REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 5 OF 2019

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

LAKE VICTORIA NORTH SERVICE BOARD

ATTORNEY GENERAL

COUNTY GOVERNMENT OF KAKAMEGA.....APPELLANTS

VERSUS

MARABA LWATINGU RESIDENTS ASSOCIATION

ANDREW OMTATAH OKOITI & OYUGI NETO (*suing as registered trustees*

***of Kenyans for Justice & Development* (KEJUDE) Trust) NASHORO AMIS,**

MUSA RODENYO, WYCLIFFE OLUMASAI & 500 OTHERS...RESPONDENTS

JUDGEMENT

The appellants in ELC Appeal No. 5 of 2019 consolidated with ELC Appeal No. 10 of 2019 appeal to the Environment and Land Court against the whole of the decision of the National Environmental Tribunal delivered on the 5th March 2019 in N.E.T Appeal Number 113 of 2013 which cancelled the EIA license no.0013949 for the construction of sewage ponds by Lake Victoria North Water Services Board which also ordered restoration plus costs and interest.

The Appellants submitted that there was adequate public participation during the prior to the issuance of the EIA licence. That during the hearing of the case at the tribunal the 1st respondent admitted to have participated in all consultations and public hearings that were held in respect of the said project. They relied on the case of Mui Coal Basin Local Community&15 Others vs. Permanent Secretary Ministry of Energy & 17 Others (2015) eKLR which summarized the minimum basis for adequate participation. They also submit that NEMA approved the project after following the proper procedure and the law and issued the license with conditions as the project was to be undertaken in phases. That the noncompliance referred to by the tribunal in respect to the two regulations refer to the application of an effluent discharge license and relevant license from the lead agency which in essence cannot be obtained prior to the operation of the facility in question. That they erred in law and in fact by arriving at the conclusion that the 2nd and 4th appellants should bear the costs of the environment restoration order issued against them thereby disregarding the statutory and constitutional obligations of the 4th appellant to ensure sustainable exploitation and utilization of the environment for the benefit of its people. That the larger public interest of the residents within Kakamega County would outweigh those, if any, of the smaller portion represented by the respondents and, the subject project herein should be allowed to go on subject to suitable conditions that would mitigate any resultant negative effect. That tribunal erred in disallowing the 3rd appellant's documents and demonstrated open bias as was demonstrated from the proceedings before it.

The respondents submitted that the EIA license in question was issued based on the Environmental Impact Assessment report prepared by Dr. Oonge Zablon who did not testify so as to be examined on the same. That the procedure in preparing the report was not followed. That there was no public participation prior to preparing the report contrary to Regulation 17 and 21 of the Environmental Impact Audit Regulations 2003. That every person has the right to a clean and healthy environment the sewage project would adversely affect the ecosystem of Lwatingu area. That the tribunal had the jurisdiction to hear the appeal as it related to the grant of a license on a flawed report.

This court has considered the appeal and the submissions therein. A clean and healthy environment is a fundamental right and the same is found in the Constitution of Kenya, 2010 **Article 42** within the Bill of Rights. **Article 42** states as follows:

> *Every person has the right to a clean and healthy environment, which includes the right—*

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

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

A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under **Article 69** which among others requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; to establish systems of environmental impact assessment, environmental audit and monitoring of the environment and to eliminate processes and activities that are likely to endanger the environment. Under the same article, every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The obligation to ensure a clean and healthy environment is imposed on everybody – from the state to all persons be they natural, juridical, association or other group of persons whether incorporated or not.

To safeguard environmental rights and to facilitate access to court for purposes of enforcing the right secured Article 70 of the Constitution of Kenya provides for Enforcement of environmental rights as follows: -

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

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

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

(b) To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;

Or

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

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

Section 3 (3) of the **Environmental Management and Co-ordination Act, 1999** (EMCA) which states that if a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to this court and this court may make such orders, among others, to prevent, stop or discontinue any act or omission deleterious to the environment; to compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other connected losses.

From the above provisions of the law the issues for determination in this appeal are as follows;

i. Whether this Tribunal and/or this Court has jurisdiction to determine this matter.

ii. Whether there has been a violation of the petitioner's constitutional rights.

iii. What orders are appropriate in the circumstances.

Whether this Court has jurisdiction to determine this matter.

The National Environment Tribunal (NET) is established by Section 125 (1) of EMCA which provides as follows :-

125. (1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members—

(a) a chairman nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the High Court of Kenya;

(b) an advocate of the High Court of Kenya nominated by the Law Society of Kenya;

(c) a lawyer with professional qualifications in environmental law appointed by the Minister; and

(d) two persons who have demonstrated exemplary academic competence in the field of environmental management appointed by the Minister.

The jurisdiction of the Tribunal is set out in Section 129 of EMCA which provides as follows :-

129. (1) Any person who is aggrieved by:—

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder; may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may:—

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c) make such other order, including an order for costs, as it may deem just.

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

Appeals on the decisions of the Tribunal lay to the High Court (which must now be deemed to refer to the Environment and Land Court by virtue of Article 162 (2) (b) of the Constitution). This is captured by Section 130 of EMCA which provides as follows :-

130. (1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.

(2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.

(3) Notwithstanding the provisions of subsection (2), where the Director-General is satisfied that immediate action must be taken to avert serious injuries to the environment, the Director-General shall have the power to take such reasonable action to stop, alleviate or reduce such injury, including the powers to close down any undertaking, until the appeal is finalised or the time for appeal has expired.

(4) Upon the hearing of an appeal under this section, the High Court may:—

(a) confirm, set aside or vary the decision or order in question;

(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

(5) The decision of the High Court on any appeal under this section shall be final.

On the other hand, the Environment and Land Court (ELC) is established by the Constitution as a superior court with the status of the High Court. This is covered by Article 162 of the Constitution which provides as follows in Sub-articles (1), (2) and (3).

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

In compliance with Article 162(2) & (3) of the Constitution, Parliament, did pass the Environment and Land Court Act (ELCA), Act No. 19 of 2011, which set up the Environment and Land Court. The jurisdiction of the ELC as may be noted in Article 162 (2) (b) of the Constitution, is to hear and determine disputes relating to the environment and the use and occupation of and title to land. This jurisdiction is elaborated in Section 13 of ELCA which is drawn as follows:-

Section 13 : Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

It will be seen from the provisions of EMCA, which I have set out above, that the jurisdiction of the Tribunal is to hear appeals from decisions of NEMA. NEMA is established by Section 7 of EMCA, and its mandate, as provided by Section 9 of EMCA, is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment. Part of this mandate is to grant Environmental Impact Assessment (EIA) licences, for under Section 58 of EMCA, no person should proceed with a project before first obtaining an EIA licence. NEMA can of course grant or

decline to issue an EIA licence. It may be that a person is aggrieved by this decision, and the reason that NET was created, was to provide an avenue for a person who wishes to challenge the decision of NEMA. This is done in the form of an appeal against the decision of NEMA. The Tribunal can confirm, set aside, or vary such decision. If a person is aggrieved by a decision of the Tribunal, the statute provides that he can pursue a final appeal to the High Court, which provision must now be read to mean the Environment and Land Court. Under Section 129(1) of the Environmental Management and Co-ordination Act, the National Environment Tribunal (NET) is empowered to hear and determine appeals arising from persons aggrieved by decisions of National Environmental Management Authority (NEMA), such as the issuance of a license.

This Petition is properly before the court, it is a Constitutional Petition alleging violations of various rights enshrined in the Constitution, including a violation of the right to a clean and healthy environment provided for in Article 42 of the Constitution. Article 162(2) (b) of the Constitution and Section 13(1) of the Environment and Land Court Act provides that this court can hear and determine any matter related to the Environment and Land. Section 13(3) of the Environment and Land Court Act further provides as follows:

> *"13(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution."*

Whether there has been a violation of the petitioner's constitutional rights.

Section 58 of the Environmental Management and Co-ordination Act stipulates the procedure to be followed when applying for an Environmental Impact Assessment license. The Section provides as follows:

> *"58(1).Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.*
>
> *(2). The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.*
>
> *(3). The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.*
>
> *(4). The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.*
>
> *(5).Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.*
>
> *(6).The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorized to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.*
>
> *(7).Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.*
>
> *(8). The Director-General shall respond to the applications for environmental impact assessment license within three months.*
>
> *(9).Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking."*

An Environmental Impact Assessment license can only be issued after a successful Environmental Impact Assessment process, which envisages two modes of processes: that is, an Environmental Impact Assessment Project Report or an Environmental Impact Assessment Study Report. The respondent submitted that there was lack of adequate participation. Regulation 17 on public participation provides as follows;

> *"17. Public participation*
>
> *1. During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.*
>
> *2. In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall-*

(a) Publicize the project and its anticipated effects and benefits by-

i. posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

ii. publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

iii. Making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks.

(b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;.

(c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

(d) ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority"

In addition to the above domestic laws Principle 10 of the Rio Declaration on Environment and Development (1992) states as follows:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process..."

By virtue of the provisions of Article 2(5) of the Constitution, the Principles in the Rio Declaration on Environment and Development are binding on the Appellant.

The appellants demonstrated that they published the notices in the Daily Nation at least twice a week for two successive weeks but did not establish that they made announcements at least once a week for two consecutive weeks in a radio with nationwide coverage in both local and official languages as required by the regulations. I concur with the findings of the tribunal that public participation was not carried out effectively during the Environmental Impact Assessment Study and prior to the issuance of the EIA license by NEMA.

As was held in the case of *Ken Kasinga vs. Daniel Kiplagat Kirui & 5 others (2015) eKLR,* where the procedures for the protection of the environment are not followed, including the process of public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat. The evidence before this court shows that the appellants did not only breach the provisions of Section 58 and 59 of the Environmental Management and Co-ordination Act, but also Article 69(1) (d) of the Constitution which provides that the State shall encourage public participation in the management, protection and conservation of the environment.

From the judgment of the Tribunal the members also considered whether the project adheres to the Environmental Management and Coordination (Water Quality) Regulations 2006 and the Environmental Management and Coordination (Wetlands, River banks, Lake Shores and Sea Shore Management) Regulations 2009 and the Environmental Management and Coordination (Air Quality) Regulations 2014. They found that the mitigation measures inadequate and that the respondent's project did not adhere to these regulation. It is interesting to note that Dr. Oonge Zablon who prepared the Environmental Impact Assessment report did not appear before the Tribunal to clarify these issues. In the case of **West Kenya Sugar Co. Ltd –vs Kenya Sugar Board and Another (2014) eKLR** the Court of Appeal held that,

"The High Court was ill equipped to decide whether or not the conditions for granting a licence had been met, some of the information provided in the application for licence was of a technical nature. Condition stipulated in Section 15 (i) (b) of the Act refers to technical experience and capacity. These factors could only have been properly evaluated by persons well versed in matters pertaining to sugar industry and the application of the policy of the Act."

This court cannot fault the decision of the Tribunal when they clearly stated that the mitigation measures proposed where inadequate to avert the risk of contaminating Lwatingu stream. The respondent stated that the project is located near the banks of the stream a wetland area and during the rainy season this area floods and the effluent discharged from the ponds might sweep away into the stream. The stream is used for domestic purposes and for cultural and religious practices. The project would also cause air pollution.

This court shall therefore not shy from allowing the issuance of closure orders aimed at preventing, stopping or discontinuing harm to the environment in deserving cases. In the case **of National Environment Management Authority & Another vs. Gerick Kenya Limited (2016) eKLR**, Mutungi J, held as follows:

"In this matter we have a situation where we have competing interest. On the one hand we have the public interest where the Community needs protection against potential harm to the environment through contamination or pollution, and on the other hand, we have the defendant's private commercial interest where the defendant wishes to develop the site for commercial gain. Where in a case such as the instant one, the public interest as the public interest is pitied against private interest, the public interest overrides the private interest is for the good of the wider public as opposed to the narrow private

interest. The public interest no doubt outweighs the private individual interest."

What orders are appropriate in the circumstances

The appellants submitted that the orders for costs and restoration of the environment were inordinately too high, harsh and punitive for a public project and funded by donors who have threatened to pull out. That the award of costs is discretionary and this should be set aside. The powers of the Tribunal are set out in Section 129 (3) of EMCA which provides as follows:-

> *129. (3) Upon any appeal, the Tribunal may:—*
>
> > *(a) confirm, set aside or vary the order or decision in question;*
> >
> > *(b) exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or*
> >
> > *(c) make such other order, including an order for costs, as it may deem just.*
>
> *(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.*

In this case it is the 2nd appellant who undertook the project and the Tribunal used its discretion judiciously in this matter. In the case of Michael Kibui & 2 others (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v Impressa Construzioni Giuseppe Maltauro SPA & 2 others (2019) eKLR the court held that;

> "*The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 as national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account the that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.*

I find the Tribunal did not err in reaching its decision and for those reasons I dismiss this appeal with no orders as to costs.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE