Vipingo Development Limited & another v Kai & 6 others (Civil Appeal E012 of 2025) [2025] KEELC 8666 (KLR) (10 December 2025) (Judgment)

Neutral citation: [2025] KEELC 8666 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL APPEAL E012 OF 2025

EK MAKORI, J

DECEMBER 10, 2025

BETWEEN

VIPINGO DEVELOPMENT LIMITED ..... 1ST APPELLANT

LAKE GAS LIMITED ..... 2ND APPELLANT

AND

JACKSON CHITENGELE KAI ..... 1ST RESPONDENT

LINET TUMA MWAKAMSHA ..... 2ND RESPONDENT

PETER YAA MWANGI ..... 3RD RESPONDENT

JOSEPH MALUSHA ABEDI ..... 4TH RESPONDENT

PROJECT KENYA YOUTH ORGANIZATION ..... 5TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 6TH RESPONDENT

THE COUNTY GOVERNMENT OF KILIFI ..... 7TH RESPONDENT

(This is an appeal against the ruling and order of the National Environment Tribunal in Nairobi (Coram: Mr. Emmanuel Mumia, Chairman; Ms. Winnie Tsuma, Vice Chairman; Member Duncan Kuria, OGW; and Member Ronald Allamano), dated August 8, 2024, in National Environment Tribunal Appeal No. 3 of 2024)

JUDGMENT

1. On February 20, 2024, the 1st to 5th respondents lodged an appeal against the appellants and the 6th 6espondent via National Environmental Tribunal Appeal NO. 3 OF 2024 (the "NET Appeal"). They challenged the approval of the Environmental Impact Assessment (EIA) License No. Nema/EIA/PSL/8728, issued on December 10, 2019.

2. The NET reviewed the case on its merits and, on March 10, 2025, issued a decision to cancel the appellants' EIA License no. Nema/EIA/PSL/8728 in this manner:

> " That the ElA Licence No. Nema/EIA/PSL/8728 issued by the 1st Respondent to the 2nd Respondent on 10th December 2019 is hereby cancelled/revoked for want of adequate public participation.
>
> b) That each party to bear their own costs."

3. The appellants, dissatisfied with this ruling, filed an appeal on March 18, 2025, outlining their grounds in the Memorandum of Appeal as follows:

a. The learned Tribunal, in its decision, erred in law and fact by failing to recognize that the mandatory provisions of Section 129(1) of the Environmental Management and Coordination Act, Cap 387 Laws of Kenya (hereinafter referred to as EMCA), oust the Tribunal's jurisdiction to hear and determine appeals filed outside the stipulated time limit.

b. The Tribunal erred in determining that the 1st to 5th Respondents were entitled to file their appeal with the Tribunal under Section 129 (2) of EMCA and in doing so, breached the 60-day time limit set by Section 129 (1) of EMCA.

c. As a result of the above misdirections, the Tribunal wrongly concluded that it had jurisdiction to issue orders canceling a Nema License for a project that was fully completed according to all the uncontroverted evidence on record.

d. The Tribunal erred in law and fact by concluding, despite overwhelming evidence on record to the contrary, that there was insufficient public participation.

e. The Tribunal made an error in law by giving too much weight to the sole evidence of the respondents' witness, instead of considering the multiple witnesses who provided thorough, uncontested evidence about the steps taken by the appellants and Nema to start and advance the project to completion.

f. The learned Tribunal erred in law and fact by considering issues suo moto that were NOT raised at all by the 1st to 5th respondents in their Grounds of Appeal and issues not addressed in evidence, thus denying the appellants the opportunity to respond to these issues and condemning the appellants without hearing them on matters that were not within the Tribunal's purview for determination.

g. The learned Tribunal erred in law and fact by completely failing to consider the uncontroverted evidence that the project, which involved the construction and operation of a 22,000MT Liquefied Petroleum Gas (LPG) plant, was complete and operational. It also failed to weigh the legal and practical implications of this completion and operational status against the prayer for cancellation of the Environmental Impact Assessment (EIA) License No. Nema/EIA/PSL/8728.

4. I acknowledge the written and oral submissions from learned counsel Mr. Musangi for the appellant, Mr. Binyenya for the 7th respondent (also an appellant), Mr. Muchiri, learned counsel for the 1st-5th respondents, and Ms. Majune, learned counsel for the 6th respondent, with appreciation, as they greatly assisted this court in reaching its decision.

5. Based on the materials and submissions presented, the issues I frame for this court's determination are: whether the Tribunal acted outside its jurisdiction by considering an appeal filed beyond the 60-

day limit under Section 129(1) of EMCA; whether the appellants met the constitutional and statutory requirements for public participation before the EIA License was issued; whether canceling a license for a completed and operational project is a proportionate and appropriate remedy, considering principles of finality and public interest; and whether alternative remedies, such as Environmental Audits under Section 68 of EMCA and structural interdicts (continuing mandamus), can effectively address any environmental concerns that arise after licensing. Costs.

6. The authority of this court as the first appellate court to review evidence from the lower court should be exercised cautiously when necessary. In Peters v Sunday Post Limited [1958] EA 424, the court stated as follows:

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

7. The duty of this court in the appeal is therefore to re-evaluate the evidence, assess it independently, and reach its own conclusions. This careful process, as outlined in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, guarantees that every aspect of the case is thoroughly examined and considered:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

Analysis and determination

8. I now proceed with the analysis and determination of the issues identified above as outlined hereafter.

    a. Whether the Tribunal acted without jurisdiction by entertaining an Appeal filed outside the 60-day limitation period prescribed under Section 129(1) of EMCA

9. It should be noted that the 1st to 5th respondents in the appeal before the Tribunal did not specify whether they approached the Tribunal under Section 129(1) or 129(2) of the EMCA.

10. The appellants, supported by the 6th and 7th respondents, argue that the Tribunal improperly exercised jurisdiction in its judgment dated February 20, 2024, on the appeal filed by the 1st to 5th respondents. They contend that, since the respondents never disclosed which stream the appeal was filed under and because the issue involves the EIA license issued by the 6th respondent to the appellant, the appeal should have been considered under section 129(1) rather than under section 129(2) of the EMCA.

11. Under Section 129(1) of EMCA, anyone unhappy with a decision by Nema must appeal to the Tribunal within sixty (60) days. This deadline is strict and cannot be extended by the Tribunal. Consequently, the 1st to 5th respondents were required to submit their appeal to the National Environment Tribunal within 60 days of December 10, 2019, the date the contested EIA license was granted to the appellants.

12. The appellants and the 6th respondent also argue that filing the appeal on February 20, 2024, nearly five years after the license was issued, was late and that the time limit prevented the 1st to 5th respondents from filing the appeal initially. They claim the tribunal erred by not dismissing the appeal on the grounds of this limitation issue.

13. Several authorities were cited in that respect; see the Court of Appeal's decision in Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR, which thoroughly discusses appeals filed by inactive litigants. Mathu, Chairman, and 2 others (all collectively suing as and on behalf of Kyuna Neighbours Association (KNA)) v National Environment Management Authority (Nema) & another; Director General, Nairobi Metropolitan Services (Interested Party) [2024] KEELC 4360 (KLR), and Runda Association v Nema, Nairobi City County, Kiwa Runda Association, and Kinuthia Macharia [2019] KEELC 14 (KLR).

14. It is argued that the decisions relied on by the Tribunal to establish jurisdiction, such as Vincent Kioko Suing in his capacity as Chairman for and on behalf of Runda Gardens Residents Association v National Environment Management Authority & others (Environment and Land Appeal E086 of 2022) [2023] KEELC 19248 (KLR) and Simba Corporation Limited v Director General, National Environment Management Authority (Nema) & others [2017] KEELC 310 (KLR), are based on flawed legal reasoning. Section 129(1) was amended by section 69 of Act No. 5 of 2015. The 2015 amendment to section 129(1) aimed to expand the range of litigants eligible to file appeals before the Tribunal. Angote J., in Mathu, Chairman, and two others (all jointly suing as and on behalf of Kyuna Neighbours Association (KNA), National Environment Management Authority (Nema), and others; Director General, Nairobi Metropolitan Services (supra)), addressed this issue. The 2015 amendment introduced a significant change to the language, expanding standing under Section 129(1) to allow any person—regardless of whether they participated in the process seeking the license—to file an appeal before the Tribunal. This change was maintained in the 2017 amendment to EMCA and remains the current position.

15. The 60-day deadline under 129(1) of EMCA, which applies only to decisions involving licenses and permits, was set for a valid reason. Kenya's government, aiming to promote development, actively encourages investment in the country, especially in projects requiring substantial capital. These projects usually need an EIA license issued by Nema before starting work. It is practical and beneficial to limit the time for challenging the issuance (or denial) of such licenses through appeals to the Tribunal —hence, the 60-day limit. Investors need confidence that, once they commit significant resources, their investments are protected from legal disputes over initial issues, such as the EIA license.

16. On the other hand, the 1st to 5th respondents believe that the Tribunal had jurisdiction to hear the appeal based on section 129(2) of EMCA, which has no time limit for appeals.

17. Regarding the jurisdiction issue in the record of appeal, the Tribunal, in paragraphs 34-36 of its judgment, determined that the appeal was not barred by time and was filed under Section 129(2) of EAMCA, which does not specify a deadline for appeals. Furthermore, the Tribunal referenced the Rio Declaration on Environment and Development, highlighting that environmental issues are best addressed through the participation of all relevant citizens at appropriate levels. It also noted that the state is responsible for providing information to encourage public involvement and awareness by making such information widely accessible. Based on this reasoning, the Tribunal concluded that it had proper jurisdiction.

18. Therefore, the primary issue in this appeal is whether it falls under section 129(1) or 129(2) of EMCA. As mentioned, the ELC has been divided on whether appeals concerning EIA licenses can be addressed under section 129(2) or if section 129(1) applies exclusively.

19. This issue was initially raised before the Tribunal and then appealed to this court as a preliminary matter. It is reported in County Government of Kilifi v Kai & 4 others; National Environment Management Authority & 2 others (Interested Parties) [2024] KEELC 13211 (KLR). This court held as follows, although reserving the issue for later consideration, which we shall examine further here.

> " The Supreme Court's ruling in the Abidha Nicholus Case emphasizes that the established forum of the first instance must be effective, prompting, for example, a rethinking of the 60 days for appealing decisions related to EIA licenses to the NET, as well as the 14-day timeframe specified in Section 72(3) of the *Physical and Land Use Planning Act* for appealing development permission decisions to the County Physical and Land Use Planning Liaison Committee. These timelines hinder environmental justice, as the parties likely to be impacted by projects subject to EIA licenses often lack the necessary information to comply with them. This issue was notably discussed in the Simba Case (supra), where the ELC pointed out critical gaps in how statutory decisions by Nema are communicated to the public. The Court recommended that the relevant agencies develop a clear and prescriptive framework for how Nema should inform the general public about statutory decisions that can be challenged under the EMCA. Additionally, in the case of Albert Mumma, acting as Chairman of the Karen Langata District Association (KLDA) v Director General - National Environmental Management Authority (Nema), Afrigo Development Co Limited & Faith Mugure Mukunga (Lead Consultant) [2018] KENET 31 (KLR), the Tribunal acknowledged that the failure to communicate decisions granting EIA licenses creates a loophole. In such cases, objections may lead to dismissals, undermining litigants' access to justice as Article 48 of *the Constitution* intended.
>
> 40. Access to timely and adequate information is essential for realizing environmental justice. Principle 10 of the Rio Declaration on Environment and Development, adopted in 1992, asserts that everyone should have the right to information access, participate in decision-making, and seek justice in environmental matters. This principle aims to safeguard the right to a healthy and sustainable environment for both current and future generations. Established in 1998, the Aarhus Convention provides the public with rights related to access to information, public engagement, and justice in government decision-making processes regarding local, national, and transboundary environmental issues. It emphasizes the importance of public access to environmental information in fostering an informed citizenry capable of defending environmental rights. Broad, inclusive, and democratic decision-making processes are essential for achieving distributive justice. Procedural injustice, which encompasses a lack of information, exclusion from participation, and barriers to justice access, can lead to distributive injustice.
>
> 41. Given that environmental challenges frequently go beyond individual permits or development approvals and involve broader issues like community rights and the safeguarding of the environment for future generations, a more comprehensive approach may be required. Therefore, courts must modify their dispute resolution processes to address urgent environmental crises effectively using adaptive environmental adjudication mechanisms – the NET is not left out.

42. Responsive environmental adjudication recognizes the unique characteristics of environmental issues, acknowledges their effects on the law and dispute resolution, and formulates legal doctrines, procedures, and remedies that meet the ongoing challenges. Consequently, Courts handling environmental cases (including NET) need to identify and utilize specific adjudicative forms and functions to support this process. These matters will be discussed in a different forum, as the appeal encompassed the issue of the NET's jurisdiction and timelines for appeals only.

43. Concerning the appeals before this Court, it is my view, after examining the submissions from both parties regarding the NET's ruling, that the central question is whether NET has the authority to adjudicate NET Tribunal Appeal No. 3 of 2024. The conclusion is that, as asserted by the NET, which I concur with, this matter has been preserved and is to be addressed through evidence presented through a substantive motion supported by affidavit(s) or during a hearing rather than through a Preliminary Objection before the NET. This Court will postpone this issue until NET thoroughly resolves it, after which it will have a bite as a substantive appeal to the ELC, given Section 130(5) of the EMCA."

19. The NET further noted in its judgment that since the 1st to 5th respondents were never parties to the proceeding that led to the issuance of the EIA license to the appellant, they only became aware of it after the Embakasi gas disaster and subsequently filed the appeal. NET emphasized that public participation was a crucial aspect before issuing the EIA license. It was observed at paragraph 45 of the judgment that:

> "Indeed, looking at international law and comparative law and how this right of public participation has been contextualized, it is safe to conclude that public participation in environmental law issues and governance has risen to the level of jus cogens. The Tribunal is therefore of the opinion that in addition to explicitly constitutionalizing (sic) this right in Articles 10 and 69 of our Constitution, the right to public participation in environmental governance is further entrenched under Article 2 (5) of *the Constitution*."

20. Building on the NET's reasoning and the core principle that environmental issues and justice must be thoroughly addressed, I agree that issues raised under any stream—whether 129(1) or 129(2) of the EMCA—should be balanced with constitutional principles and international standards such as sustainable development, public participation, and other environmental principles that have gained recognition.

21. I believe that the NET exercised jurisdiction based on principles that are well-established constitutionally, including Principle 10 of the Rio Declaration on Environment and Development, adopted in 1992, and the Aarhus Convention of 1998, which includes public participation as follows:

> "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage

public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. "

22. Principle 10 of the Rio Declaration highlights three key rights: access to information, public participation, and justice, which are essential for effective environmental governance. These "access rights" are vital for fostering transparent, inclusive, and accountable environmental management. Access to information empowers citizens by providing the knowledge necessary to participate in decision-making. Public participation is increasingly important in addressing environmental issues and promoting sustainable development, prompting governments to develop policies and laws that reflect community needs. Justice supports these access rights by allowing the public to enforce their participation rights, stay informed, and hold regulators and polluters accountable for environmental harm.

23. The Aarhus Convention (officially known as the UNECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters) is a key international treaty. It guarantees citizens and environmental NGOs the rights to access environmental information, participate in decision-making, and seek justice. The Convention promotes "environmental democracy" and aims to ensure a healthy environment for all. Signed in Aarhus, Denmark, in 1998, it empowers the public to learn about environmental issues, influence policies, and challenge inadequate decisions in court—strengthening both human rights and environmental protection.

24. The core elements of the Aarhus Convention include Access to Information—providing the right to obtain environmental data from public authorities; Public Participation—permitting involvement in environmental decision-making; and Access to Justice—the ability to challenge environmental decisions in court when rights are violated. These components support Environmental Democracy, which empowers citizens and NGOs to hold governments and polluters accountable. They also highlight the Human Rights Link, connecting environmental protection to fundamental rights such as the right to a healthy life. As an international standard, the Convention sets benchmarks for transparency and public involvement in environmental issues.

25. In that regard, I hold that the NET properly determined that it had jurisdiction to address the appeal before it.

    b. Whether the appellants herein met the constitutional and statutory requirements for public participation before the issuance of the EIA License.

26. The appellants and the 6th respondent believe that the appellant met the legal and constitutional requirements for public participation before the contested EIA license was issued. The Tribunal focused excessively and unilaterally on certain aspects of public participation. The NET should have limited itself to the complaints raised by the 1st to 5th respondents, which involved the lack of personal engagement and the use of unfamiliar language during public meetings with community members. Both issues were adequately addressed by unchallenged evidence at trial. It is well established that personal engagement with each individual is not required for public participation. The NET's preliminary findings suggested that the appellants had the burden to prove they personally engaged the 1st to 5th respondents, or that those respondents were aware of the license issuance due to their participation. Such a requirement would unfairly place an undue burden on project sponsors and would misstate the law. Regarding the lack of personal engagement, the law does not require that every individual be personally consulted, as this is impractical.

27. The appellants argue that in British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR, the court clearly addressed the principle of public participation by providing guidance on its determination, emphasizing that the fact someone was not heard is not enough to invalidate the process. Similarly, in Mohamed Jelle Hussein t/a Alamagan Enterprise Group & 2 others v County Government of Wajir & another [2023] KEHC 25795 (KLR), the High Court referenced this ruling, highlighting similar principles:

> ” Whereas the importance of public participation in any decision-making process is critical, it is not envisaged that every affected citizen by such decision must participate. Once sufficient notification is issued, the duty to attend is purely a personal decision.”

28. Regarding the language used at public participation meetings, on page 1083 of the Record of Appeal, the Nema head of public participation clarified that the spoken language is that which the local population understands. The final official record is translated into English for documentation and easy reference. Therefore, this issue was bound to fail.

29. The 6th respondent argues that the Court takes judicial notice that Article 10 (2) (a) of *the Constitution* of Kenya lists ‘participation of the people’ as one of the national values and principles of governance that bind all state organs and public officers. Article 69(1) (d) of *the Constitution* further states that, “the State shall encourage public participation in the management, protection, and conservation of the environment.”

30. The 6th respondent also affirms that Principle 10 of the Rio Declaration states that:

> “ Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

31. Furthermore, Article 6(2) of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters states that:

> “ The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:
>
> (a) The proposed activity and the application on which a decision will be taken;
>
> (b) The nature of possible decisions or the draft decision;
>
> (c) The public authority responsible for making the decision;
>
> (d) The envisaged procedure, including, as and when this information can be provided:
>
> (i) The commencement of the procedure;
>
> (ii) The opportunities for the public to participate;

(iii) The time and venue of any envisaged public hearing;

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or trans boundary environmental impact assessment procedure.

32. The 6th respondent asserts that it is undisputed that the appellants' proposed project in Kilifi County is classified as a High-Risk Project under Part 3 (11) - Hydrocarbon projects of the amendment to the second schedule of EMCA, as outlined in Legal Notice No. 31 issued on April 30, 2019.

33. As a result, the project underwent a comprehensive EIA Study, applying the provisions of the Environmental (Impact Assessment and Audit) Regulations of 2003 regarding public participation.

34. The appellants presented extensive and uncontested evidence showing the steps taken to ensure meaningful participation of project-affected persons, including publishing the project in mainstream media and the Kenya Gazette, holding public barazas, and engaging relevant stakeholders and government agencies to obtain all necessary approvals for the project.

35. The 6th respondent stated that the Tribunal's judgment extensively highlighted the steps taken by the appellants to ensure meaningful public participation of project-affected persons, in accordance with the requirement of public participation.

36. The 6th respondent argues that the Tribunal's final decision reflects a combination of its earlier statements. While recognizing that public participation in the case was inadequate, the Tribunal based its ruling on Regulations 17(2)(c), 17(2)(a)(i), and 17(2)(d) of the Environmental (Impact Assessment and Audit) Regulations. These legal provisions were neither explicitly pleaded by the appellants before the Tribunal nor discussed during the hearing. Had they been included in the pleadings, the 6th respondent would have addressed them appropriately. The Tribunal's primary duty was to resolve the issues before it, not to create new matters on behalf of a litigant and then litigate and decide them, thereby disadvantaging other litigants. The Tribunal's actions effectively ambushed the Appellants, along with the 6th and 7th respondents, who were not given a fair opportunity to respond to the issues the Tribunal relied on to cancel the impugned license.

37. The 6th respondent argues that it is now a settled principle in Kenyan courts that parties are bound by their pleadings. See Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others [2014] eKLR, the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002, as well as Raila Amolo Odinga & Another vs. IEBC & 2 others [2017] eKLR.

38. Regarding what constitutes sufficient public participation, the 6th respondent urges the court to align itself with the reasoning in the case of Mui Coal Basin Local Community & 15 Others vs Permanent

Secretary, Ministry of Energy, and 17 Others [2015] eKLR, which set out the threshold for public participation required when undertaking environmental projects.

39. The 6th respondent further argues that the Tribunal canceled the EIA License partly because the appellants did not comply with Regulation 17(2)(d) of the EIA and Audit Regulations. I urge you to find that the Tribunal erred in law and fact by failing to recognize that, under Regulation 14 of the EIA & Audit Regulations, the 6th respondent maintains a register of all licensed EIA experts. The appellant's Study Report and evidence of public participation could not have been admitted, nor could an EIA License have been issued, if the experts listed were unqualified.

40. In any case, the full Study Report of the project, although it was not presented before the Tribunal as it was unnecessary, included all relevant licenses and qualifications of the project experts who also conducted the public participation exercise on behalf of the Appellants.

41. The 6th respondent states that, based on the evidence on record, the public participation process began around 2018 and continued until the 6th respondent finally issued the impugned EIA License to the appellant on December 10, 2019. The failure of the 1st to 5th respondents to participate in the EIA licensing process, despite the information being readily available and accessible to the public, does not seem to be their own volition.

42. The expert evidence presented before the Tribunal by the 6th respondent's witness, Mr. Joseph Makau, the head of the EIA Section at Nema, indicates that the appellant carried out sufficient public participation, justifying the issuance of the EIA License. The 6th respondent argues that this court should diverge from the Tribunal's findings and instead align with the conclusions in Communist Party of Kenya v Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties) [2022] eKLR, which solely relied on the principles established in the Mui Coal Basin Case (supra) to determine that adequate public participation was achieved in this case.

43. Respondents 1 through 5 state that Article 69 (d) of the Kenyan Constitution, Section 59 of the EMCA, and Regulation 17 of the EIA Regulations 2003 explicitly delineate the procedures for public participation. These procedures include publicizing the project via posters, issuing two consecutive weekly notices in nationally circulated newspapers, broadcasting radio announcements, conducting at least three public meetings, ensuring that notices are timely and accessible, and designating a qualified coordinator to document public comments.

44. These are not just suggestions but set the minimum standards for meaningful engagement. The courts have emphasized that public participation is essential for effectiveness. Mui Coal Basin Case (supra) established the functional, proportional test:

    i. targeted engagement of those most likely to be affected;

    ii. opportunity to influence decision-making;

    iii. meaningful disclosure of information;

    iv. avoidance of "democratic theatre"; a cosmetic consultation.

45. The NET's thorough evaluation of the evidence, which determined that the EIA process did not meet those benchmarks, clearly aligns with that legal standard.

46. The 1st to 5th respondents contend that they presented witness statements, notices, and records showing the exclusion or ineffective engagement of key affected groups. The Tribunal's conclusion that participation was inadequate is a factual finding supported by the record; this Court should not lightly

overturn such findings. The Tribunal correctly applied Regulation 17 and constitutional norms; its conclusion that the license was issued after a flawed participation process is both legally and factually sound.

47. In its judgment from paragraphs 49 through 55, the Tribunal held:

> "Having reviewed the evidence on record, we note that the Respondents has provided evidence of public participation in form of minutes and list of attendees for a public consultation meeting held on 15th October 2019. In addition, the 2nd Respondent published an advertisement in the Star Newspaper on 2nd November 2018 and 12th November 2018 inviting members of the public to give their views on the proposed project. A similar advertisement was also run on the radio. A further advertisement was published in the Kenya Gazette on 9th November 2018 inviting members of the public to submit their comments on the proposed project.
>
> 50. The Tribunal also notes that pursuant to its mandatory obligation under Regulation 20, the 1st Respondent submitted a copy of the EIA study report to the relevant lead agencies for their comments. That said, it is our finding that there was no full compliance with the prescribed statutory framework on public participation, hence falling short of the threshold of public participation in environmental matters. To begin with, no evidence was placed before the Tribunal to show compliance with Regulation 17(2)(c). Under the said regulation, the proponent of the project is required to ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties. Evidence of such notices was not availed.
>
> 51. Without prior and adequate notice of the public participation meetings, it follows that some members of the public were denied the opportunity to participate in the public participation exercise as they were not made aware of the same. This dilutes the quality of public participation conducted by the Respondents.
>
> 52. Furthermore, no evidence was placed before the Tribunal to show that the 2nd Respondent publicized the project and its anticipated effects and benefits by posting posters in strategic public places in the vicinity of the site of the proposed project, informing the affected parties and communities of the proposed project. This is a mandatory requirement under Regulation 17(2)(a)(i).
>
> 53. Further, whereas under Regulation 17(2)(b) the proponent of a project is required to hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments, only one such meeting was held.
>
> 54. Lastly, under Regulation 17 (2)(d), the proponent of a proposed project is mandated to ensure, in consultation with the 1st Respondent that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the 1st Respondent. There was no evidence placed

before the Tribunal to show that such a qualified coordinator was appointed, and he carried out his statutory duty as required.

55. The upshot of the foregoing is that the second issue for determination answers in the negative; there was no adequate public participation before the issuance of the impugned EIA license, as there was no compliance with the applicable legal framework on public participation. The Respondents did not comply with several mandatory provisions regarding public participation as outlined above. As stated in Mohamed Ali Baadi and others v Attorney General & 11 others, supra, the question is not one of substantial compliance but one of compliance."

48. Before reaching its conclusion in paragraphs 37 to 48, the Tribunal clarified what public participation entails, cited important judicial precedents regarding the requirements for project proponents concerning public participation, and outlined the legal duties of the 6th respondent towards those affected or likely to be affected by the project. The Tribunal highlighted that:

> " We are therefore bound to review the evidence on record against the prescribed statutory provisions on public participation to determine whether there was compliance with the same. In that regard, we note that Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 imposes an obligation on the proponents of any project in consultation with the 1st Respondent to seek views of persons who may be affected by the project. The said regulation states as follows:
>
> 17. Public participation
>
> (1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
>
> (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall-
>
> (a) publicize the project and its anticipated effects and benefits by-
>
> (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
>
> (ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
>
> (iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

(b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

(c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

(d) ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

Additionally, under Regulations 21 and 22, prior to the making of any decision on the ESIA Study Report, the 1st Respondent is again required to involve the public. The 1st respondent is specifically obligated to invite the public, through the print media and in a prescribed format, to make oral and written comments on the Report. Further, Regulation 20 requires the 1st Respondent to submit a copy of the report to the relevant lead agencies for their comments."

49. I have thoroughly reviewed the materials and submissions provided by the parties concerning the matter of public participation. I do not find fault with the Tribunal's conclusion that the procedures delineated for such a project were not adhered to, and I acknowledge that the Tribunal appropriately cited the pertinent law and judicial precedents in support of its findings.

50. The Tribunal correctly held that public participation is based on the principle that those affected by a decision have the right to be involved in the decision-making process. In that regard, the High Court in the case of Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR succinctly explained the rationale for making public participation a constitutional requirement:

> "It may be tempting to ask why the law and indeed *the Constitution* generally imposes this duty of public participation yet the State is generally a government for and by the people. The people elect their representative and also participate in the appointment of most, if not all public officers nowadays. The answer is, however, not very far. Our democracy contains both representative as well as participatory elements which are not mutually exclusive but supportive of one another. The support is obtained even from that singular individual. We also have no doubt that our local jurisprudence deals at length with why *the Constitution* and statute law have imposed the obligation of public participation in most spheres of governance and generally we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation."

51. The Tribunal also rightly recognized that public participation is essential and cannot be ignored. In Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A), the South African Constitutional Court made this clear:

> " A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...'

52. The Tribunal also correctly affirmed that, similarly, the same Court, in the case of Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5, discussed the importance of public participation as follows:

> " ...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision."

53. I therefore concur with the Tribunal's decision regarding public participation.

c)Whether cancelling the license of a completed and operational project was a proportionate and appropriate remedy considering the principles of finality and public interest.

54. The appellants and the 6th respondent hold that Nema and the National Environmental Complaints Committee (NECC) as the designated authorities responsible for enforcing compliance. They also assert that the 1st to 5th respondents can submit any future environmental complaints through these agencies. Therefore, the Tribunal made a legal and factual error by revoking an EIA license for a project that had already been completed and was operational.

55. The 6th respondent states that Section 58 of EMCA requires project proponents to submit a detailed report and pay a fee for an Environmental Impact Assessment license. Before beginning activities listed in the Second Schedule, proponents must fund and carry out the assessment and submit a report. If the Authority determines there is a significant environmental impact, it will issue a restorative directive.

56. The 6th respondent states that this section applies to project proponents planning new projects, expanding existing ones, or modifying current projects; it does not apply to completed projects. A review of the Record of Appeal shows that the appellants told the Tribunal that the project was finished and ready for operation when the 1st to 5th respondents filed their appeal. The appellants also requested a site visit to verify the project's status, but the Tribunal declined, explaining its reasons. Therefore, the 6th respondent believes that the Tribunal's judgment and orders were out of touch with reality; they seemed harsh, unfair, and unsuitable given the circumstances. The Tribunal erred by failing to weigh economic development against environmental concerns, particularly by revoking the EIA license of a completed and operational project. The judgment did not consider the investor's situation, who invested over ten billion shillings to build the plant whose license was revoked. It also overlooked the potential impact on thousands of workers who could lose their jobs and livelihoods. Moreover, the orders ignored potential environmental issues related to the development and appeared aimed at shutting down the appellants' plant, which would be effectively closed under Section 67 of EMCA.

57. Considering the final orders issued by the National Environment Tribunal (NET), which include the cancellation or revocation of the Environmental Impact Assessment (EIA) license granted in 2018,

along with the delay by the 1st to 5th respondents in raising their concerns during the initial phase of the project, and given that the project is currently operational without any scientific evidence of environmental pollution, I tend to agree with the appellant and the 6th respondent that the final orders from the Tribunal were disproportionate. Additionally, it seems that other remedies should have been considered.

58. Article 10 of *the Constitution* delineates the National Values and Principles of Governance, which are imperative to guide all governmental institutions, officials, and individuals in the interpretation of *the Constitution*, the formulation of laws, and the development of public policies. It emphasizes fundamental principles such as Patriotism, the Rule of Law, Democracy, Human Dignity, Inclusiveness, Integrity, Transparency, and Sustainable Development, serving as a framework for the nation's governance and public administration.

59. The national values and principles articulated in Article 10(2) encompass Patriotism, National Unity, Sharing and Decentralization of Power, the Rule of Law, Democracy, Civic Participation, Human Dignity, Equity, Social Justice, Inclusiveness, Equality, Human Rights, Non-discrimination, and the Protection of Marginalized Groups. Furthermore, supplementary principles include Good Governance, Integrity, Transparency, Accountability, and Sustainable Development.

60. Article 42 of *the Constitution* affirms every individual's right to a clean and healthy environment, including the right to its protection for both current and future generations through legislation and other measures. This provision constitutes a fundamental component of the Bill of Rights. It plays a crucial role in environmental safeguarding, linking to broader rights such as health and property. Notable aspects of Article 42 include the entitlement to a healthy environment, the obligation to safeguard environmental integrity for future generations, and the need for legislative action to uphold this right. Its importance resides in elevating environmental quality from a merely policy objective to a fundamental human right, thereby empowering citizens and organizations to advocate for environmental conservation. This right is enshrined in the comprehensive Bill of Rights, which also protects other freedoms, such as the rights to life, property, and access to information.

61. Article 69 of *the Constitution* delineates the responsibilities of the government concerning environmental protection. It mandates the sustainable utilization, management, and preservation of natural resources; advocates for maintaining a minimum of 10% forest cover; safeguards biodiversity and indigenous knowledge; emphasizes public participation; and assures equitable distribution of benefits. Citizens are likewise encouraged to collaborate with authorities to ensure environmental safeguarding.

62. This judgment examined public participation, a fundamental principle enshrined in Articles 1 and 10. It requires the government to involve the public in decision-making, particularly in legislation (Articles 118 and 196) and environmental governance (Article 69), thereby reinforcing democratic processes.

63. This framework guarantees that citizens can have a direct influence on policy, thereby enhancing democracy and accountability. Article 69(d) of *the Constitution* obligates the State to foster public involvement in environmental management. Consequently, citizens are engaged in the administration and conservation of the environment.

64. On the other hand, sustainable development, a crucial aspect of our environmental law, stresses meeting current needs without jeopardizing the ability of future generations to meet theirs. This principle is also reflected in *the Constitution* Article 10 and the Environmental Management and Coordination Act (EMCA).

65. When applying the principle of sustainable development, the key principles to determine whether a project is sustainable include the Precautionary Principle (which advocates preventive action despite uncertainty), promotion of Public Participation, equitable resource use (inter- and intra-generational equity), and the valuation of National Heritage and Biodiversity.

66. *The Constitution* identifies sustainable development as a national value under Article 10. It obligates the State to ensure equitable resource use, promote traditional knowledge, and attain at least 10% tree cover under Article 69. The EMCA defines sustainable development and encourages public participation in environmental matters, thereby improving access to justice.

67. Sustainable development involves harmonizing economic, social, and environmental considerations to meet the needs of both present and future generations, while maintaining ecosystem integrity. The Precautionary Principle guides policymaking by advocating preventive measures against environmental threats in the face of scientific uncertainty. Public Participation empowers citizens to partake in environmental decision-making, with enforcement provided through EMCA.

68. Equity and benefit-sharing involve the fair utilization of resources for the benefit of all Kenyans, while respecting national heritage. The Polluter Pays principle and associated responsibilities emphasize accountability for polluters and uphold the individual duty to conserve.

69. In balancing the competing principles in this matter, I consider the final passage of the Tribunal on public participation that:

> " Having found that there was no adequate public participation, the Appellants' appeal succeeds on this ground alone. This effectively renders the second issue for determination superfluous as lack of adequate public participation renders the EIA study report inadequate. In that regard, we remind ourselves of our earlier holding in Save Lamu & 5 others Vs National Environmental Management Authority (Nema) & Another (2019) eKLR, where we stated as follows:
>
> > "'in our view, public participation in an EIA study process is the oxygen by which the ElA study and the report are given life. In the absence of public participation, the EIA study process is a still-born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the EIA study report is."

70. Although I agree with the Tribunal's final decision, I think it overlooked that the EIA license in question was issued back in 2019. The project is now up and running, billions of shillings have been invested, and we are beyond the licensing stage. Furthermore, no scientific report has ever shown that the project causes any environmental harm.

71. I agree with the authority cited by the 6th respondent in the Court of Appeal decision in Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] KECA 875 (KLR), where the court relied on the doctrines of estoppel and legitimate expectation to overturn the decision to cancel an EIA license issued over 13 years earlier, citing accrued rights and legitimate expectations:

> " Second, I note that the trial judge made an order for demolition of the three appellants' premises. There is no evidence on record to prove that per se the structures on the three appellants' premises were responsible for environmental degradation. In principle, a structure on a property can be used for a purpose that does not threaten or endanger the

environment. This being so, I find that it was injudicious to order demolition of the three appellants' structures without proof that the structures per se were the cause of pollution.

Third, I have considered the respondents' submissions that closure of factories is the only legal and effective way to enforce the constitutional Articles and statutory provisions guaranteeing the right to a clean and healthy environment. Comparatively, courts have come up with innovative methods to see that orders on environmental protection are implemented. One such innovative relief is a continuing mandamus. (See Vineet Narrain v. Union of India and Others, Supreme Court of India, Judgment of 18 December 1997, (7) SCALE 656). Another example include monitoring committees constituted to implement court orders. (For more details, see Sahu, G (2008), Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence, Journal of Law, Environment and Development (LEAD), International Environmental Legal Research Centre, London, Number 4/1). It is thus not the case that closure and demolition orders are the only effective ways to protect and conserve the environment."

72. I therefore conclude that the cancellation or revocation of the license was made in error.

d)Whether alternative remedies, such as Environmental Audits under Section 68 of EMCA and structural interdicts, can effectively address any post-licensing environmental concerns.

73. The 6th respondent appropriately contends that the tenor and interpretation of Section 67(2) of the Environmental Management and Coordination Act (EMCA) concerning the revocation, suspension, or cancellation of an Environmental Impact Assessment License is that, upon such cancellation or revocation, the effect is an absolute cessation of the project. The section states that:

> " Whenever an environmental impact assessment licence is revoked, suspended or cancelled, the holder thereof shall not proceed with the project which is the subject of the licence until a new licence is issued by the Authority."

74. I agree with the 6th respondent. Having established that the project is completed and operational, what is the impact of the cancellation of the EIA License on the appellants? As it stands, closing the appellant's plant is the only logical outcome of the canceled license.

75. Nevertheless, the most effective remedy available to address any potential environmental challenges posed by the project is not its closure. Demanding the appellants to apply for a new EIA License would be an exercise in futility, as Section 58 of EMCA is intended to regulate new projects as well as existing projects seeking to expand or alter their operations.

76. In line with the Court of Appeal's decision in Kibos Distillers Limited & others v Benson Ambuti Adega & others (supra), which involved a similar circumstance, the Court reversed the Trial Court's decision to revoke the EIA licenses of a factory. It proposed alternative remedies in the form of a continuing mandamus.

77. Consequently, the appeal will be partially upheld, and I will issue the following orders: The decree and orders issued on March 6, 2025, by the Tribunal are hereby rescinded and superseded by the following subsequent orders:

a. The orders cancelling the EIA license No. Nema/EIA/PSL/8728 is set aside because the appeal before the NET was filed more than 5 years after the license was issued.

   a. Instead, it is ordered that, pursuant to Section 68 of the EMCA, the 6th Respondent is hereby directed through an order of mandamus to conduct an audit to confirm that the Appellant's

project operations align with the statements and predictions in the initial EIA study report. The order also requires confirming that the project proponents have taken all reasonable steps to mitigate unforeseen negative environmental impacts not identified in the initial EIA, if any.

b. The exercise shall be completed within 3 months hereof, and a report shall be filed in court.

c. Looking at the nature of this litigation (prolonged), each party is to bear its own costs.

DATED, SIGNED, AND DELIVERED ELECTRONICALLY IN MALINDI ON DECEMBER 10, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Musangi for the Appellant.

Mr. Binyenya for the 7 th Respondent (also Appellant)

Mr. Muchiri for the 1 st – 4 th Respondent

Happy: Court Assistant

In the Absence of:

Ms. Majune for the 6 th Respondent