Kerongo & another v Kisii County Government & 6 others (Environment and Land Petition E001 of 2023) [2025] KEELC 6833 (KLR) (8 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6833 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND PETITION E001 OF 2023

M SILA, J

OCTOBER 8, 2025

BETWEEN

THOMSON KERONGO ..... 1ST PETITIONER

RIGENA HUMAN RIGHTS WATCHDOG ORGANIZATION . 2ND PETITIONER

AND

KISII COUNTY GOVERNMENT ..... 1ST RESPONDENT

KISII COUNTY ASSEMBLY ..... 2ND RESPONDENT

DIRECTOR, PHYSICAL PLANNING & URBAN DEVELOPMENT, KISII COUNTY ..... 3RD RESPONDENT

KENYA POWER & LIGHTING COMPANY ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

LAND REGISTRAR, KISII COUNTY ..... 7TH RESPONDENT

JUDGMENT

A. Introduction And Pleadings

1. This suit was commenced by way of a petition that was filed on 23 March 2023. The petition was subsequently amended on 26 July 2023. The 1st petitioner has introduced himself as a passionate environmentalist who brings this petition on behalf of the Kenyan people, more particularly, the residents of Kisii County. He is also the Chairman of the 2nd petitioner. The 2nd petitioner is described as a Non-Governmental Organisation. The petitioners have respectively sued, as the 1st – 7th respondents, the County Government of Kisii, the Kisii County Assembly, the Kisii County Director, Physical Planning, & Urban Development, the Kenya Power & Lighting Company , the National Land

Commission, the Land Registrar, Kisii County and the Attorney General. The subject matter in issue is the land parcel Central Kitutu/Mwamosioma/698 (the suit land) upon which the 4th respondent has developed a power distribution station.

2. According to the registration documents, the suit land got registered in name of Gusii County Council on 23 February 1967 with remarks that the land is "Reserved for Nyakemini Cattle Tripping." The petitioners aver that in a meeting of the Finance, Staff and General Purpose Committee of the Gusii County Council held on 23 December 1986, Minute 117/86, it was resolved that the suit land be set aside for the construction of Jogoo Market. The petitioners contend that the 1st respondent (County Government of Kisii), with the approval of the 2nd respondent (Kisii County Assembly) has short-changed the initial plan to construct Jogoo Market, and instead favoured the 4th respondent (Kenya Power & Lighting) with the land, and the 4th respondent has proceeded to put up structures on it without due process being followed. The petitioners urge that the allocation and assignment of the suit land to the 4th respondent violates the process of allocation of public land for private development. They particularly assert that there was no public participation before the decision to allocate the land to the 4th respondent was made and that there has not been any change of user. The petitioners aver that the National Land Commission (5th respondent) is mandated by law to ensure that all transactions on land comply with the constitutional and legislative provisions. The petitioners complain that the 4th respondent has now proceeded to put up a power sub-station in a residential estate thus pausing danger to residents and surrounding properties.

3. It is the case of the petitioners that the suit land falls in the category of reserved public land within the meaning of Section 12 (2) (f) of the *Land Act*, 2012, and that it was not available for allocation. They claim that the 5th respondent has failed in her mandate to oversee public land as provided under Article 67 of *the Constitution*. They allege violation of various provisions of *the Constitution*, including Article 40 on the right to property, based on the reasoning that the people of Kisii have been deprived their right of use of the suit land; Article 62 on management of public land; Article 35 on access to information on the basis that there was failure to disclose information concerning construction of structures on the suit land by the 4th respondent; and the principles of land policy in Article 60 of *the Constitution*. They urge that there has been infringement of the rights of the residents of Kisii to a market as earlier earmarked. They also cite violation of Sections 8 and 9 of the *Land Act*, Act No. 6 of 2012, and the requirements of the *Physical and Land Use Planning Act*, Act No. 13 of 2019. They add that the proceeds of allocation and/or lease of the suit land have never been accounted for; that at no time did the 2nd respondent discuss the allocation, and that the process remains opaque. It is urged that the 3rd respondent has not shown the need and urgency of allocation of the land to the 4th respondent and abandoning the purpose for which the land was set aside.

4. In the petition, the petitioners seek the following orders (paraphrased for brevity) :

    1. Eviction and demolition order against the 4th respondent.

    2. Permanent injunction against the 4th respondent restraining her from constructing on the suit land, wasting it, or trespassing into it.

    3. A declaration that the decision to allocate, sell and/or lease the suit land to the 4th respondent is unconstitutional and against the legitimate expectation of the residents of Kisii County and its future generations, and an order to quash the process.

    4. An order for the 4th respondent to restore the suit land to its original status before they took possession.

5. An order of Judicial Review quashing any approval from the Kisii County Assembly for any lease purportedly entered between the Governor, Kisii and/or the County Government of Kisii, and the 4th respondent, over the suit land.

6. An order of Judicial Review quashing any approval or Bill tabled on the floor of the Kisii County Assembly discussing the issue of allocating the suit land to the 4th respondent.

7. An order of Judicial Review quashing any Memorandum of Understanding that the Kisii County Government entered with any investor for any development on the suit land.

8. That the Kisii County Government be compelled to seek alternative land to allocate to the 4th respondent other than the suit land.

9. That an order be issued to order the 4th respondent to pay rent and rates after assessment by the Government Valuer from the time they started occupying the suit land.

10. An order directing the Land Registrar, Kisii, to cancel all entries made on the register of the suit land.

11. Any other orders the court shall deem just.

12. Costs of the petition be in the cause.

5. The petition is supported by the affidavit of the 1st petitioner. He has elaborated that they have filed the suit herein to challenge the decision of the 1st respondent in allocating the suit land to the 4th respondent without regard to public participation, the precautionary principle, and the principle of sustainable development. He has stated that the allocation or leasing of the suit land to the 4th respondent has led to deterioration of the already deplorable state of markets within Kisii County thus threatening the right to a clean environment. He claims that the allocation of the land has generated income for the 1st respondent which income has either been looted or misappropriated as it has not been accounted for in any financial year. He has deposed that he filed a complaint with the Land Registrar, Kisii (6th respondent) seeking to know the procedure followed to convert the suit land to the 4th respondent but he never received any feedback. He has added that the decision of the 1st respondent was reached without prior disclosure of all material facts to the public, more particularly the residents of Kisii, who are the stakeholders, and that there was no public participation. He has averred that the agreement between the 1st and 4th respondents has not been tabled before the 2nd respondent for adoption and that the 4th respondent is in occupation under unclear terms. He has added that there is no indication of a Memorandum of Understanding that has been approved by the Kisii County Assembly or the members of the public through stakeholder engagement. He has mentioned that there has been no advertisement of intention to allocate or lease out the suit property. He thus asks this court to declare the actions of the respondents as null and void.

6. The 1st respondent, the Kisii County Government, only entered appearance but did not file any response to the petition. So too the 2nd respondent, (the County Assembly of Kisii), the 3rd respondent (Director, Physical Planning & Urban Development, Kisii County) and the 5th respondent (National Land Commission).

7. The State Law Office, on behalf of the 6th respondent (Land Registrar, Kisii) and the 7th respondent (Attorney General) did file a replying affidavit sworn by Charles Ayienda, the Kisii County Land Registrar. He has deposed that there is nothing constitutional in the petition. He has nonetheless affirmed that the suit land got allocated to the Gusii County Council at the time of adjudication. The land had been reserved for 'Nyakemini Cattle Tripping' but one Okombe Nyamacharara made

a successful objection and was given 2 acres out of it. What remained, i.e 0.7 Ha, was duly registered in name of Gusii County Council on 3 April 1986 as reserved for Nyakemini Cattle Tripping. He has explained that this title has never changed hands and remains in the original state of registration.

8. On her part, the 4th respondent filed a replying affidavit to oppose the petition, and also filed a cross-petition. The replying affidavit is sworn by James Odongo, who works with the 4th respondent as an Engineer in the Infrastructure Department based in Nairobi. He has deposed that he worked as the Project Manager for the construction of Kisii East (KITARU) Sub-Station and is thus aware of the matters in issue. He has introduced the 4th respondent as a State Corporation within the meaning of Section 2 (c) of the *State Corporations Act*, Cap 446, Laws of Kenya; that the 4th respondent is also a public body within the meaning of Section 2 (1) of the *Anti-Corruption and Economic Crimes Act*, Cap 65, Laws of Kenya; that the 4th respondent is equally a public entity within the meaning of Section 3 of the *Public Procurement and Asset Disposal Act*, Cap 412C, Laws of Kenya; and that the 4th respondent is an Energy Sector Entity under Schedule 2 of the *Energy Act* and is licenced by the Energy and Petroleum Regulatory Authority, to generate, and distribute electricity to millions of power users across the country. He has deposed that in order to improve the quality and reliability of electrical supply, the 4th respondent placed an advertisement in the Daily Nation newspaper of 10 February 2010, for the purchase of land measuring approximately one (1) acre in Kisii Town among other areas in the country. He has annexed the said advertisement. He has stated that this mode of acquisition was not successful and thus the 4th respondent reached out to the County Government of Kisii and the Kisii Secondary School for land. He has annexed copies of correspondence to that effect. He has deposed that Kisii School offered to lease two acres of its land at Kshs. 500,000/= per month which was found to be inordinately high as the market valuation returned the rate of Kshs. 200,000/= per month. On 4 November 2016, the 4th respondent received an offer from a private land owner offering to sell one acre out of the land parcel Nyaribari Chache/B/B/Boburia/10741 at Kshs. 15,000,000/= (Fifteen Million) which he says they found high as their valuation of the land was Kshs. 8,000,000/= (Eight million). On 24 August 2017, they received yet another offer for sale of the land parcel Nyaribari Chache/B/B/Boburia/1350 which again he states they found high as their valuation of the land was Kshs. 10,000,000/= (Ten Million) but the land was being offered at Kshs. 13,000,000/= (Thirteen Million). He has annexed copies of the valuation reports. He states that because they failed to secure land through the open tender, given the high prices, the 4th respondent cancelled the tender and recommended a direct procurement as allowed under Section 103 (2) of the *Public Procurement and Asset Disposal Act*, 2015.

9. He has deposed that on 2 March 2018, the 4th respondent wrote to the County Government of Kisii, requesting to be allocated land for the intended purpose and followed up on the same with further correspondences. On 12 September 2018, they wrote to the County Government of Kisii specifying that they would wish to be allocated the suit land. He has averred that this request was approved by the County Government through its letter of 13 December 2018. The letter affirmed that the County Government of Kisii has approved their request for construction of a substation on the land and they were to identify one acre therein. He further deposed that in May 2019, the 4th respondent conducted an Environment Impact Assessment (EIA) through Messrs. Nanjing Daji Steel Manufacturing Company Limited and they came up with a Soil Investigation Report to facilitate design and construction of the proposed development. He has averred that an EIA Project Report was done and an application for an EIA Licence was made and issued by the National Environment Management Authority (NEMA). He has annexed a copy of a 2015 project report as annexure 23. He has continued to depose that in August 2019, an Integrated EIA was carried out and a report generated which he has annexed as annexure 24. He has averred that during this Integrated EIA there was a public participation meeting held on 20 August 2019 where people gave their views and agreed

to support the project since it was a public facility. He has deposed that on 18 October 2019, the 4th respondent received from the Kisii County Ministry of Lands, Housing, Physical Planning and Urban Development, a notification of approval for extension of user of the suit land so as to include a substation and medium voltage lines.

10. He has averred that the foregoing notwithstanding, after they commenced construction, the community raised resistance claiming that they were not aware of the project and supposed allocation of the land to the 4th respondent. The allegations made the 1st respondent and the 4th respondent to call for a consultative public participation meeting which was held on 15 November 2019. It is said to have been attended by various persons including the then County Executive Committee Member for Administration and Devolution, the Personal Assistant to the area Member of Parliament, the County Secretary, the area Member of County Assembly (MCA), the former Deputy Mayor, the 4th respondent's Regional Manager for South Nyanza, various village representatives, a clan elder and an opinion leader, who supported the project as it was a project meant for public good and would resolve the frequent power outages that riddled the County. He has averred that arising out of the meeting, the Chairperson of the Municipal Development Control Committee wrote a letter dated 19 November 2019 to the 4th respondent stating that there was consensus that work be stopped until the following activities are achieved being : that the area of the suit land be surveyed to establish its exact acreage; that the summons by the Land Registrar, Kisii, be honoured; that the existing springs within the suit land be protected in order to provide water to the community living around the area; and that the existing access road through the suit land be reinstated in order to serve the residents living across the river. Another letter dated 2 December 2019 was written to the 4th respondent by the County Secretary and Head of Public Service, notifying the 4th respondent that beaconing will be done on 3 December 2019 and construction works could resume on 4 December 2019.

11. He contends that the construction of the substation on the suit land was rightfully done by the 4th respondent after the requisite approvals were obtained being :

    a. The Kisii County Government Approval No. 13/03/2019/70.

    b. The National Environment Management Authority (NEMA) Approval No. NEMA/EIA/PSR/3018.

    c. National Construction Authority (NCA) Registration No. 2804/E/1116.

    He has annexed these documents.

12. He has continued to depose that the total acreage of the suit land is 1.7297 acres and that the substation occupies 0.67 acres out of the allocated one acre since the rest of the land is riparian land. He avers that this leaves a sufficient portion of the land for development of a market and cattle tripping. He has added that the 4th respondent has preserved the Nyakemini stream and provided an access road as agreed in the Consultative Public Participation Meeting of 15 November 2019.

13. He has deposed that the suit land is public land and the protection of the right to property under Article 40 of *the Constitution* does not apply, as the said provision protects individual land ownership rights. He avers that the construction of the substation on the suit land did not violate Sections 8 and 9 of the *Land Act*, 2012, as these sections do not apply where public land reserved for certain use is utilized by a public entity in a manner that promotes public good. He states that the only step that was not completed was the regularization and registration into the name of the 4th respondent of the section of the suit land allocated to the 4th respondent. He has added that during the public consultative meeting of 15 November 2019, the 4th respondent agreed with the Kisii County Government that the land allocated to the 4th respondent be regularized and registered by the County Government.

14. He has deposed that on 19 August 2020, the 4th respondent wrote to the County Government of Kisii requesting for regularization of the suit property but is yet to receive a response. He has averred that Regulation 30 of the Land (Allocation of Public Land) Regulations, 2017, allows any public institution which is in actual occupation of public land to apply to the Commission for the formalization of the allocation and registration of the land they wish to be allocated.

15. He contends that the approval of the construction by the County Government was a justified exercise of its mandate and function and that the interest and views of the community were considered. He avers that the substation was a mega project which cost huge sums of money obtained from public funds. He has annexed copies of some contract documents for the developments made on the suit land.

16. He states that the 4th respondent was willing to purchase land but it was untenable to utilize public funds to purchase public property for the purposes of making developments for the public good.

17. He seeks that the petition be dismissed and the National Land Commission and the County Government of Kisii be ordered to regularize allocation of 0.67 acres of the suit land already occupied by the 4th respondent and where the substation lies, in tandem with the Notification of Approval by the County Ministry of Lands, Housing Physical Planning and Urban Development dated 18 October 2019.

18. In the cross-petition, the 4th respondent seeks the following orders :

    a. A declaration that Articles 60 and 69 (1) of *the Constitution* have been violated as the land parcel Central Kitutu/Mwamosioma/698 lies idle since 1986 as a reservation for construction of a market yet the cross-petitioner's project for construction of a substation craves for allocation of land.

    b. A declaration that Articles 201 and 227 of *the constitution* are violated, infringed or threatened with violation and infringement as the cross-petitioner being a state corporation, public entity or public body risks using public funds to purchase public land.

    c. A declaration be made that the cross-petitioner being a public entity mandated to implement the national energy policy in transmitting, distributing and supplying electricity as a public utility is not a private entity and its developments are not private projects.

    d. A declaration that Articles 174 and Clauses 22 and 31 of Part 1 and Clause 8 of Part 2 of the Fourth Schedule to *the Constitution* of Kenya, 2010 have been violated, infringed and/ or threatened with infringement as the County Government of Kisii and the National Land Commission have failed to enhance the principle of harmonious existence of state agencies.

    e. An order directing the National Land Commission together with the Kisii County Government to regularize the allocation of the 0.2752 Ha of the total 0.7 Ha of LR No. Central Kitutu/Mwamosioma/698 already occupied by the 4th respondent onto which the substation lies.

    f. A declaration that the National Environment Management Authority has violated the doctrine of harmonious co-existence of state agencies by failing to process the cross-petitioner's application for a licence for the Integrated Environmental Impact Assessment and consequently violated Article 35 of *the Constitution* of Kenya, 2010.

    g. Any other orders that the Honourable Court may deem fit.

19. Only the petitioners filed a response to the cross-petition through the affidavit of the 1st petitioner sworn on 13 September 2024. In it, he repeated that the Gusii County Council in its meeting of 23 December 1986 agreed that the suit property be set aside for construction of Jogoo Market. He has averred that he is complaining because instead of constructing Jogoo Market, the Kisii County Government has allocated the suit land to the 4th respondent/cross-petitioner without due process being followed. He has repeated the violations contained in the main petition; that there was no public participation; and that the right procedure was never followed. He avers that the cross-petitioner is contradicting himself by seeking the NLC and the Kisii County Government to regularize allocation of the suit property after it has already taken occupation. He has contended that if there was a consultative meeting that was ever attended by the community and area MCA, the MCA would have tabled a motion to the County Assembly of Kisii, for discussion through the County Assembly Committee of Land, before the 4th respondent/cross-petitioner could embark on construction, if at all the property was for public good. He has reiterated that his issue is how the suit property was allocated to the cross-petitioner and whether the correct procedures were followed.

20. Initially, I had directed that the suit be canvassed through written submissions on the basis of the affidavit evidence. I thought that I would finalize the judgment on those directions and indeed gave a judgment date of 13 March 2025. However, as I went through the pleadings and submissions, I felt that the court would be enriched by visiting the disputed land and I therefore reopened the case. The locus in quo was visited on 25 February 2025 and some evidence was also taken on site.

B. Site Visit And Evidence At The Locus In Quo

21. At the locus in quo, those present included Mr. Peter Jamwa, the Senior Engineer in Charge of the substation. He elaborated what the sub-station is all about. He described it as a 'Primary Sub-station' that steps down power. The voltage that comes in is 33,000 volts and what they release is 11,000 volts. He explained that they collect power from Kegati Sub-station which receives 132,000 volts and steps it down to 33,000 volts. It is from Kegati that all power in Kisii is first received. There are 8 lines from Kegati, including the Jogoo Line which is what brings power to the subject substation. From this substation, there are four outgoing lines. One is to Mwembe area which serves the Kisii County Offices, Kisii University, Mwembe, and all the way to Bobaracho. The second line is the Nyankongo line. It serves the Prisons, part of Kisii Town towards the Kisii Teaching and Referral Hospital (KTRH), Aga Khan area and the surroundings. The third line is the Kanyimbo line which serves Egesa, Marani, Kegogi and Jog Villa. The fourth line is the Getare line which is the line going towards Nyamira. He stated that the location of the site is good as it is centrally located. To settle on this site, they considered the distance from the river, accessibility to the road and proximity to Kisii town where most of their customers are located. He stated that moving from this site would interfere with distribution of power to their customers. He advised that the power from the subject substation serves about 31,000 customers. Prior to its establishment, they were using power from Nyangena line, which got overloaded and they resorted to rationing power.

22. I could see that the area occupied by the substation has a perimeter stone wall all round and is well secured. The ground is laid with cabro stones. Within the confines of the wall is where the substation infrastructure and equipment is located. They include a building identified as the control room. The equipment installed include isolator breakers, bus bars, and transformers. There is a team of 12 persons in the substation. Mr. Jamwa estimated the cost of setting up the facility at about USD 2.8 million.

23. Cross-examined, he inter alia testified that the land was previously used as a dumpsite. He was not aware that there was a spring on the land. He stated that at the public participation forum, the community

asked for street lighting, poles to use as bridges, and supply reliability. He pointed at the street lights and added that the poles were provided. He was not sure if the bridges were done.

24. At the site, Mr. Kerongo, the 1st petitioner, also gave evidence. He mentioned that he is a resident of the area. He elaborated that the land was previously used as a cattle dip but the activity stopped in 1986 at which time the County Council changed use for it to be Jogoo market for Jogoo residents. He stated that there is no market at the area and they use the Daraja Mbili market. He claimed that there are no street lights, that no poles were issued, and no bridges made. He explained that he did not approach court earlier because the County Government and the 4th respondent refused to supply them with documents despite him writing to them. He added that even getting the search from the Lands Office was difficult. He denied that there was any public participation, and if there was, it was only for specific people. According to him the residents do not know how the project came about. He contended that the 4th respondent occupies the whole land save for the riparian area.

25. After the site was visited, there was an application by the 4th respondent to call a surveyor to testify but this was subsequently abandoned and the hearing of the suit closed.

C. Submissions Of The Parties

26. In their submissions, the petitioners raised four issues being :

    1. Whether the petitioners have locus standi.

    2. Whether public land set aside for public use can be subject to reallocation for private use.

    3. Whether allocation of the suit land to the 4th respondent was procedurally done.

    4. Whether the suit land was lawfully meant for construction of Jogoo Market as per the minutes of 23 December 1986.

27. On the first issue, that of locus standi, the petitioners urged that they do have locus as provided in Article 22 and 258 of *the Constitution* and they provided various authorities to press the point. On the other issues, the petitioners urged that the suit land was set aside for public use i.e the establishment of Jogoo Market, and was not therefore available for reallocation or appropriation. They referred me to the cases of Dorcas Atieno Rajoru & 145 others vs Mjahid Subchairman Harambee Maweni Committee SHG & 2 Others, Kipsirgoi Investments vs EACC , R vs Commissioner of Land ex parte Associated Steel Mill, and Kenya National Highways Authority vs Shaheel Mughal & 5 Others. They submitted that land reserved for public utility is not available for further alienation. They further argued that since the land was public land, it could only be allocated pursuant to Section 12 of the *Land Act*. They urged that the mandate to allocate land is that of the National Land Commission (NLC). They referred to the definition of 'public land' in *the constitution* and submitted that the suit land is public land under Article 62 (2) (a) and (b) and it was land held by the County Government in trust for the residents of Kisii. They submitted that the intended use for the land was clear and that the 4th respondent's occupation of the land is illegal.

28. On his part, Mr. Maanzo, learned counsel for the 4th respondent, in his submissions, referred me to Article 60 on the principles of land policy, Article 40 on the protection of the right to property, Article 67 on the mandate of the National Land Commission (NLC or the Commission), Article 62 (1) on public land, Article 35 on the right to information, Section 9 of the *Land Act* and the regulations thereunder, and the *Physical and Land Use Planning Act*, 2019. Counsel took some time to go through the reply filed i.e how the 4th respondent looked for land to establish a substation and eventually ended up being allocated the suit land by the 1st respondent (the County Government of Kisii) vide

the letter dated 13 December 2018. He submitted that pursuant to the allocation, the 4th respondent applied for a change of user and obtained approval on 18 October 2019. He submitted that sustainable development under Article 60 requires efficient and effective management of land as a limited resource. He submitted that an EIA was done and an EIA licence issued by NEMA, and that there was public participation. He submitted that the Consultative Public Participation Meeting lauded construction of the substation on the suit land as it was a project meant for the public good. He submitted that the 4th respondent was only allocated one acre out of 1.7297 acres and that the rest of the land can be used for development of a market or cattle tripping.

29. Counsel submitted that Regulation 30 of the Land (Allocation of Public Land) Regulations, 2017, allows any public institution which is in actual occupation of public land to apply to the NLC for the formalization of the allocation and registration of the land they wish to be allocated. He averred that Articles 60, 67 and 69 of *the Constitution* have been violated as the 1st respondent (County Government of Kisii) and the NLC have failed to facilitate regularization of the allocation of the one acre to the 4th respondent. He also submitted that Article 69 provides that natural resources shall be utilized for the benefit of the people of Kenya. He urged that Article 201 on use of public funds is also under threat of violation since public funds used by the 4th respondent risk going to waste should the allocation not be regularized. He contended that the principles of harmonious co-existence of state agencies under Articles 174 and Clauses 22 and 31 of Part 1 and Clause 8 of Part 2 of the 4th Schedule to *the Constitution* have been violated. Further that Article 35 is violated as NEMA has failed to respond to the 4th respondent's application for an EIA licence.

30. Regarding the procedure for allocation of land, counsel asserted that the 4th respondent/cross-petitioner is a State Corporation, a public entity , and a public body within the meaning of the law. He was of opinion that land allocated to it would remain public land within the meaning of Article 60 (1) of *the Constitution* contrary to the allegations of the petitioners that the land was allocated for private use. He submitted that allocation of public land to a public entity is governed by the Land (Allocation of Public Land) Regulations, 2017 particularly rules 30 – 33 and he also made reference to Section 12 (1) and 14 of the *Land Act*, Act No. 6 of 2012. He submitted that the effect of allocation of land to a public entity is that save for the change in the use of the land, the land remains public land. He referred to the case of Law Society of Kenya vs Kinyua, Head of Public Service & 5 Others; Migot-Adholla & Another (interested parties) Milimani ELC Petition No. E029 of 2022 (2022) KEELC 3962 (12 August 2022) (Ruling). He further opined that a public institution such as the 4th respondent can also acquire land through reservation pursuant to Section 15 of the *Land Act*. He added that this mode of acquisition is envisioned in Section 8 of the *Energy Act*, Act No. 1 of 2019 and he also made reference to Section 170 thereof. On the procedure for allocation of the land, counsel contended that it is the 1st respondent and the NLC who failed to complete the process and thus the prayer in the cross-petition for formalization of the allocation.

31. He submitted that there has never been reservation of the land for construction of Jogoo Market and questioned the minutes produced by the petitioners claiming the said allocation. He pressed that this land has been lying unused for over 50 years since 1967 when reserved for Nyakemini cattle tripping until 2018 when a portion of it was allocated by the 1st respondent to the 4th respondent. He sought support in the case of Ngimu Farm Limited vs Attorney General (2019) KEELC 1099 (KLR).

32. He urged that the balance of convenience falls in favour of formalization of the allocation rather than eviction of the 4th respondent and relied on the case of Tom Mboya Odege vs Cabinet Secretary, Ministry of Petroleum and Mining, Director of Mins, Lijin Mining Company Limited & Attorney General (2019) KEELC 4618 (KLR) (15 January 2019) (Judgment) and Mitu-Bell Welfare Society vs

Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) (2021) KESC 34 (KLR) (11 January 2021) (Judgment).

33. Against NEMA, (sued as 5th respondent in the cross-petition) he mentioned that upon availing the Integrated EIA report, NEMA on 4 November 2019 asked for proof of ownership of the land, and minutes and attendance list of public meetings with project affected persons. He submitted that the 4th respondent/cross-petitioner responded on 4 December 2019 indicating that the land was allocated to it by the 1st respondent and shared the minutes of public participation held on 15 November 2019 but thereafter NEMA never responded despite constant reminders. He contended that NEMA acted contrary to its mandate under Section 64 of EMCA. He added that NEMA also failed to issue an Integrated EIA licence despite persistent requests and failed to give reasons why it should not issue, yet it surprisingly participated in Environmental Audit and Monitoring during construction of the substation. He thought that there was violation of the doctrine of legitimate expectation and relied on Wanderi & 106 Others vs Engineers Registration Board & 7 Others ; Egerton University & Another (interested parties) (2018) KESC 54 (KLR). He also submitted that the 1st respondent was also in breach of legitimate expectation by not engaging the NLC to complete the allocation process. On costs, he submitted that being a public interest matter each party to bear their own costs.

D. Analysis And Disposition

34. I have considered all the above. I will address all relevant points in my discourse though not necessarily in the manner fashioned by the parties.

35. The starting point needs to be an appreciation of the nature of land which is the subject of the dispute. It is of course the land parcel Central Kitutu/Mwamosioma/698 located in Jogoo area of Kisii Town, within Kisii County. It measures 0.7 Ha (approximately 1.75 acres or thereabouts). The Kisii County Land Registrar, Mr. Charles Ayienda, annexed both the adjudication register and the green card. The adjudication register shows that there had been a dispute from one Okombe Nyamacharara and the decision was that 2 acres be given to him and the 'dip to remain with the balance.' This balance is the 0.7 Ha that comprises the suit land. From the extract of the register the suit land was registered on 23 February 1967 in the name of Gusii County Council as proprietor 'reserved for Nyakemini Cattle Tripping' and I assume that this meant the cattle dip. There has been no other entry in the register save for a boundary rectification on 3 April 1986.

36. The petitioners contend that the Gusii County Council, vide a meeting of the Finance, Staff and General Purposes Committee held on 23 December 1986, under Minute 117/86, deliberated and agreed that the suit land be set aside for construction of Jogoo Market. The petitioners annexed what they said is an extract of the minute and I will copy what is annexed. It is as follows :

> Min. 105/86 (2) – Improvement of the New Jogoo Market
>
> The committee alleged that the proposed improvement of the new Jogoo Market site was on a slow pace.
>
> After some discussion the Committee recommended that the Town Engineer should make some immediate arrangements to get .... (the words after this are not legible).

37. I actually do not see in this Minute 105/86 (2) any mention of the suit land as having been set aside for construction of Jogoo Market. Indeed, there is absolutely no mention of the suit land in this minute. What I read from the minutes is that there was concern about the slow pace of the improvement of the new Jogoo Market and the Town Engineer was to deal with it. This minute does not say where the new Jogoo Market should be. Neither does it say that the market will be on the suit land. The minute does

not discuss any change of use of the suit land from 'Cattle Tripping' to 'Jogoo market'. I am therefore at a loss as to why the petitioners contend that it is through this minute that the suit land was assigned to be the new Jogoo Market. Indeed the minute does not concern itself with any change of use or any allocation of use of any land. It only concerns itself with the delay of construction of the new Jogoo market, wherever that may be, and that is all.

38. In essence, I have no evidence of any change of use of the suit land from being used as a cattle dip to a market. No document for change of use was supplied to this court. I have no evidence that it is on the suit land that the Jogoo market is supposed to be located. I have no evidence that this land is earmarked for the establishment of any market. If the petitioners' case is that the suit land is set aside for Jogoo Market then they have failed to prove that. They have come to court claiming that the residents of Jogoo are being denied use of the land as a market, but if there is no evidence assigning the land for use as a market, there would be no basis for any resident to complain that he has been deprived use of the land as a market.

39. In any event, there is absolutely no evidence that the suit land has ever been used as a market at any one time. From the evidence tabled, the land was used either as a cattle dip or as an area for spraying cattle, which is now an obsolete activity for this area. Indeed, Jogoo area is now a built up and settled residential suburb of Kisii Town, replete with apartment blocks. From what I deduce, the land was just there, lying idle, and I cannot discount the evidence of Mr. Jamwa that the land was used as a dumping ground. What is not in doubt is that there was no active use of the land for any formal economic activity. It was land that was vacant and not in any formal use. There is no evidence of any individual or a market being displaced. I will consider the suit land as one set aside for a cattle dip, and not for Jogoo Market, for that is the evidence before me.

40. Nevertheless, I think the core issue raised by the petitioners is on the manner of allocation of the suit land to the 4th respondent, and I think that does not change, whether or not the use of the land was for a cattle dip or a market. What of course fails is the allegation that the people of Kisii have been deprived of use of the suit land as a market because there is no proof of the land having been set aside for purposes of establishing a market.

41. The other important issue regarding the nature of the suit land is the category of the land. By this, I mean, is the land public land, community land or private land ? Public land, community land and private land are defined in *the constitution* under Articles 62, 63 and 64 of *the Constitution*. They are lengthy provisions but I think it is important that I set the same out for full context. They are drawn as follows :

Public land

62.

(1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

(a) clause (1) (a), (c), (d) or (e); and

(b) clause (1) (b), other than land held, used or occupied by a national State organ.

(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

(4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

Community land.

63.

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

5. Parliament shall enact legislation to give effect to this Article.

Private land.

64. Private land consists of —

(a) registered land held by any person under any freehold tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.

42. From the above categories of land outlined in *the constitution*, we can straight away discount the land as being private land. One may be tempted to consider the land as community land under Article 63 (2) (d) (iii) because it constituted trust land upon adjudication, but we have to consider the provisions of Section 13 (2) of the *Community Land Act*, which is drawn as follows :

> 13 (2) Any land which has been used communally, for public purpose, before the commencement of this Act shall upon commencement of this Act be deemed to be public land vested in the national or county government, according to the use it was put for.

When you go back to *the Constitution* on the definition of public land, Article 62 (1) (n) provides that public land will include any other land declared to be public land by an Act of Parliament in force at the effective date or enacted after the effective date. The effective date for *the constitution* is 27 August 2010 and the *Community Land Act* was enacted in 2016 thus is an Act coming after the effective date. The *Community Land Act*, as I have pointed out at Section 13 (2), does provide that land which was communally used for a public purpose before commencement of the said Act will be deemed public land vested in the national or county government for the use that it was put up for. In our case, the cattle dip was certainly communal use of the land and it was for a public purpose. It follows that pursuant to Section 13 (2) of the *Community Land Act*, as read with Article 62 (1) (n) of *the Constitution*, the said land is public land.

43. Disposal of public land is provided for under Article 62 (4) which prescribes that public land shall not be disposed of or used except as provided for by an Act of Parliament. The *Land Act* is the Act of Parliament that regulates disposal of public land. Part II of the *Land Act* is titled 'Management of Public Land' and it is the specific part that applies to disposal of public land. In their submissions, the

petitioners pointed at Section 12 of the *Land Act* and claimed violation of it. It is also a considerably lengthy section but I opt to copy it as drawn so that nothing is lost in explanation. It provides as follows :

12. Allocation of public land

(1) Whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the Commission for the necessary action by way of—

(a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;

(b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;

(c) public notice of tenders as it may prescribe;

(d) public drawing of lots as may be prescribed;

(e) public request for proposals as may be prescribed; or

(f) public exchanges of equal value as may be prescribed.

(2) The Commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—

(a) public land that is subject to erosion, floods, earth slips or water logging;

(b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;

(c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;

(d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and

(e) natural, cultural, and historical features of exceptional national value falling within public lands;

(f) reserved land; or

(g) any other land categorized as such, by the Commission, by an order published in the Gazette.

(3) Subject to Article 65 of *the Constitution*, the Commission shall upon the request of the national or a county government set aside land for investment purposes.

(4) In fulfilling the requirements of subsection (3), the Commission shall ensure that the investments in the land benefit local communities and their economies.

(5) Subject to *the Constitution* and any other law, the Commission may, in consultation with the National and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the Vienna Convention on Diplomatic Relations.

(6) At the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be.

(7) Public land shall not be allocated unless it has been planned, surveyed and serviced and guidelines for its development prepared in accordance with section 17 of this Act.

(8) Public land allocated under this section shall not be sold, disposed off, subleased, or subdivided unless it is developed for the purpose for which it was allocated.

(9) Where the land allocated under subsection (8) is not developed in accordance with the terms and conditions stipulated in the lease, that land shall automatically revert back to the national or county government, as the case may be and the Commission shall include in its annual report the status of implementation of this subsection.

(10) In an allocation of public land under this section, the Commission may impose any terms, covenants, stipulations and reservations that the Commission considers advisable, including—

(a) that the applicant shall personally occupy and reside on the land for a period set by the Commission;

(b) the applicant shall do such work and spend such money for permanent improvement of the public land within the period specified by the Commission; or

(c) the consideration that must be paid for a disposition of public land.

(11) The Commission shall make regulations prescribing the criteria for allocation and for connected matters.

(12) The Commission shall make regulations prescribing the criteria for allocation of public land and without prejudice to the generality of the foregoing, such regulations may prescribe—

(a) forms of ownership and access to land under all tenure systems;

(b) the procedure and manner of setting aside land for investments;

(c) procedures to be followed with respect to auction and disposition of land;

(d) appropriate mechanisms for repossession of land given to citizens at the expiry of a lease; and

(e) mechanisms of benefit sharing with local communities whose land have been set aside for investment.

44. My interpretation of Section 12 above is that it concerns itself with allocation of public land to private individuals and/or entities. You will see that a request will be made to the NLC, that the NLC will ensure that the land is planned and surveyed, and that the NLC may impose terms and conditions and prescribe the form of ownership. This is clearly an allocation to a private entity. In the petition, the petitioners alleged violation of Section 12 (2) (f) of the *Land Act*, but that cannot apply, because this Section 12 as I have explained, concerns itself with allocation of public land to private entities. The 4th respondent is not a private entity but a State owned parastatal. It is therefore a public body and is indeed recognised as such in the various statutes pointed out in the replying affidavit of James Odongo.

I am fully persuaded by the depositions thereof that the 4th respondent is a public entity and disagree with the petitioners that the 4th respondent is a private entity. For that reason, Section 12 of the *Land Act* is inapplicable.

45. In my considered opinion, it is Sections 15 – 18 of the *Land Act* which apply. They are drawn as follows :

15. Reservation and development of public land.

(1) Subject to Article 66 (1) of *the Constitution*, the Commission shall, upon request by the national or county government by order in the Gazette, reserve public land located within—

(a) the surface of the earth and the subsurface rock;

(b) any body of water on or under the surface;

(c) marine waters in the territorial sea and exclusive economic zone;

(d) natural resources completely contained on or under the surface; and

(e) the air space above the surface, for one or more purposes in the public interest.

(2) Land that has been reserved by the Commission shall only be used for the purpose set out by the Commission in the order designating the reservation.

(3) Upon coming into force of this Act, the Commission shall undertake an inventory of all land based natural resources.

16. Placing of care, control and management of reserved public land

(1) Upon request by the national or county government, the Commission may, by order in the Gazette—

(a) vest the care, control and management of any reserved land with a statutory body, public corporation or a public agency for the same purpose as that for which the relevant public land is reserved under section 15 and for purposes ancillary or beneficial to that purpose; and

(b) subject that care, control and management to such conditions as the Commission specifies.

(2) The Commission may by order in the Gazette, vary any condition to which the care, control and management of reserved land is subject.

(3) Prior to the variation under subsection (2) and where the variation affects a third party the Commission shall notify the third party of such variation.

(4) An order made under this section shall not create any interest in reserved public land in favour of the management body of that reserve.

(5) Where public land reserved under this Act for the purpose of recreation is leased or subleased under a power conferred under subsection (3), the lessee or sub-lessee shall not restrict public access to the area leased unless the terms of the management order or the lease or sublease provide otherwise.

(6) A management body with whom the care, control and management of a reserved land is placed by an order under subsection (1) shall have the capacity, to hold and deal with the reserved land in a manner consistent with—

(a) the order; and

(b) any laws or regulations governing the management body or the specific land that has been placed in reserve.

(7) Notwithstanding subsection (6), a management body shall not perform a function or exercise a power if another enactment expressly prevents the body from performing that function or exercising that power, or expressly authorises another person to perform that function or exercise that power.

17. Placing of care, control and management of reserved public land.

(1) A management body shall, on its own motion or at the request of the Commission, submit to the Commission for approval a plan for the development, management and use of the reserved public land vested in the management body.

(2) Before submitting a plan to the Commission under subsection (1) a management body shall—

(a) consider any conservation, environmental or heritage issues relevant to the development, management or use of the public land in its managed reserve for the purpose of that managed reserve; and

(b) incorporate in the plan a statement that it has considered those issues in drawing up the plan;

(c) submit an environmental impact assessment plan pursuant to existing law on environment; and

(d) comply with the values and principles of *the Constitution*.

(3) If a management body submits a plan to the Commission under subsection (1) and the Commission approves that plan and notifies the management body of that fact, the management body may develop, manage and use the public land concerned in accordance with the plan as approved or subsequently varied as the case may be.

(4) Notwithstanding the provisions of this section, the Commission shall, in considering an application under this section, comply with the relevant law relating to development control.

18. Revocation of management orders

(1) If a management body does not comply with guidelines or directions issued by the Commission in writing, or does not submit a development plan in compliance with a request made under section 17(2), the Commission, by order in the Gazette, may revoke that management order.

(2) If the Commission considers that it is in the public interest to revoke a management order, the Commission may, by order in the Gazette, revoke the management order.

(3) The preparation and implementation of development plans under this Act shall be in accordance with the physical planning regulations and any other relevant law.

46. It will be seen from the above, that under Section 15 (1), of the *Land Act*, the NLC can reserve public land for a particular purpose in the public interest. Such reserved land can then be placed under a 'management body' pursuant to Section 16. This term 'management body' is defined in Section 2 of the *Land Act* as 'a statutory body, public corporation or a public agency that is authorized by the Commission to manage reserved land under Section 16.' The 4th respondent certainly fits this bill as it is a public corporation. Now, it is important that we appreciate that the vesting of the land 'shall not create any interest in the reserved public land in favour of the management body' as provided for in Section 16 (4) ; at the end of the day, it remains public land. Under the same Section 16, at subsection 1, it is the national or county government, which makes a request to the Commission to vest a particular parcel of land in the management body. The reasoning is that public land, as provided for in *the constitution*, depending on its nature, is vested in either the national or the county government. I would take it that if the land is vested in the national government, then it is the national government to make that request to the Commission and if the land is vested in the county government, then it is the county government vested with that land that will make the request. The Commission will then make an order in the Gazette vesting the said land in the management body and specify the purpose.

47. Once the land is vested, the management body is expected to avail a plan for the development of the land and this is covered in Section 17. Among the documents to be submitted is an environmental impact assessment (See S.17 (2) (c)). Once the NLC approves the plan, it will inform the management body, and the management body may now proceed with its intended development of the land. Under Section 18, the NLC is entitled to revoke the vesting order if there is non compliance with its guidelines or where no development plan is submitted or where it is in public interest to do so.

48. In all the above, the allocation needs to be for the purpose reserved. It would mean that where the allocation is for another purpose, other than that reserved, then it is necessary to first have a change of use and comply with the requirements of the *Physical and Land Use Planning Act*, 2019, for change of user and thereafter seek reservation for the new user.

49. Now, all the above was not followed. What happened here is that the 4th opted to request the Governor of the 1st respondent to directly allocate her land. But there is no law that I have seen which gives Governors power to unilaterally allocate land within their counties. Indeed, public land within a county is not vested upon the Governor and it is not for the Governor to dish it out as he pleases. The 4th respondent first wrote the letter dated 2 March 2018, addressed to Hon. James Ongwae, who was then the Governor, Kisii County. That letter was not even copied to the NLC. Another letter dated 22 August 2018 was written to the Governor specifying land between Daraja Moja and Bobaracho centre. I see that two sites were inspected, and the 4th respondent settled for the suit land as the most suitable. The 4th respondent again wrote to the Governor, through a letter dated 12 September 2018, inter alia as follows :

> " This is therefore to request you to formally allocate the unsurveyed plot in Getare, Jogoo. The company will bear the costs of registration after confirmation of allocation by the County and approval of the National Land Commission."

50. It would appear, that the 4th respondent was thus alive that there needed to be involvement of the 1st and 5th respondents though it was probably a misnomer to use the words 'confirmation' by the 1st respondent and 'approval' by the 5th respondent. What followed is the letter dated 13 December

2018 written by the Chief Officer, Lands Physical Planning, and Urban Development, of the County Government of Kisii. He wrote as follows :

> " We make reference to your letter ... dated 12th September 2018 on the above matter and wish to have you informed that the County Government of Kisii has approved your request for the construction of a substation for the Eastern part of Kisii town.
>
> Liaise with our land Surveyor for identification of one acre parcel of land and subsequent beaconing to pave way for your project."

51. There are several problems with this letter. First, it was not for the 1st respondent to approve the allocation. Secondly, it was not for the 1st respondent to approve the project. What the 1st respondent needed to do, if they were satisfied that the request for the suit land was viable, and upon dealing with planning issues which was within her domain, was to request the NLC to have the land reserved for use as a power substation and further request that the land be vested upon the 4th respondent as the management body as outlined in Section 16 of the *Land Act*. The approval of the project was also to be done by the NLC as provided under Section 17 (3) of the *Land Act*, subject only to development control which would come under the *Physical and Land Use Planning Act* as I have explained. It was erroneous for the 1st respondent to purport to directly allocate the suit land to the 4th respondent and also approve its project i.e the construction of the substation without first going through the NLC.

52. I see that vide a letter dated 2 December 2019, the 1st respondent wrote to the 4th respondent, informing the 4th respondent that beaconing of the land would be done on 3 December 2019, and I suppose this activity was to identify the specific size of land where the substation would be built. It goes without saying that this needed to be under the auspices of the NLC.

53. I see further that what happened after the letter dated 13 December 2018, is that the 4th respondent proceeded to make a development application directly to the 1st respondent, without going through the NLC, which request was approved vide the letter dated 18 October 2019. It will be recalled that the 4th respondent needed to present its development plan to the NLC for approval under Section 17 (1) of the *Land Act* but I have no evidence of any such request for approval by the NLC. That was also sidestepping the law.

54. Before I go too far, it will be seen that the allocation was directly by the 1st respondent and I see no involvement of the 2nd respondent. It is therefore erroneous for the petitioners to contend that the allocation was done in conjunction with the 2nd respondent. It is also erroneous for the petitioners to contend that there has been an exchange of money which has not been accounted for. There was no sale here, nor even a formal lease outlining any rent payable, and it cannot be alleged that there has been public loss of money or that there are funds that remain unaccounted for as alleged in the petition. But let us move on.

55. I have seen that the 4th respondent proceeded to undertake what it described as an Integrated Environmental Impact Report which it submitted to NEMA. NEMA, through its letter dated 4 November 2019, acknowledged receipt of the report but issued no licence. Instead, it asked for information on two things, firstly, that the plot number be indicated in the report, and secondly, that a public meeting with Project Affected Persons be undertaken. It seems that it was after this demand that the 4th respondent embarked on organising some more intense public engagements, for in its letter of 4 December 2019, written to NEMA, it stated that they organised a public participation forum at Jogoo Primary on 15 November 2019. Regarding the plot number, what the 4th respondent informed NEMA is that they were allocated the land by the 1st respondent and referred to the letter dated 12 September 2018. NEMA still did not issue any licence, but before I deal with that, I think I need to say

one or two things regarding the manner in which the 4th respondent was purporting to undertake the EIA for I am unimpressed, not just with the process undertaken, but also with the quality of report provided.

56. We need to be very clear about what the law demands. Section 58 of EMCA demands for there to be an EIA Project Report. It is drawn as follows :

> 58. Application for an Environmental Impact Assessment Licence
>
> (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
>
> (2) The proponent of 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.
>
> (3) The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

57. It will be seen from the above, that projects listed in the Second Schedule require a full EIA Study Report unless NEMA has directed that this may be foregone. Listed among the projects in the Second Schedule that are medium risk are :

> Power and infrastructure projects, including—
>
> (a) hydropower development not exceeding ten megawatts;
>
> (b) electrical sub-stations;
>
> (c) pumped-storage schemes;
>
> (d) cogeneration of power;
>
> (e) low voltage power transmission lines; and
>
> (f) solar power farms or plants.
>
> But listed in the 2nd Schedule under High Risk projects are projects that are "out of character with its surrounding; and (b) any structure of a scale not in keeping with its surrounding. (2) Changes in land use including—
>
> (a) major changes in land use; and
>
> (b) large scale resettlement schemes."

58. I would categorise the project as high risk given that it was out of character with its sorroundings and included a major change in the use of the land. At best it was a medium risk project. It thus required

a full EIA study report. That means that it ought to have been subjected to publication by NEMA as called upon by Section 59 of EMCA which provides as follows :

59. Publication of Environmental Impact Assessment

(1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state—

(a) a summary description of the project;

(b) the place where the project is to be carried out;

(c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and

(d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.

(2) The Authority may, on application by any person extend the period stipulated in subparagraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.

(3) The Authority shall ensure that its website contains a summary of the report referred to in subsection (1).

Lead agencies would have been needed to be called upon to present their comments as required by Section 60 of EMCA. It is upon being satisfied that all is well that NEMA would have issued an EIA licence pursuant to Section 63 of EMCA. All this was not done.

59. What was done was that there was an 'Intergrated (sic) Environmental Impact Assessment Project Report' . Forgetting the spelling error, this was not an EIA study report. Nevertheless, I have taken some time to scrutinize it. At the outset, I am baffled why the authors thought of numbering the report with roman letters rather than the simple numerical numbering that we are all used to. You would wish that an EIA report to be simplified and part of it is the way the pages are numbered. I have looked at the project location at page xii, and though it states that the project will be in Jogoo shopping centre, it goes on to say that the site is 'near the border of Narok and Kisii County' , which I think is a 'cut and paste' job gone bad, though to be fair, in later pages, the land is properly described. But you wouldn't wish for such errors in an EIA report and you would want the project location not muddled in any part of the report. If possible you would want to identify the land clearly with its GPS location and if it is registered land, then the actual registration number of the parcel of land on which the project will be. Project location is critical because from it, it will be known who the project affected persons are expected to be and what environmental impacts are capable of arising.

60. I have gone further and seen that part of the methodology employed included assessment of the site (page xxvi and xxvii) . It does not however say when the site was visited or screened. In the report there is identification of the site with a picture of some cows grazing and on the 'fauna' aspect, it is observed that there are no wild animals. That is fine, but I see no mention of impact on the 'flora' or a biodiversity impact, and I also see no mention of the Nyakemini river, the riparian area around the suit land, and the impact that this project would have on them. These details are what you expect to be in an EIA study report. What I see is that the report is full of fairly standard language and the applicable laws but

these matter less that the actual impact of the project on the land, and the surrounding area. The latter is the pith and core of any EIA project and/or study report and you would wish this to be extremely detailed. This part of the EIA study report should not be overridden by the general cut and paste parts that you would have in the rest of the report. Even at this very moment, I ask myself, what is the impact of the project on the river, the riparian area, the water springs that were mentioned, the mobility of the people who need to cross over to the other side etc. These are nowhere in the report.

61. On stakeholder engagement (page lxxii) the report states that views and comments from stakeholders were sought between 19 and 23 August 2019 and that there was a baraza. It is not said how notices for the baraza were sent, when they were sent, how it was ensured that the largest reach of the population is achieved and such like. Without these details being provided, one cannot authenticate the quality of public engagement and whether all project affected persons were actually reached for comment. I am not too persuaded about the quality of stakeholder engagement in the report.

62. Anyway, what is critical here is that NEMA had questions on the report. NEMA wanted specificity on which land the project would be located and its ownership. It wanted elaboration on stakeholder engagement. NEMA never issued any EIA licence meaning that the answers were not convincing. I am not surprised.

63. It was erroneous for the 4th respondent to proceed to undertake and complete the project without a proper EIA study report and most importantly without an EIA licence from NEMA. If the 4th respondent felt strongly that NEMA ought to have issued the licence then it had avenues for redress to compel the issuance of the licence. This was no storehouse; it was an electricity distribution substation worth tens of millions of shillings and near a riparian and residential area. Given the nature and location of the project, it was critical that NEMA first be satisfied about the environmental impacts of the project and the mitigation measures undertaken.

64. I am aware that Section 58 (8) and (9) of EMCA allow one to proceed with a project where NEMA does not respond within three months. But these provisions are not applicable because NEMA did respond. At a personal level, I need a lot of convincing on the rationale behind Sections 58 (8) and (9), and without deciding, I even doubt their constitutionality. Does it mean that a person can embark on a project that has serious environmental impacts without an EIA licence merely because NEMA has not responded within the required 3 months ? Doesn't that run afoul Article 69 (1) (f) of *the Constitution* which requires the State to establish systems of environmental impact assessment, environmental audit and monitoring the environment ? Can you say that there is a 'system' if you can embark on a project without an EIA licence simply because there is no response from the very authority that is supposed to confirm that the project does not have deleterious impacts on the environment ? As I have mentioned, I am not deciding that question in this case, but I have my reservations. Whatever the case, a prudent project proponent, embarking on a project such as this, in this particular location, would have been slow to commence works without first obtaining an EIA licence. That is what a responsible environmentally sensitive entity would have done and the imprudence of the 4th respondent on this aspect is not one to envy.

65. Before I close on this issue of the EIA licence, I observe that in part of the reply of the 4th respondent to the petition, and also in her cross-petition, the 4th respondent attempted to urge that NEMA had issued an EIA licence and annexed an EIA licence as 'JO-32.' For the avoidance of doubt, that is not an EIA licence for the project at hand. That EIA licence was issued on 21 March 2016 even before the suit land was allocated to the 4th petitioner and is for development on a different parcel of land and not the suit land. Indeed, if a licence was ever issued then there would be no prayer for such in the cross-petition. The fact of the matter remains that for the subject project, NEMA never issued any EIA licence.

66. But we are where we are. We have a fully fledged power substation that has now operated for a period of about four years. It is an important substation distributing power to more than 130,000 people of Kisii. It has cost tax payers a colossal amount of money to prop up. I do not think that it would be proportional to simply order the closure and eviction of the 4th respondent from the suit land as demanded by the petitioners. Maybe if the petitioners had come earlier, the project would not have proceeded in the manner that it did. I would think that it is critical for a person wishing to stop any project, especially a public project, to do so at the earliest opportunity so that resources are not wasted. It is imprudent to sit, wait until a public project is complete, then demand that it be removed. Where was this person all this time ? And the petitioners cannot argue that they lacked information to approach court. They could as well have filed suit to compel release of information pursuant to Article 35 of *the Constitution* if they wished to have it.

67. In essence, although I am persuaded that the process of allocating the land to the 4th respondent was not followed in accordance with the law, and I am persuaded that the 4th respondent ought not to have proceeded to undertake the project because it had no approval from the NLC and NEMA, I am not persuaded that the petitioners have made out a case for the eviction of the 4th respondent from the suit land or demolition of the substation. Having not taken any steps to challenge the project at the time that it was being undertaken, in the circumstances of this case, it will be disproportionate to order that the entire substation be demolished and the land be restored to its original state, at this juncture. My reasoning was also the reasoning of a three judge bench of this court in the case of Mohamud Iltarakwa Kochale & 5 Others vs Lake Turkana Wind Power Limited & 4 Others (and other interested parties) (2021) KEELC 1441 (KLR). The plaintiffs in that case were contesting the process of alienation of certain land to the 1st respondent on which the 1st respondent had set up a wind power generation infrastructure. The plaintiffs inter alia asked for cancellation of the title of the 1st respondent and nullification of the wind power project. Whereas the court was persuaded that the issue of title to the 1st respondent was unlawful, it was not persuaded to interfere with the project and instead granted the parties one year to comply with the existing laws.

68. In her cross-petition, the 4th respondent has claimed various violations of *the Constitution*. She has claimed violation of Articles 60 and 69 (1) (h) of *the Constitution*. Article 60 is on the land policy and Article 69(1) (h) obligates the state to use the environment and natural resources for the benefit of the people. The point that the cross-petitioner makes is that the land was idle and it needed to be put to good use, and she believes that she has done so, through the project. However, I do not see how any party can be said to have violated *the Constitution* in this regard. What the 4th respondent/ cross-petitioner needed to do was follow the due process so that she can be allocated the suit land. She cannot claim violation of *the constitution* while at the same time not following the very process that *the constitution* and statutory law demands of her. In the same vein, I do not see any violation of Articles 201 and 227 of *the Constitution* which respectively deal with public finance and prudent use of money, and procurement of public goods and services. Neither am I persuaded that simply because they have now completed the project and the same is in use, the 4th respondent has made out a case of any legitimate expectation as she claims in her cross-petition to have the land automatically transferred to her. I do not see how one can contend legitimate expectation after breaking legal procedures. The 4th respondent cannot demand that NEMA issues her with an EIA licence before she first answers the legitimate questions that NEMA put to her. Whatever the case, a good EIA study report needs first to be undertaken as provided by EMCA which I have already outlined above. What I am essentially saying is that the 4th respondent has not made out a case for the prayers in the cross-petition without first following the law.

69. What the 1st and 4th respondent need to do is proceed to take the steps that I have outlined in this judgment so that the relevant authorities can consider whether or not to affirm the allocation of the suit land to the 4th respondent or otherwise. The 4th respondent also needs to comply with the requirements of EMCA in preparing a proper EIA Study report.

70. Thus, assessing the petition and cross-petition, I am persuaded that the court will need to fashion out its orders not necessarily in accordance with the demands or prayers of the parties. The power of the court to carve appropriate orders and reliefs was recognised in the case of Mohamed Ali Baadi & Others vs Attorney General & 11 Others (2018) KEHC 5397 (KLR). In light of the foregoing, these will be the final orders of the court :

    1. That the petitioners have failed to demonstrate that the land parcel Central Kitutu/ Mwamosioma/698 was set apart for development of Jogoo Market. From the records held at the office of the Land Registrar, Kisii County, the land parcel Central Kitutu/ Mwamosioma/698 is set aside for 'cattle tripping' or a cattle dip.

    2. That it is hereby declared that the land parcel Central Kitutu/Mwamosioma/698 is public land.

    3. That the petitioners have demonstrated that the process of allocation of the land parcel Central Kitutu/Mwamosioma/698 by the 1st respondent to the 4th respondent was unprocedural.

    4. That the petitioners have not demonstrated that the 2nd respondent was in any way privy to the process of allocation and has not made out any case against the 2nd respondent.

    5. That the 4th respondent/cross-petitioner has failed to demonstrate any violations of Articles 60, 69 (1) (h), 174, 201, 227 and/or clauses 22 and 31 of Part 1 and Clause 8 of Part 2 of the 4th Schedule to *the Constitution* of Kenya, 2010 or indeed any violation of *the Constitution* by the respondents in the cross-petition.

    6. That the 1st respondent i.e the County Government of Kisii, no later than 30 days from today, to proceed to take the requisite steps outlined in the *Land Act*, for the National Land Commission to consider allocation of the land parcel Central Kitutu/Mwamosioma/698 to the 4th petitioner and this process to proceed to its logical conclusion. I further order that the petitioners be appraised and be informed of the progress of the process.

    7. That the 4th respondent to liaise with NEMA for the assessment of the environmental impacts of the project and comply with such directives as NEMA may issue and comply with the requirements of EMCA on issuance of an EIA licence.

    8. On costs I appreciate that this is public interest litigation, but also cognisant that the petitioners have spent some resources in pursuing the litigation. I further appreciate that the petitioners have demonstrated that the allocation of the suit land to the 4th respondent was unprocedural and that the 1st and 4th respondents were culpable. I will award nominal costs of Kshs. 30,000/= (Kenya Shillings Thirty Thousand) payable jointly and/or severally by the 1st and 4th respondents to the petitioners. I otherwise make no orders as to costs for or against any other parties to this litigation on either petition and/or cross-petition.

71. Judgment accordingly.

DATED AND DELIVERED THIS 8 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Thomson Kerongo – 1st petitioner and chair of 2nd petitioner

Ms. Nyamwaya h/b for Mr. Oirere for the 1st and 3rd respondents and also h/b for Mr. Onserio Ondimu for the 2nd respondent

Ms. Mulela h/b for Mr. Maanzo for the 4th respondent/cross-petitioner

No Appearance on part of National Land Commission – 5th respondent

Mr. Wabwire, State Counsel, present for the 6th & 7th respondents

Ms. Nekesa h/b for Ms. Majune for the 5th respondent in the cross-petition

Court Assistant – Michael Oyuko.