ENVIRONMENT AND LAND COURT

AT KISUMU

PETITION NO. 8 OF 2018

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 2 (1), 3 (1), 10 (1), (2), A, B & C, 27 &73 OF THE CONSTITUTION AND IN THE MATTER OF ARTICLE 20 (1), (2), (3) A & B, ARTICLE 21 (1), 22 (1), (2) & 23 (1) & (3) A, B, C, D & E OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER ARTICLE 27, 28, 32, 40, 42, 43, 47 AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999

AND

IN THE MATTER OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (JURISDICTION, PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES 2006 AS READ WITH CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, TRANSITIONAL CLAUSES AND CONSEQUENTIAL PROVISIONS OF THE SCHEDULE TO THE CONSTITUTION

BETWEEN

BENSON AMBUTI ADEGA..... 1ST PETITIONER

ERICK OCHIENG.....2ND PETITIONER

BETHER ATIENO OPIYO …..... 3RD PETITIONER

VERSUS

KIBOS SUGAR AND ALLIED INDUSTRIES LIMITED.....1ST RESPONDENT

KIBOS POWER LIMITED ..... 2ND RESPONDENT

KIBOS DISTILLERS LIMITED.....3RD RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....4TH RESPONDENT

COUNTY GOVERNMENT OF KISUMU ..... 5TH RESPONDENT

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS....INTERESTED PARTY

JUDGMENT

1. Benson Ambuti Adega, Erick Ochieng and Bether Atieno Opiyo, the Petitioners, filed their petition dated the 25th October 2018 against Kibos Sugar and Allied Industries Ltd, Kibos Power Limited, Kibos Distillers Limited, National Environment Management Authority and County Government of Kisumu, the Respondents seeking for the following prayers;

1. "A declaration that the Petitioners' right to a clean and healthy environment as guaranteed by Article 42 and 43 of the Constitution of Kenya has been violated by the actions of the Respondents.

2. A declaration that the issuance of an EIA licence No. 0000259 to the 1st Respondent by the 4th Respondent based on the environmental project report only and without the 1st Respondent conducting an EIA study for the construction of the 1650 TCD factory is unconstitutional, illegal and contravenes the provisions of Section 58, 59, 60, 61, 62, and 63 of the Environmental Management and Co-ordination Act, 1999 and provisions of Regulations 17, 18, 22, 23 and 24 of the Environmental (Impact Assessment and Audit) Regulations, 2003

3. A declaration that the variation of the 1st Respondent's EIA licence 0000259 by the 4th Respondent and subsequent issuance of certificate of variation No. 0000151 without the 1st Respondent carrying out an EIA study was unconstitutional, illegal and contravenes the provisions of Sections 58, 59, 60, 61, 62 and 63 of the Environmental Management and Cordinaton Act, 1999 and provisions of Regulation 25 of Environment (Impact Assessment and Audit) Regulations 2003.

4. A declaration that the transfer of the 1st Respondent's EIA licence No. 0000151 to the 2nd and 3rd Respondents with them conducting an EIA study is unconstitutional, illegal and contravenes Sections 58, 59, 60, 61, 62 and 63 of the Environmental Management and Cordination Act, 1999 and Regulations 17, 18, 22, 23, 24 and 25 of Environmental management and Cordination Act, 1999 (Environmental (Impact Assessment and Audit) Regulations 2003.

5. A declaration be issued to declare that the 1st-3rd Respondents have illegally acquired Environmental Impact Assessment Licences for the Kibos Sugar Factory.

6. That an order of certiorai be issues to bring into this Court and quash and or cancel the Environmental Impact Assessment Licence No. 0000151 issued to the 1st Respondent, the Environmental Impact Assessment Licence No. 0000042 issued to the 2nd Respondent and the Environmental Impact Assessment Licence No. 0000043 issued to the 3rd Respondent by the 4th Respondent for the construction of a sugar and paper mill, power plant and a distillery factory in Kibos Area, Miwani Central Location, Muhoroni Sub-County, Kisumu County.

7. That an order of permanent injunction be issued to restrain and or stop the 1st – 3rd Respondents through themselves, their directors, their agents, employees and or representatives from in any way continuing with operations of their factory and or milling of sugar cane at its factory site in Kibos Area, Miwani Central Location, Muhoroni Sub-County, Kisumu County.

8. An order of an environmental restoration order requiring the 1st – 3rd Respondents though itself, their agents, employees and or representatives to demolish any structures erected on the land parcel number LR NO 654/23 and LR NO 11273 in Kibos Area, Miwani Central Location, Muhoroni Sub-County, Kisumu County with a view of restoring the environment to its original status within 14 and in default the Petitioner be at liberty to appoint an auctioneer to demolish the structures and restore the environment and recover the cost from the 1st – 3rd Respondents.

9. A declaration that the failure, neglect and or refusal by the 4th and 5th Respondents to stop the operations of the 1st – 3rd Respondents after they had been found to repeatedly and continuously to be degrading the environment is unconstitutional, illegal and contravenes the provisions of Section 108 of Environmental management and Cordination Act, 1999 and Articles 3, 10, and 47 of the Constitution.

10. Compensatory damages for violation of the Petitioners' rights under Articles 43, 46 and 47 of the Constitution.

11. Interest.

12. Costs of an incidental to this Petition; and

13. Any other order that this court deems fit and just to grant in the circumstances."

2. The petition is based on the grounds marked 26 to 56 on its face among them being that;

a. That the 4th Respondent issued the 1st Respondent with EIA License No. 0000259 without the 1st Respondent carrying out an EIA study and submitting a report thereof contrary to Section 58 (2) of the Environment Management and Coordination Act 1999. That the failure to carry out the study and submit a report was meant to conceal material information and fail to reveal the nature of their activities and the environmental impact.

b. That the 1st to 3rd Respondents have been polluting the environment by discharging raw effluent into River Nyamasaria as confirmed by the National Environmental Complaints Committee vide their report dated the 5th October 2017.

c. That the 1st to 3rd Respondents have been polluting the environment by discharging raw effluent into River Kibos as confirmed by the Department of Water Environment, Irrigation and Natural Resources of the County Government of Kisumu of March 2018.

d. That the 1st to 3rd Respondents have been polluting the environment by discharging raw effluent into River Lielango in Miwani Kolwa East Ward as was established by the County Government of Kisumu, Department of Water, Environment, irrigation and Natural Resources in their March 2018 report.

e. That the County Executive Committee Member for Water, Irrigation, Environment and Natural Resources, County Government of Kisumu had vide their letter dated 14th September 2018 responding to the 1st Petitioner's letter of 11th September 2018, acknowledged that the 1st to 3rd Respondents were indeed discharging effluent into River Kibos but had not taken steps as required by Section 108 of the Environmental Management and Coordination Act to stop the activities.

f. That among the raw effluent being discharged from the distillery by the 1st to 3rd Respondents into the rivers was vinesse, a black liquid, which is polluting the environment. That the 4th Respondent inspected the 1st to 3rd Respondents factory on the 30th August 2018 and confirmed that they were using vinesse, which is the raw effluent from the distillery in dust control and road maintenance without subjecting it to EIA process; and that they were using bagasse in the pulp and paper industry hence releasing some fugitive dust and ash into the environment.

g. That the 4th Respondent had after noting the details set out in (f) above issued the 1st to 3rd Respondents with orders to stop the use of vinesse in dust control and road maintenance in seven (7) days; decommission the old holding lagoon for the vinesse within seven (7) days; provide chemical analysis of vinesse in seven (7) days; control the fugitive dust and flying ash from the pulp and paper industry in 14 days and undertake an EIA study for use of vinesse in road maintenance.

h. That though the improvement order by the 4th Respondent set out in (g) above was issued irregularly, as Section 108 of the Environmental Management and Cordination Act required the issuance of an environmental restoration order stopping the activities of the 1st to 3rd Respondents to avoid further degradation of the environment, they have not been complied with.

i. That the improvement order by 4th Respondent to the 1st to 3rd Respondents in (g) above amounted to an infringement of the three principles of environment law of pre-cautionary, polluter pays and cost benefit analysis.

j. That the acts of the 1st to 3rd Respondents of discharging raw effluent and polluting the rivers has left the local community with unclean water to use due to its oduor and colour, hence compromising their health.

k. That the 1st to 3rd Respondents never did EIA studies and submit Reports to the 4th Respondent for their projects. That they had only prepared an environmental Project Report sometimes in January 2004 for a construction of a mini-sugar factory with a milling capacity of 500 tonnes per day, upon which they were issued with EIA license No. 0000259 for construction of the sugar, portable spirit and packaging paper and one of the conditions therein was that the constructions be undertaken within 24 months. That however the construction of the distillery and paper factory was not started until sometimes in the year 2011 or thereabout, a period of more than 60 months from 19th October 2005 when the EIA license was issued. That the construction of the distillery and paper factory was undertaken using an expired EIA license.

l. That though the 1st to 3rd Respondents had applied for the variations of the license under their applications dated the 12th October 2010 and 26th November 2010, the variations were procured and or issued fraudulently thus illegal, null and void for reasons that;

- **As the 1st Respondent's EIA license was issued under Regulation 10 of the Environmental (Impact Assessment and Audit) Regulations 2003 and not under Regulation 24, any variations was subject to the proponent conducting an**

EIA study as provided for under Regulation 25 (3) and (4).

- **The 1st Respondent had only been allowed to set up a sugar factory with a crushing capacity of 500 tonnes per day but they instead set up one with a crushing capacity of 1650 tonnes per day without a variation of the initial license.**
- **That the EIA license was issued in regard to L.R No. 654/23 while the distillery and Paper Mill factory are constructed on L. R. No. 11273 which has never been subjected to an Environmental Project Report or EIA study. That the two factories are built on the riparian area of River Kibos, and as a result the river has been affected by soil erosion due to the collapsing river bank due to the activities in the said factories.**
- **That the 4th Respondent letters to the 1st Respondent of 1st December 2010 and 9th November 2010 asked for the proponent to undertake a full EIA study but the same has not been undertaken todate.**
- **That the 1st to 3rd Respondents have never carried out a comprehensive EIA studies covering all the social, economic, biological legal and administrative issues of their activities, and the Petitioners have been denied an opportunity to interrogate whether the project would be sustainable.**
- **That 1st Respondent was issued with variation certificate in contravention of Rule 17 of the Regulation as they failed to publicize the project, its anticipated effects and benefits. That the Environment Project Report done in 2004 does not enumerate the effects the distillery and Paper Mill factory have to the environment, local community and the County Community who depend on Lake Victoria for source of their livelihood, not to mention the Regions stable food, which is fish which has been adversely affected resulting to a change or shift in the social culture of the Region.**

3. That filed with the petition is the notice of motion under certificate of urgency for injunctive (conservatory) orders among others. The application is based on the 29 grounds on its face marked (1) to (29) and supported by the affidavit of the 1st petitioner sworn on the 25th September 2018, and supplementary and supporting affidavits sworn by the 3rd Petitioner on the 20th November 2018 and 11th March 2019 respectively, more or less deponing along the lines of the grounds on the petition. To the affidavit are annexed documents marked ***"BAA-1"*** to ***"BAA-24".*** The application was initially dealt with through this court's ruling of 31st October 2018 upon which an appeal was preferred in Eldoret C.A.C.A (Application) No. 137 of 2018 that was decided through the ruling of 7th December 2018. That during the mention of 20th December 2018, the Counsel for the Petitioners indicated that they were abandoning the notice of motion dated the 25th October 2018, in view of the Court of Appeal ruling, and so as to have the petition heard. The court then allowed the application by Kenya Union of Sugar Plantation and Allied Workers to be enjoined in the petition as Interested Party, and gave directions on filing and exchanging of replying papers and written submissions on the petition.

4. The 1st to 3rd Respondents opposed the petition through the replying and supplementary affidavits sworn by Joyce Opondo, the Group Corporate Affairs Manager/Head of Environment Department, sworn on the 30th October 2019 and 24th January 2019 respectively, among others deponing to the following;

a. That none of their operating licenses has been illegally obtained or granted in contravention of section 58 (2) of the Environment Management and Coordination Act 1999. That they are not discharging raw effluent into Rivers Nyamasaria, Kibos and Lielango as alleged.

b. That the County Government of Kisumu has never written to them complaining that they are discharging raw effluent into the river.

c. That the Respondents have installed the latest effluent discharge plant which handles all discharge and recycles the same and the correspondence relied upon by the Petitioners to the contrary are purposefully made in bad faith to paint them in bad light as entities that pollute the environment.

d. That they have fully complied with all restoration order from the 4th Respondent including stopping using venasse in watering the road, dust control measures and decommissioned the vinase holding area.

e. That the Petitioners allegations are mere village talk incited by partisan political interest and not backed by any scientific evidence and should be dismissed with the contempt it deserves.

f. That the question on how the 1st to 3rd Respondents acquired the operating licenses is not a human right issue affecting the Petitioners but an administrative one that can be challenged through the "NEMA TRIBUNAL". That the administrative processes were carried out from 2004 to 2010 and the Petitioners are therefore time barred to challenge the decisions.

g. That the EIA studies for Kibos Sugar and Allied Industries Ltd were conducted in 2004 and the factory commissioned in November 2007. That they applied for a variation of the EIA license in 2010 and conducted a new EIA reports for the Distillery Project, Paper Factory and Power Project as requested by the 4th Respondent. That accordingly the said factories were not constructed and commissioned on an expired EIA license as alleged. That the licenses were legally and regularly obtained and that the factories are not on a parcel of land different form the one specified in the license.

h. That the alleged letter dated 8th November 2010, allegedly from the 4th Respondent claiming that the EIA license for Kibos Sugar & Allied Industries Ltd no longer belong to it is a forgery.

5. The 4th Respondent filed their replying affidavit sworn by Ali Mwanzei, the Acting Director sworn on the 21st November 2018 deponing as follows among others;

a. That the 4th Respondent issued an EIA license to the 1st Respondent on the 19th October 2005 for production of high quality sugar with portable spirits and packaging paper in accordance with the Act.

b. That following complaints on river pollution, the National Environment Complaints Committee (NECC) visited the 1st to 3rd Respondents on the 20th February 2017 and made its findings and conveyed its recommendations in its report dated 5th October 2017, among them being that there be continued and surveillance of the 1st to 3rd Respondents activities. That among the major findings at River Lielengo was evidence of a blackish liquid identified as vanasse which is a byproduct of the distillery of portable spirits, and whose harmful effects could not be established immediately. That they recommended further that there be continued monitoring and improvements with the water Resources Management Authority providing chemical analysis results.

c. That during an inspection carried out by the 4th Respondent's officers on the 30th August 2018, they fund that the 1st Respondent was using the vanasse in controlling dust from the earth road and for which they issued an order Under Section 117 of EMCA requiring that the 1st Respondent desist from using it pending submission and approval of an EIA license including submission of a chemical analysis of the vanasse. That the 4th Respondent is yet to receive compliance report of the order.

d. That the pre-cautionary, polluter pays and cost benefit analysis principles the Petitioners have raised are Environmental Law Principles which are widely accepted in guiding environmental Management but must be applied with a balance to other existing legal principles such as sustainable development. That the EIA process appreciates that impacts to the environment must arise and that 100% compliance, especially for manufacturing sector is elusive, and that is why an EIA will assess the positive and negative impacts to the environment with a view of enhancing the positives and providing mitigation to reduce the negative impacts.

e. That the 1st to 3rd Respondents had indicated that they had been using the bagasse which is obtained as a by-product of sugar production, as fuel for their power production. That the Petitioners allegation that bagasse was being dumped by the road side can only be verified upon an inspection being carried out.

6. The Interested Party filed their response to the Petition through the replying affidavit of Francis Wangara, the General Secretary, sworn on the 30th January 2019 deponing to the following among others;

a. That the issues of the expired National Environment Management Authority License raised by the Petitioners should have been lodged with the tribunal before rushing to court.

b. That the order of injunction sought by the Petitioners against the Respondents would adversely affect the employment rights of the Interested Party members, while the environmental issues raised could be sorted out gradually.

c. That the area where the Respondents' industry is situated is an industrial area with other companies, including Kisumu Water & Sewerage Company (KIWASCO), Lake Basin Fish Farm, Great Lakes University, Kibos Maximum Prison, Kajulu Dumpsite, all of which discharge their effluents into the Kibos River, and singling out the Respondents companies and seeking closure orders against them is not only malicious but in bad faith.

d. That most industries running the world economy are situated near rivers and the courts/tribunals only propose control measures, which if not adhered to, are followed with strict penalties, but not closure as that would result to loss of jobs, leading to poverty and needless suffering.

e. That in the event that the Respondents are found to have violated the Petitioners' rights to healthy and clean environment, they should be given time to comply were the requirements set.

f. That the area has over a million residents who also use the rivers and the environment as a whole without any limitation.

7. The 5th Respondent replied to the petition through the replying affidavit sworn by one Salmon Orimba, the County Executive Member, Environment, Kisumu County sworn on the 2nd November 2018 among others deponing to the following;

a. That the petition is brought in bad faith with the aim of closing down the 1st to 3rd Respondents' factories.

b. That the 4th and 5th Respondents had given the 1st to 3rd Respondents all the operating licenses procedurally. That incase there was any issue of pollution, the 4th Respondent was the right agent to deal with it.

c. That the Petitioners had at no time lodged their complaints with the 5th Respondent discharging raw effluent into the river.

d. That the 5th Respondent has not breached any mandatory fiduciary duty, national values and principles of governance bestowed upon them but has been in constant touch with the 1st to 4th Respondents.

e. That the 1st to 3rd Respondents are not polluting the rivers Kibos, Nyamasiria and Lelongo, and it's not true that the Lake

Victoria eco-system has been negatively affected or fish stock depleted.

f. That Kibos prison in the area has over 1000 prisoners and has no effluent discharge plant, and discharges its waste into river Kibos as well as thousands of other residents who carry out various unhygienic activities along the said river. That therefore pollution of the rivers cannot wholly be attributed to the 1st and 3rd Respondent only or be blamed on 5th Respondent's regulatory failure.

8. M/s Gichaba & Company Advocates filed the Notice of Change of Advocates dated 8th February 2019 coming on record for the 3rd Respondent in place of M/s Olel Onyango Ingutia & Co. Advocates, who had been acting for 1st to 3rd Respondents. The 3rd Respondent then filed the notice of preliminary objection dated the 7th February 2019 on the 8th February 2019 raising following two issues;

1. "The court lacks jurisdiction to hear and determine the petition herein by virtue of Articles 72, 159 (1) 2 (c) and (e), 169 (1) (d) and 259 of the Constitution of Kenya as read with Sections 31, 32, 125, 126, 127, 129 (c) and 130 of the Environmental Management and Coordination Act (Act No. 8 of 1999) and Rules 31 and 46 of the Environment (Impact Assessment and Audit) Regulations 2003.

2. The petition and the claims thereunder are time barred by law under Section 129 (1) (c) of the Environment Management and Coordination Act and Rule 46 of the Environmental (Impact Assessment and Audit) Regulations 2003."

9. The interested Party also filed notice of Preliminary Objection dated the 8th March 2019 raising the following three (3) points;

1. "That the court lacks the jurisdiction to hear and determine the matters raised under prayers 2, 3, 4, 5 and 6 of the petition in view of the provisions of Sections 125, 126, 127 and 129 of the Environment Management and Coordination Act, Cap 387 and Regulations 46 (1) (f) of the Environment (Impact Assessment and Audit Regulations 2003).

2. That prayers 2, 3, 5, 5 & 6 sought in the petition offends mandatory provisions of the law and laid down procedures and cannot sustain the prayers sought.

3. That prayers 2, 3, 4, 5 & 6 sought in the petition are an abuse of the court process, frivolous, scandalous and vexatious and should be dismissed."

10. The 1st and 2nd Respondents filed the notice of motion dated the 2nd March 2019 seeking for the petition against them to be struck out. The application is supported by the affidavit sworn by Joyce Opondo on the 2nd March 2019.

11. The petition came up for mention on the 12th March 2019 when Counsel for the Petitioners reported that they had filed their submissions dated the 11th March 2019, albeit outside the timelines earlier given. The 4th Respondent Counsel also reported having filed their submissions dated 12th March 2019 on that morning. That the court directed and gave timelines for filing and exchanging of the written submissions on the two preliminary objections, the motion dated 2nd March 2019 and the petition for those parties who were yet to file theirs. That the matter was then set for further mention on the 2nd July 2019.

12. That the Interested Party filed their submissions in respect of the petition and their preliminary objection dated 30th April 2019 and 26th March 2019 respectively. The 3rd Respondent field their submissions on their preliminary objections dated 22nd March 2019, while the 4th Respondent filed theirs on the preliminary objections dated 8th April 2019. The 5th Respondent filed their written submissions dated 12th April 2019. That the submissions dated 26th June 2019 were filed for the 1st to 3rd Respondents on the petition.

13. The following is a summary of the various submissions;

A. 3RD RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

i. That as the petition is filed by Benson Ambuti Adega and Erick Ochieng, the alleged 3rd Petitioner, named Bether A. Opiyo, not being a party, the petition should be struck despite her support of the same through the supplementary affidavit sworn on 20th November 2018.

ii. That the petition seeks judicial review prayers under the guise of Constitutional petition.

iii. That by this court proceeding to hear the matter as a first instance court, it will have denied the parties the right of appeal, which is a denial of justice and unfair hearing contrary to Article 50 of the Constitution. That the issues raised by the Petitioners in the petition are matters that should be lodged with National Environment Complaints Committee established under Section 31 (1) of EMCA and National Environment Tribunal created under Sections 125 (1) of EMCA.

iv. That as this is not an appeal, the court should down its tools as was held in the celebrated case of Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) ltd. (1989) KLR 1, and not usurp the jurisdiction of the other properly constituted fora under the constitution and statutes.

v. That the EIA is a systematic examination conducted to determine whether or not a program, activity or project

will have any adverse impacts on the environment. That as a license during and before the project, it becomes dead wood after production commences. That any issues to do with the environment that arises is thereafter handled by the concerned authority as the EIA does not apply after the completion of the project.

vi. That Section 129 of EMCA and Regulation 40 (1) (f) and 2 of the Environment (Impact Assessment and Audit) Regulations 2003 gives a period of 60 days for any aggrieved person to appeal to the tribunal and the court as appropriate, from the date of the decision sought to be challenged. That as the petitioners' complaint relates to license No. 0000259 of 19th October 2005, certificate of variation on output No. 0000151 dated 1st December 2010, certificate of transfer of environmental Impact Assessment license to Kibos Power ltd No. 0000042 issued on 12th January 2011, and certificate of transfer of Environmental Impact Assessment License to Kibos Distillers Ltd No. 0000043 of 12th January 2011, any aggrieved person had 60 days to lodge their complaints. That as it is eight (8) years since the last license was issued, the complaints are statutory time barred and there is nothing the court could adjudicate as the cause of action is dead.

vii. That the petition is disguised as a constitutional petition when it is not, to defeat the law on limitation period. That the prayers 2 to 9 are for prerogative orders which can only be considered through judicial review.

viii. That the court should dismiss the petition with costs as it is without jurisdiction.

B. INTERESTED PARTY'S SUBMISSIONS ON PRELIMINARY OBJECTION;

i. That the court lacks jurisdiction to hear and determine the issues raised in prayers 2, 3, 4, 5 and 6 of the petition in view of Sections 125, 126, 127 and 129 of EMCA and Regulation 46 (1) of Environment (Impact Assessment and Audit) Regulations, 2003.

ii. That the challenge of EIA licenses can only be done through the National Environmental Tribunal established under Section 125 of EMCA.

iii. That the Petitioners can only come before this court on appeal under Section 130 of EMCA.

iv. That parties should exhaust all remedies available to them before resorting to litigation or Constitutional petitions. The leaned Counsel referred to several superior court decisions on the matter including that of the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs KCB & 2 Others Civil Application No. 2 of 2011 [2012] eKLR.

v. That the prayers sought by the Petitioners are scandalous, frivolous and vexatious and entertaining them will only be a wastage of precious judicial time and that the petition should be struck out with costs upon upholding the preliminary objection.

C. 4TH RESPONDNET'S SUBISSIONS ON TWO PRELIMINARY OBJECTIONS;

i. That this court has jurisdiction under the provision of the Environment and Land Court Act No. 19 of 2011, enacted by Parliament pursuant to Article 72 of the Constitution to give effect to Part 2 of Chapter V.

ii. That the provisions of Article 159 (1) and (2) (c) and (e) of the Constitution do not oust this court's jurisdiction.

iii. That as the Petitioners have attached documents showing that the National Environment Complaints Committee (NECC) had already handled the complaints, this court is therefore with jurisdiction.

iv. That the jurisdiction of National Environment Tribunal is limited to cases where the aggrieved person is challenging a decision by the NEMA (4th Respondent) or any of its committees. That if the Petitioners herein were only challenging the licenses given by the 4th Respondent, the preliminary objection would have been worthy of consideration, but as the petition seeks several other reliefs not obtainable from the Tribunal (NET), and has other parties such as the 5th Respondent, then this court original jurisdiction kicks in.

v. That as the petition contains prayers outside those the Tribunal (NET) could handle under Section 129 of EMCA, and so as not split the petition for some reliefs to be handled by one judicial body and others by another, and as the reliefs sought are severable and conjoined, then this court, that has both original and appellate jurisdiction, is the correct forum as there is no evidence that the parties raising objections with stand to suffer any prejudice.

vi. That the two preliminary objections have no merit and should be dismissed with costs.

D. PETITIONERS SUBMISSIONS;

i. That the Petitioners seek to ensure that the 1st to 3rd Respondents' factories, that were illegally constructed without complying with the Constitution and EMCA are demolished, and the environment restored to its original state, and therefore it is imperative the law and existing orders be upheld, respected and defended by all parties, and above all

by this court.

ii. That this court has jurisdiction to hear and determine the petition in view of the finding in Ken Kasing'a vs Daniel Kiplangat Kirui & 5 Ohters [2015] eKLR.

iii. That the 1st to 3rd Respondents act of discharging raw effluent and polluting the environment under the clear watch and blessings of the 4th and 5th Respondents, on illegally obtained licenses is unconstitutional and infringe on the Petitioners rights to clean and healthy environment. That the 4th and 5th Respondents have a mandatory and fiduciary duty to protect, uphold and defend the Constitution of Kenya under Article 3 (1). That their inaction, illegal actions and general abdication of their duties, runs contrary to this duty. That the illegal activities propagated by the Respondents in illegally acquiring and issuing licenses and failure by the 4th and 5th Respondents of not taking any remedial action abridges the Petitioners' right to fair administrative action.

iv. That the 1st to 3rd Respondents have never conducted EIA for their projects but only prepared an EPR in January 2004, with intent to construct a mini factory with a milling capacity of 500 tonnes per day. That however, they were issued with an EIA license No. 0000259 to construct a factory for sugar, portable spirit and packaging paper, on an EPR and not EIA. That in view of the provision of Section 58 (2) of EMCA and second schedule, it is clear the Respondents' Projects fall squarely within projects that require EIA and not EPR to be conducted.

v. That the EIA license No. 0000259 having been irregularly issued, any variation on it amounts to nothing. That further, the variations were procured and issued fraudulently and are therefore illegal, null and void. That as the 1st Respondent's EIA license had been issued under Regulation 10 of the Environmental (Impact Assessment and Audit) Regulations 2003 upon approval of a Project Report and not under Regulation 24 upon an EIA Study Report, any variation was subject to the proponent conducting an EIA study as provided for under Regulation 25 (3) and (4). The learned Counsel referred to the case of Moffat Kamau & 9 Others vs Actors Kenya Ltd & 9 Others [2016] eKLR where the court held that a variation of an EIA license to increase power output from 30MW to 61MW, accounting for more than 100% increase, and without an EIA study amounted to a violation of Regulation.

vi. That an EIA license is site specific and EIA license No. 0000259 was issued in regard to L.R. No. 654. That however the Distillery and Paper Mill factories have been constructed on L. R. 11273 which has neither been subjected to EPR or EIA. That the two factories sit on riparian area of River Kibos. The learned Counsel referred to the case of West Kenya Sugar Co. Ltd vs Busia Sugar Industries & 2 Others [2017] eKLR and submitted that as the Paper Mill and Distillery factories are on L. R. NO. 11273, which has not been subjected to an EIA study, they ought to be demolished.

vii. That the 1st Respondent's license No. 0000259 was varied on 1st December 2010 and license No. 0000151 issued. That license was then transferred vide application dated 6th January 2011 and license No. 0000042 issued to Kibos Power Ltd and license No. 0000043 to Kibos Distillers Ltd. That however, no new license were issued for the sugar and paper factory and the two are therefore operating without an EIA license. That once a license is transferred, it cease to exist and the new license takes effect and therefore the factories operating without the licenses should be closed until they comply with Section 58 of EMCA.

viii. That though license 0000259 was irregularly issued, one of its conditions was that the construction be undertaken in 24 months. That as the license was issued on the 19th October 2005, and that the Distillery and Paper Mills were not started until in year 2011 which is after about 60 months, the license had by then expired. That as there is no provisions for extension of EIA license after expiry, and in this case EIA license 0000259 had expired in October 2007, then the variations applied for by the 1st to 3rd Respondents in 2010 were not sanctioned by the law, and the licenses issued thereof were irregular and non-existent.

ix. That the improvement orders issued by the 4th Respondent contravenes Section 108 (2) of EMCA as they ought to have stopped the 1st to 3rd Respondents from any activities that degrade the environment in accordance with the pre-cautionary principle. That further the 4th and 5th Respondents ought to have ordered the 1st to 3rd Respondents to bear the responsibility and costs of restoring the environment that they had degraded in obedience to the polluter pays principle under Section 108 (2) (d) of EMCA. That further and in obedience to the Costs Benefits Analysis Principle, and considering the adverse and irreversible degradation of the environment occasioned by the 1st to 3rd Respondents, their projects are unsustainable and unfit to be continued as the degradation outweigh their costs benefits. That in any case, the 1st to 3rd Respondents have failed, neglected and refused to carry out the improvement order therefore committing an offence under Section 137 (h) of EMCA and ought to be prosecuted. That the 4th Respondent ought to act under Section 67 of EMCA which empowers it to cancel or revoke such license; or suspend such license, for such time, not more than 24 months. The counsel referred to the case of National Environment Management Authority & Another vs Gevick Kenya Ltd [2016] eKLR.

E. 1ST TO 3RD RESPONDENT'S SUBMISSIONS;

i. That as the 4th Respondent gave the 1st and 2nd Respondents a clean bill of health vide their letter dated 10th September 2018, after undertaking a further environment audit with regard to the use of vinasse for dust control and or control of fugitive dust, their motion dated the 2nd March 2019 should be granted and the petition against them dismissed with coasts. That to drag the two Respondents who have complied with the NEMA restorative orders will prejudice them and would amount to loss of precious judicial time.

ii. That the parties with complaints relating to any environmental degradation should raise them first with the Committee who may make recommendations to the Standards and Enforcement Review Committee, which is legally empowered to act and revoke or suspend any EIA license. That where the person who raised the complaint is dissatisfied, they have recourse to file a case with the Tribunal, but not to come to this court. That the court's jurisdiction comes only on appeal as this court's decision under Section 129 (5) of EMCA is final. That by the court proceeding with this matter in its original jurisdiction, the 1st to 3rd Respondents' right to have been heard first before the committee, Standard and Enforcement Committee and Tribunal will be denied. That they will also be denied the right of appeal to this court, amounting to denial of justice and unfair hearing contrary to Article 50 (1) of the Constitution. The learned Counsel referred to the Court of Appeal decision of Republic vs NEMA exparte Sound Equipment Ltd [2011] eKLR on the mandate and functions of National Environmental Tribunal, and submitted that this court should down its pen, and hold that the petition is pre-maturely filed and thus strike it out with costs.

iii. That in view of the fact that all the prayers except number 9 are primarily aimed at operations of the 1st to 3rd Respondents, and only prayer 9 is directed to the 4th and 5th Respondents, then the complaints should have been pursued under private law and not through a constitutional petition. The learned counsel referred to various decisions including Kenya Bus Services Ltd & 2 Others vs The Attorney General & 2 Others [2005] eKLR and asked the court to find that the issues raised in the petition can be resolved through other mechanism, as laid down under EMCA which the Petitioner should exhaust first before moving to this court.

iv. That the 1st to 3rd Respondents have shown through their replying affidavit that they carried out comprehensive EIA studies and submitted the results therefrom to NEMA. That the three Respondents have therefore complied with the law and due diligence has been observed in data collection, consultation/ public participation and preparation of the report. That the allegations that EIA studies were not conducted for the Respondents are not true and the Petitioners submissions to the contrary must fail.

v. That the Respondents obtained the EIA license for Kibos Sugar and Allied Industries in 2004, after complying with all relevant provisions of the law and the new licenses were issued in 2010, after they conducted new EIA studies. That as the said licenses were issued 14 and 8 years ago respectively, and Section 129 of EMCA requires complaints to be lodged in 60 days, the Petition is therefore statutory time barred, constitute an abuse of the process of the court and ought to be dismissed summarily.

vi. That the 1st to 3rd Respondents have through their replying affidavit shown that they have complied with the improvement orders issued by the 4th Respondent. That the 4th Respondent and Water Resources Authority have in their reports of 2018 confirmed compliance, and therefore the Petitioners have failed to prove their allegations as required under Section 107 (1) of the Evidence Act, Chapter 80 of Law of Kenya.

vii. That the Petitioners are meddlesome interlopers with no legitimate grievances, and have extraneous motivation and are using the mask of public litigation to frustrate the 1st to 3rd Respondents. That the said Respondents have clearly demonstrated that they are unduly being harassed and the net effect of shutting them down will be disastrous to the entire region as they are the largest tax payers, paying hundreds of millions of Kenya shillings to famers for sugarcane supplied, generates over 1500 job opportunities, carry out comprehensive CRS amongst others.

viii. That litigation should have a desirable goal of sustaining the environment even in manufacturing sector but not to shut down the factory. That if the court was to issue an order of costs, the same should be capped based on the nature of the issues and not characterization of the parties.

F. 4TH RESPONDENT'S SUBMISSIONS;

i. That the Petitioners complaints had reached the 4th Respondent, who responded by exercising the various statutory instruments available to it being cognizant of the principle of sustainable development. That though the 4th Respondent is vested with powers to issue closure orders, the Petitioners had not moved it towards that direction, but they instead moved this court whose jurisdiction to issue such orders is not in doubt.

ii. That though the 4th Respondent was not in support of closure of the 1st to 3rd Respondents industrial undertaking at the time of filing of the petition, it has since exercised its statutory mandate and closed down the distillery and paper packaging plants of the 1st to 3rd Respondents.

iii. That the Petitioners complaints were largely confirmed by the 4th Respondent especially in regard to pollution, as was noted in the inspection of 18th and 19th February, 2019. The learned counsel submit that the 1st to 3rd Respondents activities pose a risk or threat to the environment and community as their actions violates Regulation 6(a) and (c) of the Environmental Management and Coordination (Water Quality) Regulations, and Regulation 4(1) and (2) of the Environmental Management and Coordination (Water Quality) Regulation (L.N. 120 of 2006).

iv. That the 1st to 3rd Respondents have continued to carry out illegal activities and the various site visit reports by the 4th and 5th Respondent point to the inevitable conclusion that there is pollution of the nearby rivers Kibos and Nyamasia on account of their activities.

vi. That some of the matters raised by the Petitioners can well be handled by the 4th Respondent, who has capacity to inspect for compliance and make subsequent orders, including re-opening and extended closure. That the court of law has no such tools but can only supervise the actions of a statutory agency. That the 4th Respondent however supports the closure order sought by the Petitioners, while it reserves its right to upscale enforcement of the closure order of the two factories it has already issued to prosecutorial action should they be warranted.

G. 5TH RESPONDENT'S SUBMISSIONS;

i. That the 5th Respondent supports the preliminary objection by the interested party that prayers 2, 3, 4, 5 and 6 of the Petition be struck out as those grievances arise out of an administrative procedure and the appropriate forum to raise the same would be the National Environment Tribunal which should be allowed time and opportunity to deal with them before any other mechanism can be invoked. The learned counsel referred to several superior court decisions including that of Joseph Owino Muchesia & Another –v- National Environment Management Authority & Another [2014] eKLR and submitted that the petition is misplaced as it is premature, as they could only have come before this court on appeal under Section 130 of EMCA if dissatisfied with the tribunal decision.

ii. That the 1st to 3rd Respondents carried out the EIA to the satisfaction of the 4th Respondent who after approval issued the licenses, upon which the 5th Respondent issued the 1st to 3rd Respondents with the requisite permits and licenses to carry out and conduct their businesses within the County of Kisumu. That should the 4th Respondent have botched the process and issued a license when it should not have done so, the aggrieved party's recourse in law is to appeal to the Tribunal. That the 5th Respondent could not second guess the 4th Respondent, and could therefore not challenge or check the constitutionality or legality of its decisions.

iii. That the EIA for the 1st Respondent was done in 2004 as per the report, dated 30th January, 2004 after which it was commissioned in November, 2007 to start their manufacturing process. That the EIA for the 2nd and 3rd Respondents were carried out as confirmed by the report dated 17th November, 2010. That the provisions of Sections 58, 59, 60 and 63 of EMCA were complied with as the report was advertised and meetings, consultations, and public participation undertaken. That the variations of the licenses was done in accordance with the Regulations with no objections being raised.

iv. That the 1st to 3rd Respondents undertook public participation as required under Regulation 17 of the Environment (Impact Assessment and Audit) Regulations 2003. That the Petitioners have no problem whatsoever with how public participation was conducted. The learned counsel referred to the case of Kenya Small Scale Forum & 6 Others –v- Republic of Kenya & 2 Others [2013] eKLR in which the South African case of Poverty Alleviation Network & Others –v- President of the Republic of South Africa & 19 Others CCT 86/08 [2010] ZACC'S was cited and submitted that the petitioners did not participate in the said process on their own volition, and cannot now cry wolf and seek for order that are prejudicial to the Respondents.

v. That the Petitioners do not deserve the orders sought in the petition as granting them would be tantamount to undermining the authority of the tribunal. That the prayers in the petition are unjustified, unmerited, prejudicial against the Respondents, falls short of the threshold laid out in law, are scandalous, frivolous, vexatious and misconceived and the petition should be dismissed with costs to the Respondents.

vi. That as the Petitioners have failed to prove the allegations leveled against the Respondents, and as costs follow this events, the costs should be awarded to the Respondents.

14. The following are the issues for the court's determinations;

a. Whether this court has jurisdiction to hear and determine this petition in view of the Preliminary Objections raised by the 3rd Respondent and the Interested Party.

b. Whether the 1st Respondent EIA license No. 0000259 was procedurally and lawfully issued.

c. Whether the variation of the 1st Respondent's EIA license No. 0000259 by the 4th Respondent was regularly, procedurally and lawfully done.

d. Whether the variation of 1st Respondent's EIA license No. 0000151 and subsequent transfer and issuance of certificate of variation of EIA license Nos. 0000042 and 0000043 in favour of 2nd and 3rd Respondents respectively were regular, lawful and procedural.

e. Alternatively to (b) to (d) above, whether the 1st to 3rd Respondents are operating without EIA licenses.

f. Whether the 1st to 3rd Respondents are in breach of the conditions in the EIA licenses.

g. Whether the 4th and 5th Respondents have contravened Section 108 of the Environmental Management and Coordination Act, 1999 and Article 3, 10 and 47 of the Constitution.

h. Whether the Petitioners are entitled to the orders sought in the petition.

i. Who pays the costs.

15. That before moving to issues raised in the petition, it is imperative that the court first makes a determination on whether or not it has the jurisdiction to deal with the petition. The 3rd Respondent's and the Interested Party's Preliminary Objections dated the 7th February 2019 and 8th March 2019 respectively are essentially challenging this court's jurisdiction on the basis that the complaints raised by the Petitioners, and prayers 2 to 6 of the petition are matters that should have been lodged with the National Environment Complaint Committee (NECC) and or the National Environment Tribunal (Tribunal) in the first instance. That this court's jurisdiction in respect of matters to do with Environment Impact Assessment License can only be on appeal on the decision of the Tribunal, but not in its original jurisdiction. The learned Counsel for the two parties cited several decisions of the Superior Courts in support of their submissions and also referred the court to various **Sections of the Environment Management and Coordination Act**, the Regulations thereof, and **Article 50 of the Constitution** among others to buttress their case that proceedings with this petition will amount to denial of justice and unfair hearing, as the parties will be denied the opportunity to approach this court on appeal. The 4th Respondent and the Petitioners opposed the Preliminary Objections and submitted that the provisions of the statute, and the Constitution cited do not oust this court's jurisdiction in this matter for among others, that the petition contains complaints against 4th and 5th Respondents and has prayers that cannot be considered by the tribunal. The learned Counsel referred the court to various Superior Courts decisions to the effect that though some of the issues could have been raised before the tribunal, there are others that can only be dealt with through this court. That it is therefore fair and just for the issues to be raised and determined in one forum, which is this court. That having considered the submissions touching on the preliminary objections, the decided decisions of the Superior Courts referred to, the cited provisions of the Statutes, Regulation and Constitution, the court finds as follows;

a. That from the Preliminary Objections raised by the 3rd Respondent and the Interested Party and the submissions filed in support thereof, it is their case that prayers 2 to 6 of the petition could have been lodged and decided in other forums, including the **Tribunal as provided for under Section 129 (1) of Environmental Management and Coordination Act, Chapter 387 of Laws of Kenya (EMCA)**. That thereafter any party who may be dissatisfied with the Tribunal decision would have the right to file an appeal to this court under **Section 130 of the said Act** within 30 days of decision.

b. That it is important to note that the two preliminary objections, and the submissions in support have left out other prayers in the petition, that is prayers 1, 7, 8, 9 and 10 which are obviously outside the mandate of the Tribunal and other agencies under **EMCA**. That it therefore follows that the Petitioners' options were either to come to this court which has original jurisdiction under **Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act No. 19 of 2011** to deal with all the issues, or separate them into two for this court and the Tribunal.

c. That had all the issues and prayers in the petition been matters that the Tribunal had jurisdiction to hear and determine, the court would have upheld the preliminary objections raised by the 3rd respondent and Interested Party and dropped its tools without proceeding any further as has been held by the various Superior Courts including the decisions cited by the learned Counsel some of them being **Samwel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Ohters [2012] eKLR,** and **Motor vessel M. V. "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1653**. That however, this petition has prayers that the Tribunal and other agencies under the National Environmental Management and Coordination Act have no jurisdiction to handle.

d. That the Preliminary Objection also raised the issue of the Petitioners approaching the court through a Constitutional Petition instead of a suit and or judicial review. The learned Counsel referred the court to various decisions on this aspect including this court's decisions in **Michael Otieno Nyaguti & 5 Others vs Kenya National Highways Authority & 5 Others [2015] eKLR, and Gabriel Ochong Oriwo & Another vs Augstino Omwanda & Another [2015] eKLR** where the petitions were struck out or dismissed for there being alternative forums under the relevant statute, through which the complaints thereof could have been pursued instead of Constitutional petitions. The Counsel for the Petitioners on their part referred the court to the decision in **Ken Kasinga vs Daniel Kiplangat Kirui & 5 Others [2015] eKLR** where Munyao J, exercised the court's discretion to entertain the petition despite there being alternative remedies and procedures under the relevant statute. The Honourable Judge expressed himself as follows;

> **"First, I note the Petitioner's quarrel is against multiple reasons and state institutions. He has complained against NEMA, the County Government and CCK (Now Communication Authority of Kenya (CAK). I do not think that given the multifarious nature of his complaint, the issues raised could be addressed comprehensively in any single forum, unless that forum is the court…..Given this wide ranging complaint that encompassed several state prayers and individuals, I cannot fault the petitioner for coming to court."** That though the above decision is not binding to this court, it has persuasive value and the court is in agreement with the general principle therein. That to ask the petitioners herein to separate the issues that the Tribunal could handle and lodge the claim in that forum would definitely add to costs and delay in determining the issues raised contrary to dictates of the principle in **Article 159 (2) (b) of the Constitution** that ***"Justice shall not be delayed."***

e. That the other objection raised is that the claims herein are statute barred as the complaints were not raised within 60 (sixty) days of the events, as required by **Section 129 (1) of Environmental Management and Coordination Act.** That having considered the submission on this aspect and **Articles 23, 42, 47, 69 and 70 of the Constitution 2010,** the court find that as some of the complaints and prayers in the petition relates to infringement of the Petitioners' right to clean and healthy environment, the limitation period set in the statute does not apply. That in any case to matter is not before the Tribunal but in court.

f. That having come to the findings set out above, it is clear that the issues and prayers in this petition are completely different from those in the case of **Gabriel Ochong Oriwo & Another vs Augstino Omwanda & Another (Supra)** and **Michael Otieno Nyaguti & 5 Others vs Kenya National Highways Authority & 5 Others (Supra),** which could have been dealt through the forum prescribed in the statute. That the issues and prayers herein are more like in the case of **Ken Kasinga vs Daniel Kiplangat Kirui & 5 Others (Supra)** and the court hold, as Munyao J did in that decision, that the Petitioners are properly before the court with

jurisdiction to hear and determine the environmental issues raised.

The upshot of the foregoing is that the court finds the preliminary objections raised by the 3rd Respondent and the Interested Party to be without merit and are dismissed with costs. That having dealt with the Preliminary Objections, the court now turns to the petition in the following paragraphs.

16. That the Petitioners have challenged the E.I.A license No. 0000259 issued by the 4th Respondent to the 1st Respondent for among others being issued on the basis of an Environmental Project Report (EPR), instead of Environmental Impact Assessment Report (E.I.A), hence contravening **Section 58 of Environmental Management and Coordination Act (EMCA)**. The Petitioners have annexed a copy of the EPR and EIA license No. 0000259 to their supplementary affidavit sworn on 20th November 2018 and marked **"BAO2"** and **"BAO 3".** The Respondents have not availed a copy of EIA Study Report upon which they allege the EIA license No. 0000259 was based so as to rebut the Petitioners' claim. That **Section 58 (1) of EMCA** requires that proponent of projects of the nature specified in the second schedule to the Act to ***"submit a project report to the Authority, in the prescribed form, giving the prescribed information, and which shall be accompanied by the prescribed fee***." That it has not been disputed that the 1st Respondent project was of the nature of those specified in the second schedule, and the fact that the Respondents have not disputed the genuiness of the EPR availed by the Petitioners goes to confirm it. That **subsection 2 of Section 58 of EMCA** goes on to provide that upon NEMA (Authority) studying the EPR prepared and submitted under **subsection (1)** and being satisfied that he intended project may or is likely to have or will have a significant impact on the environment, direct the proponent to undertake or cause to be undertaken, at their own expert, ***"an environmental impact assessment study and prepare a report thereof"***. That **Subsection (3) of the said Section** goes on to require that the environmental impact assessment study report so prepared be submitted to NEMA in the prescribed form giving the prescribed information, and be accompanied by the prescribed fee. That **subsections (2) and (3)** uses the word ***"shall"*** in requiring the EIA study to be carried out and the Report thereof to be submitted to NEMA. That requirement is therefore mandatory. That **Subsection (7)** provides that ***"Environmental Impact Assessment shall be conducted in accordance with the environmental Impact Assessment regulations, guidelines and procedures under this Act, which brings into pray the Environmental (Impact Assessment and Audit) Regulations, 2003. That Regulation 4 (1) thereof provides that no proponent shall implement a project that is likely to have a negative environmental impact or for which an EIA is required, "unless an environmental impact assessment has been concluded and approved in accordance with these Regulations***." That **Regulation 10 (3)** allows NEMA to issue a license in Form 3 of the first Schedule of the Regulations to a proponent where the EPR shows that the project will **"have no significant impact on the environment or that the project report discloses sufficient mitigation measures."** That **sub-regulation (3)** provides that ***"if the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with those Regulations."*** That **sub-regulation (4)** goes on to provide the right of appeal to the Tribunal in accordance with **Regulation 46** where the proponent is dissatisfied with the decision to carry out an environmental impact assessment study.

17. That though the Petitioners have faulted the process through which EIA license No. 0000259 was issued by 4th Respondent to the 1st Respondent, they have not proved that the 4th Respondent had required an EIA study to be carried out by the 1st Respondent after submission of the EPR. That as the EPR at page 19, clause 6.2 shows that the project was to process ***"500 tonnes of sugarcane per day",*** which implies it was meant to be a small capacity factory, then the court will take it that the 4th respondent was satisfied that the project had no significant impact on the environment or alternatively, the EPR disclosed sufficient mitigation measures before issuing the license. That however, the court notes that the 1st Respondent appears to have increased the capacity from 500 tonnes of sugarcane per day to 1650 tonnes without obtaining a variation or doing an EIA study for approval by the 4th Respondent.

18. That another issue raised by the Petitioners is that the EPR done by the 1st Respondent and the EIA license issued by the 4th Respondent was for a project processing 500 tonnes of sugarcane per day. That the 1st Respondent was to carry out the project in 24 months from the 19th October 2005, but the construction was not commenced until long after the expiry of the validity period prescribed. That certificate of variation of EIA license No. 0000151 shows the 1st Respondent's sugarcane milling capacity had been increased from 1,650 TCD to 3000 TCD which is almost double. The variation of an EIA license is provided for by **Regulation 25** and it is the Petitioners case that an EIA study Report was required before such a variation could be considered. That whereas the court does not find sufficient basis to fault the action of the 4th Respondent to issue the 1st Respondent with EIA license No. 0000259 upon the EPR without an EIA study Report, their readiness to issue the certificate of variation of EIA license No. 0000151 that have the effect of doubling the capacity, and without requiring EIA study Report cannot go without scrutiny by the court.

19. That in the case of **Keny Kasing'a vs Daniel Kiplangat Kirui & 5 Others (Supra)**, the court held as follows:

> **"[64]…That said, what was presented was an EIA Project Report and not an EIA study report. The project report, according to Section 58 of EMCA is a precursor to the EIA study report. It is upon being satisfied, after studying the project report, submitted under subsection 58 of EMCA, that the intended project may, or is likely to have, or will have, a significant impact on the environment, that NEMA will direct the proponent of the project to conduct an EIA and present an EIA study report. This was of course never done; I do not know why, but probably NEMA thought that the project did not have significant impacts on the environment or that sufficient mitigation measures had been taken. That was their prerogative, but on my part, I do think that it was important that an EIA study report be commissioned. This is because the project was clearly out of character with its surroundings and it cannot be argued that it had a significant impact on the environment.**
>
> **[73]...where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project is given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment."**

That further, in the case of **Moffat Kamau & 9 Others vs Aelous Kenya Limited & 9 Others [2016] eKLR**, the court made the following observation on variations of EIA licenses under Regulation 25 of the Environmental (Impact and Audit) Regulations, 2003;

"[81] It will be observed that the law does not accept instances where a variation of an EIA license may be made. Under Regulation 25 (3) a variation can only be allowed without the necessity of a fresh EIA, if NEMA is satisfied that the project, as varied, would comply with the terms of the original license. Now the regulations above do not give any criteria of when a variation will not be accepted without the need to do a fresh EIA. It appears as if this is left for the discretion of NEMA. However, like all discretions, NEMA has a duty to exercise its discretion in a reasonable and justiciable manner. It is clear that the character of a project has changed, NEMA cannot shield behind Regulation 25, to say that in its pinion, there is no need for a fresh EIA report and a variation is good enough. For example, if investor x wishes to put up a water bottling factory and is granted an IEA license, and later he wishes to change the project to a fish packaging facility, it will be a stretch to say that the project has only been "varied" and no new EIA report is required. The impacts of a fish packaging facility cannot be equated with that of a water bottling facility. There will be new challenges on how to dispose of waste for example.

[89] It cannot therefore be said that NEMA sought a fresh EIA before issuing the license of variation of the project. The move to change and/or modify the initial project, from 2 kmsq situated in one land parcel, to 16km sq situated in 38 land parcels was no doubt substantial change or modification of the project. It ought to have attracted NEMA to either revoke the initial license under Regulation 28, or that the very least, to ask for a new EIA, before issuing a variation of the existing license… it will be contrary to law to allow the development of the wind farm in the 38 plots which are new sites for the project.""

And in the case of **West Kenya Sugar Company Limited vs Busia Sugar Industries Limited & 2 Others [2017 eKLR,** the court held as follows about variation of the EIA license;

"[56]...What is more, the Environmental Impact Assessment done by Africa Polysack (APL) sugar Company Limited under Section 58 of EMCA in which the stake holders took part was site specific. The site was Buhayo/Ebusibwabo/921.

[57]When an exchange of certificate was done on the basis that Africa Polysack had changed its name to Busia Industries Limited, two other site Bukhayo/Ebusibwabo/3179 and Bukhayo/Ebusibwabo/1274 were added. Those sites were not subjected to Environmental Impact Assessment. They are not compliant to Section 58 of EMCA, no EIA license was issued in respect to those sites. The petitioner is right when he said that its constructional rights under Article 10, 20, 21, 27, 47 and 50 of the Constitution were infringed.."

That from the foregoing decisions, it is clear that variation of EIA licenses that result to change in nature and capacity (size) of the project, and the location or site [Land parcel], then the 4th Respondent would be required to only act upon receiving an EIA study Report prepared in accordance with **Part II** of the Regulations. The failure to require the EIA study to be undertaken before the variation applications were considered, and certificates issued, denied the Petitioners and other residents in the area the factories are sited from being heard, and their views considered contrary to **Regulation 17** and on public participation which provides 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"

That it is important to note that public participation is now an accepted phenomenon post 2010 Constitution. That this is evinced by, for example **Article 69 (i) (d) of the Constitution** which obligates the state to ***"encourage public participation in the management protection and conservation of the environment,"*** and sub-Article (2) provides that ***"Every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources."*** That the Petitioners and other residents affected by the activities carried out by the 1st to 3rd Respondents were denied the opportunity to

have their say in respect of the said Respondents' applications for variations of the EIA license No. 0000159, when the 4th Respondent approved it and issued the certificate of variation of EIA license No. 0000151 despite them knowing the fact that the variation projects would not comply with the requirements of the original license in terms of size and capacity of sugarcane processed, and the parcel of land the projects would be situated. That needless to state, the Respondents had the EIA license varied without establishing the environmental impact the project would have. That the 2nd and 3rd Respondents are situated on land parcel L. R. No. 11273, which was not subject matter of the EPR upon which EIA license No. 0000259 was based upon. That as was held in the **Moffat Kamau case (Supra) and West Kenya Sugar Company Ltd case (Supra),** the variation licenses issued by the 4th Respondent to the 1st to 3rd Respondents were un-procedurally, irregularly, and illegally procured and processed without an EIA study Report being prepared, submitted and approved in accordance with the law. That they are therefore not compliant with **Section 58 of EMCA,** and the court finds the Petitioners have proved infringement of their rights to participate in the process of deciding whether or not the 1st to 3rd Respondents' activities in their area are in agreement with sustainable development.

20. That the transfer of an EIA license is provided for under **Regulation 26 of Environmental (Impact Assessment and Audit) Regulation, 2003**. The Petitioners case is that the 1st Respondent EIA license No. 0000259 was on 1st December 2010 varied and certificate of variation of EIA license No. 0000151 issued which was then transfered vide an application dated 6th January 2011 and certificates of Transfer of EIA license Nos. 0000042 and 0000043 issued to the 2nd and 3rd Respondents, effectively leaving the 1st Respondent without any licenses for its sugar and paper factories as no new licenses were issued. That once a license has been transferred, it ceases to exist and the new one takes effect and unless a new license is obtained, the factories formally operating under the transferred license should be closed down until they comply with **Section 58 of EMCA**. That the court finds favour with the Petitioners summation. That however it is important to note that the component of the 1st Respondent's license on sugarcane milling was not transferred to the 2nd and 3rd Respondents. That the Petitioners have submitted that the 1st Respondent was left with no license upon which those licenses and permits issued by the 5th Respondent could be anchored on.

21. That from the affidavit evidence tendered by the petitioners' and confirmed by the 4th Respondent, the 1st to 3rd Respondents have been degrading the environment by pouring vinasse on the roads for dust control and maintenance. That the said vinasse appears to have been earmarked for organic fertilizer after establishment of an appropriate factory, but was in the meantime held in a lagoon. The vinasse is described at page 28 of the 3rd Respondent's initial Environmental Audit of May 2018 as ***"a byproduct of the sugar or (ethanol) industry"*** which remains after extracting the desired products. The said report at paragraph 2 goes on to state that vinasse is ***"currently temporary held in lagoons before final disposal. Samples taken from the lagoon indicate that the composition of the waste is still higher than the recommended limits for discharge into the environment…. It was also observed that the parameters of the river water collected had higher results for sample collected downstream than that collected upstream which is an indication of intrusion of the waste from the factory (conductivity of 69.8 and 83.5 respectively)."*** The initial Environmental Audit May 2018 report is marked BAO-15 and attached to the Petitioners'' supplementary affidavit of 20th November 2018. That what the court concludes from the above finding in said report is that there was no prior arrangement or preparedness on how to handle the byproduct called vinasse before the factory was set up, and it is evident the waste was finding its way to the river and the roads, hence polluting the environment. That had an EIA study been undertaken before the establishment of the said factories, the 4th Respondent would have had the opportunity to satisfy itself of the mitigating measures that would be taken to safeguard the environment from the negative effect of the operations before issuing the EIA licenses. The court therefore finds that the 4th Respondent failed or neglected in its duty to the Petitioners and other residents of the affected area in issuing EIA licenses to the 1st to 3rd Respondents without ensuring EIA studies were conducted and Reports submitted in accordance with **Section 58 of EMCA**.

22. That when the 1st Respondent applied for EIA license for Power Co-generation under new Company name- Kibos Power Limited, vide their letter dated 22nd October 2010, the 4th Respondent replied through the letter dated 9th November 2010, signed by B.M. Langwen for Director General, among others acknowledging receipt of the letter and at paragraph 2 observed as follows: ***"Due to the expansion of the power generation component and the proposed increase of current capacity from 3MW to 25MW, please be advised this increased co-generation and the uncertainties from the associated risks should be subjected to the EIA process thus you are required to carry out an Environmental Impact Assessment (EIA). The EIA to be submitted to the Authority should then be under the new company name, N/S Kibos Power Limited."*** There is no evidence to confirm that an EIA study was carried out as directed and a report submitted. That instead, on the 26th November 2010, the 1st Respondent wrote another letter to the 4th Respondent seeking for variation of their EIA license No. 0000259 to be issued with separate EIA licenses for Kibos Sugar Ltd, Kibos Power Ltd, Kibos Distillers Ltd and Kibos Pulp and Paper mills Ltd. That the 4th Respondent acknowledged receipt of the letter through their dated 1st December 2010 in which it among others indicated that the variations to increase sugarcane milling form 1650 TCD to 3000TCD, power generation from 1.9MW to 19MW and "portable spirit viz 40KLPD" were to be processed upon payment of 0.05% of the project costs. The letter further at paragraph 3 stated as follows: ***"Your request for variation to include production of 100 Tons pulp, 100 TPD of kraft packaging paper and 10TPD of soda ash will require a separate EIA report to be carried out. This is due to the associated risks that may emanate from such a project."*** That it is clear from the two letters signed by the same B.M Langwen within less than one month are at cross-purposes on the need for an EIA for the power generation project. The letter of 9th November 2010 required an EIA study and the Report to be submitted, while that of 1st December 2010 approved the increase of power generation without requiring for an EIA study, and submission of Report for approval. That on the same date of the letter dated 1st December 2010, a certificate of variation of EIA license No. 0000151 was issued to the 1st Respondent. That what then followed is the letter dated 6th January 2011 by the 1st Respondent to the 4th Respondent seeking to transfer their EIA license No. 0000151 to Kibos Power Ltd and Kibos Distillers Ltd for power production and portable spirit respectively. That the 4th Respondent apparently approved the transfer application and issued certificate of Transfer of EIA license No. 0000042 and 0000043 in favour of Kibos Power Limited and Kibos Distillers Limited on the 12th January 2011. That the end effect of 4th Respondent approving the 1st Respondent's application of transfer dated 6th January 2011, and the issuance of EIA license nos. 0000042 and 0000043, is that the 1st Respondent managed to have Kibos Power Limited obtain EIA license without undertaking the EIA study, thereby avoiding to comply with the 4th Respondent's direction of 9th November 2010. The court is left wondering how the 4th Respondent allowed that to happen and further went ahead to allow the 2nd Respondent to commence its operations without ensuring it would not release hazardous waste to the environment causing harm to the people and natural resources in the neighborhood.

23. That further to the finding in (22) above, after the 1st Respondent had transferred the power and portable spirit production to the 2nd and

3rd Respondents, out of its EIA license No. 0000151, what remained in its docket is the sugarcane milling. That transfer of EIA license is provided for under **Section 65 of EMCA** and **Regulation 26 of the Environmental (Impact Assessment and Audit) Regulations, 2003**. That though the Petitioners submitted that the 1st Respondent was left without an EIA license to base their operations on, the court finds that the components of the EIA license No. 0000151 transferred are only those to do with power and portable spirit production. That for whatever it is worth, the 1st Respondent retained the component of sugarcane milling under EIA license No. 0000151, which had however been obtained without carrying out an EIA study and submitting a Report thereof for approval to the 4th Respondent

24. That the Petitioners have detailed the nature of the raw effluent being discharged by the 1st to 3rd Respondents into the environment including the three surrounding rivers. That though the said Respondents have disputed the claim, the 4th Respondent has in their submissions left no doubt that indeed the 1st to 3rd Respondents activities are negatively affecting the environment, and further disclosed that they have already closed down the distillery and paper packaging plants of the 1st to 3rd Respondents so as to allow improvements on the industrial processes to be made. That they submitted that ***"We thus not only support the closure orders sought in the petition but have gone ahead to exercise our statutory mandate in closing down 2 of the plants which were found to have exceeded parameters of their effluent discharge….."*** That had the 1st to 3rd Respondents complied with the 4th Respondent's restoration and improvement orders as they appear to claim in their replying affidavits and submissions, the closure order referred to by the 4th Respondent affecting two (2) of their factories would not have been issued. That the court therefore finds that the petitioners have established that the 1st to 3rd Respondents are releasing raw effluent beyond the accepted quantities and without putting in place sufficient mitigating measures thereby affecting the environment negatively. That said pollution affects not only the air, water but also the aquatic life in the water bodies in the neighborhood. That it amounts to an infringement of the Petitioners' Constitutional right to clean and healthy environment under **Article 42 of the constitution**. That the Petitioners are therefore in order to move this court as they did for the enforcement of their environment rights as provided for under **Article 70 of the Constitution**.

25. That it is apparent that the Petitioners had raised their complaints similar to those in the petition with the 4th and 5th Respondents. The 4th Respondent conceded it had acted on the complaints while the 5th Respondent denounced the correspondence availed by the Petitioners in support of their claim that they had sought assistance and action from it. That the fact that the petitioners had raised their complaints over raw effluent discharge into the environment by the 1st to 3rd Respondents years before filing this petition, without effective action being taken under **Section 108 of EMCA** points to the extent the environment in that area has been put through degrading activities. That all that time, and until after the filing of the petition when 4th Respondent reportedly issued the closure orders on the two factories, the state regulatory agencies including, the 4th and 5th Respondents, did practically nothing as the few restoration and improvement orders issued were generally not complied with and no prosecution has been initiated as of 12th March 2019, when the 4th Respondent filed their submissions in which they stated in the last sentence that ***"The 4th Respondent reserves its right to upscale enforcement to prosecutorial action should the events warrants."*** That the moment the 1st to 3rd Respondents failed to comply with the improvement and or restoration orders issued, and continued to discharge raw effluent to the environment contrary to the conditions on the EIA licenses, the 4th Respondent should have required EIA study to be carried out, and Reports submitted especially considering none had been done initially. That the fact that the sugarcane being processed had risen from 500 TCD to 1650 TCD, and then to 3000 TCD as confirmed by the initial of 2004 EPR, license No. 0000259 of 2005 and the variation certificates issued thereafter in 2010 and 2011, and that some factories had been sited on land that had not been subjected to either the EPR or EIA should have called for urgent and decisive action from the 4th Respondent, who is the national regulation on matters environment. That the court agrees with the position expressed by Munyao J in **Moffat Kamau Case (Supra)** where he held that;

> "[83]…NEMA must require a new EIA where the situation that has arisen may lead to suspension, revocation or cancellation of the license issued. Under Regulation 28 of the EIA Regulations, a license may be cancelled if;
>
> **a. "the license contravenes the conditions set out in the license,**
>
> **b. where there is a substantial change or modification of the project or in the manner in which the project is being implemented,**
>
> **c. the project poses an environmental threat which could not be reasonably favourable before the license was issued or**
>
> **d. it is established that the information or data given by the proponent in support of his application for all environmental impact assessment license was false incorrect or intended to mislead."**

26. That whereas the court agrees with the 1st to 3rd Respondents, 5th Respondent and the Interested Party position that closure of the Respondents' factories would have far reaching effect on the owners, employees and agencies receiving taxes and other payments form their activities, the court must also consider the petitioners' or rather the public interest where they need protection against potential harm to the environment through pollution which is not only affecting those who are alive today, but has the potential to negatively degrade the environment for the future generations contrary to **Article 42 of the Constitution** which provides that;

> **"42. Every person has the right to a clean and healthy environment, which includes the right –**
>
> **a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and**
>
> **b. to have obligations relating to the environment fulfilled under Article 70."**

That **Article 70 of the Constitution** on enforcement of environment rights goes on to provide as follows;

> **"70 (1) if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to the court for redress in addition to any other legal remedies that are available in respect of the same matter.**
>
> **(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate.**
>
> **a. To prevent, stop or discontinue any act or omission that is harmful to the environment;**
>
> **b. to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or**
>
> **c. to provide compensation for any victim of a violation of the right to a clean and healthy environment.**
>
> **3. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury."**

That further, **Article 23 (3) of the Constitution** sets out the reliefs the court may grant to include a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under **Article 24**; an order of compensation; and an order of judicial review. That a court of law should therefore not shy from issuing closure orders aimed at preventing, stopping or discontinuing harm to the environment in deserving cases. That in the case **of National Environment Management Authority & Another vs Gerick Kenya Limited [2016] eKLR**, Mutungi J, held as follows:

> **"[30] … In this matter we have a situation where we have competing interest. On the one hand we have the public interest where the Community needs protection against potential harm to the environment through contamination or pollution, and on the other hand, we have the defendant's private commercial interest where the defendant wishes to develop the site for commercial gain. Where in a case such as the instant one, the public interest as the public interest is pitied against private interest, the public interest overrides the private interest is for the good of the wider public as opposed to the narrow private interest. The public interest no doubt outweighs the private individual interest."**

That it follows that while the people represented by the Interested Party herein may well be part of the public, it is obvious their interests is different from that of the Petitioners, other residents of the area not employed by the 1st to 3rd Respondents, and the future generations which indeed constitutes the real wider public. That further, the private commercial and investment interests of the 1st to 3rd Respondents, which the Interested Party and the 5th Respondent seem to support, should not outweigh the public interest when the court considers what reliefs to grant to stop the pollution that degrades the environment that is evident in this petition.

27. That while some of the reports availed by the Petitioners attributed to the 5th Respondent are unsigned, the court has noted that the letter dated 14th September 2018 by Salmon Orimba signing off as the CECM – Water, Irrigation, Environment and Natural Resources acknowledging receipt of a letter dated 11th September 2018 by the 1st Petitioner could not be a forgery as the 5th Respondent appeared to claim. That in the said letter, the author, Salmon Orimba stated as follows from paragraph one;

> **"I am in receipt of your letter of concern dated 11/9/2018. Waste Management from Kibos Sugar and Allied Industries is an issue of concern to us as the Department of Water, Irrigation Environment and Natural Resources. My department has continuously monitored Kibos Sugar and Allied Industries Waste discharge activities, especially into River Kibos and is engaging its management and that of other lead Government Agencies in getting a lasting solution to the problems.**
>
> **I recognize that water pollution through effluent discharge by the industry is unacceptable and detrimental to the wellbeing of downstream users. To this effect I am in consultations with the other state lead agencies including WRA and NEMA to resolve this issue. We hope to bring this matter to rest soon…."**

That the letter by the 1st Petitioner which Salmon Orimba was responding to had at paragraph 2 detailed his complaints as follows: ***"The river [Kibos] has turned black due to effluent and other waste deposited into the river by Kibos Sugar and Allied Industries. This is a matter which has been highlighted and published in the media. The residents are suffering from the bad smell, choking smoking which [is] harmful to our health. The river has become unusable and all the all (sic) the fish are dead. The River empties into Lake Victoria, which means that the poison is being taken into the Lake and killing more fish, this destroying livelihoods of our people."*** The 5th Respondent is a member of the Environment Committees in their area of jurisdiction under **Section 29 of EMCA** and the functions are set out **under Section 30, 38, 39, 40, 41 of the Act** to include proper management of the environment in their area; preparation of Action plans incorporating among others, recommendation of environmental education on the importance of sustainable use of the environment…; set out operational guidelines for the planning and management of the environment and natural resources; identify actual or likely problems as may affect the natural resources and the broader environment context in which they exist; identify and appraise trends in the development of urban and rural settlements, their impact on the environment, the strategies for the amelioration of their negative impacts; and propose guidelines for the integration of standard of environmental protection into development planning and management. That with the role of the 5th Respondent clearly spelt out in the statute, the court find it surprising to note that in their submissions at paragraph 15, they appear to wash their hands of any responsibility where the 4th Respondent be found to have botched the process of issuing EIA license by issuing one where it should not have done so. That they go on at paragraph 16 to submit that ***"….it was not in the place of the 5th Respondent to second guess or scrutinize the decision of the 4th Respondent. The 4th Respondent is a statutory constituted body with powers to perform all***

actions such as issuing, varying, cancelling, suspending and transferring of EIA licenses. Once it exercised such powers and issued these licenses, the 5th Respondent could not challenge or second guess these decisions. It was not its responsibility to check the constitutionality or legality of such decisions." That the submission by the 5th Respondent appears not to appreciate the important role placed upon it through the County Environment Committee among others, to ensure those carrying activities in their area of governance, like the 1st to 3rd Respondents, do so without adversely and negatively degrading the environment which they, like everybody else, has a duty to jealously guard for the posterity of the current and future generations of the County, Country and the world.

28. That the Petitioners have sought for damages and submitted an award of Kshs. 100,000,000/=. They have referred to the case of **Mwangi Stephen Muriithi vs the Hon. Daniel Arap Moi, Nairobi H.C. Petition No. 625 of 2006, Arnacherry ltd vs The Attorney General Nairobi H.C. Petition No. 248 of 2013, "Attorney General vs Ramanpoop (2005) LRC 303"** and **Macharia vs Mwangi (2001) EA 110**. The court has after considering the entire petition taken the petitioners to be public spirited individuals exercising their constitutional and statutory obligation to ensure the pollution to the environment being done by the 1st to 3rd Respondents, under the 4th and 5th Respondents' disinterested eyes, is stopped for the good of the residents of the area and the public. That the petition is not about their personal and individual satisfaction only. That for that reason and further considering there are many other persons in the area and beyond, who have been affected and continue to be affected by the effects of the 1st to 3rd Respondents discharging raw effluent into the environment, the court considers an award of damages to the Petitioners as individuals not appropriate in the circumstances.

29. That on the prayers for costs, the petitioners must have incurred expenses in instructing and retaining Counsel among others. That as the petitioners have succeeded in their petition and as costs follow the event, they are entitled to costs.

30. That the foregoing findings shows that the 1st to 3rd Respondents EIA licenses were applied for, approved and issued without undertaking the EIA studies and submitting the Reports thereof to the 4th Respondent. That in the decision of **Moffat Kamau case (Supra**) Munyao J, expressed himself in the following words after coming to almost a similar finding;

> **"[90]…where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. I cannot put it any better than I did in the case of Ken Kasinga vs Daniel Kiplangat Kirui & 5 Others, (Supra)… at paragraph 73 of the judgment;-**
>
> **I am prepared to hold that where a procedure for the protection of the environment, is provided by law and is not followed then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project has been given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment."**

That this court is in agreement with that finding.

That Mutungi J, in the case of **Cortec Mining Kenya Ltd vs Cabinet Secretary Ministry of Mining & 9 Others [2015] eKLR** had the following to say upon coming to a similar finding;

> **"A party who flout the law to gain advantage cannot expect that the court will aid him to sustain the advantageous position that he acquired through the violation of the law. The acquisition by the Applicant of the mining license was not in compliance with the law and the license was void ab initio and liable to be revoked…."**

That again, the court associates itself with that position.

The court agrees with the submission of the learned Counsel for the petitioners at the last paragraph of their submission where they submitted that ***"…whenever there is real and actual environmental pollution and degradation, with apparent and real adverse effects on flora and fauna, peoples' lives and livelihood, then that is a perfect recipe for a catastrophic time bomb, that will not take so long to explode. It directs us of any luxury of waiting to take action."*** That the court has nothing to add but wholly associate itself with the position expressed by the two Honorable Judges in the cases of **Moffat Kamau (Supra) and Cortec Mining (supra)** as set out above. That the certificate of variation of the EIA License No. 0000151 for 1st Respondent, and the certificate of Transfer of EIA license Nos. 0000042 and 0000043 for 2nd & 3rd Respondents, having been applied for, processed and issued without undertaking EIA studies and submitting the Reports thereof for approval to 4th Respondent, were issued in contravention of the law. That they are therefore void ***ab initio***.

31. That having found as above that the Petitioners have established their claim against the Respondents, the court grants the petition in the following terms;

> **a. That a declaration is hereby issued that the petitioners' right to a clean and healthy environment as guaranteed by Articles 42 and 43 of the Constitution of Kenya 2010, has been violated by the actions and omissions of the Respondents.**
>
> **b. That a declaration is hereby issued that the issuance of the EIA license no. 0000259 to the 1st Respondent by the 4th Respondent, based on the environment Project Report only, for milling of 500 tonnes of sugarcane without the 1st Respondent carrying out an EIA study and going on to construct a factory of 1650 TCD was unconstitutional, illegal and in contravention of Sections 58, 59, 60, 61, 62 and 63 of the EMCA and Regulations 17, 18, 22, 23, and 24 of Environmental (Impact Assessment and Audit) Regulations, 2003.**
>
> **c. That a declaration is hereby issued that the variation of the 1st Respondent's EIA license No. 0000259 by the 4th**

Respondent, and subsequent issuance of certificate of variation of EIA license No. 0000151 without the 1st Respondent carrying out an EIA study and submitting the Report thereof to the 4th Respondent for approval, was unconstitutional, illegal and in contravention of Sections 58, 59, 60, 61, 62 and 63 of EMCA and Regulation 25 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

d. That a declaration is hereby issued that the transfer of the 1st Respondent certificate of variation of EIA license No. 0000151, and issuance of certificates of transfer of EIA license Nos. 0000042 and 0000043 in favour of the 2nd and 3rd Respondents by the 4th Respondent without carrying out EIA studies and submitting the Reports thereof to the 4th Respondent for approval was unconstitutional, illegal and contravenes Sections 58, 59, 60, 61, 62 and 63 of EMCA and regulations 17, 18, 22, 24, 25 and 26 of the Environmental (Impact Assessment and audit) Regulations , 2003.

e. That a declaration is hereby issued that the 1st to 3rd Respondents' EIA licenses have been illegally and un-procedurally acquired.

f. That an order of permanent injunction is hereby issued restraining and or stopping the 1st to 3rd Respondents, through themselves, employees and or representatives from in any way continuing with operations of their factories and, or milling sugarcane at Kibos area, Miwani Central Location, Muhoroni Sub-Conty, Kisumu County without first carrying out EIA studies and submitting the reports thereof to the 4th Respondent for approval and fresh EIA licenses issued in accordance with the law.

g. That an order of environmental restoration is hereby issued requiring the 1st to 3rd Respondents through themselves, their agents, employees and or representatives to demolish any structures erected on land parcels L.R. NO. 654/23 and 11273 in Kibos Area, Miwani Central Location, Muhoroni Sub-County, Kisumu County without an approved EIA Study Report, with a view of restoring the environment to its original status, should they fail to obtain fresh EIA licenses in one hundred twenty (120) days. That in default of the 1st to 3rd Respondents failing to comply with the said restoration order, the petitioners in conjunction to the 4th and 5th Respondents are hereby authorized to appoint an auctioneer to carry out the said restoration ordered and recover the costs from the 1st to 3rd Respondents.

h. That a declaration is hereby issued that the failure, neglect and refusal by the 4th and 5th Respondents to stop the activities of the 1st to 3rd Respondents, after they were found to repeatedly and continuously degrade the environment is in contravention of their constitutional duty to the Petitioners and other residents of the affected area under Articles 3, 10 and 17 of the Constitution is illegal and contravenes Section 108 for the EMCA.

i. That Respondents will pay the Petitioners costs.

It is so ordered

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF JULY 2019

In the presence of:

Petitioners Absent

Respondents Absent

Interested Party Absent

Counsel Mr. Ragot for the Petitioners

Mr. Onyango for 1st & 2nd Respondent

Mr. Gichaba for 3rd Respondent

Mr. Sala for 5th Respondent

Mr. Onyango P.D for Interested Party

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE