



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MOMBASA**

**ELC. PETITION NO.22 OF 2019**

**1. GETRUDE MUKOYA MWENDA**

**2. GRAHAM BOWCHER**

**3. JAYNE MAGONDU**

**4. MANAHAWA SALIM**

**5. MOHAMED ALI SALIM**

**6. BIASHA SAID SHAME.....PETITIONERS**

**VERSUS**

**1. THE CABINET SECRETARY MINISTRY**

**OF INFRASTRUCTURE, HOUSING &**

**URBAN DEVELOPMENT**

**2. KENYA PORTS AUTHORITY**

**3. NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....RESPONDENTS**

**JUDGMENT**

**PETITIONERS' CASE**

1. By a petition dated 4<sup>th</sup> June 2019 and filed on even date, the Petitioners are seeking the following orders:

**a. A declaration that the Respondents have violated the rights of the Petitioners to a clean and healthy environment under Article 42 of the Constitution of Kenya 2010.**

**b. A declaration that the Respondents have violated the rights of the Petitioners under Article 69 of the Constitution of Kenya 2010 to ensure sustainable exploitation of natural resources, eliminate processes and activities that are likely to endanger the environment.**

**c. A declaration that the 3<sup>rd</sup> Respondent has violated the rights of the Petitioners by failing to observe provisions of Article 35 of the constitution of Kenya 2010, Section 42 (1) (b), 58(2) and 64 (1) of the Environmental Management and Co-ordination Act.**

**d. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in breach and violation of Section 42 of the Environmental Management and Co-ordination Act.**

**e. A conservatory order restraining and prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from harvesting and dumping materials along the Kenya Southern Coastal Line between Likoni and Diani.**

**f. A conservatory order prohibiting the 3<sup>rd</sup> Respondent from granting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents any license, permission or authority to harvest sand or dump any materials along the Kenyan Southern Coastline between Likoni and Diani until a fresh, full environmental and social impact assessment study, including an underwater study, is undertaken by the 2<sup>nd</sup> Respondent as per the law.**

**g. Costs of the petition.**

**h. Any other relief as the honourable court may deem just and fit to grant.**

2. In support of the petition the Petitioners filed a supporting affidavit sworn by Gertrude Mukoya Mwenda on 4<sup>th</sup> June, 2019 and further affidavits of Onesmus Macharia and Joana Hancock. The Petitioners are officials of two organizations known as South Coast Residents' Association and Kwale County Natural Resources and have sued on behalf of the said organizations and the membership.

3. The Petitioners' case as set out in the petition and the affidavits in support is that the 2<sup>nd</sup> Respondent's sea sand harvesting and the dumping of dredged materials are destroying the environment and specifically the marine ecosystem in the South Coast of Kenya to the detriment of residents of Kwale County. The Petitioners further allege that some components of the sand harvesting, dredging and dumping are being done without a valid EIA License. As a result, the Petitioners' claim that their constitutional rights have been violated.

4. The Petitioners aver that on 1<sup>st</sup> June, 2015, South Coast Residents Association complained to the 3<sup>rd</sup> Respondent that the proposed sand harvesting would cause irreversible impact on the economy of Kwale County and that there was need to have the proponents undertake a full Environmental and Social Impact Assessment Study. The Petitioners aver that there have been previous sand harvesting activities in the Southern Coast of Kenya wherein the then proponents prepared an incompetent Environmental Impact Assessment report which made the Petitioners herein complain to the 3<sup>rd</sup> Respondent but did not intervene, forcing the Petitioners to go to the National Environment Tribunal which agreed that there was need to undertake extensive underwater study and involvement of stakeholders. The Petitioners aver that in March 2019, they made complaints to and/or enquiries from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents but received no response though they received information from the County Director of the 3<sup>rd</sup> Respondent stating that the impugned activities were licensed by the 3<sup>rd</sup> Respondent. The Petitioners aver that they raised complaints regarding the implication of the 2<sup>nd</sup> Respondent's activities to the environment wherein the 1<sup>st</sup> Respondent directed the 2<sup>nd</sup> Respondent to stop its activities until consultations were made with the stakeholders, including the Petitioners herein. The Petitioners aver that no proper public participation or stakeholder consultations have been undertaken by the 2<sup>nd</sup> Respondent before the issuance and variation of licenses by the 3<sup>rd</sup> Respondent to the 2<sup>nd</sup> Respondent. The Petitioners have exhibited the Environment Impact Assessment Study undertaken by the 2<sup>nd</sup> Respondent which according to the Petitioners demonstrates that the sand harvesting activities would cause great harm to the environment to the detriment of the people of Kwale County, Kenyans at large and the future generation. The Petitioners have also annexed a report dated 9<sup>th</sup> April 2019 titled "Non-Technical Report on Rapid Visual Assessments of perceived impacts of sedimentation on Tiwi Reef resulting in near-shore dredging activities" prepared by Joana Hancock who is said to be a marine biologist and researcher.

5. In this suit, the Petitioners have contended that the environmental impact assessment was carried out without public participation and that the activities by the 3<sup>rd</sup> Respondent have and shall continue to cause great damage to the environment and especially the delicate marine ecosystem in the Southern Coastal area of Kenya. The petitioners are also challenging the validity of the licences issued by the 3<sup>rd</sup> Respondent. It is contended that the 2<sup>nd</sup> Respondent did not begin the project within 24 months after being issued with License No. 0001206 dated 7<sup>th</sup> August, 2007 and instead applied for a renewal and variation of the said license. The Petitioners aver that there was no evidence produced by the 2<sup>nd</sup> Respondent or the 3<sup>rd</sup> Respondent to demonstrate that a Social Impact Assessment Report was prepared and submitted to the 3<sup>rd</sup> Respondent. That the 3<sup>rd</sup> Respondent reviewed the EIA report and found it wanting with regard to the social impact assessment. The Petitioners contend that it was irresponsible, unlawful and irregular for the 3<sup>rd</sup> Respondent to issue the 2<sup>nd</sup> Respondent with the license and renewal or variation thereof without requiring the 2<sup>nd</sup> Respondent to first fulfill the conditions set out. It is the Petitioners view that the 2<sup>nd</sup> Respondent ought to have prepared a fresh Environmental Social-Economic Impact Assessment Report in order to be granted a new license. That a new set of people were going to be affected by the extension of the area of sand harvesting and this required sensitization, consultation and compensation of the project affected people. The Petitioners further contend that no public participation was undertaken to support the addendum to the Environmental Impact Assessment Project Report.

6. In his submissions, counsel for the Petitioners submitted that there was no public participation by the 2<sup>nd</sup> Respondent on the project or Environmental Impact Assessment Project Report prior to a license being issued by the 3<sup>rd</sup> Respondent and cited Principle 10 of the Rio Declaration on Environment and Development (1992); Guideline 8 of the BALI Guidelines for the Development of National Legislation on access to Justice in Environmental Matters; Articles 10 (2) (a) of and 69 (d) of the Constitution of Kenya 2010; and Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003. The Petitioners also relied on the case of **Ken Kasing'a -v- Daniel Kiplagat & 5 Others (2015)eKLR** where Munyao, J stated:

***"Public participation for purposes of EIA ought to be real and actual."***

**It is a critical role, for the persons to be affected, may offer alternatives to the project or propose important mitigation measures. It is not a window dressing exercise, and neither should it be looked as a mere formality aimed at ticking the boxes."**

7. Counsel for the Petitioners also relied on the case of **John Kabukuru Kibicho & Another -v- County Government of Nakuru & Others (2016)eKLR** where Muyao, J reiterated the need of public participation and stated:

***"Public participation especially when it comes to EIA's is extremely critical and cannot be treated as a formality or***

**inconvenience. It is the core of any EIA exercise.”**

It was submitted that the manner in which the 3<sup>rd</sup> Respondent undertook public participation was casual and did not consult the Petitioners. Further, that the manner in which the 3<sup>rd</sup> Respondent treated that aspect of public participation in the EIA process was tantamount to abdicating its obligations to ensure public participation was undertaken pursuant to Article 10 of the Constitution and Regulation 17 of the Environment (Impact Assessment and Audit) Regulations 2003. This is especially after the 2<sup>nd</sup> Respondent applied to vary the license herein to include the Southern Coast of Kenya as a sand harvesting site. It was the Petitioners submissions that pursuant to the RIO Declaration, the state and its organs have a duty to ensure that protection of the environment is key in all development agendas and participation of its citizenry in all decisions prior to implementation of a project affecting the environment, is mandatory. Counsel for the Petitioners also cited Article 42 of the Constitution which provides that every person has a right to a clean and healthy environment. The Petitioners counsel relied on the case of **Martin Osano Rabera & Another –v- Municipal Council of Nakuru & 2 Others (2018) eKLR; Benson Ambuti Andenga & 2 Others –v- Kibos Sugar and Allied Industries Ltd & 4 Others; Kenya Union of Kenya Sugar Plantations and Allied Workers (Interested Parties)(2019)eKLR, and Ken Kasinga’ (supra)** as well as John Kabukuru Kibicho (supra). The Petitioners submitted that the License No.0001206 dated 7<sup>th</sup> August 2007 and the certificate of variation dated 26<sup>th</sup> January, 2011 are unlawful, irregular and invalid. The Petitioners submitted that whereas Regulation 25 (3) of the Environmental (Impact Assessment and Audit) 2003 Regulations allows for variation of a licence by the 3<sup>rd</sup> Respondent, they submit that Section 64(1) of EMCA and Regulation 17 ought to have been considered. That the 3<sup>rd</sup> Respondent ought to have factored that the variation included doubling the amount of sand required and extending the sand harvesting area to a much larger area covering an area between two sensitive **marine parks. The Petitioners counsel relied on the case of Moffat Kamau & 9 Others –v- Aeolus Kenya Limited & 9 Others (2016) eKLR and Benson Ambuti Andenga & 2 Others (supra)**. It was the Petitioners’ submission that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to observe the rule of law in preparation of the Environment Impact Assessment Project Report, any Addendums thereto and execution of the project. That this exposed the Petitioners and their members to a harmful environment leaving the future generations destitute in total breach of Articles 10 and 42 of the Constitution of Kenya. That the 3<sup>rd</sup> Respondent has failed in its duties as provided in Article 10 and 69 of the Constitution of Kenya Section 42 (1) (b), 58 (2) and 64(1) of the Environmental Management and Coordination Act by issuing out License No.0001206 and the Certificate of Variation 0000173 to the 2<sup>nd</sup> Respondent without following its obligations under the law. The Petitioners therefore urged the court to grant the prayers sought in the petition.

**1<sup>ST</sup> RESPONDENTS’ CASE**

8. The 1<sup>st</sup> Respondent did not file a replying affidavit or submissions, but relied on the submissions filed by the 2<sup>nd</sup> Respondent.

**RESPONSE BY 2<sup>ND</sup> RESPONDENT**

9. The petition is opposed by the 2<sup>nd</sup> Respondent by way of grounds of opposition dated 17<sup>th</sup> June, 2019 and the replying affidavit of Daniel Githinji and the affidavit of Dr. David O. Obura both sworn on 17<sup>th</sup> June, 2019 and filed in court on 18<sup>th</sup> June, 2019 and supplementary affidavit sworn by Daniel Githinji on 24<sup>th</sup> July 2019 and filed in court on 25<sup>th</sup> July, 2019. The 2<sup>nd</sup> Respondent also filed a further affidavit and witness statement all made by Daniel Githinji on 10<sup>th</sup> September, 2020 and filed in court on 14<sup>th</sup> September, 2020.

10. It is the 2<sup>nd</sup> Respondent’s contention that the Petitioners have not demonstrated any sufficient grounds or at all to support their claim that the 2<sup>nd</sup> Respondent has failed to observe the provisions of EMCA and the conditions of the EIA License. Further that the Petitioners have not adduced any sufficient ground or at all to support their claim that a fresh EIA study for the suit projects should be conducted. That the Petitioners have not shown any shortcomings for the existing EIA study that would warrant the carrying out of a fresh EIA study. In addition, it is contended that the Petitioners have not demonstrated that the suit projects have caused reduced fish catch and destruction of the marine environment. The 2<sup>nd</sup> Respondent avers that the Petitioners have not brought their claim within the realm of a constitutional petition as they have not set out with specificity the constitutional rights that they claim to have been infringed and the complaints do not qualify for a constitutional petition.

11. The 2<sup>nd</sup> Respondent avers that the prayers sought for by the Petitioners in the petition are extremely drastic and if granted, the orders would have the effect of nullifying a key national project with international dimensions which have been under implementation for more than ten years. That this would gravely prejudice the county’s national interests as well as the country’s international relations.

12. It is averred that in order for the 2<sup>nd</sup> Respondent to effectively discharge its statutory mandate, the 2<sup>nd</sup> Respondent commenced expansion of the Mombasa Port under the project named Mombasa Port Development Project which consists of among others, construction of a new container terminal in three phases and when the project is completed, it will create an additional capacity of 1.5 million TEUs (Twenty –foot Equivalent Units) per annum, taking over the overall capacity of the port of Mombasa to over 2.6 million TEUS. That the design of the projects being undertaken by the 2<sup>nd</sup> Respondent at a cost of Kshs.56,000,000,000 involves among other activities dredging at the Kilindini Port and harvesting of sea sand in Shelly Beach, Waa and Tiwi areas of Kwale County. That the harvested sea sand is used at the Kilindini Port site for reclamation, compacting and construction works within the port. According to the 2<sup>nd</sup> Respondent, the project is being implemented in an environmentally, socially and economically sustainable manner, and that adequate safeguards and mitigation measures have been put in place in order to minimize and mitigate any negative impacts that the project may have on the environment such as marine life fisheries and coral reefs. That the projects and the components thereof are contractually, and by their very nature, time bound. It is averred that the project activity of sea sand harvesting was completed and halted in August 2019 while the project activity of dredging and dumping of dredged material was completed and halted in April 2020.

13. The 2<sup>nd</sup> Respondent avers that in compliance with the law and in appreciation of the size and magnitude of the project, a comprehensive Environmental Impact Assessment (EIA) study was undertaken for the entire project in the years 2006 to identify the possible impacts that would arise as a result of the activities of the project on both the natural and social environment and to designed measures that would mitigate the impacts. That on the basis of the comprehensive EIA study and the accompanying EIA Report, NEMA, the 3<sup>rd</sup> Respondent

herein, granted the 2<sup>nd</sup> Respondent an EIA License for the project on 7<sup>th</sup> August 2007. The 2<sup>nd</sup> Respondent avers that during the process of conducting the EIA, and prior to the issuance of the EIA License, the 2<sup>nd</sup> Respondent engaged an Environmental Lead Expert/Consultant who undertook a comprehensive public participation exercise where various stakeholders were invited to attend public participation forums in relation to the project. That the main purpose of the public hearings was to give an opportunity to stakeholders and the public to present their views, objections, suggestions and concerns about the project. That at the time when the 3<sup>rd</sup> Respondent exercised its legal mandate to issue the EIA License, all the analysis and findings by the Environmental Lead Expert/Consultant and the input from members of the public were taken into account. Further, and as is customary with a project of this magnitude, the need arose for updating the EIA to capture new developments that had not been foreseen prior to the issuance of the EIA License, hence the addenda which were approved by the 3<sup>rd</sup> Respondent in March 2012 and April 2014 to cover extended area for sand harvesting and to address and provide for the increase of the volume of sand to be harvested. The 2<sup>nd</sup> Respondent averred that after the EIA license was granted by the 3<sup>rd</sup> Respondent in August, 2007, and after the subsequent approvals of the addenda, no person, including the Petitioners herein, challenged the grant of the EIA License by way of appeals as provided for under the provisions of EMCA, and faults the Petitioners for bringing the current petition 12 years after the EIA License was issued. The 2<sup>nd</sup> Respondent stated that during the implementation of the project, it has sustained a monitoring framework as well as a strong stakeholder engagement mechanism, including undertaking vigorous public participation exercise. The 2<sup>nd</sup> Respondent denied the Petitioners' allegations that areas of Waa and Tiwi are being used as dumping sites, reiterating that the specific site at which dredged material is dumped was meticulously chosen in the year 2011 by a multi-agency team which was guided by international best practice including depth and proximity to sensitive marine habitats. The 2<sup>nd</sup> Respondent has annexed all the relevant documents.

14. In their submissions, counsel for the 2<sup>nd</sup> Respondent submitted that disputes such as the one crafted in the current petition ought to be brought before court as ordinary civil or common law claims rather than constitutional petitions. Counsel relied on the case of **International Centre for Policy & Conflict & 5 Others –v- Attorney General & 4 Others (2013)eKLR; Re Application by Bahadur (1986)LRC (Const); Minister of Home Affairs –v- Bickle & Others (1985)LRC Const; COD & Another –v- Nairobi City Water & Sewerage Company Limited (2015)eKLR; and Anita Karimi Njeru –v- Rep (1979)KLR 154**. Counsel for the 2<sup>nd</sup> Respondent submitted that the issues in dispute in the petition are primarily based on the EIA process and EIA License for the suit projects, which are firmly anchored in statute, namely, the Environmental Management and Coordination Act (EMCA) and therefore could be litigated by way of a civil suit or a common law dispute. Counsel pointed out that the suit project commenced about the year 2006, and the 2<sup>nd</sup> Respondent conducted EIA in 2006 and 3<sup>rd</sup> Respondent granted them an EIA License in 2007. That the EIA process and the granting of the EIA License took place before the 2010 constitution came into force, yet the Petitioners are challenging the said project contending that the EIA process and the EIA License violate their constitutional rights under the 2010 constitution. It was submitted that the procedural, substantive and constitutional validity of the EIA License is to be determined by law as it was on 7<sup>th</sup> August 2007 when the EIA license was issued and not the 2010 constitution. The 2<sup>nd</sup> Respondent's counsel relied on the south African case of **DN Plessis & Others –v- De Clerk & Another (1997)I LRC 637** in which it was held that a party cannot invoke the provisions of the constitution in a claim arising from facts which had occurred before the commencement of the constitution unless it is expressly stated that the constitutional provisions in question is retroactive.

15. It was further submitted that the Petitioners have not proved their case on a balance of probabilities as they never tendered credible evidence to prove their allegations and to demonstrate violation of their right under the provisions of the constitution or any other law. It was submitted that in this case, there was adequate meaningful public participation and that even after the EIA approvals were granted for the projects, the 2<sup>nd</sup> Respondent kept engaging with stakeholders during the implementation of the suit projects. The 2<sup>nd</sup> Respondent's counsel submitted that it is common principle of public participation that the mere fact that particular views may not have been acted upon cannot be used as a yardstick for finding that the whole project lacked proper public participation. Counsel relied on the case of **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others –v- County of Nairobi Government & 3 Others Petition No. 486 of 2013** in which Lenaola J (as he then was) appreciated that public participation is not the same as saying that the public views must prevail. Counsel also relied on the case of **Republic –v- County Government of Kiambu Ex parte Robert Gakuru & Another (2016)eKLR**.

16. It was the 2<sup>nd</sup> Respondent's submission that the Petitioners have failed to demonstrate a basis for this court to issued an order or directing that a fresh EIA study be conducted, that the project is being undertaken pursuant to a valid EIA License. Further, that the Petitioners have failed to demonstrate any invalidity with the current license and variations. It was submitted that the Petitioners are already actively pursuing other dispute resolution mechanisms in respect of their complaints herein, including a petition pending before the National Assembly and another one before the public complaints committee and therefore the aim, including of this petition, is to derail the large-scale government development and infrastructure by all means possible. It is their submission that the petition is made on baseless and unfounded allegations, is a blatant abuse of the court process and is aimed at scandalizing the operations of the 2<sup>nd</sup> Respondent and the suit projects while serving hidden private interests. The 2<sup>nd</sup> Respondent's counsel also relied on the case of Independent **Electoral & Boundaries Commission & Another –v- Steven Mutinda Mule & 3 Others (2014)eKLR**.

17. It was submitted that there was no evidence adduced before this court showing the alleged dwindled fish volume as a result of the suit projects. This is because there was no empirical study showing the volume of catch before the project commenced and the alleged dwindled volumes noticed after the project commenced. The 2<sup>nd</sup> Respondent maintained that scientific reports it has tabled clearly show that the suit projects have had no adverse irreversible impacts on the environment and any change in fish volume is not attributable to the suit projects. It was the 2<sup>nd</sup> Respondent's submission that the Petitioners have failed to establish and demonstrate a prima facie case necessary for the granting of the reliefs sought in the petition. The 2<sup>nd</sup> Respondent further submitted that the petition and the reliefs sought herein have been overtaken by events the projects having been completed. Counsel for the 2<sup>nd</sup> Respondent relied on the case of **Uganda Corporation Creameries Ltd and Another –v- Reamtor Limited Case No. 11 of 1999 and Fredrick Karisa Shungu & 3 Others –v- Rev. Geoffrey Gidyo Dida (2012)eKLR**. It was submitted that the petition does not represent any public interest at all and the 2<sup>nd</sup> Respondent's counsel relied on the case of **Ashok Kumar Pandey –v- State of West Bengal AIR 2004 SC 280 and Brian Asin & 2 Others –v- Wafula W. Chebukati & 9 Others (2017)eKLR**.

18. Counsel for the 2<sup>nd</sup> Respondent asked the court to revisit its earlier decision on the jurisdictional question because of the judgment of the Court of Appeal in **Kibos Distillers Limited & 4 Others –v- Benson Ambuti Atega & 3 Others (2020)eKLR** which was delivered on 31<sup>st</sup> January, 2020 a week after this court's ruling delivered on 23<sup>rd</sup> January, 2020. Counsel submitted that the matters being raised in this

petition can be sufficiently handled by the NET or National Environmental Complaints Committee and should only find their way to this court by way of an appeal. The 2<sup>nd</sup> Respondent's counsel pointed out that the ELC have already started giving effect to the Kibos decisions and referred to the decision of Omollo, J delivered on 16<sup>th</sup> June 2020 in **Chrispinus Munyane Papa & Another –v- National Environmental Management Authority & Another (2020)eKLR** in which the learned judge acknowledged that the Court of Appeal had stated that the principle of the exhaustion would require that a litigant starts at the lowest forum before proceeding to the higher court. Counsel submitted that the law now disentitles a litigant from coming to the ELC as a court of first instance merely because some of the issues to be raised are constitutional.

### **RESPONSE BY 3<sup>RD</sup> RESPONDENT**

19. The 3<sup>rd</sup> Respondent opposed the petition by way of a replying affidavit of Daniel Githinji and the affidavit of Zephaniah Ouma both sworn on 24<sup>th</sup> July, 2019 and filed in court on 26<sup>th</sup> July, 2019. The 3<sup>rd</sup> Respondent avers that it was furnished with an Environment Impact Assessment Project Report (EIA Report) for the proposed container terminal modernization project for purposes of consideration for issuance of an EIA License. A copy of the acknowledgment letter dated 6<sup>th</sup> December, 2006 has been annexed. The 3<sup>rd</sup> Respondent avers that in the spirit of collaboration with lead agencies and undertaking due diligence, the 3<sup>rd</sup> Respondent vide its letter dated 28<sup>th</sup> December, 2006 wrote to the relevant lead agencies seeking their views on the proposed project. A copy of the letter dated 28<sup>th</sup> December 2006 has been annexed.

20. The 3<sup>rd</sup> Respondent states that before issuance of the license, it wrote to the 2<sup>nd</sup> Respondent on 9<sup>th</sup> January, 2007 informing them of their requirement to publish for two successive weeks in both the Kenya Gazette and in a Newspaper of nationwide circulation a public notice inviting the public to submit oral or written comments on the environmental impact assessment report. A copy of the said letter has also been annexed. That before the issuance of the license, there was participation in which various stakeholders were in attendance. That the public hearings were held on 13<sup>th</sup> September, 2006, 13<sup>th</sup> October, 2006, 9<sup>th</sup> November 2006 and 25<sup>th</sup> May 2007 in which the public and various stakeholders present were given an opportunity to present their views and concerns about the project. A copy of a brief is annexed. The 3<sup>rd</sup> Respondent avers that it considered the views submitted and addressed before the 2<sup>nd</sup> Respondent was issued with an EIA License. That on 30<sup>th</sup> May 2007, the 2<sup>nd</sup> Respondent wrote to the 3<sup>rd</sup> Respondent informing the 3<sup>rd</sup> Respondent of their acceptance of the conditions and that they would comply with all the conditions. That the 3<sup>rd</sup> Respondent issued the 2<sup>nd</sup> Respondent with a License dated 7<sup>th</sup> August, 2007. Copies of the Letters and License have been annexed.

21. The 3<sup>rd</sup> Respondent states that on 13<sup>th</sup> January, 2011, the 2<sup>nd</sup> Respondent filed an application with the 3<sup>rd</sup> Respondent for variation of the EIA License for the time to which the project was to commence. That the delay to commence the project was due to the lengthy procedures that were necessary to effect the loan agreement between the 2<sup>nd</sup> Respondent and the project financier. That upon reviewing the application and satisfying itself that the application met the statutory provisions on 26<sup>th</sup> January, 2011, the 3<sup>rd</sup> Respondent issued the 2<sup>nd</sup> Respondent with a certificate of variation dated 26<sup>th</sup> January 2011 and valid for 24 months. A copy of the License No.0001206 has been annexed. It is further stated that after reviewing the addendum report according to a letter dated 8<sup>th</sup> March 2012, the 3<sup>rd</sup> Respondent noted that the proposed sites would lie along the same borrow pit area identified in the EIA report and also the amount would be the same. That the 3<sup>rd</sup> Respondent informed the 2<sup>nd</sup> Respondent to observe mitigation measures in the approved EIA report for the additional sites and also to provide GPS coordinates for each new site for monitoring and future assessment of impacts. The 3<sup>rd</sup> Respondent avers that it continuously assesses the environment and social variables of potential impacts by the synthetic collection of the specific data and evaluating the data for purposed mitigation measures effectively address the potential negative impacts. That after submission of the addendum, on 3<sup>rd</sup> March, 2014 the 2<sup>nd</sup> Respondent wrote to the 3<sup>rd</sup> Respondent for approval to mine an additional 8.3 million cubic metres of sand from the same offshore sand borrow pit used for phase II and III of the project, and the 3<sup>rd</sup> Respondent reviewed the application and was satisfied that the Environmental Management Plan in the EIA Report plus proposed interventions contained in the addendum report would suffice and proceeded to issue the 2<sup>nd</sup> Respondent with a License. That the 2<sup>nd</sup> Respondent applied for a further 8 million M3 for phase II and III of the project in a second addendum and the 3<sup>rd</sup> Respondent informed the 2<sup>nd</sup> Respondent that since the area of sand mining was the same using the method, existing Environmental Management Plan should suffice and therefore no need for another EIA for the process. The 3<sup>rd</sup> Respondent avers that it ensured the project was subject to the public participation and met the threshold for public participation leading to the issuance of the EIA License and the subsequent approvals. That at the time of issuing the License and throughout the development of the project, no appeal was filed challenging the same as provided for under EMCA. It is therefore the 3<sup>rd</sup> Respondent's contention that the Petitioners allegations that the project is proceeding without an EIA License is unfounded and untrue. That the ruling of the NET in **Appeal NO. 152 of 2015** referred to by the Petitioners was quashed by the **High Court in Nairobi Misc.App.No. 82 of 2016**. The 3<sup>rd</sup> Respondent reiterated that it has complied with all relevant laws, regulations and proper rules of procedure in issuing the EIA License for the project.

22. It is the 3<sup>rd</sup> Respondent's submission that the issues raised in the petition herein do not suffice to be issues that can be raised by way of a constitutional petition to be litigated before this court. Counsel for the 3<sup>rd</sup> Respondent relied on the case of International Centre for **Policy & Conflict & 5 Others –v- Attorney General & 4 Others (2013)eKLR**; **Supreme Court of India decision in Re Application by Bahadur (1986)LRC (Const); Minister of Home Affairs –v- Bickle & Others (1985) LRC (Const.); COD & Another –v- Nairobi City Water & Sewerage Company Ltd (2015)eKLR**. The 3<sup>rd</sup> Respondent further submitted that the Petitioners have failed to demonstrate and establish a prima facie case. Counsel for the 3<sup>rd</sup> Respondent relied on the case of **Ramanlal T. Bhat –v-R (1957) E.A. 335; Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003)eKLR**. The 3<sup>rd</sup> Respondent maintained that the EIA License was issued procedurally, that there was as much public participation incorporated in the project as it was sufficiently required and that the EIA report submitted met all the prerequisite details that the law demanded of it as prescribed in the EIA regulations and EMCA. The 3<sup>rd</sup> Respondent submitted that this petition does not challenge the content and substance of the application submitted to the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent's counsel relied on the case of National Association for the Financial Inclusion of the **Informal Sector –v- Minister for Finance & Another (2012)eKLR**; the Court of Appeal of Belize decision in **Belize Alliance of Conservation Non-Governmental Organizations –v- The Department of the Environment and Belize Electric Company Limited; Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others – v- County of Nairobi Government & 3 Others Petition No.486 of 2013; and Republic –v- County Government of Kiambu Ex Parte**

23. The 3<sup>rd</sup> Respondent submission was that the project report was prepared in accordance with the relevant statutory and constitutional framework and the issuance of the EIA License to the 2<sup>nd</sup> Respondent was properly done by the 3<sup>rd</sup> Respondent upon being satisfied that the 2<sup>nd</sup> Respondent had fulfilled all legal requirements for the construction of the project. It is the 3<sup>rd</sup> Respondent's submission that it is not necessary that the EIA should pursue investigations to resolve every issue or topic. The 3<sup>rd</sup> Respondent's counsel relied on the case of both the Court of Appeal and the Supreme Court of Belize in claim No.550 of 2010- **Peninsula Citizens for Sustainable Development Limited –v- Department of the Environment & Placencia Marina Limited**; the Supreme Court of South Africa decision in **MEC for Environmental Affairs and Development Planning –v- Clairison's CC (408/2012 (2013) ZASCA 82 (31 May 2013)**.

24. The 3<sup>rd</sup> Respondent further submitted that the Petitioners acknowledge that the 3<sup>rd</sup> Respondent issued the EIA License and are bound by their pleadings and are therefore estopped from doublespeak. Counsel for the 3<sup>rd</sup> Respondent relied on the case of **Independent Electoral & Boundaries Commission & Another –v- Steven Mutinda Mule & 3 Others (2014)eKLR**. It was submitted that the Petitioners' allegation that there has been reduced fish volume has not been sufficiently proved. Counsel for the 3<sup>rd</sup> Respondent cited Section 107 of the Evidence Act and relied on the case of **Jennifer Nyambura Kamau –v- Humphrey Mbaka Nandi (2013) eKLR** and submitted that Petitioners have failed to establish and demonstrate a prima facie case necessary for the granting of the reliefs sought in the petition. It was further submitted that the reliefs sought have been overtaken by events, the project being almost completed. The 3<sup>rd</sup> Respondent urged the court to consider public interest and balance of convenience in the matter. They relied on the case of **Ashok Kumar Pandly –v- State of West Bengal AIR 2004 SC 280 and Brian Asin & 2 Others –v-Wafula Chebukati & 9 Others (2017) eKLR**. The 3<sup>rd</sup> Respondent submitted that the subject matter of these proceedings is an important national facility being developed by both the National Government and the 2<sup>nd</sup> Respondent for the economic and social benefit of the country and public at large whose interests surpasses the private and Sectarian interests of the Petitioners. The 3<sup>rd</sup> Respondent urged the court to dismiss the petition with costs.

#### **ANALYSIS AND DETERMINATION**

25. I have considered the petition, the responses made and the rival submissions. The issues falling for determination are:

- i) Whether there was a valid EIA License for the project.**
- ii) Whether there was proof of violation of the Petitioners' rights to a clean and healthy environment.**
- iii) Whether the Petitioners are entitled to the prayers sought in the petition.**
- iv) What orders should be made with regard to the petition?**

26. In order to be able to appreciate the issues raised in the petition, one has to go through all the paragraphs in the petitions. What I can deduce from the pleadings is the issue of the EIA License No.0001206 issued on 7<sup>th</sup> August 2007. Looking at the petition, it is clear in my mind that the Petitioners are challenging the EIA License issued by the 3<sup>rd</sup> Respondent to the 2<sup>nd</sup> Respondent on 7<sup>th</sup> August, 2007 and the approvals for the subsequent addenda. It is clear therefore that the issues in dispute in the petition are primarily based on the EIA process and the EIA License for the harvesting of sand and dumping of dredged materials at sea. Although the Petitioners have cited various Articles of the constitution and allege that their rights to a clean and healthy environment have been violated, the bottom-line is that they are challenging the EIA process and the EIA License issued for the projects.

27. Section 58 (2) of the 1999 EMCA provided as follows:

**“The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority being satisfied, after studying the project report submitted under Subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.”**

Regulation 10 (2) of the EIA Regulations 2003 provides that:

**“Where the Authority is satisfied that the project will have no significant impact on the environment or that the project report discloses sufficient mitigation measures, the Authority may issue a license in form 3 set out in the First Schedule of these Regulations.”**

28. Under Regulation 4(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003, no proponent shall implement a project likely to have a negative environmental impact or for which an environmental impact assessment is required under the Act or the Regulations, unless an environmental impact assessment has been concluded and approved in accordance with the Regulations.

29. In the instant case, the 3<sup>rd</sup> Respondent has shown that it was furnished with an EIA report for the proposed container terminal modernization project for purposes of consideration for issuance of an EIA License. There is evidence that a copy of the project report was submitted to each of the relevant lead agencies. And undertaking due diligence, the 3<sup>rd</sup> Respondent vide its letter dated 28<sup>th</sup> December, 2006 wrote to the relevant lead agencies seeking their views and comments on the proposed project. These lead agencies included Kenya Wildlife Service, Coast Development Authority, the defunct Mombasa Municipal Council, Ministry of Transport, among others. It has also been shown that notice to the public for meetings were issued in respect of the project that ran in dailies and in the Kenya Gazette. The Respondents have produced correspondences, notices and minutes as proof that public hearings and public participation exercise were

conducted. In the affidavit in support of the petition, the Petitioners admit an EIA study was done and a report prepared. The Petitioners also admit an EIA License was issued for the project, though they allege the same was not valid.

30. From the material placed before this court, it is evident that the 3<sup>rd</sup> Respondent exercised its legal mandate to issue the EIA License to the 2<sup>nd</sup> Respondent in accordance with the law. There is also evidence that show that public participation was conducted where stakeholders and the public aired their concerns suggestions and objections. Moreover, no person, including the Petitioners herein, challenged the grant of the EIA License as provided for under Section 129 of EMCA. The project is said to have commenced in 2006/2007 and the EIA License issued on 7<sup>th</sup> August 2007. This petition was only filed in June 2019. In my view, the Petitioners are guilty of laches and have brought this petition as an afterthought when the project is almost completed, if not, completed. Further, the petitioners cannot invoke the provisions of the Constitution of Kenya, 2010 to challenge activities carried out in 2006/2007.

31. Have the Petitioners proved that their rights, including the right to clean and healthy environment have been violated? From the material placed before me, it is quite evident that the 2<sup>nd</sup> Respondent undertook a vigorous public participation exercise in the period leading to the issuance of the EIA License and subsequent approvals. It is also evident that the EIA License and the subsequent approvals were issued after the relevant authorities, including the 3<sup>rd</sup> Respondent, were satisfied that all conditions and requirements preceding the issuance of the same had been fully met. Even after the EIA approvals were granted by the 3<sup>rd</sup> Respondent for the suit project, the 2<sup>nd</sup> Respondent has shown that it kept engaging with stakeholders during the implementation of the projects. Further, apart from the exhaustive public participation that was conducted prior to commencement of the project, the 2<sup>nd</sup> Respondent has also shown that the whole project in itself incorporated a continuous, robust, open and voluntary grievance redress mechanism which the 2<sup>nd</sup> Respondent, the consultants, the contractors and subcontractors are required to adhere to. The Respondents have also shown that there were elaborate mitigation measures put in place, including continuous monitoring process to ensure that the environment was not damaged. The report relied on by the Petitioners is titled "Non-Technical Report on Rapid Visual Assessment on Perceived Impacts" was made after a duration of only two hours. In my view, and considering the magnitude of the project in question, the reports by the Petitioners were limited in both time and scope and not sufficient to accurately demonstrate that there was any adverse effects of the sand harvesting, dredging and dumping on the environment. Moreover, the said reports are too generalized and lacked the necessary scientific backing to afford it credence. Unlike the Petitioners, the Respondents have presented and tabled scientific reports that clearly show that the project has had no adverse impact on the environment, including the marine ecosystem. I am in agreement with the Respondents submissions that the entire petition is based on speculative and unfounded allegations which have not been proved. I am also in agreement with the respondents' averments that sea sand is able to replenish itself with short period of time.

32. The Respondents have also submitted that the project subject of these proceedings is an important national facility meant for the economic and social benefit of the public at large and whose interests surpasses the private and secretarian interests of the Petitioners. In the case of **Kenya Medical supplies Agency (KEMSA) –v- Mavji Kanji Hirani & 8 Others (2018) eKLR**, the Court of Appeal while considering public interest stated as follows:

**“Looked at as a whole, we think that on a balance of probabilities, the case of KEMSA stood on a firmer ground and ought to have been upheld and the Respondents case dismissed not least because in a contest between private interests of dubious legitimacy and solid public interest claims, the latter ought to prevail.....**

**We accept as good law the rather commonsensical proposition that in the tussle for supremacy between private and public interests, the latter must prevail. The courts have a duty to identify and uphold the public interest, alive to the fact that their decisions ought to conduce to the attainment of that which is for the advancement of the public good.”**

33. Being guided by the above Court of Appeal decision, I am also of the view that the project in this suit is of great public importance and to uphold the public interest, the petition herein ought to be dismissed.

34. In the final analysis, the upshot of the foregoing is that this petition lacks merit and is dismissed.

35. On costs, I have noted that the Petitioners have only sought declaratory orders. There is no prayer for compensatory damages for their alleged violation of their constitutional rights. It may therefore be concluded that the Petitioners concern was simply to protect the environment. In the circumstances, I order that parties bear their own costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 11<sup>th</sup> day of November 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**