



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CONSTITUTIONAL PET NO. 16 OF 2020**

**LYDIA KAGUNA JAPHETH.....1<sup>ST</sup> PETITIONER**

**LUCY ADHIAMBO NYALWANGA.....2<sup>ND</sup> PETITIONER**

**HAMDAN IQBAL BAYUSUF.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**MBESA INVESTMENTS LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MOMBASA.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> Respondent, Mbesa Investment Limited, has raised a preliminary objection dated 22<sup>nd</sup> July, 2020 as follows:

**1. The court has no jurisdiction in the sense that the issues raised in the plaint are issues to be determined before the National Environment Tribunal.**

**2. That the suit violates the provisions of Section 129 and 130 of the Environmental Management and Coordination Act, 1999 (EMCA).**

**3. From the foregoing, the suit is bad in law and an abuse of this Honourable Courts process and ought to be struck out with costs.**

2. Pursuant to directions given by the court and with the agreement of the parties' advocates, the Preliminary Objection was canvassed by way of written submissions. The 1<sup>st</sup> Respondent's advocates Messrs Balala & Abed Advocates filed their submission on 3<sup>rd</sup> August 2020 which were ably highlighted by Mr. Said while the petitioners filed theirs on 14<sup>th</sup> September, 202 through Messrs Oluga & Co. Advocates and ably highlighted by Mr. Oluga.

3. The 1<sup>st</sup> Respondent submitted that the objection being one challenging the jurisdiction of this court to entertain the petition pursuant to sections 129 and 130 of EMCA is on a pure point of law, thus satisfying the requirements in the famous case of **Mukisa Biscuits Manufacturing Co. Ltd. –v- West End Distributors Ltd (1969) EA** where Law J. A. stated:

**“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary objection, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration....”**

4. Counsel for the 1<sup>st</sup> Respondent also relied on the case of **County Government of Migori –v- I.N. B Management IT Consulting Limited (2019)eKLR** whereby the court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:

**“10. The jurisdictional point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law.**

That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme Court of Kenya Civil Application No.11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal –v- Judicial Service Commission & Others when in demystifying jurisdiction quoted from the decisions in Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangama –v- Hon. Atai Aidoko Aliuswan & 4 Others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows:

**“....It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity dead- and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost.....”**

5. The 1<sup>st</sup> Respondent’s counsel also relied on the celebrated case of **Owners of the Motor Vessel “Lillian S” –v- Caltex Oil (Kenya) Ltd (1989) I KLR** which dealt with a court’s jurisdiction on a matter before it and stated as follows:

**“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law does not have tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

6. Turning to the objection now before court, the 1<sup>st</sup> Respondent’s counsel submitted that the Environment and Land Court is established pursuant to the provisions of Article 162 (2) (b) of the Constitution of Kenya 2010 and Section 4 of the Environment and Land Court Act No. 19 of 2011 and its jurisdiction is provided by Section 13 thereof. That Article 169 (1) (d) of the Constitution of Kenya 2010 and Section 125 of EMCA establishes the National Environment Tribunal and Section 129 thereof provides for an appeals mechanism to an aggrieved person to approach the Environment and Land Court after a decision has been rendered by the Tribunal.

7. Counsel for the 1<sup>st</sup> Respondent relied on the Supreme Court decision on exercise of jurisdiction in the case of **Samuel Kamau Macharia & Another –v- Kenya Commercial Bank & 2 Others, Application No.2 of 2011** held as follows:

**“68. A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.....where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”**

8. Regarding a situation when a court is seized of a matter and statute provides for a procedure for redress before a litigation comes to court, the 1<sup>st</sup> Respondent’s counsel relied on the case of speaker of the **National Assembly –v- James Njenga Karume (1992)eKLR** where the Court of Appeal had this to say:

**“.....where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed.”**

9. The 1<sup>st</sup> Respondent’s counsel also relied on the decisions of the Supreme Court in the case of **Benard Murage –v- Fine Serve Africa Ltd & 3 Others (2015) eKLR** where it was held:

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

10. The 1<sup>st</sup> Respondent contends that the issues raised in the petition are within the province of the National Environment Tribunal exercising original jurisdiction under Section 129 of EMCA and this court will be seized of the matter when exercising its appellate jurisdiction under Section 130 of EMCA. That the petitioners jumped the gun in filing the present petition before this court instead of lodging their case before the Tribunal. The 1<sup>st</sup> Respondent’s counsel relied on the case of **Kibos Distillers Ltd & 4 Others –v- Benson Ambuti Atega & 3 Others (2020)eKLR** in which the Court of Appeal faced arguments on jurisdiction between the Environment and Land Court (ELC) and the National Environment Tribunal (NET) and rendered itself on the issues, inter alia, as follows:

**“In the instant matter, the learned judge citing the case of Ken Kasinga –v- Daniel Kiplagat Kirui & 5 Others (2015)eKLR, and other decisions from courts of coordinate jurisdiction held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings-that all that a litigant need to do is draft pleadings such that claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping. As aptly stated by the Supreme Court in Samuel Kamau Macharia and Another –v- Kenya Commercial Bank Ltd and 2 Others (supra), jurisdiction cannot be conferred by way of Judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust jurisdiction on a Tribunal or another institution by the constitution or statute. To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of the**

other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in speaker of the National Assembly –v- James Njenga Karume (1992)KLR where it was stated that where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Section 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction. A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claims is not a legally recognized mode for conferment of jurisdiction to any court or statutory body. In additional, Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayers no.s.1, 7, 8, 9 and 10 in the petition. It was never the intention of the constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.

In this matter, the key dispute in the petition before the trial court was whether the three appellants were polluting the environment and whether the appellants EIA Licences were lawfully procured. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal or the NECC. To this extent, I find that the learned judge erred in usurping the jurisdiction of the Tribunal and/or the NECC. I further find that the trial judge in usurping the jurisdiction of the Tribunal negated and rendered otiose the legal effect of Section 130 (5) of EMCA which makes the decisions of the ELC on appeal to be final. Having erred in exercising original jurisdiction in this matter, the learned judge erred in rendering superfluous and ineffectual the provisions of Section 130 (5) of EMCA.”

11. It was submitted that since the petitioners are challenging, among other complaints, the EIA License procured by the 1<sup>st</sup> Respondent, and seeking an injunction preventing the construction of the project by the 1<sup>st</sup> Respondent until a fresh EIA study is carried out with the participation of the petitioners, the appropriate forum for the petitioners is the Tribunal, and that whichever way the Tribunal renders its decision, the dispute will find its way to this court exercising its appellate jurisdiction. Consequently, the 1<sup>st</sup> Respondent submitted that this court has to down its tools and either strike out the petition or stay the same pending the determination of a complaint before NET.

12. It was the petitioners’ submission that the objection is baseless and must fail because it refers to ‘issues raised in the plaint’ and ‘suit’ while there is no ‘plaint’ in this case which is a constitutional petition. On the merits of the objection raised, it was the petitioners’ submission that the NET does not have the mandate to determine the following issues raised in the Amended petition: i) whether the 1<sup>st</sup> Respondent obtained approval for change of user and consolidation of its properties in an irregular and unprocedural manner and against the law; ii) whether there is breach of the petitioners’ right to a clean and healthy environment as guaranteed by Articles 42 and 70 of the Constitution of Kenya, 2010 and Section 3(1) of the Environmental Management and Coordination Act, 1999 and whether there is violation of the Petitioners’ right to public participation; iii) whether there is violation of the provisions of the Physical and Land Use Planning Act, 2019; iv) whether the 1<sup>st</sup> Respondent’s development is in violation of the conditions imposed on its Titles because the area of the buildings erected on the land exceeds 50% of the area of the land; v) whether the 1<sup>st</sup> Respondent’s development is in violation of the Integrated National Land Use Guidelines published by the National Environment Management Authority (NEMA), the 3<sup>rd</sup> Respondent herein; vi) whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents violated the petitioners’ constitutional right to fair administrative action under Article 47 of the Constitution of Kenya; vi) whether there was breach of the petitioners’ right to equal protection and equal benefit of the law as guaranteed by Article 47 of the Constitution of Kenya, 2010; and viii) whether there was breach of the petitioners’ right to public participation as guaranteed by Article 10 of the Constitution of Kenya.

13. The petitioners submitted that Section 129 of the EMCA is clear on what issues the NET should deal with and that the same do not include the said issues raised in the Amended Petition. Counsel for the Petitioners argued that the mere fact that issues pertaining to NEMA license have been raised does not mean that ALL the issues raised in the petition must be taken to the NET. It was submitted that the preliminary objection herein does not challenge the jurisdiction of this court generally, but challenges the jurisdiction of the court in the sense that the issues raised in this case are issues to be determined before the NET. Counsel for the petitioner argued that what that means is that if can be shown, and which contend they have done, that there are issues that do not fall within the mandate of the NET, then the Preliminary Objection must fail. Counsel for the petitioners submitted that there is no procedure in the constitution or any Act of Parliament which provides that the listed grievances should be dealt with by the NET and hence the case of Speaker of the **National Assembly –v- John Njenga Karume (supra)** is not relevant.

14. The petitioners’ counsel submitted that under Article 165 (3) (b) as read with Article 165 (5) (b) of the Constitution of Kenya, it is only the High Court and courts of equal status which have jurisdiction to determine a question of violation of constitutional rights, adding that under Article 162 (2)(b) of the constitution, this court is the one with jurisdiction to hear and determine disputes relating to the environment, the use and occupation of and title to land. That the same power is donated by Section 4 and 13 of the Environment and Land Court Act, 2011. The petitioners’ counsel submitted that no other institution has such jurisdiction and that the suggestion by the 1<sup>st</sup> Respondent that the question of whether the petitioners’ constitutional rights have been violated is an issue for determination by the NET is not anchored in any law, adding that NET has no jurisdiction.

15. On the reliance on the Court of Appeal decision in the case of Kibos Distillers Limited & 4 Others (supra) by the 1<sup>st</sup> Respondent to support its argument that this court has no jurisdiction, the petitioners’ counsel argued that in the case of Kibos Distillers Limited (supra), there was no determination by either the Environment and Land Court (ELC) or the Court of Appeal regarding the jurisdiction of the ELC in reference to the constitution. That in both their determinations on the issue of jurisdiction, both the ELC and the Court of Appeal relied solely on the provisions of EMCA, and that this was confirmed by the Supreme Court in the case of **Benson Ambuti Adega & 2 Others –v-**

Kibos Distillers Limited & 5 Others (2020) eKLR where it pronounced itself thus:

**“(43) In the ELC, the court held that it had the jurisdiction to hear and determine the petition, not by dint of powers conferred upon it by Article 162 (2) (b) of the constitution or sections 4 and 13 of the Environment and Land Court Act, 2011, but by dint of the provisions of the Environmental Management & Coordination Act, and more particularly, Sections 129 (1) and 130 thereof:.....**

**(44) On its part, the appellate court made a categorical finding that the court did not have the jurisdiction to hear and determine the petition, not pursuant to constitutional conferment of jurisdiction, but that the court did not have the mandate to determine issues that could have been adjudicated in other appropriate forums. On the issue of jurisdiction, which the petitioners argue is nonetheless a constitutional issues, the appellate court made no reference to the constitution, but relied on the provisions of Sections 129 (1), (3) 130, (130) (5) of the Environmental Management & Coordination Act in allowing the appeal.**

**(45) There was thus no determination made by any of the superior courts with regard to the jurisdiction of the Environment and Land Court in reference to the constitution. In both their determinations on the issue of jurisdiction, they relied solely on the provisions of the Environmental Management & Co-ordination Act, with peripheral reference to the constitution to buttress their decisions.”**

16. The petitioners submitted that although there may be legal remedies under Section 129 of EMCA, the petitioners are allowed to come to this court by reason of Article 70 of the constitution which allows person whose rights have been or are threatened to be violated to make an application to court for redress in addition to any other legal remedies. The petitioners’ counsel urged this court to invoke the court’s jurisdiction under Article 70 which is in addition to any other legal remedies that the petitioners may explore. In support of their submission that this court has jurisdiction, the petitioners’ relied on the decisions of this court in the cases of **Getrude Mukoya Mwenda & Others –v- Cabinet Secretary Ministry of Infrastructure Housing & Urban Development (2020)eKLR and Gedion Kibundu & 2 Others –v- Kenya Ports Authority & 3 Others (2020)eKLR. The petitioners also relied on the cases of Dominic G. Nganga & Another –v- Director General National Environment Management Authority & 4 Others (2020)eKLR, KM & 9 Others –v- Attorney General & 7 Others (2020)eKLR; and Patrick J. O. Otieno –v- Lake Victoria South Water Services Board (2020)eKLR.**

17. It is also the petitioners’ submission that the 1<sup>st</sup> Respondent has opted to apply the provisions of EMCA selectively. That while the 1<sup>st</sup> Respondent relies on Section 129 to argue that this court lacks jurisdiction, the 1<sup>st</sup> Respondent has conveniently ignored Section 3 (3) of EMCA which expressly permits a person who alleges that a right to clean and healthy environment has been or is likely to be denied to apply to the ELC for redress.

18. The petitioners further submitted that even if this court were to make a finding that the issue touching on the EIA license is to be determined by NET, the outcome of the preliminary objection would not be to strike out the petition, but to refer the dispute touching on the legality of the EIA License to the NET but retain the rest of the issues for determination by this court as per the guide given by the Supreme Court in the case of **Benson Ambuti Adega & 2 Others (supra)** where the Supreme Court stated as follows:

**“(53)....the superior court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issues with regards to the issuance of EIA licenses by the 4<sup>th</sup> Respondent to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the Constitution was protected.**

**(54) The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the petition, the appellate court should at that juncture issued appropriate remedies, which would have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination....”**

19. Thus, the petitioners submitted that if this court is inclined to making a finding that the issue pertaining to the issuance of the EIA license is one that should be determined by NET, the court should not strike out the entire petition but should refer the issue of EIA License to Net for determination while reserving the rest of the issue in dispute for the court’s determination. It was submitted that the preliminary objection should therefore not result into striking out of the entire petition.

20. The court has carefully considered the Notice of Preliminary Objection raised by the 1<sup>st</sup> Respondent and the rival submissions. The preliminary objection essentially challenges the jurisdiction of this court to hear and determine the issues before court. The 1<sup>st</sup> Respondent contends that the issues raised are to be determined before the National Environment Tribunal.

21. First, I should begin by dealing with a potentially dispositive procedural matter raised by Mr. Oluga for the petitioners; that the preliminary objection must fail because it challenges issues raised in the “plaint” and not the “petition”. Although the 1<sup>st</sup> Respondent did not make any submissions on that account, it is not in dispute that the proceedings herein were commenced by way of a petition and not a plaint. It was therefore technical mistake for the 1<sup>st</sup> Respondent’s counsel to refer to a “plaint” and not a “petition”. Nonetheless, Article 159 (2) (d) of the Constitution makes it clear that when called upon to administer justice, the courts or any other tribunals which exercise judicial authority, shall not be blindly enslaved by procedural technicalities. Whereas the constitution does not urge the courts to disregard procedural rules, the constitution is very clear that the courts should not have undue regard to procedural technicalities. I find that the preliminary objection raised by the 1<sup>st</sup> Respondent should not fail simply because it referred to a “plaint” instead of a petition. It is my view that the

reference to a plaint instead of a petition is a technical issue that does not go to the substance of the matter.

22. I will now turn to the substantive issue at hand. Two issues arise for my determination:

- i. Whether or not this court is clothed with jurisdiction to hear and determine these proceedings. If yes;**
- ii. What orders commends themselves to be given.**

23. In the case of **Owners of Motor Vessel “Lillian S” –v- Caltex Oil (K) Ltd (supra)**, Nyarangi JA held as follows:

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

24. The case before this court is a constitutional petition challenging the 1<sup>st</sup> Respondent’s development project in the 1<sup>st</sup> Respondent’s properties namely LR. NO.MN/I/5503, LR. NO MN/1/5504 and LR NO./MN/I/3412 which neighbour properties known as LR. NO.22048 (ORIGINAL NO.5501/1) Section I Mainland North, owned by the 1<sup>st</sup> petitioner, LR. NO MN/I/5502 in which the 2<sup>nd</sup> petitioner is a tenant, and LR NO.MN/I/3278 which is owned by the 3<sup>rd</sup> petitioner. It is the petitioners’ case that the 1<sup>st</sup> Respondent has obtained approval and license from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively for the said development. That the 1<sup>st</sup> Respondent obtained from the 2<sup>nd</sup> Respondent approval dated 25<sup>th</sup> September, 2015 for change of user and consolidation of the 1<sup>st</sup> Respondent’s properties, and obtained from the 3<sup>rd</sup> Respondent Environmental Impact Assessment License NO.NEMA/EIA/VC/1387 dated 14<sup>th</sup> May, 2020. It is the petitioners’ contention that the 1<sup>st</sup> Respondent’s development project is in violation of the constitution, statute and legal regulations and that the said development project is being undertaken in a manner that is in violation of the petitioners’ constitutional right, to wit; the right to clean and healthy environment as guaranteed by Articles 42 and 70 of the Constitution of Kenya, 2010 and Section 12 (1) of the Environmental Management and Coordination Act, 1999 and the right to public participation and give views in respect of a development that is likely to adversely affect the petitioners’ rights. The petitioners further contend that the Respondents are in violation of Article 10 of the constitution by failing to involve the petitioners who are the immediate neighbours in the project before granting the approvals and that the Respondents also violated Regulation 17 (1) & (2) and Regulation 21 of the Environmental (Impact and Audit) Regulations, 2013, as well as Sections 58 and 59 of the Environmental Management and Coordination Act. According to the petitioners, the development project is also being undertaken in a manner that is in breach and violation of the Physical Planning Act, the Physical and Land Use Planning Act, 2019, and the integrated National Land Use Guidelines.

25. In the amended petition dated 13<sup>th</sup> July 2020, the petitioners pray for the following orders:

- 1. A declaration be and is hereby made that the Approval for Change of User and Consolidation of the 1<sup>st</sup> Respondent’s properties LR. NO.MN/I/5503, LR NO. MN/1/5504 and LR.NO.MN/3412 dated 25<sup>th</sup> September, 2015 and issued by the County Government of Mombasa, the 2<sup>nd</sup> Respondent herein, under Reference Number TP.6/CCU/24/15 (0002293) is illegal, unconstitutional, null and void and is hereby revoked forthwith.**
- 2. A declaration be and is hereby made that Environmental Impact Assessment License No. NEMA/EIA/PSL9181 dated 14<sup>th</sup> April 2020 and Certificate of Variation of Environmental Impact Assessment License No. NEMA/EIA/VC/1387 dated 14<sup>th</sup> May 2020 both issued by the National Environment Management Authority, the 3<sup>rd</sup> Respondent are illegal, unconstitutional, null and void and is hereby revoked forthwith.**
- 3. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent’s development of 3 towers known as Towers A, B and C comprising of 126 units, swimming pools, underground water tanks, sea wall and associated facilities and amenities on properties LR. NO.MN/1/5503, LR NO.MN/1/5504 and LR. NO. MN/3412 in its current form is in breach of the petitioner’s constitutional rights, is illegal, null and void.**
- 4. An order of prohibition and permanent injunction be and is hereby issued to restrain the 1<sup>st</sup> Respondent, whether by itself, its Directors, shareholders, agents, assigns, employees and servants and/or whomsoever is acting under its authority or instruction, from undertaking and proceeding with the construction development of 3 towers known at Towers A, B and C comprising of 126 units, swimming pools, underground water tanks, sea wall and associated facilities and amenities on properties LR. NO. MN/1/5503, LR. NO.MN/1/5504 and LR. NO. MN/1/3412 and using the licenses and approvals impugned in this petition without procedurally obtaining fresh, proper and requisite approvals and licenses in accordance with the law.**
- 5. An order of prohibition and of permanent injunction be and is hereby issued to restrain the 1<sup>st</sup> Respondent, whether by itself, its Directors, shareholders, agents, assigns, employees and servants and/or whomsoever is acting under its authority or instruction, from commencing, undertaking and proceeding with the construction development of 3 towers known as Towers A, B and C comprising of 126 units, swimming pools, underground water tanks, sea wall and associated facilities and amenities on PROPERTIES LR. NO.MN/1/5503, LR. NO.MN/1/5504 AND LR NO.MN/1/3412 before undertaking fresh Environmental Impact Assessment Study with the full participation of the Petitioners herein and in a manner that is in conformity with the law and regulations.**
- 6. An order of mandamus and/or mandatory injunction be and is hereby issued to compel the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein to take measures to ensure that the 1<sup>st</sup> Respondent’s development on LR. NO.MN/1/5503, LR. NO.MN/1/5504 and LR. NO.MN/1/3412 is undertaken in a manner that conforms with the constitution, statute and regulations and in a manner**

**that does not violate and infringe on the petitioners' rights.**

26. Having carefully perused the petition herein and the supporting affidavits, it is clear to me that the petitioners are challenging the approval and license obtained by the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively. It is also not in dispute that the petitioners are alleging violations of various rights enshrined in the constitution, including the right to a clean and healthy environment provided for in Articles 42 and 70 of the Constitution and the right to fair administrative action and right to equal protection and benefit of the law as provided for under Articles 47 and 27 of the constitution. The petitioners further allege that the Respondents denied the petitioners the right to public participation which is provided for under Article 10 of the constitution. From the pleadings, it is manifestly evident that the petition is multifaceted and has presented issues some of which could be determined by the court while the others can effectively be determined by the National Environment Tribunal and the National Environmental Complaints Committee.

27. Under Article 162 (2) (b) of the constitution and Sections 4 and 13 of the Environment and Land Court Act, this court has the mandate to hear any matter related to the environment and land, including constitutional petitions such as the instant one. On the other hand, the National Environment Tribunal is established by Section 125 (1) of the Environmental Management and Coordination Act, (EMCA) and its jurisdiction is set out in Section 129. Section 129 of EMCA provides inter alia, that any person who is aggrieved by the grant of a license or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, or the imposition of any condition, limitation or restriction on a licence, or the revocation, suspension or variation of a licence under the Act or regulations made thereunder, may within sixty days after the occurrence of the event against which that person is dissatisfied, appeal to the National Environment Tribunal (NET). The Tribunal may confirm, set aside or vary the order or decision in question. The Tribunal may also issue orders maintaining the status quo of the matter or activity which is the subject of appeal before it, until the appeal is determined. Appeals on the decisions of the Tribunal lie to this court under Section 130 of EMCA.

28. In the instant case, the 1<sup>st</sup> Respondent has submitted that the court has no jurisdiction to determine the issues raised in the petition herein, and therefore prays that the suit be struck out. On their part, however, the petitioners have submitted that this court has jurisdiction and that the Tribunal does not have the mandate to determine the issues raised in the petition. The petitioners have urged this court to follow its holding in earlier decisions in the case of **Getrude Mukoya Mwenda & Others –v- Cabinet Secretary Ministry of Infrastructure, House & Urban Development (supra)** and the case of **Gedion Kibundu & 20 Others –v- Kenya Ports Authority & 3 Others (supra)**. In the two cases which this court decided on 23<sup>rd</sup> January, 2020 the court made a finding that unlike the Tribunal, this court is the only one mandated to hear and determine application for redress for a denial, violation or infringement of, or threats to, rights relating to environment and land.

29. The court has however noted that the Court of Appeal and the Supreme Court have since made findings on jurisdiction on petitions that are multifaceted and have issues some of which could be determined by the court while the others can be determined by the Tribunal. In the case of **Benson Ambuti Adegwa & 2 Others-v- Kibos Distillers Limited & 5 Others (2020)eKLR**, the Supreme Court of Kenya in a decision which was delivered on 4<sup>th</sup> August, 2020, stated as follows:

**“49. It would therefore seem that the superior court, determined, quite incorrectly, that it had power or jurisdiction to hear and determine the petition, which although raised issues that were within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have been effectively determined by another legislatively established tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee.**

**50. The trial court, as did the appellate court, correctly determined that the petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two superior courts was were the trial court then went further to determine that these multifaceted issues could be determined by the court “in the interests of justice.” It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the petition.....”**

30. The Supreme Court went on and stated as follows:

**“53....the more favourable relief that the superior court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regard to the issuance of EIA licenses by the 4<sup>th</sup> Respondent to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The court should have reserved the issues pending the outcome of the decisions of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the constitution was protected.”**

31. In light of the above, and being guided by the above decision of the Supreme Court which no doubt is binding on me, it is my finding that the outcome of the preliminary objection would not be to strike out this petition. It is my finding that this court has jurisdiction to determine the constitutional issues raised in the petition that is, the rights to a clean and healthy environment, the right to fair administrative action, the right to equal protection and benefit of the law and the right to public participation. It is also my finding that the issue touching on the EIA license ought to be determined by the NET. Accordingly, I hereby refer the dispute touching on the legality of the EIA license to the NET but retain the rest of the issues for determination by this court alongside any matter that may be appealed, if at all. In the result, the preliminary objection raised by the 1<sup>st</sup> Respondent seeking to strike out the suit is hereby dismissed with no order as to costs.

32. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 19<sup>th</sup> day of October 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**