REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

PETITION NO. 1 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 2(1), 3 (1), 10 (1) a,b & c, 27 & 73 OF THE CONSTITUTION AND IN THE MATTER OF ARTICLE 20 (1), (2), (3) a & b, (4) a & b ARTICLE 21 (a), 22(1), (2), & 23 (1) & (3) a, b, c, d & e OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION AND VIOLATION OF

FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED

UNDER ARTICLE 27,28,32,40,42,43,47 AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND CO-ORDINATION ACT, 1999

AND

IN THE MATTER OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS 2003

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (JURISDICTION,

PROTECTIONS OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE

INDIVIDUAL) HIGH COURT PRACTICE RULES 2006 AS READ WITH

CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA,

TRANSITIONAL CLAUSES AND CONSEQUENTAIL PROVISIONS

OF THE SCHEDULE TO THE CONSTITUTION

BETWEEN

CHRISPINUS MUNYANE PAPA...1ST PETITIONER

ANZELIMO OMUSE...2ND PETITIONER

VERSUS

NATIONAL ENVIRONMENTAL AUTHORITY....................................1ST RESPONDENT

KIBOS SUGAR & ALLIED WORKERS INDUSTRIES.......................2ND RESPONDENT

JUDGEMENT

INTRODUCTION

1. The dispute herein revolves around the establishment and operations of a cane loading and buying centre at Nambale town, Busia County. The two petitioners – **CHRISPINUS MUNYANE PAPA** (1st Petitioner) and **ANZELIMO OMUSE** (2nd Petitioner) – allege violation of various aspects of both constitutional and statutory law, particularly those related to the environment. They therefore sued the two respondents **– NATIONAL ENVIRONMENT MANAGEGEMNT AUTHORITY** (1st Respondent) and **KIBOS SUGAR AND ALLIED INDUSTRIES LTD** (2nd Respondent) – whom they blame for the prevailing state of affairs.

THE PETITION

2. More particularly, the 2nd respondent is said to have established the cane loading and buying centre (simply "centre" hereafter) without first obtaining the requisite Environmental Impact Assessment (EIA) license from 1st Respondent, which would seem to suggest that the necessary Environmental Impact assessment study that is supposed to precede the establishment of such centre had not been conducted. Had that been done in the manner required by law, the petitioners averred that they and other area residents would have had the opportunity to interrogate the likely effects of the operations of the centre on both the environment and their lives.

3. The centre is said to have been established near Nambale river and some of its waste is said to be finding its way there thus polluting it and endangering not only its aquatic life but also human consumers of its water. The 2nd respondent is also said to be probably buying stolen sugarcane. It owns no sugarcane farms from around and the cane it is buying is said to have its likely source from some people who steal it from the farms of local farmers at night. The centre's location in the middle of Nambale town is also said to be affecting traffic flow. The heavy machinery in use by the 2nd respondent is said to block roads occasionally thus endangering lives of other road users.

4. But these are not the only problems associated with the 2nd respondent's presence and operations in the area. The petitioners alleged there is always a pungent smell from rotting sugarcane and the problem of sugarcane poaching in the area has increased. Other existing millers are also said to have stopped assisting the farmers and have also stopped repair and maintenance of roads. The land on which the 2nd respondent is operating is said to be owned by a defunct cotton ginnery group that has no management team in office capable of selling or leasing the land. The activities of the 2nd respondent are said to be capable of causing irreversible pollution and deterioration of the area's fragile ecological system. The location of the centre is said to be sloppy and seepage of both human and industrial waste into the rivers is said to be likely. The overall effects are said to consist in reduced water volumes, interference with the river's aquatic life, poor water quality due to pollution, imbalance in the environment due to destroyed forest and vegetation cover, and increased soil erosion.

5. The establishment of the second respondent, its operations, and its other related activities are said to have interfered with the petitioner's right to fair administrative action under Article 47 of the Constitution, and the right to clean and healthy environment under Article 42 of the Constitution. They have also exposed the Nambale's ecosystem and damaged it irreversibly contrary to Article 43, with the 2nd respondent simultaneously also in breach of Articles 3(1) and 10 (2) (a) (b) (c) and (d) of the Constitution. In addition, the 2nd respondent is said to be in breach of Section 58 (1) of the Environmental Management & Coordination Act of 1999, Regulations 7,8,17,18,19,20,21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003, and Section 25 of the Water Act.

6. The petitioners are praying for the following orders:

> *(1) A declaration that the commencement of operations by the 2nd respondent in respect of the project in constructing and operating sugar cane trans-loading and/or buying centre in Nambale trading centre, Nambale Sub-county in Busia County without procuring and/or being issued with and Environmental Impact Licence by the 1st Respondent is unconstitutional, illegal and contravenes the provisions of Sections 58,59,60,61,62 and 63 of the Environmental Management and Co-ordination Act, 1999 and provisions of Regulations 17,18,22 and 24 of the Environmental (Impact Assessment and Audit) Regulations, 2003.*
>
> *(2) A declaration that the Environmental Impact Assessment and Audit being done by the 2nd respondent and received by the 1st respondent on 10/9/2018 in respect of the project in constructing and operating a sugar cane transloading and/or buying centre in Nambale Trading Centre, Nambale Sub-County in Busia County without procuring and/or being issued with an Environmental Impact Licence by 1st respondent is unconstitutional, illegal and contravenes the provisions of Sections 58,59,60,61,62, and 63 of the Environment Management and Co-ordination Act, 1999 and provisions of Regulations 17,18,22,23 and 24 of the Environmental (Impact Assessment and Audit) Regulations, 2003.*
>
> *(3) A declaration that the commencement of discharge of effluent into the environment by 2nd respondent in respect of the project in constructing and operating a sugar transloading station and buying centre in Nambale Sub-county in Busia County without being granted a licence to discharge effluent by National Environmental Management Authority and a corresponding licence from Water Resources Management Authority is illegal, unconstitutional, and contravenes the provisions of Section 75 of the Environmental Management and Co-ordination Act, 199 and Section 25 of the Water Act.*

(4) A declaration that the petitioner's right to a clean and healthy environment as guaranteed by Article 42 and Article 43 of the Constitution of Kenya has been violated by the actions of the respondent.

(5) An order of a permanent injunction restraining the 2nd respondent from operating a weighbridge loading station and/or sugarcane buying centre on land parcel no. BUKHAYO/KISOKO/5440 in Nambale Sub-County, Busia County.

(6) An order of Environmental Restoration requiring the 2nd Respondent through itself, their agents, employees, and/or representatives to demolish any structures erected on Land parcel No. BUKHAYO/KISOKO/5440 at Nambale Township, Nambale sub-county in Busia County with a view of restoring the environment to its original status within 14 days and in default the petitioner be at liberty to appoint an auctioneer to demolish the structures and restore the environment and recover costs from the 1st respondent

(7) General damages

(8) Interest

(9) Costs of and incidental to this petition; and

(10) Any other order that this honourable court deems fit and just to grant in the circumstances.

RESPONSES TO THE PETITION

7. The 1st Respondent made a response vide a replying affidavit filed on 30th May, 2019. It talked of not having received any Environmental Impact Assessment report but acknowledged receiving Environmental Audit report. The audit report showed that the 2nd respondent took over the site on lease basis from the defunct Cotton Development Authority. To the 1st respondent, the suit against it "*ambiguous and does not clearly stipulate how the 1st respondent has breached if any the petitioner's rights*". The petitioner was accused of making "*constitutional references without any nexus to the breach occasioned to such articles by 1st respondent*". The 1st respondent stated that the petition as pleaded against it is "*a mere sham, speculative and waste of court's time*"

8. The 2nd respondent responded vide a replying affidavit filed on 29th May, 2019. In the response, the petitioners are described as "*persons who have no locus standi, to file the same and are busy bodies/ political hirelings who have no authority to bring same before court*", with the word "*same*" in the petition referring to petition. The 2nd respondent denied that its operations are illegal. It averred that it operates a cane loading station on land parcel NO BUKHAYO/KISOKO/5440 leased from Nambale Farmers' Co-operative Union. Its operations involve buying cane from farmers, weighing it, and transporting it to the factory for processing.

9. An environmental audit was said to have been conducted and a report thereof submitted to County Director of Environment, Busia, who acknowledged receiving it and even recommended the improvements that needed to be made. The audit was said to have been professionally done by one George Adhoch, a lead expert duly registered with National Environment Management Authority. The 2nd respondent denied that it is polluting Nambale river though spillage of oil or other substance and averred that that wouldn't happen as it is not carrying out any manufacturing, processing, or repair work on the site. It stated that the allegations of the petition need to be scientifically shown and evidence presented to court, which the petitioners have not done.

10. The 2nd respondent denied allegations of cane stealing whether by itself or though proxies and averred that it has its own cane in the area and has other leased cane farms. Also denied was that its activities were increasing insecurity in the area, caused cane poaching by unscrupulous people or affected traffic flow. The issues raised are not constitutional, 1st respondent averred, and the petitioners have come to court with "*lies and alternative facts*" and made "*wild theories*" not supported by any evidence or scientific data.

11. The responses filed by the respondent elicited a further affidavit from the petitioners. The further affidavit was filed on 10th June, 2019 and it largely reiterated the truthfulness of the contents of the petition. In particular, it stated that the issues raised are constitutional and relate to enforcements of rights under articles 27,28,32,40,42,43 and 47 of the Constitution. The 2nd respondent was said to have failed to conduct an Environmental Impact Assessment, with the report referred to in this response being that of Environmental audit, which it seems to be confusing with Environmental Impact Assessment report.

PETITIONERS SUBMISSIONS

12. The matter was canvassed by way of written submissions. The petitioner filed two sets of submissions, one on 7th May, 2019 and the other, a second set styled "*PETITIONER'S FURTHER WRITTEN SUBMISSIONS*", on 10th June, 2019. The first set was filed without the benefit of the substance of the respondent's submissions. The second set is largely a counterpoise to those submissions. The first set started with a recapitulation of the case before deleanating the issues for determination thus:

(a) Whether the 2nd respondent is operating the weigh bridge/sugar transloading station and buying centre in Nambale without carrying out EIA and obtaining the license from NEMA.

(b) Does the fact that Environmental Impact Assessment was not performed and NEMA licence not issued render the operation of the weigh bridge by the 2nd respondent legally invalid.

(c) Whether the petitioners are entitled to the relief's sought.

13. On the first issue, (which is (a)) the petitioners submitted that the law- cited to be sections 58,59,60,61 and 63 of the Environmental Management and Co-ordination Act, 1999, and provisions 17,18,22,23 and 24 of the Environmental (Impact Assessment and Audit) Regulations – enjoin that Environmental Impact Assessment (EIA) be carried out before commencing a project like the one operated by the 2nd respondent but the 2nd respondent never undertook such assessment. The petitioners submitted that what the 2nd respondent's mistakes for such report was actually an Environment Audit which is usually done for on-going projects. According to the petitioners, such audit report is null and void if and where done without first conducting Environmental Impact Assessment (EIA) the operations of the 2nd respondent were therefore said to be illegal.

14. The second issue (which is (b)) shows the petitioners saying what they have already said regarding the first issue namely: That the operations of the 2nd respondent are illegal for failure to comply with the relevant law and/or obtain the requisite licence.

15. And regarding the final issue (issue (c)), namely whether the petitioners are entitled to the reliefs sought, the petitioners sought succour in decided case law, including **KEN KASINGA VS DANIEL KIPLANGAT KIRUI and 5 Others (2015) eKLR and DOUGLAS ONYANCHA & 3 OTHERS VS JOSEPH KARANJA WAMUGI & 4 OTHERS (2019) eKLR**, to drive home the point that failure by the respondents to follow the law was a violation of their rights. They emphasized that they were denied opportunity to participate in decision making processes in projects that affected their lives. More particularly, they submitted that they were denied their constitutional right of public participation. They submitted therefore that they are entitled to the remedies they are seeking.

16. The petitioner's second set of submissions elaborated more on some of the issues covered in earlier submissions and then addressed some issues raised in the 2nd respondent's submissions. It was reiterated for instance that lack of EIA report was admitted by none other by 1st respondent in its response to the petition, specifically at paragraphs 7,8,9 and 10 in the replying affidavit.

17. Jurisdiction was an issue raised by the 2nd respondent. And the position taken is that the matter should not have been filed in this court in the first place. It ought, it was submitted, to have started at the Public Complaints Committee from where it should have escalated to National Environmental Tribunal if need be. According to the 2nd respondent, "*the petition is frivolous because it raise issue (sic) which are not constitutional in nature and mere hearsay meant to colour an incompetent petition*".

18. It is clear that the second set of submissions by the petitioners intended to address the issue. It was submitted that the petition is a constitutional one "*brought before this court to enforce rights protected under Article 27,28,32,40,43, and 47 of the Constitution which have been particularized in the petition and brought under Article 21 (1) 22(1) (2) & (3) a,b,c,d & e of the Constitution*". It was further pointed out that "*these are constitutional issues that can only be addressed by this court as provided under Article 162 (2) of the Constitution and Section 13 (2) and (3) of the Environment and Land Court Act*."

19. The 2nd respondent also contended that this matter is essentially between private parties as the 1st respondent, which is a public body, is a fringe or nominal party not meant to be affected by the outcome of the matter. The petitioners also sought to respond to this and submitted, interalia, that the constitution "*has long eroded the historically held position that the constitutional petitions apply only vertically but not horizontally*". The case of **ISAAC NGUGI VS NAIROBI HOSPITAL and 3 OTHERS (2013) eKLR** was cited to drive the point home.

2ND RESPONDENT'S SUBMISSIONS

20. The 1st respondent did not file submissions. What we have on record are submissions filed by the 2nd respondent on 29th May, 2019. The submissions started with a snapshot of the matter before stating the issues for determination. And the issues were stated thus:

(i) Does the honourable court have jurisdiction to hear and determine the matter?

(ii) Whether a constitutional petition can be lodged between two private persons, especially where there are express civil remedies available to the petitioner under the civil law.

(iii) Has the 2nd respondent complied with the provisions of Sections 58,59,60,61,62 and 63 of the Environment Management and Co-ordination Act, 1999, as read with provisions of regulations 17,22,23, and 24 of the Environment (Impact Assessment & Audit) Regulations, 2003?

(iv) Has the petitioner proved beyond reasonable doubt that the 2nd respondent is polluting the environment?

(v) Costs

21. On the issue of jurisdiction, the 2nd respondent submitted, interalia, that the starting point should have been the Public Complaints Committee. It is this body, it was submitted, "*that is constitutionally empowered or mandated to handle the petitioner's complaints as raised in the petition and not this court*". The petitioners were faulted for moving this "*court prematurely before raising their complaint before the right forum thereby divesting it of jurisdiction*."

22. As regards whether the petition is between two private parties, the 2nd respondent submitted it is so as "*the prayers are primarily aimed at the operations of the 2nd respondent and none is directed at the 1st respondent*" Then the case of **KENYA BUS SERVICES LTD & 2 OTHERS VS THE ATTORNEY GENERAL & 2 OTHERS (2005)eKLR** was cited for the proposition that fundamental rights and freedoms set out in bill of rights are enforceable by private individuals by way of constitutional reference only as against the state and state

organs and not by private individuals against another private individual. It is also a point that was said to have been made in the case of **TEITIWNNANG AND ARIONG & OTHERS (1987) L.R.C CONST 517.**

23. The 2nd respondent further submitted that it has complied with Sections 58,59,60,61,62,and 63 of the Environment Management and Coordination Act, 1999, and Regulations 17,22,23, and 24 of the Environment (Impact Assessment & Audit) Regulations, 2003. The replying affidavit filed was said to show well that the 2nd respondent undertook an Environment Impact Assessment and Audit. There was therefore adherence to due diligence, it was submitted.

24. The petitioners have also not proved their case, the 2nd respondent averred. They were said to have failed to prove pollution. They only alleged but no proof was proffered. According to the 2nd respondent the court should reject the petitioners' averments as there is no "*scientific evidence backing their allegation*".

25. Ultimately, the court was asked to dismiss the entire petition with costs.

ANALYSIS & DETERMINATION

26. I have considered the petition, the responses made, and the rival submissions. I apprehend the issues for determination to be as follows:

> *(i) Whether or not this court has jurisdiction to entertain this matter.*
>
> *(ii) Whether or not the 2nd respondent is involved in the operations alleged by the petitioners and, if so, whether the operations are in compliance with the law.*
>
> *(iii) Whether or not a petition of the kind now before this court can be lodged between private parties.*
>
> *(iv) Whether the petitioners have proved their case.*
>
> *(vI) Which way for costs?*

27. I have already mentioned the positions espoused by each side regarding the issue of jurisdiction. It is clear that according to the petitioners, this court is the only one seized of jurisdiction as some of the issues raised relate to violations of the constitution which only this court is mandated to handle. To the second respondent however, the matter should not be a constitutional petition. All the issues raised can be handled at the lower levels and there are appropriate remedies provided for by the law in those levels. Besides, the 2nd respondent continued, filing the matter here will deny "*the 2nd respondent their right to have been first heard before the* ***"public committee"*** *and "**the tribunal**" thus denying them the chance/right to appeal*".

28. There was a time when the jurisprudence emanating from our superior courts seemed to favour the position taken by the petitioners. That would seem to be the position taken by Emukule J (as he then was) in the case of **KEN KASINGA VS DANIEL KIPLANGAT KIRUI & 5 OTHERS (2015) eKLR** when he emphatically stated that the Environment and Land Court is a court of both original and appellate jurisdiction with the mandate relating to environment both as a court of first instance and as an appellate court.

29. Even then however, there was still some ambivalence. The case of **BERNARD MURAGE VS FINE SERVE AFRICA LIMITED & 3 OTHERS (2015) eKLR** seemed to embrace the view that not all violations of law would raise constitutional issues and where statutory law provides for a forum and remedy, then that should be the first port of call for a litigant.

30. But in the more recent case of **KIBOS DISTILLERS LIMITED & 4 OTHERS VS BENSON AMBUTI ADEGA and 3 OTHERS: (2020) eKLR**, the court of appeal, while faced with a scenario similar to the one that obtains here, expressed the position that the fact that a party has made multifaceted prayers in a suit which a tribunal may not handle is not in and of itself enough to make a party come to the higher court for redress. The position of the court of appeal was that mischievous or crafty parties would try to make such prayers in order to avoid the tribunal. The court stated that the principle of exhaustion would require that a litigant starts at the lowest forum before proceeding to the higher court. That is the law now. It disentitles a litigant from coming to the environment and land court as a court of first instance merely because some of the issues to be raised are constitutional.

31. It seems to me then that the petitioners were wrong to institute the matter before the Environment and Land Court, Busia, as a court of first instance. They needed to start at the lower forum first.

32. But there is another reason concerning this matter which persuades me that the matter should have been filed at the lower forum. The reason has to do with the constitutional issues raised. I have looked at them and the Environmental Management and Coordination Act, is sufficiently well placed to deal with all of them. The Act establishes various fora and various legal provisions and remedies to deal with breach. It seems clear to me that the petitioners were trying to make constitutional issues of otherwise simple matters whose remedial measures are adequately catered for in a statute specifically tailored for such issues. I refer again to **Benard Murage's case** (*ante*) where the court expressed itself thus:

> "*Not each and every violation of the law must be raised before the High Court as a Constitutional issue. Where there exists alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first".*

I think it is now clear that I am in general agreement with the 2nd respondent on the issue of jurisdiction.

33. I now come to the second issue, which is whether the 2nd respondent is involved in operations. It is common ground that it is. The operations are illegal according to petitioners, but very legal according to the 2nd respondent. According to the petitioners, the operations are illegal because no environmental impact assessment was conducted before commencement of operations. But the 2nd respondent averred that it took over operations from another body that had ceased operations. And after taking over, it conducted an environmental assessment and audit.

34. In my view, the 2nd respondent was supposed to conduct an environmental impact assessment before it commenced its operations. This is the same view taken by the 1st respondent in its response. But it's also clear that the 2nd respondent conducted an environmental impact assessment and audit in the course of its operations. The relevant authority then ordered it to address some issues and when this was done, it was given the go-ahead to continue with its operations.

35. The petitioners would have us believe that because the exercise of environmental impact assessment was not done at the commencement of operations, then the 2nd respondents operations were illegal and not even the environmental impact assessment and audit conducted late would make them legal. If one wants to be strictly legalistic, one would have to accept that it was wrong for the 2nd respondent to start operations without first conducting an environmental impact assessment. But legalism alone does not inform the justice served by law. Besides legalism, justice is also a matter of pragmatism, nay, hard-nosed pragmatism.

36. In matters of environment, the body that is charged with ensuring that environmental impact assessment is conducted is the same body that ensures that environmental impact assessment and audit is also done. It is this body that allowed the 2nd respondent to continue its operations after environmental impact assessment and audit was done. It did so knowing that Environmental Impact Assessment had not been done at the commencement of the proceedings.

37. In my view, that is what pragmatism is about. Environmental Impact Assessment and Audit is conducted in a broadly similar manner as environmental impact assessment itself. The aim for both is to address environmental concerns that need to be considered. To me, this is the correct approach. The petitioners are being unrealistic by insisting that operations should stop simply because a step was omitted. This is not to say that environmental impact assessment is not necessary. It is rather to say that in some circumstances, omission to conduct it is not always fatal to a case, particularly where another assessment is done and given approval by the relevant body. At the end of the day, it is important to appreciate that the application of the law consists in its realism and functionalism, not in its pharisaical formalism.

38. An issue (issue no. 3) was raised by the 2nd respondent about the matter being between private parties and thus not been suitable for adjudication under the law applicable to violation of fundamental freedoms. On this, it is the petitioners, not the 2nd respondent, who are right. The second respondent is trying to rely on the old law which placed high premium on the view that violation of fundamental freedoms and the resultant adjudication thereof can only be between the state and its citizens. But our constitution broadened that view and envisaged a situation where violation can take place between private citizens or persons. That is the law that Majaja J was articulating in **ISAAC NGUGI VS NAIROBI HOSPITAL & 3 OTHERS (2013) eKLR**. This is the import and purport discernible in Article 3 (1) which enjoins that every person has an obligation to respect, uphold and defend the constitution and Article 19(1) which states that the Bill of Rights applies to all law, binds all state organs and all persons. These Articles are justiciable and not merely declaratory. It flies in the face of commonsense in my view to hold that a private individual cannot violate fundamental freedoms.

39. The other issue (issue NO IV) requires the court to consider whether the petitioners have proved their case. The petitioners alleged various kinds of violation of both constitutional and statutory law. The 2nd respondent denied all this. As pointed out by the 2nd respondent, Section 3(4) of the Evidence Act is clear that "*A fact is not proved when it is neither proved nor disproved*". It is a basic legal principle that when one party asserts a fact and the other party denies it, that fact is not proved. To prove it, the person asserting it needs to do more than allege.

40. The petitioners made serious allegations of environmental pollution and degradation. According to them, there was oil spillage from machines operating on the site which found its way into Nambale river, in the end affecting and even destroying the aquatic life in it. There was also offensive smell from rotting cane as well of other activities that degraded the environment.

41. It behoved the petitioners to be well prepared to prove the allegations. While serious allegations like that are made, court submissions are not enough to drive the point home. A site visit for instance can be helpful. More importantly however is the need for experts input to prove some of the allegations. In **KIBOS DISTILLERS LIMITED & 4 OTHERS VS BENSON AMBOTI ADEGA & 3 OTHERS: (2020) eKLR**, the court emphasized the need for experts input as follows "*pollution is primarily proved by empirical, technical, and scientific evidence and not by layman opinion testimony or depositions*". The omission to make available experts evidence or report is one of the biggest weakness in the petitioner's case. And without it, it is not possible to say that the case is proved. The petitioners are not experts and some of the allegations they make – like destruction of aquatic life in Nambale river – are way beyond their depth. Only experts can offer credible proof.

42. The final issue (issue NO 5) relates to costs. Before I address this issue, I wish to point out that in light of what the court has said up to now, it's clear that the petitioner's case falls short on grounds of jurisdiction, standard of proof of the case, and its allegations as to legality of 2nd respondent's operations. It is therefore a case for dismissal. I now come to costs. In matters of environment, it is usually the position that private citizens are not condemned to pay costs unless their cases are plainly frivolous. The rationale for this is that such citizens and others of like mind may feel discouraged to raise environmental issues through litigation if prohibitive costs would be the end result of loosing.

43. I do not view this matter as one that is frivolous. To me, the petitioners set out to ventilate various environmental concerns but fell short in the manner I have already stated. I do not therefore deem it necessary to condemn them to pay costs. The upshot, when all is considered, is that this case is hereby dismissed but each side should bear its own costs.

Dated and signed at Kericho this 16th day of June, 2020.

....

A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 16th day of June, 2020.

....

A. OMOLLO

JUDGE