



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. E06 OF 2020

IN THE MATTER OF

ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS

UNDER ARTICLES 2, 10, 27, 28, 40, 43, 47 AND 70 OF THE CONSTITUTION

AND

IN THE MATTER OF RIGHTS TO PROTECTION, CONSERVATION AND

SUSTAINABLE USE OF TIVA RIVER IN KITUI COUNTY

BETWEEN

JOHN MUTHUL.....1ST PETITIONER
RIXION KYALO LINA.....2ND PETITIONER
VICTOR MULWA NZILU.....3RD PETITIONER
FRANCIS MALUKI MUTIA.....4TH PETITIONER
CHRISTOPHER KONDO KATHUMO.....5TH PETITIONER
GEORGE KIVUSYU IKUTHU.....6TH PETITIONER
NGOMO MWANZIA.....7TH PETITIONER
ABEL SALU MUMU.....8TH PETITIONER
JACOB MAVUSI KAVILI.....9TH PETITIONER
PATRICK KIILU KITHAMBYO.....10TH PETITIONER
SAMSON MWAKI MAVUSI.....11TH PETITIONER
JULIUS NZOMO MUNYAO.....12TH PETITIONER
GEOFFREY MWENZE MWEMA.....13TH PETITIONER
TIMOTHY WAMBUA MBUSYA.....14TH PETITIONER
JONATHAN MWANZA KIVUSYU.....15TH PETITIONER

MBUSYA KALELU.....16TH PETITIONER
WILLIAM KITHIIA MAVUSI.....17TH PETITIONER
PATRICK NDOLO.....18TH PETITIONER
FREDRICK SAKAYO KITHIIA.....19TH PETITIONER
DANLEWIS B. MWAVU MBULA.....20TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF KITUI.....1ST RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER, MINISTRY OF ENVIRONMENT AND
NATURAL RESOURCES, KITUI COUNTY.....2ND RESPONDENT
COUNTY ASSEMBLY OF KITUI.....3RD RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4TH RESPONDENT
COUNTY COMMANDER, NATIONAL POLICE SERVICE KITUI.....5TH RESPONDENT
KITUI COUNTY COMMISSIONER.....6TH RESPONDENT
PETER MULI KALUNGU.....7TH RESPONDENT
SAND TRANSPORTERS & ENVIRONMENT CONSERVATION GROUP.....8TH RESPONDENT

RULING

1. In the Notice of Motion dated 11th September, 2020, the Petitioners have sought for the following orders:

a) That conservatory orders do issue retraining the Respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources more particularly sand harvesting from Tiva River in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County until hearing and determination of this Petition.

b) That the costs of this Application be met by the Respondents.

2. The Application is supported by the Affidavit of the 1st Petitioner who has deponed that he has the authority of the other Petitioners to swear the Affidavit and execute other documents in this matter on their behalf; that the Petition has been filed on their own behalf and on behalf of the residents of Kitui County and beyond, who in one way or the other depend on, use and derive benefits from a river known as *Tiva River* which cuts through the Kitui County.

3. It was deponed that all the Petitioners were born, raised and are residents of areas known as Ndumoni, Tanganyika, Tiva and Nyanyaa in Kitui Central and Kitui Rural Constituencies of Kitui County (*hereinafter after referred to as the 'areas'*) and that these areas are next and near a major river in Kitui County known as *Tiva River* (*hereinafter referred to as 'the river'*).

4. The Petitioners deponed that under Articles 3 and 69 of the Constitution, every person, including the Petitioners and the Respondents, have duties to defend and uphold the Constitution and cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources; that Kitui County is classified as a semi-arid area and that like all other areas of the country, environmental conservation should be at the core of the function of the organs entrusted with governance.

5. The Petitioners deponed that the whole County of Kitui has been blessed with enormous natural resources which by right devolve to all residents of the areas and their future generations and that all residents of Kitui County and State organs have a duty to conserve the environment as they exploit the natural resources.

6. According to the Petitioners, *Tiva River* originates from Mutonguni hills and Kitumui ridges and snakes its way through large areas which are fully inhabited by a large population all the way to Tsavo National Park; that the river and its tributaries serve and sustain quite a good number of the county's population and that over a period of years, the Respondents have violated their constitutional duties to conserve the environment and ensure sustainable use of natural resources (*particularly as regards the river and its basin*) in a manner which has been detrimental to the lives, interests and properties of the residents of Kitui County, and all those who benefit from the river resources in and

outside the County.

7. It is the Petitioners' case that most people derive their livelihood from and depends on the *Tiva River* for both domestic and farms use and that these have been compromised by the way the Respondents have exploited and allowed exploitation of the river resources particularly in the areas the Petitioners reside in.

8. It was deponed that since the promulgation of the Constitution in 2010, which makes environmental conservation a constitutional issue, the Respondents have been allowing traders and unscrupulous persons to harvest and scoop sand from the river without any regulations and that the excavation and harvesting of the sand from the river has made some wet areas to dry up including the river and its tributaries.

9. It was deponed that the 4th Respondent, in recognition of the importance of conserving the environment in sand harvesting sites developed sand harvesting guidelines which all persons and State organs should adhere to and that the guidelines are sound and if applied properly would go a long way in preserving and conserving the river and other sites in the country.

10. It was deponed by the Petitioners that the 1st to 6th Respondents have permitted, allowed, licensed and let the 7th and 8th Respondents and other persons under the umbrella of the 8th Respondent to harvest sand from the river without following the regulations laid down by the 4th Respondent for such activities and that as a result, the environment in and around the river has gradually been degraded causing the river to dry up and as a consequence, put the lives of the Petitioners and those of their future generations into uncertainty.

11. It was the averment by the Petitioners that the 7th and 8th Respondents and their associates have over a long period of time under the watch, permission and connivance of the 1st to 6th Respondents carried out indiscriminate, uncontrolled and illegal harvesting and excavation of sand from the river which has made the areas 'residents' livelihoods very hard and that as result of the said indiscriminate, uncontrolled and illegal harvesting and excavation of the sand from the river, the Petitioners have complained to the 1st, 2nd and 3rd Respondents to make laws and regulations on sustainable use and exploitation of the resources from the river.

12. According to the Petitioners, instead of coming up with concrete laws, rules or regulations on sand harvesting and exploitation of river resources and trade, the 1st Respondent has been imposing cosmetic bans which it immediately lifts at will without consulting the people who are affected by the said trade and that the imposition and lifting of the bans have been done selectively and at the whims of the 1st, 2nd and 3rd Respondents without involving the community who are the victims of the trade.

13. It was deponed by the Petitioners that following their agitation for licensing and regulation of sand harvesting, and in order to secure protection by the 5th and 6th Respondents, the 7th and 8th Respondents and their groups of cartels secured from the 1st and 2nd Respondents a letter dated 15th July, 2020 allowing them to harvest sand from the river among others and that this was done without consulting the members of the community who are affected or are likely to be affected by the wanton destruction of the environment by the said exploitation.

14. According to the Petitioners, they continued, directly and through their elected leaders, to raise complaints on the blanket permission granted to the 7th and 8th Respondents and their group of cartels to harvest sand from *Tiva River* without any checks and balances as they did not understand why the 1st and 2nd Respondents had not consulted them or the local community yet sand harvesting of the magnitude carried out and authorized by the Respondents has serious environmental impact on their rights to life and a clean and sustainable environment.

15. According to the Petitioners, the 1st, 2nd and 3rd Respondents have perfected their style of leadership and manner of handling environmental issues raised by the Petitioners with contempt and that every time the Petitioners lodge a complaint, either directly or through their elected representatives, the said Respondents go on knee jerk reaction to suspend the sand harvesting activities which suspensions are never enforced.

16. The Petitioners deponed that as a result of the actions and inactions of the Respondents, the river is slowly drying up, pushing water levels down and deep such that the residents of the areas are unable to get enough water for their households, livestock and farms use and that the activities by the Respondents are causing desertification, a process which is irreversible and a threat to the livelihoods and rights of the people of Kitui County and beyond. It was deponed that in addition to the dropping of water levels, the river is no longer able to retain water when it rains, thus endangering the lives of the people of Kitui County.

17. It is the Petitioners' case that Article 42 of the Constitution grants them the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, and to have obligations of the State and its organs relating to the environment fulfilled. In this regard, it was deponed, the Respondents are constitutionally bound to pass laws and regulations and take other measures to protect the environment for the benefit of the Petitioners.

18. It was deponed by the Petitioners that Article 69(1)(a) of the Constitution demands that the State, to which the 1st to 5th Respondents belong, ensures sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits; that Article 69(1)(d) requires that the State should encourage public participation in the management, protection and conservation of the environment and that Article 69(1)(f) and (g) provides that there shall be established system of environmental impact assessment, environmental audit and monitoring of the environment and eliminate processes and activities that are likely to endanger the environment.

19. The Petitioners deponed that Article 69(h) provides that the State shall utilize the environment and natural resources for the benefit of the people of Kenya; that it is a mandatory requirement under Article 69(2) that every person has a duty to cooperate with State organs and other persons to protect and conserve and ensure sustainable development and use of natural resources and that the Respondents have by their conduct, actions and inactions complained of violated the above stated constitutional provisions and as a result violated their constitutional

rights.

20. According to the Petitioners, the said violations are reflected in the following manner: the 1st, 2nd and 4th Respondents have failed to involve the Petitioners and the people of Kitui in making their decision to allow and permit various people including the 7th and 8th Respondents in harvesting sand from Tiva River despite obvious repercussions the same would have over the people of Kitui; they have ignored the obvious threats to sustainable development of the area by compromising the environment and resources from the river and the surrounding areas; and have failed to practice and observe the rule of law by failing to implement guidelines and regulations developed by the 4th Respondent to regulate sand harvesting activities in the country.

21. The Petitioners urged that the benefits of sand harvesting has not benefited the people of Kitui in any way; that the funds from sand harvesting has not been utilized to benefit the residents of Kitui but a few individuals against the provisions of Article 69(1)(h) of the Constitution and that the 1st and 2nd Respondents have not been open and transparent in the way they have handled funds generated from the exploitation of the river resources.

22. Since the Respondents have acted outside the realm of the law and the Constitution, it was deponed, their decisions, acts, directives and directions complained of should be quashed and that any documents or instrument processed and issued through the said unlawful, secretive and dubious means be declared null and void and cancelled forthwith.

The 1st and 2nd Respondents' response:

23. The 1st and 2nd Respondents filed a Notice of Preliminary Objection in which they averred that the Petition and the Application are prematurely before this Court; that the mandatory provisions of Order 1 Rule 8 of the Civil Procedure Rules have not been complied with and that the Petitioners have no capacity to institute the suit/Petition herein.

24. In the Relying Affidavit, the County Secretary of the 1st Respondent deponed that the 1st and 2nd Respondents have at no such time acted in violation or breached any of the fundamental and constitutional rights of the Petitioners; that the County Government has taken all measures and precautions to protect its resources and more particularly coal, sand and charcoal and that the Petitioners have failed to clearly demonstrate to this Honourable Court which of their rights has been violated.

25. It was deponed that the 1st and 2nd Respondents have not allowed and or issued permits to unscrupulous persons to harvest sand from *Tiva River* without any regulations and restrictions; that the 1st and 2nd Respondents believe in environmental conservation and are keen on protecting, managing and conserving the environment to ensure sustainable use of natural resources without jeopardizing it and that some of the Petitioners are imposters and do not hail from the area surrounding *Tiva River* as alleged in the Application.

26. It was deponed that it is true that the 1st Respondent issued permits to the 7th and 8th Respondents for sand harvesting at *Tiva River*; that the said harvesting of sand is regulated, controlled and informed by the Environmental Impact Assessment Report that was conducted for the said purposes and that the 8th Respondent is a dully registered company with the permission from the County Government to harvest and excavate sand from *Tiva River*.

27. The 1st Respondent's County Secretary deponed that public participation was conducted regarding all the issues raised in the Application and the Petition; that the Environmental Impact Assessment Report was concluded after extensive public participation as provided for under Article 69(1)(d) of the Constitution and that the Report recommended and advised that the best alternative is for the sand harvesting project to be implemented.

28. According to the 1st and 2nd Respondents, the harvesting and excavation of sand from *Tiva River* is controlled; that there are in place strict laws governing and regulating sustainable use of the said resource and that the said harvesting of sand by the 7th and 8th Respondents is limited to internal use within the County Government of Kitui and local consumption only.

29. The 1st Respondent's County Secretary deponed that the Governor of the 1st Respondent imposed bans on transportation and export of charcoal and sand outside the borders of the County Government of Kitui; that the consumption of the sand and charcoal is limited to the confines of Kitui County and that those who attempt to defy the ban and regulations imposed on the exploitation of sand, coal and charcoal are usually arrested, charged and arraigned in Kitui Law Courts.

30. It was deponed that the volumes of sand collected by the 7th and 8th Respondent is self-sustaining and is used in building social amenities for the benefit of the residents of Kitui which amenities include schools, hospitals, offices and even roads in compliance with the Environmental Impact Assessment Report.

The 7th and 8th Respondents' response:

31. The 7th Respondent, who is also the Chairman of the 8th Respondent, deponed that he is a businessman within Kitui County; that part of his business involves transporting sand and other building or construction materials for hire and that as transporters, they usually buy the sand or water or any other river resource from the river-line community groups who do the actual harvesting of the sand and other river resources.

32. It was deponed by the 7th Respondent that as a matter of fact, the transporters are not allowed to start loading or scooping or heaping up the sand or the river resources directly without first paying for it to the local groups, usually represented by youth groups or men from the river-line community.

33. It was deponed that as transporters, they are purchasers and the community groups are sellers of the sand and other river resources; that they provide the river-line community with a ready market for their products or resources; that in so doing, the groups have a steady source of income for their families and the outlying communities fronting the river-line course from the upstream to downstream and that as transporters, they are in the forefront in promoting all programmes geared towards conserving the environment and the river resources.

34. It was deponed by the 7th Respondent that as transporters, they were guided by the 2nd Respondent on how to initiate the business project plan, and were advised to do an Environmental Impact Assessment Report to inform and guide them on the positive and negative impacts of their business project objectives and plans and on the best way to integrate these business objectives and plans with the needs of the community, livelihoods, conservation and sustainability of the resources.

35. It was deponed that transporters prepared an Environmental Impact Assessment Report; that the same was registered with the office of the 2nd Respondent; that the report was to examine the following issues: the socio-economic and biophysical environment of the project area; the developments on adjoining pieces of the land and the likely impacts of the project on the same; environmental impacts on sand harvesting and the products and wastes to be generated by the harvesting of sand.

36. It was deponed by the 7th Respondent that the issues of the relevant legislations, sustainability, agenda 21 and other related issues were captured in the Environmental Impact Assessment Report and recommendations made to guide the group in their sand harvesting business to ensure that their activities do not impact the river-by-product resource in a depletable manner, or in a way that may injure the County community.

37. It was deponed that the issue of public participation in preparing the report was adequately done; that the Applicant's complaints are unfounded and that the complainants is constituted of a group that is rivaling the registered group that is harvesting and selling the sand to the transporters.

38. According to the 7th Respondent, after the baseline preparation was achieved, they applied to the 1st and the 2nd Respondents to authorize them to do the business of transporting the sand from the river; that the details of their trucks were enumerated in order to monitor and tract the volume and tonnage of the sand transported from the area and that as per the letter licensing their transportation business, the volume and tonnage of the sand taken is limited and controlled, and that the role of the 5th and 6th Respondents is to enforce the same, and any single breach of the rules attracts a court case.

39. It was deponed that the 1st Respondent, vide a Gazette Notice No. 936 of 2nd February, 2018, issued a ban on transportation and sale of charcoal and sand, outside the geographical boundaries of the County of Kitui, and revoked all licenses, permits and other documentations issued authorizing the transportation of sand and charcoal outside the County.

40. According to the 7th Respondent, the intention of the 1st Respondent in issuing the said Gazette Notice was to protect, conserve, control and regulate the natural resource in question for the benefit of the people of Kitui County and more so, against exploitation by unscrupulous traders.

41. The 7th Respondent deponed that during the floods, sand deposits increases tremendously and some is deposited off the river-flow course and unto the farms; that lifting of the ban for a limited period to allow the harvesting and sale of the sand is a sound decision and that *Tiva River* is in a good condition.

42. The 7th Respondent deponed that before the Petitioners filed the Petition, it was necessary for them to engage an audit of the existing environment around the river and present a situational analysis of the same as the basis of their complaints; that it is only an audit report by an expert that would convince the court about the Petitioners complaints and that the main objective and motive of the Petitioners herein in filing this Petition was to secure temporary orders to scuttle their business because they (*the transporters*) have refused to work with them, and to frustrate the other registered group.

43. The 7th Respondent finally deponed that no one visited the local community and the river in question and prepared any report to vouch for the alleged threat of the ecosystem and that there is no report from a hydrologist analyzing the water levels or depth of *Tiva River* or the level of degradation of the said river. The Petitioners filed a Further Affidavit which I have considered.

Submissions:

44. The counsel for the Petitioners, the 1st, 2nd, 7th and 8th Respondents appeared before me and made oral submissions. The Petitioners' counsel submitted that the Preliminary Objection by the Respondents is based on lack of compliance with Order 1 Rule 8 of the Civil Procedure Rules; that Constitutional Petitions are not governed by the Civil Procedure Rules and that Constitutional Petitions are governed by the "*Mutunga Rules*".

45. The Petitioners' counsel submitted that under Article 22, 42 and 43 of the Constitution, a party does not need any authority to file a Petition on behalf of others and that while dealing with environmental matters, Section 3(1) of the Environmental Management and Co-ordination Act allows anyone to file a Petition in the Environment and Land Court in respect of environmental matters.

46. Counsel submitted that sand harvesting is an environmental issue; that there are no laws or regulations passed by the 3rd Respondent governing sand harvesting in Kitui County and that sand harvesting in the County is a free for all exercise.

47. It was submitted by the Petitioners' counsel that an Environmental Impact Assessment Report is not a regulation, a law or a licence; that there is no single permit issued to the 7th and 8th Respondents or a cess receipt showing that the County has been receiving income from the

sand harvesting exercise and that harvesting of sand without supervision is likely to infringe on the Petitioners' right to a clean and healthy environment.

48. It was submitted that Article 42 and 70 of the Constitution provides that there should be legislation for sustainable management of resources and that Kitui County needs to pass Rules and Regulations to govern sand harvesting in the area. It was submitted that the water levels of *Tiva River* have dropped due to sand harvesting which is not controlled by the County.

49. Counsel submitted that NEMA's guidelines on sand harvesting should be reduced into legislation; that there has been no adherence to the said guidelines and that this court should be guided by the precautionary principle to prevent environmental degradation. It was submitted that if the Application is not allowed, the logical economic recourse by the Respondents is to exploit the resource and leave. The Petitioners' counsel relied on numerous authorities which I have considered.

50. The 1st and 2nd Respondents' counsel submitted that this is a representative suit; that Order 1 Rule 8 of the Civil Procedure Rules spells out the procedure of filing of a representative suit and that a notice should have been issued to all parties, including all the residents of Kitui, informing them about the Petition.

51. It was submitted by the 1st and 2nd Respondents' advocate that this matter should not have been filed in this court (*the Environment and Land Court*); that the Petition should have been filed in the National Environmental Tribunal (*the NET*) and that the issue of harvesting sand and issuance of licenses should be dealt with by the Tribunal.

52. Counsel submitted that the Petitioners and the 7th and 8th Respondents were involved in the business of sand harvesting in Kitui; that the Petition is filed to pursue business rivalry between the two and that the County Government of Kitui published a Gazette Notice to manage and control sand harvesting and charcoal burning.

53. According to counsel, people have been charged in court for contravening the Gazette Notice; that the Governor banned the harvesting and transportation of sand outside the County Government of Kitui and that the issue of banning the sale of sand outside the County has been acknowledged by the Petitioners.

54. It was submitted by the 1st and 2nd Respondents' advocate that the Petitioners are imposters; that there is no nexus between the Petitioners and the River in question; that the Petitioners have not shown how their rights have been affected and that the source of the river is almost 30km away from the impugned sites and yet the other people downstream have not complained.

55. It was submitted by the 1st and 2nd Respondents' counsel that sand is important for the development of the County, including the construction of roads; that the County cannot complete its projects because of the orders issued by this court and that the County Government has made efforts to be guided by the Environmental Impact Assessment Report.

56. Counsel submitted that there is silting of the river which will affect dams if harvesting of the sand is not done; that Article 69(h) of the Constitution provides that one can utilize the environment for the benefit of the people by gazetting the business and control of sand harvesting and that the Government is utilizing the resources sustainably.

57. The 7th and 8th Respondents' advocates agreed with the submissions by counsel for the 1st and 2nd Respondents. Counsel submitted that there is no justifiable cause of action against the 7th and 8th Respondents; that the 7th and 8th Respondents lodged an application to harvest the sand from the *Tiva River* and that the 7th and 8th Respondents obtained authorization to harvest the sand.

58. Counsel submitted that Article 69(h) (i) of the Constitution allows for sustainable exploitation of natural resources; that the 7th and 8th Respondents provide a ready market for the sand to the community and that the 7th and 8th Respondents pay for the sand to the Kivaa Community Account.

59. The 7th and 8th Respondents' counsel submitted that the projects in the County will be affected if the order is granted; that the 7th and 8th Respondents have been supporting the community; that the rights of the Petitioners have not been violated by the 6th and 7th Respondents.

60. In rejoinder, the Petitioners' advocate submitted that under Article 70(3) of the Constitution, the Petitioners do not have to show that they have suffered any injury; that Section 129 of the Environmental Management and Co-ordination Act gives specific jurisdiction to the Tribunal; that the law allows the Tribunal to deal with Appeals from the decisions of NEMA and that the Petitioners are not appealing against the decision of NEMA.

Analysis and findings:

61. Having read and considered the Petition, the Application, the Respondents' responses and the submissions, the issues for determination are as follows:

a. *Whether this court has jurisdiction to hear and determine the Petition and the Application;*

b. *Whether the Petitioners have the locus standi to file the Petition;*

c. *Whether, prima facie, the Petitioners' right to a clean and healthy environment has been or is likely to be infringed; and*

d. Whether conservatory orders should issue.

Jurisdiction of this court and the National Environmental Tribunal:

62. The requirement that a Court or Tribunal can only deal with a dispute in respect of which it has the requisite jurisdiction cannot be overemphasized. In the case of *Lillian “S” vs. Caltex Kenya Limited [1989] eKLR*, the Court of Appeal held as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

63. In *Republic vs. Karisa Chengo & 2 Others [2017] eKLR*, the Supreme Court held as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

64. In *Kibos Distillers Limited & 4 others vs. Benson Ambuti Adegwa & 3 others [2020] eKLR*, the Court of Appeal held as follows:

*“A party or litigant cannot be allowed to confer jurisdiction on a Court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of 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 only 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] eKLR* where it was stated that where there is a clear procedure for the redress of a particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”*

65. This court’s jurisdiction emanates from the provisions of Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act (*the ELC Act*). Article 162(2)(b) of the Constitution provides as follows:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to–

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

66. Parliament enacted the Environment and Land Court Act in compliance with the provisions of Article 162(3). Section 13 of the Environment and Land Court Act provides as follows:

“(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.”

67. Article 165(5) of the Constitution divests the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2) of the Constitution. The Supreme Court delved into the issue of the jurisdiction of this court vis-a-vis the jurisdiction of High Court in great detail in the case of *Republic vs. Karisa Chengo & 2 Others* [2017] eKLR in which it held as follows:

“[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act... From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa...”

68. The reading of the Constitution and the Environment and Land Court Act shows that it is this court that has the unlimited jurisdiction to resolve disputes relating to land and the environment. However, this court’s jurisdiction is subject to the jurisdiction donated to the subordinate court and Tribunals by statutes, whose decisions are appealable to this court. One such Tribunal is the National Environmental Tribunal (*the NET*).

69. The jurisdiction of the NET, which is a creature of the Environmental Management and Co-ordination Act (EMCA) is found at Section 129 of the Environmental Management and Co-ordination Act which provides as follows:

Appeals to the Tribunal

“(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.”

70. The Petitioners herein are not appealing against the decision of NEMA. Indeed, in the Petition, the Petitioners have accused the Respondents of engaging in the business of harvesting sand from *Tiva River* without any licence or permit from NEMA, and that their actions are an infringement on their right to a clean and healthy environment as stipulated under Article 42 of the Constitution. The ultimate prayers that the Petitioners are seeking in the Petition are:

“(1) A declaration that the 1st, 2nd, 3rd and 4th Respondents have violated Article 10 of the Constitution in the manner in which they have over the years handled and dealt with the issuance, permits, licenses and allowed sand harvesting activities in *Tiva River* in *Kitui County* especially in *Ndumoni, Tanganyika, Nyanyaa and Tiva areas*.

(2) A declaration that the 1st, 2nd, 3rd and 4th Respondents have infringed and violated constitutional rights of the people of *Kitui* especially in *Ndumoni, Tanganyika, Nyanyaa and Tiva areas* as provided for in Article 42 of the Constitution by failing to pass, enact or legislate laws, regulations and rules or guidelines to govern and regulate sand harvestings activities in *Kitui County*.

(3) A declaration that the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents have violated mandatory provisions of Articles 60(1)(c), 60(1)(e), 69(1)(a), 69(1)(d), 69(1)(f), 69(1)(g), 69(1)(h), 69(2) and 201(a) of the Constitution in the manner they have handled and dealt with sand harvesting activities in *Kitui* especially in *Ndumoni, Tanganyika, Nyanyaa and Tiva areas*.

(4) A declaration that the 1st, 2nd, 4th, 5th and 6th Respondents have violated the Petitioners’ rights under Articles 35(1) and (b) of the Constitution by failing to supply information requested for vide the Petitioners’ advocates’ letters dated 7-08-2020 and an order directing the said Respondents to supply the information requested within a specified period.

(5) A declaration that 7th and 8th Respondents have violated the provisions of Article 53(1)(d) of the Constitution by employing and engaging services of children under the age of 18 years to load their trucks, lorries and trailers.

(6) A declaration that the Petitioners and people of Ndumoni, Tanganyika, Nyanyaa and Tiva areas of Kitui County have suffered damages as a result of violations of their rights and the Constitution by the Respondents and an order that an inquiry as to damages to the community be undertaken and adequate and commensurate compensation, restoration and reparations be made and undertaken by the Respondents within a specified period.

(7) A permanent injunction restraining the Respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources from Tiva River until such time as there shall be laid, enacted and legislated laws, regulations or guidelines with the force of the law for purposes of governing and regulating sand harvesting activities within Kitui County.

(8) A declaration that the Petitioners and the people of Kitui are entitled to be involved and participate in making, formulating, developing and legislating of laws, rules, regulations and guidelines to govern sand harvesting activities in Kitui County and any law, regulations, rules and guidelines enacted, passed or issued by the 1st to 6th Respondents without involvement and participation of the Petitioners and the people of Kitui shall be unconstitutional.

(9) The Respondents do pay the costs of this Petition.”

71. Under the provisions of the Constitution and Section 13 (4) of the Environment and Land Court Act, it is this court which has the jurisdiction to determine if indeed the Petitioners’ rights under Article 42, 69 and 70 of the Constitution have been or are likely to be infringed upon and not the National Environmental Tribunal (NET).

72. Considering that the Petitioners are not challenging the decision of NEMA, either in issuing a licence or otherwise in respect of the harvesting of sand from *Tiva River* by the Respondents, and in view of the prayers sought in the Petition which are confined to the alleged infringement of the Petitioners’ rights, it is the finding of this court that the National Environmental Tribunal does not have the requisite jurisdiction to deal with this Petition. It is this court that has the jurisdiction to deal with the issues raised in the Petition and the Application.

The locus standi of the Petitioners:

73. The Petitioners have averred in the Petition that the Petition has been filed on their own behalf and on behalf of the residents of Kitui County and beyond, who in one way or the other depend on, use and derive benefits from a river known as *Tiva River*.

74. The Petitioners deposed that as a result of the actions and inactions of the Respondents, the river is slowly drying up, pushing water levels down and deep such that the residents of the areas are unable to get enough water for their households, livestock and farms’ use and that the activities of the Respondents are causing desertification, a process which is irreversible and a threat to the livelihoods and rights of the people of Kitui County and beyond.

75. The Petitioners’ case is that Article 42 of the Constitution grants them the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, and to have obligations of the State and its organs relating to the environment fulfilled. The Petition is therefore hinged on the alleged infringement of Article 42 of the Constitution.

76. Article 22(1) of the Constitution guarantees the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, meaning that every person has a right of ensuring that their rights in relation to the environment are not violated or threatened by way of litigation.

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

78. The Constitution goes further to provide that on such an application, the court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.

79. Article 70 of the Constitution grants any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment. The said Article provides as follows:

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

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

80. It is therefore clear from the above provision that one need not have a personal interest or suffered any injury before filing a Petition alleging the infringement of the right to a clean and healthy environment. In *Joseph Leboo & 2 others vs. Director Kenya Forest Services & another [2013] eKLR*, the Court held as follows:

“26. A reading of Articles 42 and 70 of the Constitution, above, make it clear, that one does not have to demonstrate personal loss or injury, in order to institute a cause aimed at the protection of the environment.

27. This position was in fact the applicable position, and still is the position, under the Environmental Coordination and Management Act (EMCA), 1999, which preceded the Constitution of Kenya, 2010... It can be seen that Section 3(4) above permits any person to institute suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. Litigation aimed at protecting the environment, cannot be shackled by the narrow application of the locus standi rule, both under the Constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment. The plaintiffs have filed this suit as representatives of the local community and also in their own capacity. The community, of course, has an interest in the preservation and sustainable use of forests. Their very livelihoods depend on the proper management of the forests. Even if they had not demonstrated such interest, that would not have been important, as any person who alleges a violation of any law touching on the environment is free to commence litigation to ensure the protection of such environment. I am therefore not in agreement with any argument that purports to state that the plaintiffs have no locus standi in this suit.”

81. Article 70 of the Constitution and Section 3(4) of the Environmental Management and Co-ordination Act permits any person to institute a suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury. As was held in *Joseph Lebo* case (*supra*), litigation aimed at protecting the environment cannot be shackled by the narrow application of the locus standi rule, both under the Constitution and statute, and indeed in principle.

82. The principle behind the law permitting any person to institute a suit relating to the protection of the environment without the necessity of demonstrating personal loss or injury is because the protection of the environment is not only for the benefit of the present generation, but also for the future generation. The preamble to the Constitution recognizes the importance of protecting the environment for the benefit of the future generation as follows:

“**Respectful** of the environment, which is our heritage, and determined to sustain it for the benefit of future generations.”

83. Indeed, Section 18 of the Environment and Land Court Act and Section 3(5) of the Environmental Management and Co-ordination Act provides that this court should be guided by the principle of *intergenerational* equity while resolving environmental disputes. Section 2 of the Environmental Management and Co-ordination Act defines *intergenerational* equity as follows:

“**intergenerational equity**” means that the present generation should ensure that in exercising its rights to beneficial use of the environment the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.”

84. The quality of life for the future generation depends on our decisions today. The need for change in human development for them to lead happy lives has been debated for decades. The sustainability discourse started in the 1970s, and the 1992 UN Conference on the Environment and Development recognized intergenerational equity as central for policymaking that safeguards the future - this principle is now found in the constitutions of many countries, including Kenya.

85. Indeed, the World Commission on Environment and Development noted as follows: “We borrow environmental capital from future generations with no intention or prospect of repaying... We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.”

86. Some countries, most notably Israel and Hungary, have created their own guardian or commissioner for future generations, independent voices for the long term that act as temporal checks and balances. Based on the human right to a healthy environment (*Hungary*) and on a basic law concerning sustainable development (*Israel*), the Commissioners in each country have unrestrained access to the information behind policymaking; respond to citizens’ concerns; and publicly expose the long-term implications of current decisions.

87. New Zealand has a Parliamentary Commissioner for the Environment that is referred to as the Guardian of the Long View, and in the European Union, a civil-society coalition has based its emerging campaign on the overarching aim of the *Lisbon Treaty* to secure “the well-being of its [the EU’s] people”, which includes the well-being of future citizens.

88. The idea that as members of the present generation, we hold the earth in trust for the future generations informed the development of the principle of *intergenerational* equity. Therefore, any person can move the court with a view of protecting the environment, not only for his benefit, but for the benefit of the future generations. It is for that reason that in principle, the locus standi to file suits challenging the violation of the right to a clean and healthy environment is given to all and sundry.

89. The Petitioners herein, whether they hail from Kitui County or not, and whether the harvesting of the sand from *Tiva River* affects them directly or not, have the locus to prosecute the Petition which is premised on the ground that the Respondents have infringed on their right to a clean and healthy environment. This right is applicable not only to them, but also the future generations. The Petitioners in this matter therefore have the requisite locus standi.

90. The Respondents have argued that this being a representative suit, the Petitioners should have complied with the provisions of Order 1 Rule 8 of the Civil Procedure Rules, which requires the issuing of a notice to all the interested parties. My short answer to that is that Constitutional Petitions are governed by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules)*.

91. Rule 4 of the *Mutunga Rules* provides as follows:

“4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—

(i) a person acting on behalf of another person who cannot act in their own name;

(ii) a person acting as a member of, or in the interest of, a group or class of persons;

(iii) a person acting in the public interest; or

(iv) an association acting in the interest of one or more of its members.”

92. The above Rule allows a Petitioner to file a suit on his behalf and on behalf of a class of persons or in the public interest where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened. Such a Petitioner is not required to give a notice to the affected parties before filing the Petition. The Petitioners herein are acting on their own behalf, and in the public interest of the people of Kitui County.

Whether the Petitioners’ rights have been or are likely, *prima facie*, to be infringed or threatened by the Respondents

93. The Petitioners’ case is that *Tiva River* originates from Mutonguni hills and Kitumui ridges and snakes its way through large areas which are fully inhabited by a large population, all the way to *Tsavo National Park*; that the river and its tributaries serve and sustain quite a good number of the County’s population and that over a period of years, the Respondents have violated their constitutional duties to conserve the environment and ensure sustainable use of natural resources (*particularly as regards the river and its basin*) in a manner which has been detrimental to the lives, interests and properties of the residents of Kitui County, and all those who benefit from the river resources in and outside the County.

94. According to the Petitioners, most people derive their livelihood from and depend on the *Tiva River* for both domestic and farms’ use and that this livelihood has been compromised by the way the Respondents have exploited and allowed the exploitation of the river resources, particularly in the areas they reside in.

95. It was deponed that the Respondents have been allowing traders and unscrupulous persons to harvest and scoop sand from the *Tiva River* without any regulations and that the excavation and harvesting of the sand from the river has made some wet areas to dry up, including the river and its tributaries.

96. It was deponed that the 4th Respondent, in recognition of the importance of conserving the environment in sand harvesting sites developed sand harvesting guidelines which all persons and State organs should adhere to; that the guidelines are sound and that if applied properly, would go a long way in preserving and conserving the river.

97. The Petitioners informed the court that the 1st, 2nd, 3rd, 5th and 6th Respondents have permitted, allowed, licensed and let the 7th and 8th Respondents and other persons under the umbrella of the 8th Respondent to harvest sand from the *Tiva River* without following the guidelines laid down by the 4th Respondent for such activities and that as a result, the environment in and around the river has been gradually degraded, causing some parts of the river to dry up, and as a consequence, put the lives of the Petitioners and those of their future generations into uncertainty.

98. It was the averment by the Petitioners that the 7th and 8th Respondents and their associates have over a long period of time under the watch, permission and connivance of the 1st to 6th Respondents carried out indiscriminate, uncontrolled and illegal harvesting and excavation of sand from the *Tiva River* which has made the areas’ residents’ livelihoods very hard and that as result of the said indiscriminate, uncontrolled and illegal harvesting and excavation of the sand from the river, the Petitioners have complained to the 1st, 2nd and 3rd Respondents to make laws and regulations on sustainable use and exploitation of the resources from the river.

99. According to the Petitioners, instead of coming up with concrete laws, rules or regulations on sand harvesting and exploitation of river resources and trade, the 1st Respondent has been imposing cosmetic bans which it immediately lifts at will without consulting the people who are affected by the said trade and that the imposition and lifting of the bans have been done selectively and at the whims of the 1st, 2nd and 3rd Respondents without involving the community who are the victims of the trade.

100. The 1st Respondent’s case is that it has taken all measures and precautions to protect its resources and more particularly coal, sand and charcoal and that the Petitioners have failed to clearly demonstrate to this court which of their rights has been violated.

101. The 1st Respondent admitted that it issued permits to the 7th and 8th Respondents for sand harvesting at *Tiva River*; that the said harvesting of sand is regulated, controlled and informed by the Environmental Impact Assessment Report that was conducted for the said purpose and that the 8th Respondent is a duly registered company with the permission from the County Government to harvest and excavate sand from *Tiva River*.

102. According to the 1st and 2nd Respondents, the harvesting and excavation of sand from *Tiva River* is controlled; that there are in place strict laws governing and regulating sustainable use of the said resource and that the said harvesting of sand by the 7th and 8th Respondents is

limited to internal use within the County Government of Kitui and for local consumption only.

103. The complaint by the Petitioners is that the harvesting and excavation of sand from *Tiva River* by the Respondents is uncontrolled and illegal, and that the same is being carried unsustainably and contrary to the provisions of Article 42 and 69 of the Constitution.

104. Article 42 of the Constitution of Kenya, 2010 provides that every person has the right and is entitled to a clean and healthy environment, which right includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures particularly those contemplated in Article 69.

105. The right to a clean and healthy environment is bestowed on every person, and has been considered by the courts and eminent authors to be essential for the existence of mankind. In *Adrian Kamotho Njenga vs. Council of Governors & 3 others* [2020] eKLR, it was held that:

“18. Article 42 of the Constitution guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.

19. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.”

106. Further to the foregoing, the Constitution under Article 69 obligates all persons to protect and ensure a clean and healthy environment, which include but is not limited to elimination of processes and activities that are likely to endanger the environment as well as establish systems of Environmental Impact Assessment and Environmental Audit and Monitoring of the environment.

107. This position was elaborately considered in the case of *Martin Osano Rabera & Another vs. Municipal Council of Nakuru & 2 others* [2018] eKLR where the court adopted the decision in *Communication No.155/96: The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs. Nigeria* where the African Commission on Human and People’s Rights stated as follows:

“These rights recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, “an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health.”

The right to general satisfactory environment, as guaranteed under article 24 of the Africa Charter or the right to healthy environment, as it is widely known therefore imposes clear obligations upon a government. It requires the State to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”

108. Article 70 (1) of the Constitution empowers any person who alleges that a right to a clean and healthy environment has been infringed or is threatened to apply for redress from the court in addition to any other legal remedies available in respect of the matter. An applicant alleging that a right to a clean and healthy environment need not demonstrate that any person has incurred loss or suffered injury.

109. Article 70 (2) of the Constitution provides that on application for enforcement of the right to a clean and healthy environment, the court may make any order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment, and may compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment.

110. Section 3 of the Environmental Management and Co-ordination Act complements the provision of Article 70 of the Constitution. The said Section allows any person who alleges that the right to a clean and healthy environment has been, or is being infringed or violated to bring an action notwithstanding that that such a person cannot show that the Defendant’s act or omission has caused or is likely to cause him any personal loss or injury

111. Article 69 (1) (a) of the Constitution demands the State, to which the 1st to 5th Respondents belong, to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits. Article 69(1)(d) requires the State to encourage public participation in the management, protection and conservation of the environment.

112. Rivers all over the world are under immense pressure due to various kinds of anthropogenic activities, among them indiscriminate extraction of sand and gravel which is disastrous as the activity threatens the river ecosystem.

113. Sand harvesting activities affects the environment by causing land degradation, loss of agricultural lands, low availability of water and poor quality of water in the affected rivers. Bed degradation of rivers due to sand harvesting undermines bridge support, and may change the morphology of a river, which constitutes aquatic habitat. The loss of this ecosystem affects the environment in many and far reaching ways. To address the issue of sustainable harvesting of sand, NEMA has come up with sand harvesting guidelines (*National Sand Harvesting Guidelines, 2007*).

114. Under the guidelines, the Technical Sand Harvesting Committee (TSHC) is supposed to be established by every County where sand harvesting activities take place. The Technical Sand Harvesting Committee (TSHC) has been given the mandate to ensure that: Sand dams gabions are constructed in designated sand harvesting site; lorries are using designated access roads only to sand harvesting sites; and designated sand harvesting sites are rehabilitated appropriately by Riparian Resource Management Association (RRMA), County Council (*County Governments*) and approved dealers under close monitoring and supervision by the Technical Sand Harvesting Committee in compliance with Environmental and Management Co-ordination Act.

115. The Guidelines restrict sand harvesting to riverbeds with no harvesting allowed on river banks in order to prevent the widening of rivers.

116. According to the Guidelines, no person is allowed to harvest sand from any area not designated as a sand harvesting site by the Technical Sand Harvesting Committee (TSHC) and the site must have an Environmental Management Plan (EMP) to guide in the rehabilitation of the sites.

117. In addition, harvesting of sand should not exceed six (6) feet in depth; designated sand collection sites should be at least 50 meters from the riverbanks or dyke and harvesting of sand should be done concurrently with the restoration of areas previously harvested.

118. The Guidelines further provide that sand harvesting should be strictly “*open-cast harvesting*”. In case of underground tunneling or extraction of sand, appropriate technology should be used to safeguard human safety, and river sand harvesting should be done in a way that ensures that adequate reserve of the sand is retained to ensure water retention.

119. According to the Guidelines, sand harvesting should not be allowed on river banks and harvesting should not take place within 100 meters of either side of physical infrastructure including bridges, roads, railway line and dyke. The Guidelines further stipulate that any person who sell sand will be required to issue a receipt to the purchaser and keep records of such for periodic inspection by the relevant authorities.

120. The Respondents herein did not provide to this court any evidence to show that the NEMA Guidelines of 2007 on Sand Harvesting have been complied with in respect to the harvesting of sand from *Tiva River* or at all. Indeed, there is no evidence before me to show that the 1st Respondent has put in place a Technical Sand Harvesting Committee (TSHC) which is responsible for the proper and sustainable management of sand harvesting within the County.

121. In the absence of a Technical Sand Harvesting Committee (TSHC) as required under the Guidelines, and in the absence of any evidence to show compliance with all the Guidelines, or a law passed by the 3rd Respondent to regulate sand harvesting, it is my finding that the harvesting of sand in *Tiva River* is not, *prima facie*, being exploited and utilized in a sustainable manner, contrary to the provision of Article 69 (1) (a) of the Constitution.

122. Although the Respondents argued that the harvesting of the sand from *Tiva River* is for the development of the County, and that the local community has immensely benefited from the said harvest, they should be aware that environmental considerations should be at the center stage of all developments.

123. *Sustainable Development* is one of the national values and principles of governance in the Constitution that bind all State organs, State officers, public officers and all persons. In its report, *Our Common Future*, the *Brundtland Commission* defined Sustainable as *development that meets the needs of the present without compromising the ability of future generations to meet their own needs*’.

124. Under Section 2 of the Environmental and Management Co-ordination Act, sustainable development is defined as follows:

“sustainable development” means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.”

125. In the *Case Concerning the Gabcikovo-Nagymaros Project, (Hungary v Slovakia)*, 1997 WL 1168556 (ICJ), it was held as follows:

“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed [and] set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.”

126. Essentially, sustainable development seeks to address *intra-generational equity*, that is equity among the present generation and *inter-generation equity*, that is equity between generations. As opined in *Gabcikovo* case (*supra*), sustainable development reaffirms the need for both development and environmental protection, and neither can be neglected at the expense of the other.

127. The four (4) recurring elements that comprise the concept of ‘*sustainable development*’ is the need to preserve natural resources for the benefit of future generations (*the principle of intergenerational equity*); exploiting natural resources in a manner which is ‘*sustainable*’, ‘*prudent*’, ‘*rational*’, ‘*wise*’ or ‘*appropriate*’ (*the principle of sustainable use*); the ‘*equitable*’ use of natural resources, and the need to

ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, (*the principle of integration*).

128. The principle of sustainable development seeks to limit environmental damage arising from anthropogenic activities and lessen the depletion of natural resources and pollution of the environment (*See Cullet P., Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law (Aldershot: Ashgate, 2003) pp 8-9*).

129. Sustainable development is a principle with a normative value, demanding a balance between development and environmental protection, and as a principle of reconciliation in the context of conflicting human rights, that is the right to development and the right to protecting the environment.

130. Sustainable use of natural resources is recognized under Article 69 of the Constitution, where the State, including the 1st Respondent, is obliged to ensure *sustainable* exploitation of sand in *Tiva River*. The sustainable harvesting of sand from the river can only be accomplished if the National Guidelines on Harvesting of Sand, 2007 are complied with fully, and legislation is passed by the 3rd Respondent in compliance with Article 42 of the Constitution.

131. Although the 1st Respondent informed the court that it had published a Gazette Notice banning the transportation of sand outside the county, the said Gazette Notice does not create any offence that is punishable in court. Indeed, the said Gazette Notice does not amount to a law or a regulation to regulate how sand should be harvested by the local community.

132. Criminal enforcement of environmental law is necessary to protect the integrity of the regulatory system, prevent harm to the environment and to punish the violators (*See Patricia Kameri-Mbote; 'the use of Criminal Law in Enforcing Environmental Law'; in Environmental Governance in Kenya, Implementing the Framework Law, ed. C.O. Okidi, et al.*). It is for this reason that Article 42 of the Constitution obligates the State, including the 1st Respondent, to protect the right to a clean and healthy environment through legislative measures, which the 1st and 3rd Respondents have not done.

133. Although the Respondents stated that they have been relying on an Environmental Impact Assessment Report that was prepared by the 7th and 8th Respondents, the said Environmental Impact Assessment Report was never submitted to NEMA for approval pursuant to the provisions of Sections 58 of the Environmental Management and Co-ordination Act.

134. Indeed, according to the *Second Schedule* of the Environmental Management and Co-ordination Act, an Environmental Impact Assessment Study Report is supposed to be submitted to NEMA for all activities involving sand harvesting, whereafter a license is issued. Section 58 (2) of the Environmental Management and Co-ordination Act provides as follows:

“The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.”

135. The Respondents have never complied with the above provision of the law. As was held in *Moffat Kamau & 9 Others vs. Actors Kenya Ltd & 9 Others [2016] eKLR*, where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat.

136. The Respondents argued that if the Application is allowed, it will hurt the economy of the Kitui County by stalling the ongoing construction projects, and that the livelihood of the communities that rely on the harvested sand will be adversely affected. My response to that is that while determining environmental issues, this court is guided by certain principles, one of them being the *precautionary principle*. In the case of *Halai Concrete Quarries & Others vs. County Government of Machakos & Others, Machakos ELC Petition No. 19 of 2020*, this court held as follows:

“The precautionary principle is one of the most popular and commonly applied principles of ecologically sustainable development.

The principle is based on Principle 15 of the Rio Declaration on Environment and Development, which Kenya is a signatory to, which states as follows:

‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ (Rio Declaration on Environment and Development ,1992).

Central to the precautionary principle is the element of anticipation, reflecting a need for effective environmental measures to be based upon actions which take a longer-term approach. The principle evolved to meet the evidentiary difficulty caused by the fact that information required to prove a proposition may be in the hands of the party causing or threatening the damage to the environment. Waiting for scientific proof regarding the impact of the pollutants discharged into the soil, water and air from the impugned dump site could result in irreversible damage to the environment and in human suffering. This court cannot therefore wait until there is evidence of the effects of the dump on the Petitioners and the residents of the area to order for its closure when the people who are mandated to ensure that the law is complied with to protect the environment and the health of people do not

do so.”

137. Waiting for scientific proof regarding the impact of sand harvesting on *Tiva River* could result in irreversible damage to the environment and in human suffering. The short term economic stagnation that may result due to the conservatory orders of this court does not outweigh the environmental imperatives of *Tiva River*.

138. The Respondents have the responsibility of abiding by the *National Guidelines on Harvesting of Sand* and the Environmental Management and Co-ordination Act, and enacting a law or regulations to ensure that there is sustainable exploitation of sand from *Tiva River*.

139. The Respondents herein have failed, *prima facie*, to comply with the laws and Guidelines pertaining to harvesting of sand from *Tiva River*. The 3rd Respondent has also failed to pass laws and regulations which will criminalise the exploitation of sand from *Tiva River* in an unsustainable manner.

140. That being so, it is my finding that the Petitioners have established a *prima facie* case with chances of success. The Application dated 11th September, 2020 is allowed as follows:

a) Conservatory orders be and are hereby issued retraining the Respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources more particularly sand harvesting from Tiva River in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County until hearing and determination of this Petition.

b) The costs of this Application to be met by the 1st Respondent.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF NOVEMBER, 2020.

O.A. ANGOTE

JUDGE