

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCEPPET NO. E006 OF 2025

MOHAMED SAID ALI KARUNGU 1ST
PETITIONER

RAPHAEL NYIRO 2ND
PETITIONER

VERSUS

TAIFA GAS INVESTMENT SEZ LIMITED
RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....

....

.....INTERESTED
PARTY

RULING

*[PETITIONER'S NOTICE OF MOTION DATED 17TH JULY 2025 AND
RESPONDENT'S NOTICE OF PRELIMINARY OBJECTION DATED 22ND
OCTOBER 2025]*

1. The petitioners filed the notice of motion dated 17th July 2025 seeking for the following orders:
 - a) "Spent.
 - b) Spent.

c) THAT this Honourable Court be pleased to issue a Conservatory Order of Temporary Injunction to forthwith prevent, stop, discontinue or restrain the Respondent whether by itself, servants, agents, officers and or anyone claiming under her from carrying out deleterious activities particularly cutting down, wasting away and destroying trees or any property, excavating or carrying out construction or works including but not limited to setting up a Liquefied Petroleum Gas (LPG) terminus on the suit property known as Mombasa/Mainland South/Block 1V/247, in Likoni Mombasa pending the hearing and determination of this petition.

d) THAT the costs of this Application be provided for.”

The application is based on the twenty-one grounds on its face marked (1) to (21) respectively, and supported by the affidavit of Mohamed Said Ali Karungu, the 1st petitioner, deposing inter alia that they are residents of Likoni and that they recently learnt the respondent intends to clear indigenous natural trees, vegetation and excavate Mombasa/Mainland South/Block 1V/247, suit property, to provide space and support for the LPG tanks for their plant; that those activities

will lead to soil erosion and environmental degradation of the suit property and its environs; that the suit land holds shrubs, marsh-plant and various types of grass on fossilized coral rocks and its clearing will interfere with the coral rock and negatively affect the ecosystem around the suit property; that the massive amounts of construction materials to be used in the project will generate huge amounts of waste and lead to deterioration of the suit land and its environs; that the construction of a pipeline will lead to suspension sediments that will ruin the quality of water and penetration of light for the ecosystem in the surrounding sea water; that the construction of the pipeline will ruin the fishing grounds which is the livelihood of the local population, and pose as a danger to the fishermen and seafarers' vessels that is a potential for accidents; that the respondent has not demonstrated to the interested party that it had obtained the consent of the petitioners' and other affected parties' approval before commencing the project that involves injurious or hazardous activities; that the respondent's project will have adverse environmental and land use impacts on the suit property including depreciation of the environment, increase in

pollution, increased vehicular and human traffic and rise in insecurity which will pose a great threat to the petitioners servants and inhabitants in the area; that the respondent's project will also infringe on the petitioners' right to have the environment protected by the law not only for their benefits but also for the present and future generations; that the respondent has not obtained or demonstrated any legal approvals or permits from the interested party, or compliance with Article 42 of the Constitution and or any approvals from relevant state organ to fell the petitioners' indigenous trees, cause destruction of property or commence roadworks on the suit property, and if such approvals exists, the same were obtained without prior notice, consultation or public participation of those directly affected by the projects' activities, and therefore, such approvals are illegal and unlawful.

2. The record confirms that when the matter came up before me on 18th July 2025, I granted interim conservatory order in terms of prayer (2) pending service, filing of replies and inter parties hearing on 31st July 2025. On that date counsel for the petitioner confirmed having served the application and as no

replies had been filed in opposition, the court confirmed the order by granting prayer (3) and fixed the petition for mention on 29th October 2025. In between the respondent filed two applications dated 7th and 8th August 2025 to which directions were issued on the said dates respectively for hearing on 15th September 2025. The respondent also filed notices of appeal and on the 15th September 2025, the court heard counsel for both sides but declined to stay the conservatory order. A further mention of 24th September 2025 was fixed for the parties to update the court on the progress of the applications pending before the Court of Appeal. on that date another mention was taken for 14th October 2025 and a further one for 23rd October 2025. During the latter mention, the court was informed of the Court of Appeal orders of 15th October in Civil Application No. E073 of 2025, related to E074 of 2025, E075 of 2025 and E086 of 2025, in which the court directed inter alia as follows:

“The parties having agreed to compromise the applicant’s applications before us on such terms as the Court thinks fair and just in the circumstances, we hereby order and direct:

a) *That the appellant do file and serve its reply to the 1st respondent's notice of motion dated 17th July 2025 in Mombasa ELC No. E006 of 2026[sic] within three (3) days from the date hereof.*

b) *That the respondents notice of motion dated 17th July 2025 be heard by the trial court as a matter of urgency and, in any event, within thirty (30) days from the date hereof.*

c) *That in the meantime, the status quo subsisting as at the date hereof be maintained for a period of thirty (30) days pending the hearing inter parties of the applicant's application dated 17th July 2025 and, for avoidance of doubt, the contested construction of the applicant's project be put on hold in the meantime.*

d) *Accordingly, the 1st and 2nd respondent's related motions dated 15th August 2025 and 17th September 2025 be marked as having been compromised; and*

e) *In view of the public nature of the dispute, each party do bear their own costs of the four (4) applications."*

3. That as the petitioners and their counsel were absent on 23rd October 2025, the court directed the matter be mentioned on

29th October 2025 which date had been fixed earlier. All learned counsel for the parties herein attended and after considering their submissions on the various issues, the court directed inter alia as follows so as to comply with the tight timelines prescribed by the Court of Appeal:

- a) *“That the respondent’s replying affidavit that had been filed on 22nd October 2025, which was outside the three days, was deemed as properly filed and served, and the petitioner was granted three (3) days to respond to any new issues of facts thereon.*
- b) *That the petitioners’ notice of motion dated 17th July 2025 and respondent’s preliminary objection dated 22nd October 2025 to be canvassed together through written submissions.*
- c) *That interested party be at liberty to file and serve a reply to the petitioners’ application before close of business that day and petitioner granted leave to respond to new issues of facts in three (3) days after service.*
- d) *That the petitioners to file and serve submissions on their application and respondent’s preliminary objection in*

three (3) days from that day and the other parties to file and serve theirs in three (3) days after service.

e) That the Regional Police Commander to supervise the construction stoppage order for the remaining period of 30 days ordered by the Court of Appeal on 15th October 2025.

f) Ruling on the notice of motion and preliminary objection on 12th November 2025.”

4. The application is opposed by the respondent through the replying affidavit of Jamal Huwei, the General Manager and one of the respondent's directors, sworn on the 22nd October 2025, in which he deposed inter alia that the petitioners have not met the requirements set out in the case of Gitirau Peter Munya versus Dickson Mwenda Kithinji & 2 Others [2014] eKLR, that are, to establish a prima facie case; demonstrate irreparable loss, and public interest and proportionality for the order sought to be granted; that the petitioners' allegations that the respondent had commenced the project without obtaining the requisite statutory permits from the interested party, conducting public participation and complying with

Article 42 of the Constitution to fell the indigenous trees are not only fake but misleading for the following reasons:

- a) That the respondent prepared and submitted the terms of reference {TOR} for the EIA study in compliance with Regulation 11 od EIA Regulations;
- b) That after the approval of the TOR, the respondent submitted to the interested party the names and qualifications of the experts appointed to undertake the EIA study in accordance with section 58(5) of EMCA;
- c) That the duly appointed experts carried out a comprehensive EIA study that incorporated environmental baseline analysis, site evaluation, prediction of potential impacts, and examined possible project alternatives, proposed appropriate mitigation measures to be implemented before, during and after the project, developed an Environmental Management Plan {EMP} outlining monitoring, evaluation timelines, ad the costs of implementing the mitigation measures in compliance with Regulations 16, 18 to 20 of the Regulations;

- d) In compliance with Regulation 19, the respondent submitted hard copies and one electronic of the EIA Study Report to Interested Party in the prescribed Form 1B under the First Schedule, together with the applicable statutory fees;
- e) The respondent ensured comprehensive public participation through the newspaper notices, public barazas and stakeholder meetings were held on various dates within Likoni and adjacent communities in compliance with Regulation 21 of EIA Regulations, and attendance registers, minutes and photographs of the public participation meetings were taken;
- f) That the respondent attended to the concerns raised by interested party before submitting the final EIA Study Report, incorporating all stakeholder inputs and mitigation measures;
- g) That the EIA Study report was approved, and EIA Licence No. NEMA/EIA/PSL/21998 issued pursuant to section 63 of EMCA and Regulation 24, authorising the respondent to commence the project subject to specified environmental management conditions;

- h) That the respondent established Environmental Management and Monitoring Plan [EMMP] and has since submitted periodic environmental monitoring reports to interested party as required under section 68 of EMCA, with the First Annual Environmental Audit Report prepared in 2025 demonstrating adherence to all licence conditions and mitigation measures;
- i) Respondent had also obtained statutory consents and approvals from relevant agencies including Special Economic Zone Authority, County Government of Mombasa, Ministry of Lands, Public Works, Housing and Urban Development, National Construction Authority, Energy and Petroleum Regulatory Authority, Kenya Ports Authority, and Ministry of Defence confirming the project's conformity with safety, planning and environmental regulations; and
- j) That the respondent has continued to observe its environmental and social obligations under the licence by maintain open communication with the local stakeholders, conducting site inspections and ensuring all the operations are within the approved parameters.

5. The respondent further deposed inter alia that the petitioners or persons claiming under them had the opportunity to submit their objections or representations during the public participation phase but failed to do so; that environmental group had filed an appeal before National Environment Tribunal, being NET Appeal Nos. 37, 41 and 46 (consolidated) of 2022, challenging the issuance of the said EIA Licence, but after the full hearing, the appeals were dismissed, affirming the legality and procedural propriety of the Licence; that the project is a national and public interest initiative, designed to improve Kenya's energy security, enhance competition in LPG sector and create employment in line with Article 69(1)(d) of the Constitution and the National Energy Policy 2018; that the Respondent has incorporated comprehensive Environmental Management Plans (EMPs) and mitigation measures addressing all potential environmental, social and safety concerns, ensuring that the project remains sustainable and compliant with environmental safeguards; the respondent has not breached any constitutional, statutory or regulatory provision and continues to act in good faith, consistent with the obligations under Articles 42, 69, and 70 of the

Constitution and EMCA, 1999; that the petitioners have not tendered any scientific, technical or expert evidence demonstrating actual or imminent environmental degradation, pollution or breach of law and their allegations are speculative and unsupported by evidence; that the petitioners have neither established a prima facie case nor demonstrated any illegality, irregularity or procedural impropriety in the licencing process; that any alleged harm is speculative and if ever established, it would be compensated; that the balance of public interest favours continuation of the project which is a national infrastructure that is lawfully approved and halting it would occasion substantial financial loss and undermine investor confidence and both the application and petition should be dismissed with costs.

6. The respondent also filed the notice of preliminary objection dated the 22nd October 2025 raising the following grounds:

a) *“That the issues raised herein have already been heard and determined by the National Environment Tribunal Appeal Nos. 37, 41 and 46 (consolidated) in a judgement delivered on 31st January 2024.*

- b) That the subject matter issues in dispute are substantially the same as those that were the subject of determination before the National Environment Tribunal.*
- c) That by virtue of section 130 of EMCA, any party aggrieved by a decision of the National Environment Tribunal may only appeal to the Environment and Land Court on points of law only, thereby limiting this Honourable Court's jurisdiction to appellate review and no re-litigation of matters already heard and concluded by the Tribunal.*
- d) That this petition is therefore res judicata, contrary to the provisions of section 7 of the Civil Procedure Act (Cap 21, Laws of Kenya), and amounts to an abuse of the court process.*
- e) That this Honourable Court lacks jurisdiction to hear and determine the matter, the same having been conclusively adjudicated by the National Environment Tribunal, a competent forum established under section 125 of Environmental Management and Coordination Act (EMCA), Cap 387.*

f) That further and without prejudice, under the doctrine of exhaustion as codified in section 9(2) and (3) of the Fair Administrative Action Act, 2015, and affirmed in numerous judicial precedents, any party aggrieved by a decision of NEMA must first exhaust the appellate procedure provided under section 129 of EMCA before invoking the jurisdiction of this Honourable Court.

g) That consequently, this petition is misconceived, incompetent, frivolous, vexatious, and an abuse of the process of this Honourable Court, and should be struck out with costs to the respondent."

7. The record confirms that when the matter came up before me on 18th July 2025, I granted interim conservatory order in terms of prayer (2) pending service, filing of replies and inter parties hearing on 31st July 2025. On that date counsel for the petitioner confirmed having served the application and as no replies had been filed in opposition, the court confirmed the order by granting prayer (3) and fixed the petition for mention on 29th October 2025. In between the respondent filed two applications dated 7th and 8th August 2025 to which directions were issued on the said dates respectively for hearing on 15th

September 2025. The respondent also filed notices of appeal and on the 15th September 2025, the court heard counsel for both sides but declined to stay the conservatory order. A further mention of 24th September 2025 was fixed for the parties to update the court on the progress of the applications pending before the Court of Appeal. on that date another mention was taken for 14th October 2025 and a further one for 23rd October 2025. During the latter mention, the court was informed of the Court of Appeal orders of 15th October in Civil Application No. E073 of 2025, related to E074 of 2025, E075 of 2025 and E086 of 2025, in which the court directed inter alia that:

“The parties having agreed to compromise the applicant’s applications before us on such terms as the Court thinks fair and just in the circumstances, we hereby order and direct:

- a) That the appellant do file and serve its reply to the 1st respondent’s notice of motion dated 17th July 2025 in Mombasa ELC No. E006 of 2026[sic] within three (3) days from the date hereof.*
- b) That the respondents notice of motion dated 17th July 2025 be heard by the trial court as a matter of urgency*

and, in any event, within thirty (30) days from the date hereof.

c) That in the meantime , the status quo subsisting as at the date hereof be maintained for a period of thirty (30) days pending the hearing inter parties of the applicant's application dated 17th July 2025 and, for avoidance of doubt, the contested construction of the applicant's project be put on hold in the meantime.

d) Accordingly, the 1st and 2nd respondent's related motions dated 15th August 2025 and 17th September 2025 be marked as having been compromised; and

e) In view of the public nature of the dispute, each party do bear their own costs of the four (4) applications."

8. That as the petitioners and their counsel were absent during the mention of 23rd October 2025, the court directed the matter be mentioned again on 29th October 2025, which date had been fixed earlier. All the learned counsel for the parties herein attended, and after considering their submissions on the various issues, and so as to comply with the tight timelines prescribed by the Court of Appeal, the court directed inter alia as follows:

- a) *“That the respondent’s replying affidavit that had been filed on 22nd October 2025, which was outside the three days, was deemed as properly filed and served, and the petitioner was granted three (3) days to respond to any new issues of facts thereon.*
- b) *That the petitioners’ notice of motion dated 17th July 2025 and respondent’s preliminary objection dated 22nd October 2025 to be canvassed together through written submissions.*
- c) *That interested party be at liberty to file and serve a reply to the petitioners’ application before close of business that day and petitioner granted leave to respond to new issues of facts in three (3) days after service.*
- d) *That the petitioners to file and serve submissions on their application and respondent’s preliminary objection in three (3) days from that day and the other parties to file and serve theirs in three (3) days after service.*
- e) *That the Regional Police Commander to supervise the construction stoppage order for the remaining period of 30 days ordered by the Court of Appeal on 15th October 2025.*

f) Ruling on the notice of motion and preliminary objection on 12th November 2025.”

The court gave short timelines for filing and exchanging replies and submissions due to the limited time remaining from the thirty (30) days prescribed by the Court of Appeal, through its order of 15th October 2025. The court fixed the matter for ruling on 12th November 2025, so as to render a determination within the said prescribed 30 days period.

9. The interested party opposed the petitioners' notice of motion dated the 17th July 2025 through the replying affidavit of Gilbert Karimu advocate, sworn on 29th October 2025, inter alia deposing that the respondent had informed the interested party of its intention to undertake a liquid petroleum gas storage plant which was classified as a High Risk project under the Environmental (Impact Assessment and Audit) Regulations; that the interested party asked the respondent to furnish it with the Terms of Reference of the project for review and approval which were submitted on 7th August 2022, and were approved; that interested party asked the respondent to prepare the EIA Study Report; that on 31st May 2022, the respondent submitted the Social Impact Study

Report for the proposed Liquid Petroleum Gas Storage plant development project in Mombasa County, and the interested party approved it guided by the principle of sustainable development; that the respondent's licence had been challenged before National Environment Tribunal in Appeal Nos. 37, 41 and 46 of 2022 that were all dismissed.

10. On the 2nd November 2025, the learned counsel for the petitioner filed their first submissions dated the 2nd November 2025 in support of their application dated 17th July 2025, and on 3rd November 2025 filed their second submissions dated 3rd November 2025 on the preliminary objection dated 22nd October 2025. The learned counsel for the respondent filed their submissions dated the 3rd November 2025 in respect of both the application and preliminary objection on the same date. That as I finish drafting this ruling today the 6th November 2025, at 11.51.15 hours, the interested party has filed their submissions, dated 2nd November 2025, in support of the respondent's preliminary objection. The court has carefully considered the said submissions by the learned counsel for all the parties herein.

11. The following are the issues arising from the preliminary objection and application for the court's determinations:

a) Whether this petition is res judicata in view of NET Appeal Nos. 37, 41, and 46 of 2022 (consolidated), and if so, whether this court has jurisdiction in the matter.

b) Whether the petitioners have prematurely approached the court before exhausting the other statutory dispute resolution mechanisms.

c) Whether the petitioners have met the threshold for the conservatory order sought to be issued.

d) Who pays the costs?

12. The court has carefully considered the grounds on the preliminary objection and application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, the pleadings and come to the following determinations:

a. As is required whenever a preliminary objection that touches to the jurisdiction of the court, or that which if upheld, could determine the suit or application is raised, then the court is obligated to make a determination on it first before proceeding to any other issue. A notice of

preliminary objection was discussed in the case of Mukisa Biscuit Manufacturers Ltd versus Westend Distributors Limited [1969] E.A 696, where Law, JA stated that;

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

In the same case, Newbold, JA set out the remit upon which preliminary objections were founded as follows;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

It is therefore clear that a preliminary objection should be raised on a pure point of law, and only upheld where the court is satisfied that there is no dispute on the facts between the parties. Such a preliminary objection on pure point of law is then determined without consideration of evidence. Where there is a contestation on the facts, the mode of raising an objection is through an application to enable the parties present their affidavit evidence for and against the same. The court then hears the application by considering the factual materials presented, and the legal arguments by the parties, before rendering its determination. In view of the foregoing, the court will therefore consider the respondent's preliminary objection first, because if upheld, then there would be no need to consider the petitioners' application. Conversely, if the preliminary objection is rejected, the court will then proceed to analyse the application on its merit. Going by the submissions by the learned counsel for the petitioners and respondent, the respondent's seven grounds in their preliminary objection are for the purposes of this ruling,

summarized into two grounds of res judicata and exhaustion.

b. In their submissions, the learned counsel for the respondent pointed out that the petitioners filed their submissions on 2nd and 3rd November 2025, which was outside the time of three (3) days, directed by the court, that was ending on 1st November 2025. The court will however proceed to consider the submissions though filed late, in the same way it accepted the respondent's replying affidavit despite it having been filed outside the three days prescribed by the Court of Appeal.

c. In support of their preliminary objection, the learned counsel for the respondent submitted inter alia that the petitioners had fully participated fully in NET Appeal Nos. 37, 41 and 46 of 2022 (consolidated), and are now presenting the same grievances and evidence in the guise of this constitutional petition, in contravention of *section 7* of the Civil Procedure Act, as the issues raised herein have already been adjudicated upon before NET. That this court does not have original jurisdiction to rehear matters already determined by NET under *section*

130 of EMCA, and that the petition is premature and defective for failure to exhaust the statutory mechanisms under EMCA. The counsel cited the case of E.T versus Attorney General & Another [2012] eKLR, where it was held that:

“res judicata is not a technical rule of procedure by a fundamental doctrine resting on public policy which requires that litigation must come to an end.”

That the issues raised in the present petition are substantially and procedurally identical to those raised and determined through the judgement delivered on 31st January 2024 in NET Appeal Nos. 37, 41 & 46 of 2022 (Consolidated). That the issues in this petition are over the respondent’s proposed construction of a 30,000MT Liquefied Petroleum Gas (LPG) Terminal on MS/1V/247, within Dongo Kundu Special Economic Zone. That the NET appeals proceedings had challenged the same EIA Licence No. NEMA/EIA/21998, and had raised the same questions of facts and law of public participation, marine biodiversity, environmental safety and compliance with EMCA and its Regulations, like in this petition.

d. That NET being a competent statutory forum, with jurisdiction under *section 129(1)* of EMCA, had rendered a final and conclusive determination on all issues in its decision of 31st January 2024, and specifically determined that;

- i. the respondent's project had obtained all requisite statutory approvals prior to commencement;
- ii. adequate and meaningful public participation had been conducted in accordance with *Regulations 17 to 22* of the Environment (Impact Assessment and Audit) Regulations, 2003; and
- iii. the respondent had complied with all constitutional and environmental safeguards, with sufficient mitigation measures to address concerns on biodiversity, safety and sustainability.

That although the petitioners herein were not listed as parties in the NET Appeals Nos. 37, 41 & 46 of 2022 (Consolidated), they are litigating under the same title

and interest as the appellants in those proceedings. The counsel submitted that the law does not require a literal identity of names for res judicata to apply, and cited the case of Uhuru Highway Development Limited versus Central Bank of Kenya & 2 Others [1996] eKLR, where it was held that: *“it suffices that the parties in the subsequent proceedings derive their rights, grievances, or claims from the same subject matter and under the same capacity or interest.”* That as the petitioners, as members of the affected community in this petition, were also comprised in residents of Likoni and Haki Kenya Organization CBO, who were duly recognised as community representatives challenging the same EIA Licence on behalf of the local residents in the NET appeals. The counsel referred explanation 6 in section 7 of the Civil Procedure Act that provides that:

“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

That accordingly, the court should interpret that “*res judicata prevents a litigant or persons claiming under the same title*” to mean that it is not only the parties named in the earlier case who are bound by the judgement, but also those who derive their interest, authority or right through them, that is to say privies in law, in estate, in blood, or in representation.

- e. The learned counsel for the respondent pointed out that the learned counsel for the petitioners herein was the same counsel for the appellants in the NET Appeals Nos. 37, 41 and 46 of 2022 (Consolidated), and being fully aware of the decision thereof of 31st January 2024, raised the same issues challenging the same EIA Licence in this petition, against the same respondent. That the participation of the petitioners’ counsel in this petition, raising the same issues already adjudicated upon by the NET, indicates an attempt to circumvent a binding judgement of the Tribunal, by presenting a concluded matter as a new constitutional petition, so as to undermine the principle of finality and integrity of judicial proceedings. That the mere invocation of constitutional

provisions cannot sanitize a claim that is otherwise barred, as it does not transform an exhausted dispute into a fresh cause of action.

- f. In opposition to the preliminary objection, the learned counsel for the petitioners has inter alia submitted that the petitioners are contending that the respondent's LPG project was being undertaken in a blatant disregard of the constitutional, statutory and environmental safeguards. That there was no compliance with the provisions of EMCA, and no adherence to the constitutional requirement of public participation, and that the licensing process undertaken by the interested party was tainted with irregularities, opacity and disregard for the rights for the affected families. That the claim that the decision made by NET meant this petition is res judicata cannot be true as the tribunal jurisdiction is limited to hearing appeals from administrative decisions of interested party relating to licences, permits and compliance with notices under *section 129* of EMCA.
- g. That as NET powers are administrative as opposed to constitutional, and EMCA does not grant the NET power to

interpret or enforce the Constitution or to adjudicate illegal violations of fundamental rights and freedoms, the preliminary objection should be rejected. The learned counsel referred to the following superior court decisions, Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Save Lamu & 5 Others versus National Environment Management Authority & Another [2019] eKLR, Association of Manufacturers & 2 Others versus Cabinet Secretary, Ministry of Environment & Natural Resources & 3 Others [2017] eKLR, John Florence Maritime Services Limited & Another versus Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR, eKLR, Okiya Omtatah Okoti versus Communication Authority of Kenya & 8 Others [2018] eKLR, Republic versus Independent Electoral and Boundaries Commission (IEBC) Ex-Parte, National Super Alliance (NASA) Kenya [2017] eKLR, and Mukisa Biscuit Manufacturing Company Limited versus West End Distributors [1969] EA 696.

h. The principle of res judicata has been codified under section 7 of the Civil Procedure Act chapter 21 of Laws of Kenya that provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The respondent has in their preliminary objection, replying affidavit and submissions stated that NET Appeals Nos. 37, 41 and 46 of 2022 (Consolidated), that were determined in their favour through the Tribunal’s judgement of 31st January 2024, raised the same issues of challenging the respondent’s EIA Licence, that is subject matter in this petition, against the same respondent. That the issues in the Tribunal appeals were over the Respondent’s proposed construction of a 30,000MT

Liquefied Petroleum Gas (LPG) Terminal on MS/1V/247, within Dongo Kundu Special Economic Zone. That in the said appeals, the appellants had challenged the same EIA Licence No. NEMA/EIA/21998, and had raised the same questions of facts and law of public participation, marine biodiversity, environmental safety and compliance with EMCA and its Regulations, like in this petition. That the Tribunal that dealt with the consolidated appeals was a competent statutory forum with jurisdiction under *section 129(1)* of EMCA, and had rendered a final and conclusive determination on all issues in its decision of 31st January 2024, and specifically determined that the respondent's project had obtained all requisite statutory approvals prior to commencement; that adequate and meaningful public participation had been conducted in accordance with *Regulations 17 to 22* of the Environment (Impact Assessment and Audit) Regulations, 2003, and that the respondent had complied with all constitutional and environmental safeguards, with sufficient mitigation measures to address concerns on biodiversity, safety and sustainability. The court has perused record, both the CTS

and physical, to see whether the petitioner filed any further or supplementary affidavit in answer to new issues of facts in the replying affidavits and seen none. It follows therefore that the respondent's and interested party's depositions on what the subject matter, parties and determinations in the Tribunal appeals were, has not been disputed by the petitioners. The petitioners have also not disputed the contention by the respondent that NET had jurisdiction to hear and determine the consolidated appeals. What I hear the petitioner say in opposition to the respondent's preliminary objection is that the claim that this petition is res judicata cannot be true as the tribunal jurisdiction is limited to hearing appeals from administrative decisions by NEMA relating to licences, permits and compliance with notices under *section 129* of EMCA. That as NET powers are administrative as opposed to constitutional, and EMCA does not grant the NET power to interpret or enforce the Constitution or to adjudicate illegal violations of fundamental rights and freedoms, the preliminary objection should be rejected.

i. I have perused the petition herein, dated 17th July 2025, and especially the prayers sought that are generally for declaration that the respondent's project is illegal, unlawful, unconstitutional, null, and void, environment restoration order, conservatory order of injunction, compensation to the petitioners, and costs. It is apparent from the petitioners' pleadings and affidavit evidence, that their claim is based primarily on the ground that the respondent's project is being carried out without the requisite approvals and permits from NEMA and others. The petitioners further posit that if approvals have been obtained, the same were obtained without prior notice, consultation or public participation of those directly affected by the projects' activities, and therefore, such approvals are illegal and unlawful. The petitioners' claim is therefore not essentially about their constitutional rights and freedoms being infringed or threatened by the works related to the project, but are questioning the process and or the status of the project approval, and execution of the said project. The petitioners' claim in this petition is therefore not a constitutional petition, but a

challenge on the respondent's EIA Licence to the LPG project.

j. The respondent has through the replying affidavit, confirmed carrying out the LPG project. It has also disclosed the details of the licensing processes it has undertaken and the approvals obtained as follows:

- i. That the respondent prepared and submitted the terms of reference {TOR} for the EIA study in compliance with Regulation 11 of EIA Regulations;
- ii. That after the approval of the TOR, the respondent submitted to the interested party the names and qualifications of the experts appointed to undertake the EIA study in accordance with section 58(5) of EMCA;
- iii. That the duly appointed experts carried out a comprehensive EIA study that incorporated environmental baseline analysis, site evaluation, prediction of potential impacts, and examined possible project alternatives, proposed appropriate mitigation measures to be implemented before, during and after the project, developed an

Environmental Management Plan {EMP} outlining monitoring, evaluation timelines, and the costs of implementing the mitigation measures in compliance with Regulations 16, 18 to 20 of the Regulations;

- iv. In compliance with Regulation 19, the respondent submitted hard copies and one electronic of the EIA Study Report to Interested Party in the prescribed Form 1B under the First Schedule, together with the applicable statutory fees;
- v. The respondent ensured comprehensive public participation through the newspaper notices, public barazas and stakeholder meetings were held on various dates within Likoni and adjacent communities in compliance with Regulation 21 of EIA Regulations, and attendance registers, minutes and photographs of the public participation meetings were taken;
- vi. That the respondent attended to the concerns raised by interested party before submitting the final EIA

Study Report, incorporating all stakeholder inputs and mitigation measures;

- vii. That the EIA Study report was approved, and EIA Licence No. NEMA/EIA/PSL/21998 issued pursuant to section 63 of EMCA and Regulation 24, authorising the respondent to commence the project subject to specified environmental management conditions;
- viii. That the respondent established Environmental Management and Monitoring Plan [EMMP] and has since submitted periodic environmental monitoring reports to interested party as required under section 68 of EMCA, with the First Annual Environmental Audit Report prepared in 2025 demonstrating adherence to all licence conditions and mitigation measures;
- ix. Respondent had also obtained statutory consents and approvals from relevant agencies including Special Economic Zone Authority, County Government of Mombasa, Ministry of Lands, Public Works, Housing and Urban Development, National Construction Authority, Energy and Petroleum

Regulatory Authority, Kenya Ports Authority, and Ministry of Defence confirming the project's conformity with safety, planning and environmental regulations; and

- x. That the respondent has continued to observe its environmental and social obligations under the licence by maintain open communication with the local stakeholders, conducting site inspections and ensuring all the operations are within the approved parameters.

The petitioners have not presented any documentary evidence to counter that presented by the respondent on the licensing processes undertaken and the approvals obtained. The court therefore has no reasons or basis upon which to fault the process undertaken by the respondent and the approvals obtained thereof, in respect of their LPG project.

- k. That as there is no dispute that the National Environment Tribunal [NET] had jurisdiction to hear, and determine the consolidated appeals Nos. 37, 41 & 46 of 2022, that had like in this petition, challenged the respondent's EIA

Licence for the LPG project, and other statutory approvals and processes. That as there is no dispute that the appeals were dismissed vide the judgement of 31st January 2024, then the respondent challenge on this petition on the basis that it raises similar issues to those decided in the said appeals, has merit. To succeed in their preliminary objection on the ground of res judicata, the respondent needed to establish before the court that first, the issues subject matter in this petition were the same in the NET appeals, which it has done, and secondly, the similarity in the parties. The respondent has conceded that the petitioners herein were not personally named as appellants in the NET appeals, but hastened to submit that though they were not listed as parties in the NET Appeals Nos. 37, 41 & 46 of 2022 (Consolidated), they are litigating under the same title and interest as the appellants in those proceedings.

- I. The counsel further submitted that the law does not require a literal identity of names for res judicata to apply. The counsel cited the case of Uhuru Highway Development Limited versus Central Bank of Kenya & 2

Others [1996] eKLR, where it was held that *“it suffices that the parties in the subsequent proceedings derive their rights, grievances, or claims from the same subject matter and under the same capacity or interest.”* The counsel further submitted that the petitioners, as *members of the affected community* in this petition, were also comprised in *residents of Likoni* and Haki Kenya Organization CBO, who were duly recognised as community representatives challenging the same EIA Licence on behalf of the local residents in the NET appeals.

m. The counsel referred explanation 6 in *section 7* of the Civil Procedure Act that provides that:

“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

The counsel urged the court to interpret the finding that *“res judicata prevents a litigant or persons claiming under the same title”* to mean that it is not only parties

named in the earlier case who are bound by the judgement, but also those who derive their interest, authority or right through them, that is to say privies in law, in estate, in blood, or in representation. The learned counsel further pointed out that the learned counsel for the petitioners herein, was the same counsel for the appellants in the NET Appeals Nos. 37, 41 and 46 of 2022 (Consolidated), and being fully aware of the decision thereof of 31st January 2024, went ahead to represent the petitioners herein to file this petition raising the same issues challenging the same EIA Licence in this petition, against the same respondent. That the participation of the petitioners' counsel in this petition raising the same issues already adjudicated upon by the NET, indicates an attempt to circumvent a binding judgement of the Tribunal, by presenting a concluded matter as a new constitutional petition, so as to undermine the principle of finality and integrity of judicial proceedings. That the mere invocation of constitutional provisions cannot sanitize a claim that is otherwise barred, as it does not

transform an exhausted dispute into a fresh cause of action.

n. I have perused the petition and it is clear the petitioners have described themselves at paragraph (1) & (8) as residents of Likoni, Mombasa County. At paragraph (13) they state that project's pipeline poses a danger to fishermen and seafarers accessing the area. At paragraph (24), the petitioners alleges that the project will have adverse environmental and land use impacts on the suit property, including depreciation of the environment, increase in pollution, increased vehicular and human traffic and a rise in insecurity which will pose a great threat to the petitioners servants and inhabitants around the suit property. The petitioners' averments referred to above shows clearly that petitioners' claim arises from being members of the community where the respondent's project is situated, and not from a cause of action that is personal to them only. In tandem with the finding in the case of Uhuru Highway Development Limited versus Central Bank of Kenya & 2 Others [1996] eKLR, where it was held that *"it suffices that the parties*

in the subsequent proceedings derive their rights, grievances, or claims from the same subject matter and under the same capacity or interest", I have no difficulty in agreeing with the respondent's counsel's submission that the petitioners herein are persons claiming under the same title as the appellants in the NET Appeals Nos. 37, 41 & 46 of 2022 (Consolidated), which were decided vide the tribunal's judgement of 31st January 2025. That having come to the finding that the issues and parties in this petition are the same as those in the NET appeals decided on 31st January 2024, it follows that this petition is res judicata and the preliminary objection is upheld, on that ground. The finding that the respondent's preliminary objection on the ground of res judicata is upheld, suffices to determine the petition and application herein. However, the court will proceed to consider the second ground of the preliminary objection that the court's jurisdiction was invoked prematurely; conversely put, that the petition contravenes the principle of exhaustion.

o. On whether this petition is premature, the learned counsel for the respondent submitted that the court's original jurisdiction under *Article 162(2)(b)* of the Constitution should not be invoked before exhausting the statutory alternative remedies. Counsel referred to the case of International Centre for Public Policy and Conflict & 5 Others versus Attorney General & 4 Others (2013) eKLR, Diana Kethi Kilonzo & Another versus IEBC & 10 Others (2013) eKLR where the court held inter alia that the court should:

".....give an opportunity to the relevant constitutional bodies or state organs to deal with disputes under the relevant provision of the parent statute..... Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted",

And submitted that this petition is premature and incompetent ab initio, as the petitioners have not proffered any justification or demonstrated the existence

of exceptional circumstances to warrant exemption under *section 9(4)* of the Fair Administrative Action Act, 2015, that provides that:

“Notwithstanding subsection (3), the High Court or subordinate court may, in exceptional circumstances and on an application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

The respondent’s further counsel submitted that the petitioners have neither made a formal application for exemption, nor shown that the circumstances surrounding the issuance of the EIA Licence to the respondent were so exceptional to justify recourse to this court, as mere dissatisfaction with a statutory process or unfavourable decision does not amount to exceptional circumstance. Counsel added that jurisdiction, once lacking, cannot be cured by consent, sympathy, or creativity, as without it the court has no power to make one more step and referred to the case of Owners of Motor Vessel ‘Lillian S’ versus Caltex Oil (Kenya) Limited

[1989] KLR. Having come to the finding above that the National Environment Tribunal is with jurisdiction to address any appeals relating to the EIA Licence issued to the respondent by the interested party, then it follows this appeal was filed before this court prematurely, as the right forum to seek relief from is the Tribunal, and approach this court through its appellate jurisdiction as opposed to original jurisdiction. Probably, as the NET has already pronounced itself on similar issues through the previous related appeals, what the petitioners should have done is to seek legal advice on how to apply for joinder or substitution after judgement and file an appeal on the NET decision of 31st January 2024 on the consolidated appeals, if they were dissatisfied with the decision thereof, and the listed appellants opted not to pursue an appeal.

p. That having upheld the respondent's preliminary objection on the two grounds, which effectively determines the petition, there is no need to proceed to analyse the merits or otherwise of the notice of motion

dated the 17th July 2025. The said application is for striking out, just like the petition.

q. On the issues of costs, I will follow the Court of Appeal in its order of 15th October 2025, in Civil Application No. E073 of 2025 related to E074 of 2025, E075 of 2025 and E086 of 2025, and order that due to the public nature of the dispute herein, each party bears their own costs.

13. That having come to the above determinations on the respondent's preliminary objection dated the 22nd October 2025, and the petitioners' notice of motion dated the 17th July 2025, the court finds and orders as follows:

a) That the respondent's preliminary objection on the grounds of res judicata and exhaustion is upheld.

b) Accordingly, the petitioners' petition and application, both dated 17th July 2025, are struck out.

c) That each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF NOVEMBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:

PETITIONERS : Mr. Muchiri

RESPONDENT : Mr. Kemei and Mr Masinde

INTERESTED PARTY : Mr. Karimu

NECHESAH-COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

Original