue importance to the evidence of the 1<sup>st</sup> Respondent who was proved to have had differences with the appellants was therefore well founded.

**c. Whether the Tribunal erred in finding that the environmental matters concerning the site ought to have been handled by the NEMA Nyamira Office as opposed to the Kisii or Kisumu office;**

91. Being a project report, the buck stopped with NEMA to ensure various stakeholders gave their input on the project report before making its determination on it. This is requirement is stipulated in **Regulation 9** of the **Environmental (Impact Assessment and Audit) Regulations, 2003** thus:

**9. Comments on project report**

(1) Where the project report conforms to the requirements of regulation 7(1), the Authority shall within seven days upon receipt of the project report, submit a copy of the project report to—

(a) each of the relevant lead agencies;

(b) the relevant District Environment Committee; and

(c) where more than one district is involved, to the relevant Provincial Environment Committee, for their written comments which comments shall be submitted to the Authority within twenty one days from the date of receipt of the project report from the Authority, or such other period as the Authority may prescribe.

(2) On receipt of the comments referred to in subparagraph (1) or where no comments have been received by the end of the period of thirty days from the date of receipt of the project report, the Authority shall proceed to determine the project report.

92. A presumption of regularity is the starting point when determining whether public official duties have been properly discharged. The onus to prove otherwise rest on the person asserting that the public duty was conducted irregularly. (See *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others Civil Appeal 153 of 2019 [2020] eKLR*)

93. The project report prepared by Julius Nyerere was sent to NEMA Kisumu Provincial office on 4<sup>th</sup> May 2012. Samson Bokea, the County Director of Environment, Kisii County testified that they received the project report from the Provincial Director of Environment, Nyanza on 16<sup>th</sup> May 2012 with instructions to review the report and provide adequate information for decision making.

94. Samson Bokea explained that when they received the reports, they were required to distribute them to lead agencies and ask them for their input. He testified that he visited the site and was satisfied that based on the magnitude of the project it was not necessary to conduct an environmental impact assessment study as the project could co-exist with the surroundings. He was also satisfied that there was adequate public participation. The NEMA office Kisii therefore sent its comments indicating that the site was ideal for the proposed project.

95. National Environment Management Authority (NEMA) headquarters also sent a team to the site when it received a complaint from the 1<sup>st</sup> Respondent around September 2012. He stated that the team which was led by one of the Deputy Directors must have been satisfied with what they saw as the EIA licence was eventually issued to the proponent in October 2012.

96. Samson Bokea testified that the project report was also sent to the physical planning office, the town clerk, the public health, occupation health and district health offices within Kisii district but they did not submit their comments on the project. He was not certain whether the report had been sent to his Nyamira counterpart but stated that when he talked to him he indicated that he had no problem with the project.

97. The Appellants were aggrieved by the Tribunal's finding that the NEMA office in Nyamira office should have been involved in the process. They surmised that the site could be in the environmental jurisdiction of Kisii County as it was close to Kisii County Headquarters in Kisii town. The two Kitutu Constituencies having been split into Kitutu Chache which is in Kisii and Kitutu Masaba which is in Nyamira County.

98. Having analyzed the evidence on the matter, I cannot fault the Tribunal for reprimanding National Environment Management Authority (NEMA) for failing to involve its office in Nyamira and seeking its comments as provided under Regulation 9 of the Environmental (Impact Assessment and Audit) Regulations. I would however not go as far as stating that the land and the project in question fell within the jurisdiction of the Nyamira Office as the Tribunal authoritatively did.

99. The evidence presented before the Tribunal was not clear on the County in which the Manga Orotuba escarpment is located. Whereas, the 1<sup>st</sup> Respondent insisted that the project was located in Nyamira County, the Appellants' witnesses including Samson Bokea and the 1<sup>st</sup> Appellant, Father Obanyi were not certain whether Manga Orotuba is situated in Nyamira or Kisii County. It is perhaps for this reason that the EIA Expert, Julius Nyerere sent the project report to the Provincial Environment Committee as there appeared to be more than one district involved.

100. NEMA's sole witness Samson Bokea, was non-committal on whether his counterpart in Nyamira had received a copy of the project report for his comments. He also testified that all the stakeholders whose comments were sought on the project came from Kisii district, as it was then referred to.

101. The conclusion to be drawn from the facts is that Manga Orotuba is located at the boarder of or fairly close to the boarder of Nyamira and Kisii Counties. It was thus necessary for National Environment Management Authority (NEMA) to seek the views of both county offices on the project report before issuing the Environment Impact Assessment (EIA) licence.

**d. Whether the Tribunal erred in finding that there was a community forest and a water catchment area and thus erred by finding that there was inadequate consultation with lead agencies before NEMA issued an EIA Licence;**

102. The Appellants criticized the Tribunal's decision for generalizing the entire area of Manga Orotuba area which was said to encompass 161 kilometres yet the project in question was a 5 bed roomed house. They contended that the Tribunal erred by failing to sift through the evidence and narrow down on the site of the project which was not likely to have any negative environmental impact that could not be mitigated.

103. Section 2 of the EMCA and Regulation 2 of the Environmental (Impact Assessment and Audit) Regulations, 2003 define an environmental impact assessment as a "systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment" and provide that the environment includes "the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment."

104. It is clear, from the foregoing definition, that the scope of an environmental impact assessment is extensive and far reaching. It takes into account all aspects of the surroundings of a proposed project, identifying likely impacts on the environment and suggesting means by which any negative implications can be alleviated.

105. The argument that the Tribunal should have restricted itself to the site of the project and brushed off the respondents' concerns on the impact of the project to the entire Manga Orotuba area is unconvincing. The environment consists of various mutually dependent elements including land, water, atmosphere among others. It would be misleading to select certain aspects of the environment and avoid others or isolate the area of the site and fail to take into account its environs. A wholesome appraisal of the project's surroundings was necessary for an accurate and honest assessment of the likely effects of the project on the environment.

## Whether there was a community forest at Manga Orotuba

106. On the finding that Kenya Forest Service should have been consulted, the appellants contended that there was no proof of the existence of a forest within the meaning of the Forest Act. They urged that there could not be a community forest on privately owned land. For their part, the respondents submitted that the appellants had not considered the history of the Orotuba forest which had been initiated by Ben Mobisa on public trust land.

107. The **Forest Act, 2005** which was repealed by the **Forest Conservation and Management Act, 2016** defined a forest area to mean unalienated government land declared by the Minister in a gazette notice as a forest area. The Act defined forests as “*any land containing a vegetation association dominated by trees of any size, whether exploitable or not, capable of producing wood or other products, potentially capable of influencing climate, exercising an influence on the soil, water regime, and providing habitat for wildlife, and includes woodlands.*” It did not require gazettement for an area dominated by trees and with potential to influence the ecosystem to be defined as a forest.

108. The available evidence indicates that attempts were made to define the boundaries and gazette Manga Orotuba as a local authority forest but this was not done by the time the dispute arose. However, there was overwhelming evidence from both the Appellants and the Respondents that the area had a significant number of trees. There was also consensus among the witnesses that there had been gradual degradation of the forest in the area.

109. Ben Mobisa, a former chief of the area, testified that in a bid to meet the required forest cover, the government gave the community seedlings to plant trees in the area during his tenure between 1991 and 2001. He expressed his deep disappointment at the current state of the area which he described as being bare. The 1<sup>st</sup> Respondent testified that Manga Orotuba escarpment as an important water catchment area and of cultural importance to the Gusii community. The District Forest Officer, Wilson Nyakundi was emphatic that Manga Orotuba is a forest although it had not been gazetted. There was also proof that the Catholic Diocese of Kisii had made efforts to protect the trees in the area. Father Amunya and Father Nyakundi told the Tribunal that they had taken measures to curb the cutting down of trees in the area by fencing their portion of land and hiring guards to take care of the forest.

110. I have also seen various correspondences including a letter dated 9<sup>th</sup> July 2007 by the District Environment Officer of Kisii to the Clerk, Nyamira City Council; minutes by the Public Complaints Committee and some letters by KFS addressed to the Clerk, Nyamira County Council, decrying the failure to protect the forest in Manga Orotuba. Evidently, there was a forest within the meaning of the repealed Forests Act as set out above. Given the outcry against the cutting down of trees in the area, it is rather curious that NEMA did not deem it necessary to seek comments from Kenya Forest Service, the lead agency in the protection of forests, on the project in question.

## Whether the site in question was a water catchment area

111. Closely related to the foregoing issue was the question of whether the site in question was a water catchment area. The Appellants argued that there was no proof that the site was a water catchment area and that the issue was not one of the grounds of appeal. The appellants contended that when the Tribunal visited the site, it did not reveal any rivers or streams and that the WARMA officer had stated that the stream closest to the site was 1 kilometre away.

112. The report by the WARMA Officer was in the view of the appellants, inauthentic since the officer was not present during its preparation. The Tribunal was therefore faulted for relying on that report and for giving disproportionate weight to the officer’s evidence on the presence of the streams when he had failed to point them out during the site visit.

113. The written proceedings confirm that there was a site visit before the matter was heard. Ole Kiseru, the WARMA officer, admitted that he did not accompany the Tribunal during their site visit. He testified that they had visited the area on 22<sup>nd</sup> and 30<sup>th</sup> August 2012 with a team from the region after receiving a complaint from the 1<sup>st</sup> Respondent on 21<sup>st</sup> August 2012.

114. He testified that their team began their survey of the Manga ridge which covered an area of 161 acres from the hilltop. As they moved downhill, they counted a total of 14 springs. The coordinates and sources of the springs were captured and their drainage systems identified. He stated that the springs in the area traversed Gucha, Ndiwa and Rachuonyo areas and merged with other rivers to eventually drain into Lake Victoria.

115. He testified that WARMA’s recommendation was that the Orotuba forest on the Manga escarpment should be left intact and human settlement discouraged on the hill top. He told the Tribunal that the springs they found on Manga hills were recharged by rain water and if there was good vegetation on the hills, the rate of percolation during the rains would increase. It was the Authority’s position that if settlement was encouraged on Manga hills, it would create surface run-off due to clearance of vegetation. It also of the view that the forest should be considered a water tower, worthy of conservation and gazettement.

116. The Appellants’ contention on the probative value of the evidence given by the WARMA officer is easily answered by **Rule 26** of the **National Environmental Tribunal Procedure Rules, 2003** which provides as follows;

### **26. Procedure at hearing**

(1) *At the beginning of the hearing the Chairman shall explain the order of proceeding which the Tribunal proposes to adopt.*

(2) *Subject to this rule, the Tribunal shall conduct the hearing in such manner as it considered most suitable to the clarification of the issues before it and generally to the just handling of the proceeding and **shall, so far as appears to it appropriate, seek to avoid legal technicality and formality in its proceedings.***

(3) The parties shall be heard in such order as the Tribunal shall determine, and shall be entitled to give evidence, to call witnesses, to question any witnesses and to address the Tribunal both on the evidence and generally on the subject matter of the appeal.

(4) Evidence before the Tribunal may be given orally or, if the Tribunal so orders, by affidavit or written statement, but the Tribunal may at any stage of the proceedings require the personal attendance of any deponent or author of a written statement.

**Pursuant to subsection (1) of section 126 of the Act, the Tribunal may receive evidence of any fact which appears to it to be relevant.**

**(6) At any hearing the Tribunal may, if it is satisfied that it is just and reasonable to do so, permit a party to rely on grounds not stated in his notice of appeal or, as the case maybe, his reply and to adduce any evidence not presented to the Authority before or at the time it took the disputed decision.**

(7) The Tribunal may require any witness to give evidence on oath or affirmation and for that purpose it may administer an oath or affirmation in due form. **[Emphasis added]**

117. Section 126 (1) of the EMCA Act provides that the Tribunal is not bound by rules of evidence as set out in the Evidence Act. Admittedly, the issue of whether the area was a catchment area was not raised in the Notice of Appeal. That said, I find that it was crucial to the determination of the question of whether there was adequate consultation by National Environment Management Authority (NEMA) prior to the issuance of the EIA licence to the appellants. Moreover, Rule 26 (6) of the NET Procedure Rules above empower the Tribunal to permit a party to rely on grounds not set out in the Notice of Appeal and adduce evidence not presented to NEMA if it is just and reasonable to do so.

118. If this court were to accept the Appellants' argument that the report by the WARMA officer was not authentic, his oral testimony would still stand. It is undeniable that the evidence given by Ole Kiseru was direct evidence as he was personally involved in mapping out the springs and streams in the area. He complained that despite being the lead agency in water conservation, WARMA did not get a copy of the EIA report.

119. The Tribunal was on firm ground in accepting the evidence given by the WARMA officer that Manga Hills was a water catchment area. His evidence was cogent, clear and hardly shaken on cross examination. As already held, the specific site of the project could not be taken in isolation as argued by the Appellants. The project was to exist in Manga Orotuba hills and there was need to ascertain whether it could co-exist with its surroundings.

120. The EMCA tasks National Environment Management Authority (NEMA) with co-ordinating the various environmental management activities being undertaken by the lead agencies. It also has a duty to work with other lead agencies to issue guidelines and prescribe measures to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya.

121. Addressing the importance of forests as water towers, the court in ***Clement Kipchirchir & 38 others v Principal Secretary Ministry of Lands Housing and Urban Development & 3 others Petition No 42 of 2013 [2015] eKLR*** made the following observations;

*61. From what I can see, the evictions were aimed at conserving the Mau Forest, a forest of great importance, in that it is a water tower and is of huge ecological value. Indeed the lives of many Kenyans depend on the Mau forest. The Constitution at Article 69(1) (b) obligates the Government to work to achieve and maintain a tree cover of at least 10% of the land area of Kenya. The same Article obligates the State to eliminate processes and activities that are likely to endanger the environment. There can be no argument that the presence of the petitioners in the forest was going to endanger the forest and the larger environment. It was not an arbitrary exercise of State power for the Government to move to evict the petitioners. The move to evict them in my view was fully justified.*

122. So essential is the protection of forests to the well-being of humanity and the health of the planet, that their protection is included in the global blue print to for sustainable development. Goal 15 of the Sustainable Development Goals aims to:

*“protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss”.*

123. The foregoing analysis leads me to the conclusion that the Tribunal's finding that National Environment Management Authority (NEMA) erred in failing to involve lead agencies such as KFS and the WARMA was justified.

**e. Whether the Tribunal misapprehended the law when it found that NEMA had not taken into account the change of user in approving the licence;**

124. The Tribunal found that the Appellants herein did not seek a change of user of the land from forest to settlement before obtaining NEMA's approval and licence of the project. This finding has been challenged on the basis that there was evidence that the Church owned the land and it was there not necessary for National Environment Management Authority (NEMA) to ask the proponent to provide evidence of change of user.

125. I agree with the Appellants' contestation of this finding by the Tribunal. In my analysis, no evidence was specifically led on the issue of the change of user of the land. The change of use of land relates to processes of physical planning which is governed by the Physical Planning Act. That Act provides mechanisms to address issues on the acquisition of development permission and has an elaborate appeal process for aggrieved parties.

126. The Physical Planning Act provided the more appropriate forum to address questions of change of user, if at all they were raised by the Respondents. Moreover, the Physical Planning Department in Kisii had been given a copy of the project report and failed to make a comment on it. This issue was clearly outside the scope of the Tribunal's mandate and the Tribunal erred in making a finding on the issue. (See *Jane Ngunyo Muhia v Director General, National Environmental Management Authority & another ELC Appeal No. 20 of 2016 [2017] eKLR* and *Jeremiah Nyandusi Abuga & 17 Others v City Council of Nairobi Environmental & Land Case 145 of 2012 [2013]eKLR*)

**f. Whether the Tribunal erred in finding that the Carmelite Fathers was not a legal entity when the same was a non-issue before the Tribunal.**

127. I agree with the Appellants' position that the question of whether the Carmelite Fathers was a legal entity was peripheral to the main issues for determination before the Tribunal. The finding by the Tribunal that the congregation was not a legal entity is also questionable in light of the evidence by Father Amunya that the congregation could own land.

128. In the final analysis, I find the appeal to be lacking in merit for the reasons given above. I hereby dismiss the Appeal. Each party shall bear its own costs.

**Dated, signed and delivered at Kisii this 8<sup>th</sup> day of February 2021.**

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**J.M. ONYANGO**

**JUDGE**