REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO 50 OF 2013

KEN KASING'A.....PETITIONER

VERSUS

DANIEL KIPLAGAT KIRUI ….....……..1ST RESPONDENT

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

EATON TOWERS KENYA LTD…….....3RD RESPONDENT

COMMUNICATIONS COMMISSIONS OF KENYA.....4TH RESPONDENT

NAKURU COUNTY GOVERNMENT.....5TH RESPONDENT

PEMAN COUNSULTANTS LTD.....6TH RESPONDENT

JUDGMENT

(Constitutional petition alleging violation of right to clean and healthy environment; petitioner being owner of land; adjacent owner allowing the erection of a telecommunication receiver station and mast; entity erecting the mast having no licence from CCK to do so; process of planning approval not properly followed; EIA and public consultation; petitioner arguing that he was not consulted; consultation only on caretakers of neighbouring parcels; no proof of consultation of property owners including petitioner; EIA requiring adequate and proper consultation; lacuna in law on regulations on erection of telephone base receiver stations; need for regulations to be in place; remedies; restoration order; receiver station having been put up illegally ordered to be pulled down)

PART A: INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of a Constitutional Petition filed on 18 December 2013, which petition was amended on 17 February 2014. The petitioner is the registered proprietor of the land registered as Nakuru Municipality Block 11/195 situated in Milimani area, an up market residential estate in Nakuru Town. It is his contention that his rights as contained in Articles 42 and 70 of the Constitution of Kenya, 2010, have been infringed by the respondents. Article 42 of the Constitution grants the right to a clean and healthy environment whereas Article 70 of the Constitution provides for the enforcement of the environmental rights covered by Article 42 of the Constitution. The petition is also said to be brought pursuant to the provisions of Article 1 of the Communications Commission of Kenya Guidelines for Siting of Communications Infrastructure, Towers (Masts) and Safe Use of Mobile Telephones and Other

Wireless Terminals, 2007; Section 58 of The Environmental Management and Co-ordination Act, Cap 387 Laws of Kenya; Section 25 of the Kenya Information and Communications Act, Cap 411A Laws of Kenya; and Section 36 of the Physical Planning Act, Cap 286 Laws of Kenya.

The facts leading to this petition are as follows:-

2. The 1st respondent is the proprietor of the land parcel Nakuru Municipality Block 11/196 which is adjacent to the petitioner's property. The 3rd respondent is a company which has described itself as specializing in the construction of telecommunications masts which are leased to network operators. The network operators then install their antennas, microwaves and transmitters upon these telecommunications masts.

3. The 1st respondent was approached by the 3rd respondent, who was of the view that the 1st respondent's property was suitable for the putting up of a mobile base transmission mast. Through a letter of offer dated 6 September 2013, the 3rd respondent offered to lease the 1st respondent's premises for a term of 10 years commencing November 2013 at an annual rent of Kshs. 300,000/= to be increased at the rate of 5% for each subsequent year. The 1st respondent agreed by signing the offer letter. So that it may proceed to erect the telecommunication station and mast (the project) , the 3rd respondent, through its agents, Eackelberg & Company, engaged the 6th respondent, Peman Consultants Ltd (Peman), a consultancy firm that deals with physical planning and environmental impact assessment, to proceed to effect an extension of user of the 1st respondent's property, and to conduct an environmental impact assessment of the project to be undertaken.

4. On 30 September 2013, the 6th respondent, presented to the County Government of Nakuru, the 5th respondent, an application for development permission and extension of user of the 1st respondent's property, which was hitherto a residential premises, so that the 3rd respondent may be allowed to erect the proposed telecommunications mast on the said property. An advertisement for extension of user was placed in the Star Newspaper of 28/29 September 2013 giving 14 days to any person opposed to the extension of user to lodge his/her objections. On 9 October 2013, the application for extension of user was allowed by the County Government of Nakuru. The 6th respondent also proceeded to prepare an Environmental Impact Assessment Project Report of the proposed project on 26 September 2013, which report was forwarded for approval to the 2nd respondent, the National Environmental Management Authority (NEMA). Vide a licence dated 28 November 2013, NEMA granted an Environmental Impact Assessment Licence and gave a go ahead to the proposed project.

5. It is not clear when development of the project started, but the development irked the petitioner, who wrote several complaint letters to NEMA, wondering how and when the project got its (NEMA) approval. His first letter is dated 27 November 2013, and in it, the petitioner alerted NEMA that a telephone mast was being raised in contravention of Environment Management and Coordination Act (EMCA), for he had not been consulted, and no one had sought his opinion, before proceeding with the development. This was followed up by another letter which is undated (but probably of 27 November 2013), and another dated 28 November 2013, through which the petitioner asked to see a copy of the EIA report. He received a reply from NEMA on 5 December 2013, through which the petitioner was advised that he has a right of appeal to the National Environmental Tribunal. It is then that the petitioner decided to file this suit.

6. In this suit, the petitioner has contended that the 1st respondent has caused him injury by allowing his compound to be used by the 3rd respondent as an offloading site and a metal cutting workshop which has exposed him to intrusive noise. He has also contended that the 2nd respondent has issued an EIA licence without following the environmental impact regulations, guidelines and procedures, thus unprocedurally sanctioning the illegal erection of a mobile telephone base transmission mast. It is further contended that the 3rd respondent has proceeded to illegally construct and erect a mobile telephone base transmission mast on the property owned by the 1st respondent, having illegally procured an EIA licence from the 2nd respondent without following the laid out regulations. It is also contended, that the 4th respondent, has illegally issued a telecommunications licence to the 3rd respondent without conducting due diligence on procedural issues surrounding the legality of the construction of the mobile telephone base transmission mast, thus allowing the 3rd respondent to illegally switch it on; that the 5th respondent has illegally

approved the 3rd respondent's development application without a change of user; that the 6th respondent carried out an environmental impact assessment and annexed to its report fictitious and untruthful public consultation forms not reflective of the views of the immediate community and the immediate interested or affected parties. It is the view of the petitioner that the respondents have violated his rights by failing to afford him reasonable opportunity to submit oral or written comments on the EIA report before allowing its approval, and consequently, his rights to a safe, clean and healthy environment have been violated and/or not recognized by the respondents.

7. In the amended petition, the petitioner has prayed for the following orders :-

(a) A declaration that the respondents have violated the petitioner's rights to a safe, clean and healthy environment.

(b) An order compelling the 4th respondent to immediately suspend the operation of all base transceiver mast stations operated by the 3rd respondent pending the forensic audit on procedural issues surrounding the legality of the construction of those mobile telephone base transmission masts constructed and operated by the 3rd respondent.

(c) An order compelling the 2nd respondent to deregister the 6th respondent from its register of all individual experts or firms of all experts authorized by it to conduct or prepare environmental impact assessment studies and reports pending a forensic investigation on each environmental impact assessment study and report the 6th respondent has undertaken since its registration.

(d) An order that the 2nd and 4th respondents do sanction an independent public survey and study of the effects on the surrounding environment, of all mobile telephone base transmission masts constructed and operated within Kenya.

(e) An order cancelling all the licences respectively issued to the 3rd respondent by the 2nd, 4th and 5th respondents, namely an Environmental Impact Assessment License, a telecommunications licence and a development permission for the illegal construction and erection of a mobile telephone base transmission mast on L.R No. Block 11/196 owned by the 1st respondent and leased to the 3rd respondent.

(f) An order directing the 3rd respondent to immediately dismantle and bring down the illegally constructed mobile telephone base transmission mast including its foundation on L.R No. Block 11/196 owned by the 1st respondent and leased to the 3rd respondent.

(g) An order for the payment of general damages by the respondents to the petitioner for violating his right to a safe, clean and healthy environment.

(h) An order for costs of the petition.

(i) Such other orders as this Honourable Court may deem fit to grant.

8. The suit was originally filed at the High Court. A preliminary objection was raised that the High Court had no jurisdiction in the matter, and through a ruling delivered on 18 June 2014, the High Court upheld the objection and ruled that it had no jurisdiciton. The suit was however not struck out, but was transferred to this court, the Environment and Land Court, sitting at Nakuru, for disposal.

9. All the respondents filed replies to the petition.

10. In his replying affidavit, the 1st respondent conceded that he leased his premises to the 3rd respondent so that a telecommunications base transmission mast may be erected on it. He averred that the 3rd respondent assured him that he would acquire all the necessary permits and licences required to install and operate the mast. He stated that public participation was intensively done, and that his neighbours and the residents in general were visited, and called upon to give their comments and opinion on the proposed

project. The petitioner however declined to fill the participation forms despite several attempts by himself and the agents of the 3rd respondent. He stated that the public participation forms annexed to the EIA project report were duly filled by the residents of Milimani estate. He was present when the site was being constructed and it is his view that the 3rd respondent's machinery, vehicles and equipment were maintained with an effort to mitigate noise pollution and that the work was carried out during the day and not at night. In any event, he has averred that the construction is now complete and no more noise is expected on the site. He has denied infringing on the petitioner's rights since he personally asked him to submit his comments but that the petitioner kept his comments to himself. It is his opinion that the petitioner has an ill motive and wants to deny him the benefit of the lease agreement. He has averred that the petitioner is disgruntled since he had complained to the 1st respondent over the phone that his (the petitioner's) land is more suited for the establishment of the telecommunications mast. He has pointed out that no other neighbour has complained or raised objections to the project and that the petition is not in the public interest or the good of the neighbourhood. He has also averred that the grievances raised by the petitioner do not meet the threshold of a constitutional matter and the same ought to have been raised by way of a suit before the National Environmental Tribunal (NET).

11. The 2nd respondent did not file a replying affidavit, but relied on the replying affidavit of the 6th respondent.

12. The 3rd respondent filed a replying affidavit sworn by one Christopher Taracha, its project manager. He explained inter alia that they engaged the 6th respondent to procure development permission from the County Government of Nakuru, which was approved. The 6th respondent also conducted an EIA project report and NEMA did grant an EIA licence pursuant thereto. He received information from one Peter Macharia, of the 6th respondent, that the views of the general public living in the adjoining properties were sought and noted in the report, and that the views of the petitioner were sought, but he deliberately chose not to participate in the fact gathering exercise by always having his gate closed and not bothering to open when prompted. He has averred that the 3rd respondent complied with all construction conditions specified in the NEMA licence and has also complied with all the operational conditions. He has specifically stated that they complied with the Noise and Excessive Pollution Control regulations and since the construction is complete, there is presently no intrusive noise from the site. He has also stated that any hazards posed by electromagnetic fields (EMF) will only be from the antennas, on top of the mast, which areas the general public will not have access to. It is his view that in any case, the Radio Frequency emissions are way below the internationally allowable limits provided by the World Health Organisation and the mast height has been approved by the Kenya Civil Aviation Authority. He also raised issue that the petitioner ought to have filed an appeal at the NET and that this court has no jurisdiction.

13. The 4th respondent is an independent statutory body established by the Kenya Information and Communications Act Cap 411A, Laws of Kenya. Its mandate includes the licensing and regulation of postal, information and communications services in Kenya. In its replying affidavit, sworn by Liston Kirui, the Assistant Director in charge of telecommunications licensing, the 4th respondent has explained the various available licenses in the telecommunications sector and the manner of applying for them. Mr. Kirui has averred that on 22 March 2013, the 3rd respondent applied to be granted a Network Facilities Provider Tier 2 (NFP-T2) licence to enable it construct telecommunications towers in Kenya (Base Station Towers). The application was approved on October 2013, and an offer letter dated 25 October 2013, was issued to the 3rd respondent. There was a fee to be paid, before a licence could be issued to the 3rd respondent. To his knowledge, the 3rd respondent has not yet paid the prescribed fee and has therefore not been issued with the NFP-T2 licence. The 4th respondent has thus refuted the claims of the petitioner that it did illegally issue a licence to the 3rd respondent. Mr. Kirui has averred that the commission did not act unconstitutionally nor has it violated the petitioner's right to a clean and safe environment and neither did it fail in its duties by merely considering the application submitted by the 3rd respondent. To the affidavit, was annexed the application of the 3rd respondent and the offer letter.

14. The 5th respondent, the County Government of Nakuru, filed a replying affidavit sworn by Joseph M. Malinda, the interim Clerk of the County Assembly of Nakuru. He has explained that the County Government has a statutory mandate of undertaking and ensuring proper development planning and

control of land and buildings within the county. He has averred that on 30 September 2013, the 5th respondent received an application for development permission dated 11 September 2013, from the 3rd respondent. The application also sought an extension of user of the 1st respondent's premises. There were no objections received from the general public, and having been satisfied that the application was proper, the 5th respondent did approve the development. He averred that the 5th respondent exercised due diligence and care in ascertaining the contents of the 3rd respondent's application. He has denied that the 5th respondent violated the petitioner's rights.

15. The 6th respondent, filed a replying affidavit sworn by Christopher Muchiri, its managing director. He has averred that the 6th respondent is licenced by NEMA as a firm of experts. He explained that the company was contracted to carry out an extension of user and an EIA of the proposed project. They did apply for development permission and extension of user, and they did conduct an EIA of the proposed project. They sent a Field Officer, one Julius Macharia, who visited the site on 21 September 2013. It is averred that he did consult with the neighbours and public participation sheets were filled. He gathered that most of the houses in the area operated as guest houses and they therefore chose to have the views of the caretakers since they are the ones involved in the daily running of the houses. When they first met the petitioner, he indicated that he would stop the project just as he had done to a neighbouring school and that his opinion was biased ab initio. The project report was prepared and submitted to NEMA and a licence issued. It is his view that all matters raised by the petitioner have already been well covered in the project report and in the conditions for licencing of the project, and that if the petitioner was not satisfied, he could have contested the decision with the NET.

PART B : SUBMISSIONS OF COUNSELS

16. In his submissions, counsel for the petitioner submitted inter alia that the petitioner's right to a clean and healthy environment has been violated by all the respondents. He submitted that the 1st respondent's right to use his property as he wishes must be done in a manner that will not interfere with his neighbours' right to also enjoy their property. He submitted that the facts set out in the petition, show a breach of duty of care by the 1st respondent. He relied on the case of ***Kenya Breweries Ltd vs Godfrey Odoyo (Civil Appeal No. 480 of 2002) (2005 eKLR)***. He submitted that the 2nd respondent did not follow due diligence before issuing a licence to the 3rd respondent. He submitted that NEMA cannot rely on their experts alone and if they do so, they must be held vicariously liable for their acts or omissions. He relied on the case of ***M (a minor) vs Amulega & Another, Civil Case No. 5837 of 1992 (2001) KLR 424***. He submitted that NEMA must take responsibility since the EIA licence was obtained on the false and misleading information in the 6th respondent's report. He further submitted that the 2nd respondent did not follow due diligence to ensure that the construction conditions were followed. He pointed out that in the reply of the 4th respondent, the 4th respondent has stated that the 3rd respondent has no licence. He submitted that through the admission of the 4th respondent, the 3rd respondent is transmitting signals illegally and without their approval yet the 4th respondent has done nothing about it. He submitted that since the 4th respondent is negligent of its duty of care owed to the petitioner, and the public, of bringing down the illegal masts, it should be liable for any damage that may arise now or in future to the petitioner.

17. He submitted that the change of user of the 1st respondent's premises did not follow due process and was in contravention of Section 41 (3) of the Physical Planning Act, Cap 286. He submitted that the said section requires involvement of immediate and adjacent neighbours which was not the case. He also submitted that there was violation of Section 59 (1) of EMCA . He relied on the case of ***Peter Bogonko vs NEMA (2006) eKLR*** to emphasise the need for public participation. He pointed out that the 6th respondent has admitted that it sought opinions of caretakers instead of the owner of the property or the person most affected by the mast. He also raised issue that the location of the project on the ground is different from what is stated in the plans and that the erection of the station at the wrong site has completely jeopardized the ambient environmental standards that the petitioner and neighbours have set in the area. He submitted that the mast has blocked the petitioner's view of Lake Nakuru and the National Park thus denying him and his family, the use and quiet enjoyment of their property. He submitted that this mast has also devalued the petitioner's residence and limited development in his land.

18. Counsel for the 1st and 5th respondents, submitted that the petitioner was not excluded from public

participation. He relied on the cases of ***Moses Munyendo & 908 Others vs Attorney General & Another (2013) eKLR*** and ***Consumer Federation of Kenya (COFEK) vs Public Service Commission & Another (2013) eKLR*** on what public participation entails. He submitted that the 6th respondent went to the ground to interview persons but the petitioner declined to give an input. He further submitted that the 5th respondent placed an advertisement in the Star Newspaper, inviting comments from the public, which public, included the petitioner. He submitted that there has been no violation of the petitioner's rights to a clean and healthy environment. He stated that the noise emanated by construction is over and done with, and that the expert report shows that the electromagnetic emissions cannot affect the residents, and further, that there has been no evidence that the emissions may cause harm to the residents. He submitted that the petitioner cannot demonstrate for a fact how the mast will infringe on his right to a clean and healthy environment.

19. He submitted that the petitioner has decided to clothe his claims using constitutional provisions to give the appearance that they are vital when they could have been solved without reference to the constitution. He relied on the case of ***Judy Watiri Wambugu vs Chief Land Registrar & 7 Others (2014) eKLR*** as authority that where a matter can be resolved without recourse to the constitution, the constitution should not be involved at all. He submitted that the issues raised by the petitioner could be well and effectively determined in a claim of nuisance which is a simpler and more appropriate claim than the current suit by the petitioner, and the 1st respondent would be liable for any harm that is caused by the mast. He submitted that with regard to the decisions to issue licences to the 3rd respondent, the petitioner should have sought orders of judicial review to quash these decisions. He was of the view that this case is an abuse of the process of court and relied on the cases of ***Fatuma Mohamed Sharif vs Principal Magistrate Court Kajiado & 2 Others (2014) eKLR***; ***Dr. Kiama Wangai vs John N. Mugambi & Another (2012) eKLR***; and ***National Bank of Kenya vs Roseline Mary Kahumbu (2007) eKLR***. He also submitted that the petitioner is not only seeking reliefs that affect him, but is also asking the court for blanket orders that will affect the rights and responsibilities of other people who are not parties to this petition and who have no notice of the same, and the court cannot issue such orders. He was of the view that these are ambitious prayers that can only be deemed to test the courts and cause the respondents anxiety.

20. Counsel for the 2nd respondent submitted that the 2nd respondent (NEMA), considered the views of all interested parties and players, including the petitioner, in arriving at its decision which was made in public interest as opposed to the narrower interests of the petitioner. He submitted that it was deemed fit to issue an EIA licence after considering the EIA project report; that the petition is premature as no breach of licence conditions has been alleged; that the petitioners have not proved any irrationality, denial of a right, irregularity on part of the 2nd respondent; that if anything, the petition is premised on *mala fides;* that the petitioner has relied on reports that cannot pass the test of credibility or probative value; and that the petitioner seems to have taken upon himself the statutory role of NEMA. He asked that the petition be dismissed in the interest of sustainable development.

21. Counsel for the 3rd respondent submitted on three broad issues. First, it was the submission of counsel that this court has no jurisdiction. He submitted that the petitioner ought to have appealed the decision to grant an EIA licence to the NET as provided by the EMCA. He submitted that the petitioner may not use the constitutional avenue to pursue remedies that are already provided by statute and that the constitutional petition is an abuse of the court process. He relied on a dictum in the case of ***Re Application by Bahadur (1986) LRC (Const) 297*** where it was stated that the Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. He submitted that the petitioner should not be allowed to make a mockery of the constitutional avenue to press for reliefs that can fairly be adjudicated upon by a Tribunal established by statute. It was his view that the questions raised by the petitioner are questions that fall within the ambit of the NET. He submitted that the invocation of the constitutional procedure, while there is a parallel procedure for the determination of disputes from the decisions of NEMA, is an abuse of the process of court. He relied on the cases of ***Rich Productions Limited vs Kenya Pipeline Company & Another (2014) eKLR ; Isaac Ngugi vs Nairobi Hospital & Another (2013) eKLR; Joseph Owino Muchesia & Another vs National Environmental Authority & Others (2014) eKLR***; the decision of the Court of Appeal in Trinidad & Tobago in the case of ***Damian Belafonte vs The Attorney General of Trinidad and Tobago, (Civil***

Appeal No. 84 of 2004) ; and ***Diasta Investments Limited vs Nilesh Devan Kara Shah & 4 Others (2013) eKLR***. He submitted that the net effect of allowing the petition would be to have the EIA licence cancelled and to have the telephone mast demolished which is the same remedy that the NET would issue if it allowed the petitioner's case.

22. Secondly, counsel submitted that the 3rd respondent followed procedure before the commencement and during the implementation of the development project. He submitted that an EIA project report was prepared before the commencement of the project and an EIA licence issued after consideration of the same. He submitted that all conditions contained in the licence were fulfilled and that the petitioner cannot challenge the licence after the 60 day period given to appeal to the NET. He further submitted that no challenge has been made under the Physical Planning Act, i.e an appeal to the Liaison Committee , a further appeal to the National Liason Committee and a further appeal to the High Court.

23. Thirdly, counsel submitted that the 6th respondent sought the general views of the public which were noted in the EIA project report but that the petitioner deliberately chose not to participate. He submitted that the 6th respondent complied with its constitutional and statutory mandate to have the public participate in the proposed project and that the petitioner's rights to a clean and healthy environment had not been infringed. He submitted that the petitioner had failed to give particulars of the manner in which his constitutional right to a safe and clean environment were breached or threatened. He relied on the cases of ***Rich Productions Ltd vs Kenya Pipeline Company Ltd (supra)*** and the Court of Appeal decision in the case of ***Mumo Matemu vs Trusted Society of Human Rights & 5 Others (2013) eKLR***. He closed his submissions by stating that the petition is too open ended and speculative.

24. Counsel for the 4th respondent pointed out that the position of the 4th respondent is that it has not issued any telecommunications licence to the 3rd respondent, and since the sole ground upon which the petition was filed against the 4th respondent was that the 4th respondent has issued a licence to the 3rd defendant, the petition ought to be dismissed. He also submitted that there is no requirement to conduct a public hearing before issuing a telecommunications licence. He submitted that the petitioner has not stated the specific right under Article 42 of the Constitution which was violated. He relied on the case of ***Kenya Toner and Supplier Ltd vs Director of Weights and Measures & Others (2012) eKLR*** for the submission that where a respondent has adhered to the provisions of statute, the acts complained of cannot be deemed to be a violation of the petitioner's constitutional rights.

25. Counsel for the 6th respondent was also of opinion that this court has no jurisdiction and that the petitioner's matter lies squarely within the jurisdiction of NET, with an appeal moving to the High Court. He submitted that this court therefore does not have original jurisdiction on the matter and should down its tools. He relied on the case of ***The Owners of Motor Vessel "The Lillian S" vs Caltex Oil Kenya Limited (1989) KLR***. He further submitted that the EIA was done professionally and in compliance with statute. He was also of the view that prayer (d) of the petition takes the form of a class suit but that the case herein does not fall within the provisions of Article 258(2) of the Constitution.

PART C : ANALYSIS AND DECISION

26. From the pleadings and the submissions of counsel, it is my view that the following issues are up for determination.

(i) Whether this Court has jurisdiction to determine this matter.

(ii) Whether the constitutional avenue is available to the petitioner.

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

(iv) What orders are appropriate in the circumstances.

Issue 1 - Whether this court has jurisdiction to determine this matter.

27. The respondents argued that this court has no jurisdiction to try this matter. They held the view that if the petitioner was aggrieved by the issuance of an EIA licence to the 3rd respondent by the National Environmental Management Authority (NEMA), then his avenue ought to have been to appeal this decision to the National Environmental Tribunal (NET) which is established by Section 125 of the Environmental Management and Co-ordination Act (EMCA). They further argued that given that EMCA has provided for an appeal mechanism through the NET, then this court does not have original jurisdiction in the matter, but can only handle an appeal from the decision of NET.

28. It is imperative therefore that I set out the constitutional and statutory provisions that provide for the jurisdictions of the NET and the Environment and Land Court (ELC).

29. The 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.*

30. 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.

31. 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.

32. 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).

33. In compliance with Article 162(2) and (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.

34. It will be seen from the provisions of EMCA, which I have set out above, that the jurisdiction of the Tribunal is limited to hearing 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.

35. EMCA was passed in the year 1999, when the ELC did not exist. The ELC came into being after the Constitution of 2010, and was created by the ELCA which was assented to on 27 August 2011 and came into force on 30 August 2011. It will be observed that as provided by the Constitution at Article 162 (2) (b), the ELC has mandate to hear disputes relating to the environment and the use and occupation of, and title to, land. Section 13 (1) of ELCA, which elaborates the jurisdiction of the court, provides that the ELC has both original and appellate jurisdiction to hear **all** disputes relating to environment and land. Such disputes will include, as provided in Section 13 (2) (a), disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. Section 13 (2) (e) makes clear that what is set out in (a) to (d) above it, is not conclusive, and provides that the ELC can hear any other dispute relating to environment and land.

36. It will be seen from the above that the ELC has an extremely expansive jurisdiction. Indeed, in my view, as long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction. This jurisdiction is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or the rejection of an EIA licence. True, a person aggrieved by the decision has avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading filed in the ELC as a court of first instance. If the ELC feels that the matter can be determined by NET, it can refer the matter to NET for determination, and wait to sit on appeal over the decision of NET. But such deferral to NET would not be a statement that the ELC has no jurisdiction over the matter.

37. To press the point home, let me draw an analogy with the jurisdiction of the High Court, which many are accustomed to. Article 165 of the Constitution, provides that the High Court has original unlimited jurisdiction in civil and criminal matters. Let us assume that there is a money claim for Kshs. 100,000/=. Such claim can of course be heard by a Magistrates Court, established by the Magistrates Court Act, CAP 10 , Laws of Kenya. But if the litigant files such claim in the High Court, can it be argued that the High Court has no jurisdiction ? That certainly cannot be a valid argument, for the High Court has unlimited original jurisdiction, which inevitably will also include jurisdiction to hear that money claim of Kshs. 100,000/=. If it is minded to do so, the High Court can of course exercise its powers under Section 18 of the Civil Procedure Act, CAP 21, Laws of Kenya, and transfer the suit to the Magistrates Court for hearing and disposal, for the reason that the Magistrates Court has jurisdiction to hear the case, but such transfer will not be a holding that the High Court has no jurisdiction in the matter. It is the same with the ELC when dealing with a matter that could also have been filed in NET in the first instance. The ELC, if after taking all factors into consideration, is of the opinion that it will be prudent for the matter to first be heard by NET, can opt to defer the matter to NET, but as I said earlier, and I repeat, that would not be a statement that the ELC has no jurisdiction in the matter.

38. The reason why the ELC has such expansive jurisdiction, is because the ELC is a specialized court, specifically created to hear disputes over the environment and land. Its judges are persons experienced in matters relating to the environment and land, and are persons who possess the requisite knowledge and expertise, to handle even the most complex of matters relating to the environment.

39. Thus, if the dispute herein can be categorized as a dispute over the issuance of an EIA licence by NEMA to the 3rd respondent, this court has jurisdiction to hear the matter. But as drawn, and we should not lose focus, this case is actually a constitutional petition alleging that the rights of the petitioner to a clean and healthy environment as provided by Article 42 of the Constitution, have been violated by the various actions of the respondents. There can be no question that this court has jurisdiction to hear a dispute on whether or not the right of a person to a clean and healthy environment has been violated, for this jurisdiction, is explicitly set out in Section 13 (3) of ELCA. Indeed, this court has jurisdiction to hear any constitutional petition so long as such petition relates to the environment or land. This has been decided in various decisions including my own decision in the case of ***Mohammed Said vs County Council of Nandi, Eldoret E & L Petition No. 2 of 2013, (2013) eKLR***.

40. On the first issue, the question whether this court has jurisdiction to try this matter, I do hold that this court is properly seized with jurisdiction to try the suit, and I will now proceed to consider the merits of the case.

Issue 2: Whether the constitutional avenue is available to the petitioner

41. The case of the petitioner is that there is an infringement of his rights to a clean and healthy environment as provided by Article 42 of the Constitution. The said law is drawn as follows :-

> ***42.*** *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.*

42. If a person is of the view that his right to a clean and healthy environment is being violated, he has recourse to apply to court for redress. This is brought out in Article 70 of the Constitution which is drawn as follows :-

> ***70.*** *(1) If a person alleges that a right to a clean and healthy environment recognised 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.*

43. The petitioner has of course presented what he feels is a raft of legislative violations in his petition.

Inter alia, it is his view that the EIA licence was improperly issued as he was not consulted and so too the development planning permission. The manner in which he believes his constitutional rights were violated is captured in Paragraph 16 and 17 of his amended petition which is drawn as follows :-

> *16. The 1st, 2nd, 3rd, 4th, 5th, and 6th, respondents have violated the petitioner's rights by failing to afford him reasonable opportunity to submit oral or written comments, on the environmental impact assessment report, before allowing its approval and respectively issuing the 3rd respondent with an Environmental Impact Assessment Licence, a telecommunications licence and development permission for the project.*
>
> *17. Consequently the Petitioner's right to a safe, clean and healthy environment has been violated and/or not recognized by the 1st, 2nd, 3rd, 4th, 5th, and 6th, respondents.*

44. The respondents have responded to the claims of the petitioner, partly by arguing that this cannot be a proper constitutional petition. It is their view that the petitioner ought to have sought redress through the channels provided by statute, which do provide one with an avenue to challenge a decision of NEMA in relation to the issuance of an EIA licence, or a decision of the County Government, in relation to physical planning. Counsel for the 1st respondent argued that the case of the petitioner against the 1st respondent can indeed be a simple case of nuisance which can be determined in an ordinary suit. Various authorities were tabled to support this position of the respondents.

45. In the case of ***Fatuma Mohamed Sharif vs The Principal Magistrate's Court Kajiado & Others, Petition No. 67 of 2014***, the petitioner claimed that his constitutional rights were violated when the Kadhi's Court heard a succession case, which in the view of the petitioner, did not have the requisite jurisdiction. Mumbi J, in dealing with the matter, held that the proper avenue was to file an appeal or review the decision but not to file a constitutional petition. The court cited with approval the decision in the case of ***Kemrajh Harrikissoon vs Attorney General of Trinidad and Tobago (1979) WLR 63*** wherein it was observed as follows :-

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress …is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action…" .

46. In the case of ***Judy Watiri Wambugu vs Chief Land Registrar & Others, Nakuru High Court, Constitutional Petition No. 49 of 2012***, the petitioner claimed that her rights to own property were violated by the issuance of another title based on a parallel land register to other parties by the Land Registrar. Waithaka L J, was of the view that the matter could not be resolved solely by invocation of the constitution as this will involve statutory determinations based on the provisions of the land statutes. The petition was struck out and the petitioner granted leave to pursue his claim under private law.

47. There is also the decision of ***Joseph Owino Muchesia & Another vs National Environmental Authority & Others***. This was a constitutional petition alleging violation of the right to a clean and healthy environment. The complaint inter alia was that NEMA had issued an illegal EIA licence to the 2nd respondent, allowing the 2nd respondent to develop a sugar complex and factory. It was contended that the EIA licence was issued in contravention of the provisions of EMCA. The court was of the view that the matter could be well determined by following the laid down statutory provisions. The court cited with approval the determination of the Court of Appeal of Trinidad and Tobago in the case of ***Damian Belfonte vs The Attorney General of Trinidad and Tobago*** where it stated as follows (the court reviewing various authorities) :-

> " In Jaroo v AG, *the Board made the point that the right to apply to the High Court under Section 14 (1) of the Constitution should be exercised only in exceptional circumstances where a parallel remedy exists. There the Board repeated the warning by Lord Diplock in Harrikissoon vs AG that*

the mere allegation that a human right of fundamental freedom of the applicant has been or is likely to be contravened is not sufficient to invoke the constitutional jurisdiction of the court. If it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court and is being made : "solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involved no contravention of any human right or fundamental freedom" (quoting paragraph 19 of the decision in Harrikissoon vs AG) *then it can be said that there was an abuse of process.* "

48. The court in further reviewing its authorities continued as follows at paragraph 19 of the decision :-

" The opinion in Jaroo has recently been considered and clarified by the Board in AG v Ramanoop ((2005) UKPC 15). *Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process* <u>*where there is an available common law remedy*</u>*. In their lordship's words : " Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical,* <u>*but by no means exclusive*</u>*, example of such feature would be a case where there has been an arbitrary use of state power. (emphasis added)."*

49. A review of the above decisions will make one conclude that courts are usually averse to hearing matters, couched as constitutional petitions, where in essence, what is complained of is adequately covered by the common law or by statute. I have no problem with that position. It is not however a position that is cast in stone, for where there are unique circumstances (or "features" to use the words in the case of ***Damian Belafonte),*** the court can proceed to determine the case, and if convinced that there are constitutional violations, hold in favour of the petitioner. I do not think that it is a mandatory position, that where there are alternative remedies under statute, or other procedure under statute, a court can never entertain a constitutional petition. The court has to weigh the matter, and in its discretion, make a decision whether or not to proceed with it, or refer the litigant to the other existing remedies.

50. In the instance of our case, I do think that there are unique features which make me exercise my discretion in favour of entertaining the petition, despite there being alternative remedies and procedures under statute. First, I note that the petitioner's quarrel is against multiple persons and state institutions. He has complained against NEMA, the County Government and the CCK (now Communications Authority of Kenya (CAK)). I do not think that given the multifarious nature of his complaint, the issues raised could be addressed comprehensively in any single forum, unless that forum is the court. The petitioner could have filed the complaint against NEMA to the NET, but that would not have addressed his complaint against the County Government on account of physical planning. There was avenue to complain against the physical planning approval to the Liaison Committee, but that would not have addressed his complaint against NEMA. Neither of these forums could address the complaint against CCK, which could probably only have been addressed in court or at the Communications Appeals Tribunal established under Section 102 of the Kenya Communications and Information Act, CAP 411A, with the latter not having jurisdiction to deal with the complaint against NEMA or the County Government. Given this wide ranging complaint that encompassed several state players and individuals I cannot fault the petitioner for coming to court.

51. It is another matter whether his case is one that was fit to be filed as a constitutional petition. A violation of the constitution is of course alleged, but probably the dispute could have just as well been entertained as an ordinary suit. But I see no harm in the petitioner placing his grievances through the avenue of a constitutional petition, and I am indeed ready to entertain this suit as a constitutional petition. In my view, exceptional circumstances, as I have pointed out earlier, do exist. In any event, if I am to fail to address the issues in this petition, the recourse of the petitioner will be to file a new suit, which I will still have to hear. It is now already close to two years since this suit was filed. I do not see the need to postpone what can be handled now for later, merely because there are question marks raised by the

respondents on the procedure that was adopted to hear the dispute, but which procedure causes no harm to any party. I am guided by Article 159 of the Constitution which requires the Court to do justice without undue regard to procedural technicalities. I do not wish to be counted as being among those who are ready to sacrifice substance for procedural technicalities especially when matters touching on the protection of the environment are concerned. Matters of environment protection call for urgent attention, which I am unable to hold pending, merely because of possible procedural technicalities. In this case, serious issues touching on statutory bodies who have the mandate to safeguard the environment and to safeguard critical matters that have been entrusted to them by Kenyans, have arisen and justice requires that they be addressed here and now.

52. In summary, on issue 2, the constitutional avenue is available to the petitioner.

Issue 3 : Whether there has been a violation of the petitioner's constitutional rights.

53. The petitioner has complained about the project and various actions or omissions by several institutions and persons. It is his view that the actions of the actors herein led to a violation of this rights. I will therefore need to assess the acts complained of and make a decision whether the same constituted a violation of the rights of the petitioner. I will start with the project itself which impacts on the conduct of the 3rd and 4th respondents.

(a) The Telecommunications Project and the Conduct of the CCK (now CAK)

54. The project is a telecommunications network project. It is the law, and it has been laid out by the 4th respondent, that before proceeding to embark on such a project, the proponent must have a network licence granted by the CCK (now Communications Authority of Kenya or CAK). However, the 3rd respondent, has no licence and has no business in the first place putting up such a mast. I am appalled that despite now being aware of the fact that the 3rd respondent has no licence, the 4th respondent has not deemed fit to take any action against the 3rd respondent; neither has it taken any steps to pull down the mast or at least stop the operations of an unapproved base station which has been put up without the requisite licence.

55. The requirement that one needs to have a licence before operating a telecommunication system is found in Section 24 of the Kenya Information and Communications Act, which is drawn as follows :-

> *S. 24 Requirement of licence.*
>
> *(1) No person shall—*
>
> ***(a) operate a telecommunication system; or***
>
> *(b) provide any telecommunication services, except in accordance with a valid licence granted under this Act.*
>
> *(2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment to a term not exceeding five years, or to both.*

56. The 3rd respondent was required to pay a fee to be allowed to operate as a network provider. It has not paid such fee, yet it is in operation. That is impunity. I find it interesting that in its description, the 3rd respondent has self titled itself as a *"leading network provider in Africa"*. If it operates in the manner that has been disclosed in this petition, then it does not deserve such designation. You cannot deserve the title of *"leading network provider"* when you have no licence in the first place. Indeed, its operations probably need to be investigated by the CAK and if an offence has been committed, prosecution should follow. It still baffles me that the CAK has done nothing despite being entrusted by Kenyans to police the telecommunications sector, yet the provisions of Section 24 of the statute which I have set out above, are clear that one needs a licence before operating. How can a company which has no licence put up such

critical communications infrastructure ? In fact in this day and age, when the country is fighting terrorism, this can be a serious matter of national security. I am certainly not impressed by the conduct of the 4th respondent. It has allowed the 3rd respondent to operate without a licence. Doing so has also denied Kenyans revenue which is badly needed in our economy.

57. The long and short of it is that the 3rd respondent had no business putting up the telecommunications mast without first having a licence to do so. That is a mast that has been placed illegally and with the utmost impunity. The 4th respondent has no choice but to commence investigations on how this could happen and take the necessary remedial action.

58. I will next go to the development permission granted by the 5th respondent.

(b) The Planning Permission issued by the 5th respondent.

59. It was explained by the 3rd and 6th respondents that an application for extension of user of the 1st respondent's property was made. I have seen the application, which was prepared by the 6th respondent on 30 September 2013. I have also seen the advertisement for extension of user which was placed in the Star newspaper of 28/29 September 2013. That advertisement allowed for 14 days to any person who wished to present objections to the proposed extension of user. The development permission was granted on 9 October 2013, which of course, was before the lapse of the 14 days invited to the general public to comment. I do not see how it can be said that the public was allowed to participate, when the time given for them to present their objections, was not allowed to run before the planning approval was granted.

60. It has also not been demonstrated by the 1st, 3rd, 5th and 6th respondents, that a notice pursuant to Section 41 (3) of the Physical Planning Act , was issued to the petitioner or to the public. That provision is drawn as follows :-

> *S. 41 (3) Where in the opinion of a local authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title deed of property, the local authority shall, at the expense of the applicant, publish the notice of the application in the Gazette or in such other manner as it deems expedient, and shall serve copies of the application on every owner or occupier of the property adjacent to the land to which the application relates and to such other persons as the local authority may deem fit*

61. It cannot be denied that the project in issue had important impact on contiguous land and that it was a development that did not conform to the terms of the title deed (for that is the very reason that an extension of user was being sought). It is clear from the above provision that publication in the Star newspaper was not good enough. Copies of the application needed to be served upon every owner or occupier of adjacent property. This was not done. The petitioner was therefore never informed, in the form required by Section 41 (3) of the Physical Planning Act, that his neighbor, the 1st respondent, intended to extend the user of his property, in a manner that would affect the petitioner's property. It cannot therefore be argued that the petitioner was granted opportunity to participate in the decision, of whether or not, the user of the neighbouring land should be changed.

62. The procedure under the Physical Planning Act was clearly flouted.

(c) The EIA Licence.

63. The EIA licence was issued on 28 November 2013 pursuant to an EIA project report. It however seems as if development on the site had proceeded before the issuance of this licence. I say this, because there seems to have been developments ongoing, as at 20 November 2013, when the petitioner wrote to the County Director of Environment complaining of the development and complaining that a telephone base transmission mast was being raised. This was followed up by the petitioner's letter of 27 November 2011, where he again complained that no EIA had been carried out, and if any was carried out, no notice had been given to the neighbours, him included. The respondents have not contested the averments of the

petitioners and have not demonstrated that the development was only begun after the EIA licence was issued. To me, there appears to have been a violation of Section 58 of EMCA which provides that no projects should be commenced without at least there having been tabled an EIA project report.

64. Be as it may, the main complaint is that the petitioner was never consulted. This has of course been countered by the 3rd and 6th respondents who averred that they did try to consult the petitioner but he declined to give any comments. There is a material discrepancy of fact with one party stating that he was never consulted and the other party stating that the petitioner was consulted. That said, what was presented was an EIA Project Report and not an EIA study report. The project report, according to Section 58 of EMCA is a precursor to the EIA study report. It is upon being satisfied, after studying the project report, submitted under subsection 58 of EMCA, that the intended project may, or is likely to have, or will have, a significant impact on the environment, that NEMA will direct the proponent of the project to conduct an EIA and present an EIA study report. This was of course never done; I do not know why, but probably NEMA thought that the project did not have significant impacts on the environment or that sufficient mitigation measures had been taken. That was their prerogative, but on my part, I do think that it was important that an EIA study report be commissioned. This is because the project was clearly out of character with its surroundings and it cannot be argued that it had a significant impact on the environment.

65. I have not found a precise provision in EMCA which requires the participation of the neighbours for the preparation of the project report. But good practice demands that there be public participation. This is so both locally and internationally. The Rio Declaration on Environment and Development (1992) at Principle 10 emphasizes the need for Public Participation. It is drawn as follows :-

Principle 10

> *Environmental issues are best handled with 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 processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

66. Principle 10 above is echoed in the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters. Part II thereof which comprises of Guidelines 8 to 14 is drafted as follows :-

Guideline 8

> *States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned (The "public concerned" being defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest.) should be informed of their opportunities to participate at an early stage in the decision-making process.*

Guideline 9

> *States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.*

Guideline 10

States should ensure that all information relevant for decision-making related to the environment is made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.

Guideline 11

States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

Guideline 12

States should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any such review process to the extent that circumstances permit.

Guideline 13

States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment.

Guideline 14

States should provide means for capacity-building, including environmental education and awareness-raising, to promote public participation in decision- making related to the environment.

67. It is apparent from the above that the State, through its relevant organs, has the duty to ensure that the persons most affected by the project are consulted and this inevitably includes neighbours.

68. The 6th respondent was aware of this important need and proceeded to interview some persons for their views. But to me, the persons interviewed were not the ones most affected by the project. It is admitted that they were caretakers of homes or guest houses. None was a property owner, or at least tenant, of the premises to be most affected. That cannot be defined as public participation. It is critical that the neighbours of any project be specifically sought for their views, in so far as an EIA project report, or an EIA study report, is concerned. Their input is significant. If none wants to participate, a diligent EIA expert will include that in her report, giving the manner in which the person was sought and how and when he declined to give comments. Although there is contention as to whether or not the petitioner was sought out, I will give him the benefit of doubt, for there is no mention in the EIA project report, that he was actively sought and he declined to comment or could not be reached for comment. The purported public participation was done casually and was probably deliberately evading the opinions of immediate neighbours.

69. Public participation for purposes of EIA ought to be real and actual. It has a critical role, for the persons to be most affected, may offer alternatives to the project or propose important mitigation measures. It is not a window dressing exercise, and neither should it be looked at as a mere formality, aimed only at ticking the boxes. I am surprised that NEMA could rubberstamp such a slapdash job, at least in so far as participation of the persons most affected by the project was concerned. It was the duty of NEMA to ensure that proper public participation was done. On seeing the project report, NEMA ought to have referred the proponents of the project back to the ground for proper public participation. This was not done and NEMA clearly slept on the job.

70. What all the above presents to me is that the respondents were hell bent on proceeding with the project, whether or not there were objections to it, and in fact, it seems to me, that the respondents deliberately wanted to avoid engaging the persons whom they thought would be opposed to the project. That is not how to conduct public participation. In fact the views of the person who is most likely to

oppose the project are the most important views, for it is that person who will bring out the negative environmental impacts that the project is likely to bring forth, so that concrete mitigation measures are considered early enough.

71. I hold that the EIA project report was conducted without due regard to the views of the neighbours and that the petitioner was not consulted.

(d) Was there a breach of Article 42 of the Constitution ?

72. The petitioner argues that his rights to a clean and healthy environment have been infringed. This of course has been disputed by the respondents. However, there is no contention that a base station receiver has been developed on the property in issue and from my analysis above, the said station has been set up in complete contravention of the law. I have also held that there was no adequate public participation before the project was set up. The fact therefore remains that the base station is illegal. It may be that if the law was followed, the project would have been disallowed, or allowed with some modifications. It may also be that the project would have been allowed to continue as it is now. But all that is conjecture because the process was not followed.

73. I am prepared to hold that where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project is given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment. It is informative that one of the principles of environmental law is the precautionary principle. The precautionary principle applies where there is uncertainty as to whether a matter has potential to cause environmental harm. The approach in the face of such uncertainty is to exercise caution, and where possible, stop the activity that is suspected to have potential to cause environmental harm. The burden of proof in instances where the precautionary principle is invoked, in my view, ought to rest upon the proponent of the project, who needs to demonstrate that the project at hand is not harmful to the environment or that the harm to the environment is tolerable, owing to the greater public benefit, especially where there are no better alternatives to the project. It is important to weigh the risks and benefits of a particular transmitter station before confirming that its presence is safe to the environment. This was not done in our case.

74. Apart from the particular base station in issue in this case, this litigation has brought to fore the lacuna in the law with regard to the regulation of telecommunication base transmitter stations. This petition raises significant questions on how we are to deal with telecommunication base transmitter stations. It is beyond argument that telecommunication base transmitter stations have potential to cause harm to the environment and to people. They may have a negative visual impact on the environment and propensity to harm, through emissions of electromagnetic waves. They are otherwise necessary if we are to sustain communication, at least according to the current technological levels. They are a phenomena that will be with us and we need to find a way of accommodating them. That is where regulation is important, starting with regulations from the players; in our case, the most significant being NEMA and CAK.

75. EMCA however does not have provisions for base transmitter station regulations. Section 58 of EMCA provides for at least a project report to be provided for the certain projects set out in the Second Schedule and where such project has a significant impact on the environment, a full EIA should be done. The Second Schedule lists various projects but you will not find included in the second Schedule a Base Receiver Station. This is not particularly surprising, because EMCA is a 1999 statute, when telecommunication was not at the level that we see today. The base receiver station may probably not have been an issue in 1999, but it certainly is an issue now, and it is time that EMCA in general, and the Second Schedule in particular, was looked at so that the same can capture the evolving technological advances and projects which have impacts on the environment including telecommunication base receiver stations and masts.

76. The petitioner did mention the CCK Guidelines for Siting of Communications Infrastructure, Towers

(masts) and Safe use of Mobile Telephones and Other Wireless Terminals, and was of the opinion that these have been flouted by the respondents. I have tried to find these Guidelines but have not seen them. What I have seen is that the said Guidelines are in draft form, prepared in the year 2007 for public participation. Public participation was closed on 23 August 2007 *(See http://www.ca.go.ke/index.php/public-consultations as at 4 November 2015)* . I have not seen these Guidelines adopted as either regulations or absorbed within legislation. To me, they appear to still be in draft form and are unapproved, at least from my research. If they have been passed, then this has not been visible to me. The CAK has the mandate to control the telecommunications sector, and this inevitably must include control of where base transmitter stations may be put up, and what processes and safeguards to the environment need to be maintained. As I stated earlier, I have not seen any regulations from CAK on this issue.

77. Time is ripe for both NEMA and CAK, to sit with all stakeholders and provide regulations for the setting up and the maintenance of telecommunications base receiver stations and masts. The current lacuna in the law cannot be allowed to continue as there is potential that the same may lead to degradation of the environment as seems to me to have been the case herein.

Issue 4 : What orders are appropriate in the circumstances ?

78. I had set out at the beginning of this judgment , the various orders sought by the petitioner. I have considered the same.

79. On whether or not the petitioner is entitled to a declaration that his rights to a clean and healthy environment have been infringed, I allow the same on the reasoning of my discourse above. But there are more far reaching prayers that have been asked for.

80. The petitioner has asked for an order to compel the 4th respondent to immediately suspend the operation of all base transceiver mast stations operated by the 3rd respondent pending forensic audit on procedural issues surrounding the legality of their construction. I think the petitioner has a point, considering that it has emerged that the 3rd respondent does not have a licence to operate, which is acknowledged by the 4th respondent. I hereby direct the 4th respondent to commence investigations as to the operations of the 3rd respondent and determine whether the 3rd respondent has undertaken other similar or related projects without a licence and proceed to take remedial action in accordance with the provisions of the Kenya Information and Communications Act.

81. The petitioner further asked for orders to compel the 2nd respondent to deregister the 6th respondent from its register of individual experts pending forensic investigation on each environmental impact assessment study that the 6th respondent has undertaken. On my part, I wish to reprimand the 6th respondent for its rather casual approach when undertaking the EIA project report which is the subject of this litigation. But without any other complaints, I feel that it will be going too far to suspend their operations, or to make an order that they be deregistered. However, NEMA is free to investigate any complaints raised against the 6th respondent and is also free to undertake any disciplinary action against the 6th respondent.

82. The petitioner asked for orders to have NEMA and CAK sanction an independent public survey and study of the effects on the surrounding environment of all mobile telephone base transmission masts constructed and operated within Kenya. I hesitate to issue such a far reaching order, without evidence that the existing base transmitter stations constitute a risk to the environment. But as I mentioned earlier, I have not seen any provision in statute that regulates the siting of telecommunication base stations. I do not know, whether there is a register or map of where the base transmitter stations have been sited. I think it is important that there be clear regulations on the construction and maintenance of telephone base transmitter stations and/or masts including where they can be sited and what environmental mitigation measures ought to be taken. I also think that it is important for there to be a register of such base stations so that it can be known how many they are, and where exactly they have been sited. I therefore issue orders compelling NEMA and CAK to issue regulations on the siting, construction and maintenance of telephone base receiver stations and/or masts and further compile a map or register of existing telephone

base transmitter stations. I believe that a six months period is more than enough for this exercise.

83. The petitioner asked for orders to cancel the EIA licence, the telecommunications licence and the development permission issued herein. There is no telecommunications licence to cancel as the 3rd respondent has none, and I have already issued appropriate orders to address this. On the other two licences, I have already held that there was impropriety in the manner in which the EIA licence and the development permission were granted. I have little option but to cancel the two licences issued by NEMA and the County Government of Nakuru. They are hereby cancelled.

84. The petitioner has asked that the base transmitter station which is the subject of litigation be dismantled. I have held that the base station is a potential risk to the environment. I would have been prepared to issue an order that a fresh EIA be conducted, and if found safe and that appropriate mitigation measures have been undertaken, allow the mast to remain in place. However, the mast has been put up and is being operated by an entity that has no licence to do so. I will be perpetuating an illegality if I am to allow the base station to remain in place. The base station must be pulled down and the environment restored to the manner that it was before the illegal mast was put up. I therefore issue an environmental restoration order, ordering all the respondents to jointly ensure that the site in dispute is restored back to the manner that it was before the base transmitter station was constructed. I direct that this be done within 30 days.

85. The petitioner has asked for general damages for violation of his right to a clean and healthy environment. On this, I will award a token Kshs. 10,000/= jointly against the respondents in recognition that his rights were duly infringed.

86. The petitioner will also have the costs of this petition jointly against the respondents.

87. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 4th day of November 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr Yoni holding brief for Ms. Moraa of M/s Konosi & Company Advocates for the petitioner.

Mr Gatonye of M/s Mirugi Kariuki & Company Advocates for the 1st & 5th respondents

Ms Kithinji holding brief for Mr. Gitonga of NEMA for 2nd respondent

Ms Ontiti holding brief for M/s Coulsen Harney & Company Advocates for 3rd respondent

Ms Kamar holding brief for Mr. Inyangu of M/s Ameli Inyangu & Partners Advocates for 4th respondent

No appearance on part of M/s Stanley Henry Advocates for 6th respondent.

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU