



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

PETITION NO. 9 OF 2017

LUO COUNCIL OF ELDERS.....1ST PETITIONER
WILLIS OPIYO OTONDI.....2ND PETITIONER
EPHRAIM AMWAI.....3RD PETITIONER
THE KURIA COUNCIL OF ELDERS.....4TH PETITIONER
SAMUEL KARIABE.....5TH PETITIONER
THE ABAGUSII CULTURAL AND
DEVELOPMENT COUNCIL.....6TH PETITIONER
JAMES MATUNDURA.....7TH PETITIONER
THE OGIEK COMMUNITY.....8TH PETITIONER

VERSUS

THE CABINET SECRETARY WATER & IRRIGATION....1ST RESPONDENT
THE CABINET SECRETARY
ENVIRONMENT AND NATURAL RESOURCES.....2ND RESPONDENT
THE RIFT VALLEY WATER SERVICES BOARD.....3RD RESPONDENT
THE NATIONAL ENVIRONMENTAL
MANAGEMENT AUTHORITY.....4TH RESPONDENT
THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF BOMET.....1ST INTERESTED PARTY
THE COUNTY GOVERNMENT OF NAROK.....2ND INTERESTED PARTY
THE COUNTY GOVERNMENT OF KISUMU.....3RD INTERESTED PARTY
THE COUNTY GOVERNMENT OF MIGORI.....4TH INTERESTED PARTY

THE COUNTY GOVERNMENT OF KERICHO.....5TH INTERESTED PARTY
THE COUNTY GOVERNMENT OF NYAMIRA.....6TH INTERESTED PARTY
THE COUNTY GOVERNMENT OF HOMABAY.....7TH INTERESTED PARTY
THE COUNTY GOVERNMENT OF KISIL.....8TH INTERESTED PARTY
THE COUNTY GOVERNMENT OF SIAYA.....9TH INTERESTED PARTY
RIFT VALLEY COUNCIL OF ELDERS.....10TH INTERESTED PARTY

CONSOLIDATED WITH

PETITION No. 45 OF 2016

COUNCIL OF KIPSIGIS ELDERS.....1ST PETITIONER
WILLIAM KETIENYA.....2ND PETITIONER

VERSUS

RIFT VALLEY WATER SERVICES BOARD.....1ST RESPONDENT
THE CABINET SECRETARY,
WATER AND IRRIGATION.....2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

COUNTY GOVERNMENT OF KERICHO.....1ST INTERESTED PARTY
COUNTY GOVERNMENT OF NYAMIRA.....2ND INTERESTED PARTY
COUNTY GOVERNMENT OF NAROK.....3RD INTERESTED PARTY
COUNTY GOVERNMENT OF BOMET.....4TH INTERESTED PARTY
COUNTY GOVERNMENT OF KISUMU.....5TH INTERESTED PARTY
COUNTY GOVERNMENT OF MIGORI.....6TH INTERESTED PARTY
KENYA TEA GROWERS ASSOCIATION.....7TH INTERESTED PARTY

CONSOLIDATED WITH

PETITION No. 44 OF 2016

ECOSYSTEM SOCIAL ECONOMIC

DEVELOPMENT ORGANIZATION (ESEDO).....1ST PETITIONER
DANIEL M. RUTO.....2ND PETITIONER
SIMON K. MAIYWA.....3RD PETITIONER

WESLEY K. SAMOEL.....4TH PETITIONER

WILSON K. MARITIM.....5TH PETITIONER

DAVID K. SITIENEL.....6TH PETITIONER

AND

RIFT VALLEY WATER SERVICES BOARD.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

BARAGET COMMUNITY FOREST ASSOCIATION....1ST INTERESTED PARTY

UPPER NYONGORES WATER

RESOURCE USERS ASSOCIATION.....2ND INTERESTED PARTY

J U D G M E N T

Introduction:

1. This judgment is in respect of three consolidated constitutional Petitions: Petition No. 9 of 2017, Petition No. 44 of 2016 and Petition No. 45 of 2016. The Petitions concern a project known as Itare Dam Water Supply Project located on Itare River within Nakuru County. It is one of the Government of the Republic of Kenya's flagship projects envisaged under Vision 2030 and is projected to cost about Kshs.35 billion. At the core of the Petitions is the question of whether or not reasonable and/or adequate public participation was undertaken before the project was implemented and further allied to this broad question are issues whether in implementing the project, the Respondents acted in violation of National Values and Principles of Governance;right of access to information; land rights; and right to clean and healthy environment as provided in the constitution and other laws.

Background and the Pleadings:

2. Petition No. 9 of 2017 was filed on 16th February 2017 at the Environment and Land Court in Kisii as Kisii ELC Petition No. 2 of 2017. It was subsequently transferred to this court on 6th March 2017 pursuant to an order made by the court on same day. The Petitioners allege among other allegations, that the project and the manner in which it was being implemented violated the constitutional provisions on national values and principles of governance, public participation, equality before the law, national values and devolution as well as right of access to water and natural resources as provided for *inter alia* under Articles 10, 42, 69 and 70 of the Constitution. The Petitioners in Petition No. 9 of 2017 seek the following orders in the Petition:

- a. A Declaration that the procurement, tendering and securing the two Environmental and social impact assessment reports were done unprocedurally, violated the law and therefore null and void.
- b. A Declaration that the construction of Itare Dam Water Supply project is against public policy, is a breach of the rules of natural justice and violated constitutional principles of public participation.
- c. A declaration that the construction of Itare Dam Water Supply Project is against international standards contained in the UNDP report, World Commission on Dams Report and World Bank guidelines on dams.
- d. A declaration that the construction of Itare Dam Water Supply project violates the East Africa Community Treaty and Specifically Protocol for sustaining development of Lake Victoria Basin.
- e. A declaration that the 5th Respondent breached Article 156 in failing to promote, protect the rule of Law and defend public interest by failing to give proper legal representation on the violating [sic] of the Law by the 1st and 2nd Respondents.
- f. A declaration that the 1st, 2nd and 3rd Respondents as the authority to construct are subject to the provisions of Article 10, 201 and 225 in the lawful discharge of its constitutional mandate.
- g. A declaration that the 1st and 2nd Respondents as a state entity is subject to the provisions of Articles 2, 2(5), 2(6), 3, 10, 21, 22, 23, 35, 42, 43, 47, 69, 70, 174, 176, 258, 259 of the Constitution of and fourth schedule Article 185(2), 186(1) and 187(2) of the Constitution of the Republic of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013.
- h. A declaration and an order directing the 1st, 2nd and 3rd Respondents to take all the necessary steps to address the gross

violation of the Petitioners Constitutional Rights.

i. A declaration that whoever made the mistakes should be made to pay for the mistakes.

j. An order of certiorari to remove to the High Court and quash the decision of the 1st, 2nd and 3rd Respondents to construct the Itare Dam Water Supply Project.

k. An order directing 1st, 2nd and 3rd Respondents to stop the construction of the Itare Dam Water Supply Project until the issues and concerns of the Petitioners are addressed.

l. The Respondents to pay the Petitioner costs of the Petition in any event.

3. Earlier, another Petition had been filed on 25th August 2016 in Mombasa, during the Judges' Annual Colloquium, as Mombasa ELC Petition No. 240 of 2016. As the petition essentially related to a matter in Nakuru, the same was transferred to this court and was renumbered ELC Petition No. 45 of 2016 (Nakuru). The Petition also concerned the construction of Itare Dam and the Petitioners therein alleged that there was no proper public participation and that Articles 10, 27, 47 and 67 of the Constitution of Kenya 2010 were violated, among other allegations. The Petitioners in ELC Petition No. 45 of 2016 (Nakuru) therefore sought the following reliefs:

i. A declaration that the Itare Dam Water Supply Project is borne out of bias and discrimination and hence unconstitutional and the same violates the riparian water rights of all the Kenya communities settled at the western part of the Mau water towers.

ii. A permanent injunction be issued barring and/or prohibiting the 1st, 2nd and 3rd Respondents by themselves, agents and/or servants or officials from continuing with the construction of ITARE DAM WATER SUPPLY PROJECT.

iii. A mandatory injunction be issued against the 1st, 2nd, 3rd Respondents compelling them to carry out restoration programme at the site of the Itare Water Dam.

iv. Further and/or other orders that this Honourable Court deem fit to grant.

4. The last Petition being ELC Petition No. 44 of 2016 (Nakuru) was filed on 15th September 2016. The Petition also concerned Itare Dam Water supply Project. The Petitioners in the Petition alleged inter alia, that the Government of Kenya had not compensated the local community after acquiring their land, that there had been no public participation in the execution of the project and that Articles 10, 35 and 40 of the Constitution of Kenya 2010 had been violated. The Petitioners in ELC Petition No. 44 of 2016 (Nakuru) sought the following reliefs:

a. A temporary and permanent conservatory [sic] restraining the Respondents by themselves, their agents, employees and/ or servants from further initiating, clearing, cultivating, or whatsoever developing, extracting, conveying or in any way carrying on with Itare Water Dam Project until the natives are compensated and an order of mandamus to compel the government to compensate the locals whose land within Tinnet/Kabongoi/Ndoinet/Kiptororo Settlement Scheme was taken by the government;

b. An order that the Environment Impact Assessment Report in relation to Itare Dam Project be made public and in the alternative an Environmental Impact Assessment be carried out in relation to the project;

c. A declaration that the Petitioners and the residents of Nakuru County and especially the residents of Kiptororo within Kuresoi ought to be consulted and involved in Itare dam project.

5. Though filed separately, the 3 Petitions were as it were, joined at the hip from the onset owing to the fact that they all raised the question of whether or not the Itare Dam project infringed on various constitutional and other legal provisions. Pursuant to a ruling of the court dated 31st July 2017, the court referred the matter to the Hon. Chief Justice for His Lordship to consider appointing a bench of uneven number of judges to hear and determine the Petitions. The Hon. Chief Justice duly empanelled the present bench in that regard. On 27th November 2017, following our empanellment, the Petitions were listed for directions and on the date we ordered the three Petitions to be consolidated and to be heard together. We further ordered that Petition No. 9 of 2017 be the lead file. Although we further directed the Petitions to be heard by way of affidavit evidence, written submissions, we nonetheless owing to the technical nature of the Environment and Social Impact Assessment (ESIA) study report directed that the expert witness of the 3rd Respondent in Petition No. 9 of 2017 attends court to testify orally. Additionally, we ordered that a visit to the *locus in quo* be done after the evidence of the technical expert witness.

Petition No. 9 of 2017;

6. Petition No. 9 of 2017 is supported by three affidavits: one sworn by Willis Opiyo Otondi who is the 2nd Petitioner and chairman of the Luo Council of Elders, the 1st Petitioner; another sworn by Edwin Kiprotich Kimetto who is the Secretary of Council of Kipsigis Elders and finally the last one is sworn by Francis Kipkurui Maritim who is the Chairman of Ogiek Community.

7. It was deponed by Willis Opiyo Otondi that it was his duty as chairman of the community to protect the interests of the community whose members generally inhabit Kisumu, Siaya, Migori and Homa Bay counties. He stated that he learnt about the Itare Dam Project through press reports and upon investigations he came across a report called Itare Dam Water Supply Project Environmental and Social Impact

Assessment (ESIA) Report dated September 2014. He stated that the report was rejected as inadequate and a new report was prepared but which was not any different from the initial report save that it contained names of persons picked from Sachangwan and in Nakuru purportedly to represent the 9 counties listed in the Petition herein as interested parties. He deposed that he discovered that the proponent of the project was Rift Valley Water Services Board (RVWSB) the 3rd Respondent herein and that the project was going to be constructed in Mau Water Catchment Area. The project was a threat to Sondu Miriu power plant and would also interfere with rivers Ndoinet, Sogol, Targanbei, Kipsonoi, Sondu Miriu, Kuja, Chemosit and Nangores all of which ended up in Lake Victoria.

8. The deponent added that the ESIA report failed to capture that the Mau Water Tower where the project was located was the largest water tower from which rivers Chemosit, Jamji, Sondu, Ewaso Nyiro, Molo, Kipchorian, Chepkullo, Sessei, Gucha and Awach originated and which rivers in turn fed lakes Victoria, Nakuru, Baringo and Natron. Though the report noted that there would be transfer of water from Lake Victoria Catchment Area to Lake Nakuru Basin, there was no consultation and public participation among the people living in the downstream counties of the Interested Parties. He further stated that Kenya has signed various treaties and protocols such as the Protocol for Sustainable Development of Lake Victoria Basin, 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1992 Convention on Biological Diversity and 1992 United Nations Framework Convention on Climate Change and that the manner in which the project was being implemented flouted these treaties and protocols as well as principles laid down in United Nations World Commission on Dams of November 2000. He averred that the dam would only benefit the people of Nakuru at the expense of the people of the 9 Interested Party Counties. He thus averred that there was going to be discrimination perpetuated by the Respondents against the people living in the interested party counties if the project was to be allowed to continue. He asserted that there has been breach of Articles 10, 69, 70, 156, 174 and 175 of the Constitution by the Respondents.

9. The other two supporting affidavits were essentially on the same terms as those of the affidavit of Willis Opiyo Otondi.

3rd Respondent's Response to Petition No. 9 of 2017:

10. The 1st and 2nd Respondents did not file any response to the Petition.

11. On its part the 3rd Respondent filed a replying affidavit sworn by Eng. Japheth Mutai, its Chief Executive Officer. He deposed that the land upon which the project was being constructed was government land and that there was therefore no violation of right to property. He added that the people of Kenya generally and the residents of Nakuru and its neighbourhoods would benefit from increased supply of quality water as a result of the project. That an Environmental and Social Impact Assessment study was done for the project and an ESIA study report dated December 2015 prepared, a copy of which was annexed to the replying affidavit. As a result, the 4th Respondent issued an environmental compliance certificates or permit in respect of the project. He added that the 3rd Respondent complied with all its statutory obligations in respect of the project and carried out adequate public participation as required. He further stated that allowing the Petition would be contrary to public policy as that would lead to loss of public funds due to the contractual arrangements respecting the project.

4th Respondent's Response:

12. The 4th Respondent (NEMA) filed a replying affidavit sworn by Prof. Geoffrey Wahungu who is its Chief Executive Officer. He deposed that NEMA is opposed to the Petition in so far as it challenges NEMA's decision to grant an Environmental Impact Assessment (EIA) Licence for the project. He added that on 21st April 2015, the 3rd Respondent submitted to NEMA an ESIA report for the project. In turn, NEMA wrote to various lead agencies on 23rd April 2015 seeking their views on the proposed project. NEMA received responses from the Water Resources Management Authority (WARMA) and from the County Government of Nakuru, both of which gave approval for the project though WARMA gave some conditions. Upon reviewing the ESIA report, NEMA through letter dated 4th June 2015 required the 3rd Respondent to ensure wider public participation and to submit a study report pursuant to the provisions of Section 58 of the Environmental Management and Co-ordination Act (EMCA). The 3rd Respondent complied and submitted to NEMA an ESIA Study Report which NEMA acknowledged through letter dated 18th February 2016. Once again, NEMA sought views from various lead agencies through its letter dated 19th February 2016. Pursuant to Regulation 21 of the Environmental Management and Co-ordination (Impact Assessment and Audit) Regulations NEMA directed the 3rd Respondent through its letter dated 26th February 2016 to publish the ESIA Study Report in both the Kenya Gazette and local dailies. On 30th May 2016, NEMA received a response from Kenya Electricity Generating Company (KENGEN) seeking some clarifications. Subsequently on 24th October 2016, NEMA asked the 3rd Respondent to furnish a Resettlement Action Plan (RAP). The 3rd Respondent duly complied and provided the RAP and a Surveyor's Report showing the project area and/or site.

13. Ultimately, NEMA issued to the 3rd Respondent an Environmental Impact Assessment Licence on 26th October 2016 approving the construction of the project subject to the conditions printed on the licence. The licence was a living document that allows monitoring of the project through improvement and restoration orders, stop orders and prosecution. The deponent added that the process of awarding the EIA Licence provided for public participation pursuant to parts 2 and 3 of the Environment (Impact Assessment and Audit) Regulations 2003 and that it was therefore not true that there was no public participation as alleged by the Petitioners. The project was of great significance to the government's Vision 2030 and presented a lot of good to the wider public. He thus urged the court to dismiss the Petition.

Petition Nos. 44 and 45 of 2016:

14. In view of the common and similar issues raised in all the three Petitions, Petition Numbers 44 and 45 of 2016 were subsumed into Petition No. 9 of 2017 which is the lead file. Accordingly, the evidence adduced in Petition No. 9 of 2017 also applies in Petition Numbers 44 and 45 of 2016.

Petitioners' Response:

15. The Petitioners filed a further affidavit sworn by Willis Opiyo Otondi in response to the Respondents' affidavits. Mr. Otondi deposed

that the project violated the Petitioners' right to clean water as provided for at Article 43; right to life and dignity as provided for at Articles 26 and 28 of the constitution. That the Respondents could not seek to benefit the residents of Nakuru County while trampling upon the rights of residents of the 9 interested party Counties. He added that the Petitioners had engaged scholars who had cast doubt on the scientific basis and methodology employed by the Respondents' consultants who prepared the ESIA study report relied on by the Respondents and specifically by the 4th Respondent (NEMA) when it issued the Environmental Impact Assessment Licence approving the project for implementation. He annexed a copy of a document titled "**Review of the Environmental and Social Impact Assessment (ESIA) Study Report for the Proposed Detailed Designs of Itare Dam Water Supply Project**".

Testimony of Expert Witness:

16. Pursuant to the directions that we gave, oral evidence was taken in respect of only one witness: the 3rd Respondent's or RVWSB's expert witness Dr. Zablon Oonge. He told the court that he was an Engineer by profession and held a Doctor of Philosophy degree in Civil Engineering. He lectured in Civil Engineering at University of Nairobi and also ran a consulting firm. His area of expertise was on hydraulics and that was what he taught at the university. He stated he was one of the Dam Experts in the Country and was a practitioner of Environmental Impact Assessment (EIA) as a NEMA registered lead expert. He was registered with NEMA in 2004 and has practiced as a lead expert since then. He was involved in Nzoia water project and has consulted in road projects such as Kisumu Busia Road. According to him, he had wide experience in undertaking EIA studies and preparation of resettlement action plans.

17. Dr. Oonge further told the court that the 3rd Respondent (RVWSB) contracted a company known as H. P. Gauff to do the Dam design, tunnel design, EIA and resettlement action plan in respect of Itare Dam water supply project. H. P. Gauff in turn contracted him and his team to do the work. They were to do all these over a period of two years. He stated they commenced the project work in 2010 and completed the initial report in 2012 which they presented to RVWSB. He said it took RVWSB a while to get funds for the project. In late 2014 or early 2015 funds for the project were available and they proceeded and completed the ESIA study report on the project and presented same to NEMA in December 2015.

18. Regarding the dam design, the expert stated the first item they looked into was where the dam was to be located. He stated they determined the dam would be located in a wet area since there was a running river. The next issue considered was how much water was available in the catchment area. That was assessed by rainfall and river gauging system. Reliance was placed on rainfall records from Metrological department to determine how much water would flow into the river since there was no river gauging system in place. The third issue according to the expert was to determine the position to locate the dam and it was determined to locate the same at the lowest point where the rivers flowed into as that allowed more room for water collection and banking of the dam.

19. The expert explained that they had to investigate the nature of the ground below the target area to ascertain its suitability for the kind of project. Once the potential area was identified he stated they drilled bore holes so as to ascertain the actual strata below. They determined that the type of strata below was suitable. They needed rock below since it would be cheaper than doing a concrete dam. Luckily, he stated, rock was available in the dam surroundings in quantities that would be adequate to complete the dam. The project entailed transferring water from one side of the Mau complex to the other side. The expert explained that their intention was to have the water to flow by gravity from the dam but Mau was a barrier. They decided a 14 kilometre long and 4.5 metre diameter tunnel had to be drilled under the Mau to channel the water from the dam on western side of the Mau to the water distribution point on the eastern side of the Mau. The dam was to be on Itare River which flows to Lake Victoria. In the course of drilling the tunnel, at some point it would be about 500 metres below the surface. The tunnel at some points would be below boreholes that were in use and therefore it was necessary to ensure the tunnel would not be porous such that it would drain water servicing the boreholes. The tunnel thus had to be completely sealed using pre-cast concrete in such a way that water would not percolate or seep into it.

20. Regarding the Environmental Social Impact Assessment (ESIA) Study Report, Dr. Oonge told the court that NEMA had standardized the methodology of the reports presented to it into introduction, project component, legal framework, environmental baseline conditions and the social and economic setting. He added that the ESIA study report which he prepared for the project complied with NEMA guidelines in terms of its structure and its contents and that that was why NEMA granted a licence for the project.

21. As regards impact of the project on the environment, the witness referred the court to page 201 of the ESIA study report where the potential impacts on environmental and social values were addressed. Key among the social impacts of the project on social values was employment opportunities. The dam had several components such as treatment works, tunnel and distribution. The people wanted to have only locals employed on the project. The witness and his team relied on the laws of Kenya to ensure that employment opportunities were available to everyone. They explained to the people living around the project area that they were to be considered for job opportunities in the implementation of the project. These explanations were done through meetings which were organized with the locals. Dr. Oonge was present in all the meetings and answered all the questions that were raised by the attendees. The attendances at the meetings would vary such that in the affluent areas the attendance would be as few as 50 people while in the low income areas and near the dam site the attendance was very high. As many as 3,000 people attended at the dam site. The attendees were concerned with both personal and community benefits. The witness added that a lot of the impacts of the project such as air emission, dust emission and making river water dirty are short term impacts. Many of these impacts would cease once construction work stops.

22. Concerning flood control, the witness referred the court to page 206 of the ESIA report observing that floods routinely occur in Kenya whenever there are heavy rains. He explained the biggest floods in his lifetime were in 1961 to 1962. He stated that a dam helps control downstream flow and hence controls floods. He stated that when building a dam, one looks for what is called 96% confidence flow and he observed that anything above the 96% is flood flow. The Itare dam was designed to pick and store part of the 4% above the 96%. The dam was to pick water from the floods and in the event no floods occurred then the dam would not retain any water from the river. The river flow would continue normally.

23. The witness further stated that the Itare River is part of the Sondu River system, which passes through Bomet County. The part where the dam is being constructed constitutes approximately 6% of the Sondu catchment system. The dam would pick water at the very tip of Itare River and would leave intact the majority of Itare River and Sondu system. Sondu system mainly passed through Bomet County and a bit of it through Kericho County. The Sondu system all joined together at Sondu Market which is in Kisumu County. The dam would not

affect River Kaptigel in Bomet County or River Kipsonoi at all. Ndunai River would also not be affected. All these rivers drain into the Sondu system.

24. Dr. Oonge also testified that the Sondu system does not affect Narok County at all. Narok County gets its water from Mara and Narok rivers. Part of Mara River is in Bomet County. Regarding Kisumu County, he stated that the confluence of Sondu system is at Sondu town in Kisumu and that since only 6% of Itare River flow would be affected by the dam, there would be no much impact on the Sondu system. Kenya Electricity Generating Company (KenGen) had expressed concern about the impact of the project on the Sondu system. He added that they explained to KenGen that only 6% of the Sondu system or catchment area would be affected by the dam and that the dam would only take 6% of the rainfall volumes in the Sondu area. KenGen were satisfied by the explanations that the impact on the Sondu Miriu system would be minimal and insignificant.

25. On the issue whether there was any connection between the other counties and the dam, the witness stated that Migori County has absolutely nothing to do with the Sondu system and as for Nyamira County, only a small portion of it was touched by Sondu River. This portion was absolutely insignificant to the Sondu system. Most of the rain in Nyamira County goes to Gucha River System. Kisii County also had nothing at all to do with Sondu system. The whole of Kisii County rivers drain to Gucha system.

26. The witness further stated that he was familiar with the design on Ndakaini Dam, a 75meter high dam on Thika River. Chania River joined Thika River which in turn later joined Tana River. Thika River drains into Ndakaini Dam but nonetheless continued flowing downstream. Despite Ndakaini Dam serving Nairobi County, Thika River and Chania River which are connected with it have not dried downstream. They are always flowing. This was due to what is called environmental release which regulates the amount of water abstracted from the river. The regulation of what amount of water is taken and what is left to flow downstream on rivers is the work of WARMA (Water Resources Management Authority). NEMA has no role on the dam after the construction is completed.

27. Dr. Oonge further stated that he did not see how the 6% off take of water from the Sondu water catchment area would turn Migori, Narok, Kisii and Nyamira counties into deserts since these counties are not related to the 6% abstraction of the water. He added that water would enter the dam every season when it rained and there were ordinary floods. It would not have to await the onset of any major floods as during every rain season there would be adequate flood water to refrenish the dam water.

28. On mitigation measures for the project's adverse impacts, Dr. Oonge referred the court to page 260 of the ESIA study report and stated that in regard to employment, the contractor was to as far as possible source unskilled workforce from within the project area. For skilled workforce, the contractor would be free to retain his skilled workforce if he had any and if he did not, then he would source from the project area where available.

29. In regard to settlements and encroachment, the witness stated that there were between 6 and 10 settlements in the project area. The land where the project was to be located was Government land which was defined as Government land for a dam way back in 1982. The land was large and was bounded by the forest on one side and recent allottees of land on the other sides. When the project became a reality, the witness stated there was a huge influx of people into the area and some of them put up temporary plastic tents. The witness stated that as at the time of his testimony, there were more than 1,000 people who had settled on the outskirts of the parcel of land. The witness and his team identified the original 6 to 10 families when preparing the resettlement plan. These families were to be compensated on livelihood cost as opposed to value of land. They never laid claim to the land but had only constructed structures for shelter. The witness told the court that he and his team made resettlement proposals which appear at page 271 paragraph 15.8.1 of the ESIA study report. They also identified control strategies and objectives on cultural heritage impacts at paragraph 15.10 of the report and made recommendations on cultural conflicts, social problems and cultural assets. They urged the host communities to be good hosts to the incoming immigrant workers.

30. Concerning public participation, Dr. Oonge referred the court to page 299 of the ESIA study report. He stated that he was personally in attendance at the public sensitization meetings as the chief consultant and as the environmental expert. He said that he and his team made presentations and there was thereafter question and answer sessions and the questions and the answers were duly recorded. Sheets of papers were given for the attendees to write their own names as a way of obtaining a record of the people present. The names were later typed into a list which is at pages 332 of the ESIA report. The attendees were always asked what language they wished to be used in the meetings. At the beginning of the project, Dr. Oonge stated that he and his team walked around the project and met the people. He stated two advertisements were placed in two dailies and also announcements over the radio as per NEMA guidelines were made. At the dam site, he stated they additionally used a vehicle mounted with loud speakers to publicize the meetings and that they also used posters as can be seen at page 328 of the ESIA report.

31. Dr. Oonge in concluding his evidence in chief stated that the World Bank had guidelines for construction of dams and that the Kenya government used these guidelines even where the project was not World Bank funded. The government sourced funds for the projects from sources other than the World Bank. He stated that the Itare dam was being constructed in accordance with World Bank guidelines and was funded by the Italian Government. The Italian Government insisted that the project had to comply with the World Bank guidelines and there had to be an EIA report to enable them to fund the project.

32. Under cross examination by Mr. Eredi instructed by the Attorney General, Dr. Oonge told the court that the NEMA licence was issued on 26th October 2016 and that he was not aware of any appeal against the issuance of the licence. He added that the purpose of the ESIA study report was to guide the project. If the project complied with ESIA report, adverse impacts would be limited. In regard to public participation, Dr. Oonge stated that they invited Lake Victoria Basin Development Authority but they did not come to present any views. The public participation and stakeholder engagement that was done for the project was guided by NEMA guidelines and NEMA was satisfied that the appropriate threshold had been met.

33. Under cross examination by Mr. Gitonga instructed by NEMA, Dr. Oonge stated that the 1st report was submitted as a project report. He stated that as the Itare Dam Project was very large, NEMA demanded for a full study report. The full study report was the ESIA report dated December 2015 and submitted in February 2016. Explaining the difference between a project report and a full study report, Dr. Oonge stated that in a project report one deals with several issues but public participation is not emphasized in it. In a full study report, public participation

was key. In the instant case Dr. Oonge explained that it took him and his team 8 months to review the project report and to prepare the full ESIA study report.

34. Regarding the tunnel design, the witness stated that the change in tunnel design from one where there would have been two pipes carrying the water through the tunnel to one that had no pipes but was a precast tunnel that was sealed to ensure there was no seepage of external water into the tunnel, the witness stated the change would not have resulted in any change in impact to the environment and would therefore not have necessitated a new ESIA study.

35. On the issue relating to public participation, Dr. Oonge referred the court to pages 195 paragraph 6.2.1 and page 196 wherein there was a list of people who were consulted. The witness stated notices were placed in daily newspapers, Kenya Gazette and there were publications through radio stations. He explained that NEMA also put a notice in Kenya Gazette and invited comments. Since NEMA issued a licence for the project, Dr. Oonge was of the view that NEMA must have received positive feedback in their engagement with the public. According to Dr. Oonge, he and his team did extensive public participation and those who wanted to participate came forward and their views and concerns were considered and taken into account.

36. On further cross examination by Mr. Mwamu for the Petitioners in Petition No. 9, Dr. Oonge told the court that he was hired by H. P. Gauff, a German Engineering firm which had head hunted him for the exercise. He affirmed he entered into a contract with H. P. Gauff who were his client but not Itare Dam Project. He was contracted for the duration of the project which started in 2010. He stated study ended in 2014 but explained that the process that had started could not end until the project was concluded. He stated that he prepared a project report dated 3rd October 2014 and submitted it to NEMA and later prepared and submitted the ESIA full study report as required by NEMA following their review of the initial project report.

37. The witness further stated that besides doing the ESIA study he also designed the dam and tunnels. He explained that though the contractor later changed the design of the tunnel from one that had pipes running inside to a hollow one without pipes running inside, the change could not be captured in the ESIA report because the change came much later after the ESIA study. He however maintained the change in the tunnel design did not have any environmental impact to necessitate any amendment to the ESIA report.

38. Dr. Oonge further stated that the project would result in transfer of water from Lake Victoria catchment area to Lake Nakuru Basin. A total of 100,000 cubic metres water per day would be transferred. A little of the water would be used within the Lake Victoria Basin, for example in Kedowa town. According to Dr. Oonge, 100,000 cubic metres per day is a miniscule amount of water.

39. Further, regarding the issue of public participation, Dr. Oonge reiterated that there was adequate public participation organised by him and by NEMA. The advertisements by NEMA were done after public engagement and participation had been done during the ESIA study process. The witness however stated he did not bring to court a copy of any of the advertisements that he published in the dailies for his public participation but maintained they were there. Stakeholders on water issues such as Lake Basin Development Authority, Lake Victoria South Water Services Board, KenGen and Kericho Water and Sanitation Company were contacted by way of letters. Vehicle mounted public address system announcements were not done in Kisumu. During public participation, the witness stated that he and his team walked from Ndoinet to Nakuru. They interviewed more than 3,000 people. In the ESIA study report, they highlighted only the meetings they held where there were many people. The public participation sessions are captured from page 260 of the ESIA study report. They covered two counties: Nakuru and Kericho.

40. Upon being referred to a letter from WARMA dated 4th May 2015, the witness stated that WARMA gave conditions all of which were complied with. KenGen also raised concerns in a letter dated 25th May 2016 which were discussed and addressed. A hydrological assessment report was prepared and given to NEMA. It is the hydrological assessment report that indicated whether the project would affect water flow in the counties downstream. WARMA as the body that was concerned with the amount of abstraction of water, issued a licence for the project during the year 2016.

41. Regarding the review of the project ESIA study report by M. A. Omulo and Prof. Raphael J. A. Kapiyo, Dr. Oonge stated that if the stakeholders downstream thought the issue was important, they would have come to the meetings that were held. A schedule of the public participation meetings was published and any concerned stakeholders were invited to come to the meetings to raise any issues and/or concerns respecting the project. Regarding the issue of public review, Dr. Oonge stated that it was within the mandate of NEMA to undertake as envisaged under EMCA.

42. Under cross-examination by Mr Kipkoech, advocate for the Petitioners in Petition No. 44 and 45, Dr. Oonge stated that most if not all of the public participation meetings were in Nakuru County and that the participants supported the project by raising hands. At Ndoinet, there was a group that was not happy with the project. He added that the source of Itare River is in Nakuru County but it flowed towards Bomet County. The public participation focused majorly where the project was sited and where its impact was to be mostly felt and experienced which was on the Nakuru side.

43. In further cross examination by Mr. Ombui advocate, Dr. Oonge stated that Nakuru had been growing steadily until 2007 and 2008 there was a sudden surge in population growth following the 2007 post election violence leading to a strain in water supply. Other than Mereroni River, Nakuru relied on boreholes for its water supply and most of the boreholes were on the verge of drying up. The witness stated there was therefore an acute shortage of water in Nakuru which called for urgent intervention. He stated that Nakuru on a daily basis needed about 120,000 to 130,000 cubic metres of water and only between 30,000 to 40,000 cubic metres of water was available from the current sources. Therefore, Itare Dam was seen as a feasible project aimed at dealing with the acute scarcity of water that was being experienced within Nakuru County. In the premises, the witness was of the view that unless the Itare Dam Project was completed as envisioned, Nakuru would continue to experience serious water shortage which would hamper growth and development within the Town and the County.

44. In re-examination, the witness stated that out of the 100,000 cubic metres of water to be transferred in the project, 90,000 cubic metres would be used in Nakuru County and out of this about 70,000 cubic metres per day would reach Nakuru town while the rest would be distributed to the adjoining areas of Njoro, Molo, Elburgon and Kedowa.

45. The witness added that during every rainy season, there is minor flooding. There are however occasional major flooding or El Nino. The dam was not intended to control major floods but was meant to booster water supply and would have the added benefit of absorbing and controlling the minor and major floods whenever they occurred.

46. Regarding the review of his ESIA study report by M. A. Omulo and Prof. Raphael J. A. Kapiyo, the witness stated that a hydrological assessment report was prepared by a hydrologist and that he used it in preparing the designs for the dam. Though the reviewers state that they were not able to get the hydrological or feasibility reports, the witness said the reviewers did not contact him and his team for the reports which would have been readily availed.

47. In conclusion, the witness stated that the catchment of the dam constitutes 6% of the Sondu River catchment area, and that the project would only take 4% of the water flows and store it in the reservoir for abstraction. The rest of the flow which is 96% is left undisturbed. The 4% was what would yield 105,000 cubic meters of water that would go into the dam. After treatment, 5000 cubic meters of water is returned into the system and only 100,000 cubic meters of water is abstracted. The reduction of water flow downstream in the entire catchment area will only be 4% and that would not be significant to have any adverse environmental impact on the Counties downstream.

Visit to the locus in quo:

48. The court visited the site of the project on 7th May 2018. Dr. Oonge was present and showed the court where the dam was being constructed, where the boring of the tunnel will start as well as where the treatment works were being constructed. The court was shown where the tunnel would open on the eastern part of the Mau and where the water storage tanks were to be constructed for collecting and storing the water before being channelled through pipes for distribution. At the dam construction site the witness showed us where the water spillway was to be constructed.

Consideration of the Issues, Submissions, Analysis and Determination:

49. Having perused the pleadings and having heard evidence of the technical expert, Dr. Zablon Oonge, called at the instance of the court and further having heard the parties respectively in their oral submissions and further having considered the written submissions filed on behalf of the parties, we have identified the following issues for determination in the consolidated Petitions:-

- 1) Whether the Environment and Land Court has the jurisdiction to entertain and determine the Petition(s)?**
- 2) Whether reasonable and/or adequate public participation was undertaken before the Itare Dam Project was implemented?**
- 3) Whether the Petitioners' rights of access to information on the Itare Dam project was violated?**
- 4) Whether in implementing the Itare Dam Project, the Respondents acted in violation of Articles 10, 42 and 69 of the Constitution.**
- 5) Whether the Petitioners' right to a clean and healthy environment has been violated?**
- 6) Whether the NEMA licence issued for Itare Dam project was validly issued after due process?**
- 7) Whether the proposed Itare Dam project violates any constitutional or statutory provisions of Kenyan laws, regional/ international treaties or protocols?**
- 8) Whether the Petitioners land rights were violated in any manner by the Respondents?**
- 9) What reliefs, if any, the Petitioners are entitled to?**

50. The Petitioners in the consolidated Petitions acknowledge there was an Environmental Social Impact Assessment (ESIA) report that was approved by the National Environmental Management Authority (NEMA) on the basis of which a licence was issued for the project. The Petitioners, however challenge the validity of the ESIA report arguing that there was no public participation and that they were not consulted as stakeholders who stood to be affected by the proposed project.

51. Although the issues we have identified for determination in the petition are not so distinct as to be neatly severed, we will endeavour to consider them sequentially as set out hereinabove.

1. Whether the Environment and Land Court has jurisdiction to determine the Petition:

The 3rd Respondent, Rift Valley Water Services Board and the 5th Respondent, the honourable Attorney General who actively participated in these proceedings questioned the jurisdiction of this court to hear and determine these Petitions. The 3rd and 5th Respondents took the position that as the Petitioners were challenging the validity and/or adequacy of the ESIA report that led to the issue of the licence by NEMA approving the implementation of the project, the appropriate procedure would have been for the Petitioners to lodge an appeal to the National Environmental Tribunal (NET) under the provisions of Section 129 of the environmental Management and Coordination Act (EMCA). The 3rd and 5th Respondents submitted, that to the extent the Petitioners had not exhausted the alternative dispute resolution procedure provided by statute, in this case through Section 129 of EMCA this court lacked the jurisdiction to entertain the matter as to do so would be to usurp the mandate and functions of another statutory body. They urged us to find that this court has no jurisdiction to hear and determine the

Petition and therefore to dismiss the same.

52. Considering the issue of this court's jurisdiction to determine the Petition was raised by the 3rd and 5th Respondents, we are obligated to make determination on the issue. Indeed, where the issue of a court's jurisdiction is raised, the court ought ordinarily to determine such issue at the earliest opportunity. This is because jurisdiction is everything and without jurisdiction, a court must down its tools. In the case of **the Owners of the Motor Vessel "Lillian SS" -vs- Caltex Oil Kenya Limited [1989] KLR**, Nyarangi, J.A (as he then was) stated:

"...I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized... of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no business for a continuation of proceedings pending other evidence. It lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

53. A court's jurisdiction flows from either the constitution or legislation or both. The Supreme Court in **The Matter of the Interim Independent Electoral Commission (Constitutional Application No. 2 of 2011)** (unreported) discussed the issue of jurisdiction and observed as follows:-

"Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution; by statute law and by principles laid out in precedent, ...the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the court, is to apply the same with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of parliament where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by the Constitution."

54. The Supreme Court further in the case of **Communications Commission of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others [2014] eKLR** restated what has come to be known as **"Constitutional Avoidance Principle"** that is where it is possible to determine a matter on some other basis, that other forum should be pursued other than the court being Petitioned to determine a constitutional issue. The Supreme Court observed thus:-

253. It was the trial court's finding that the content generated by the 1st, 2nd and 3rd Respondents have been freely available to the public on the digital platform, since its launch in 2009 (paragraph 66 of the judgment). The learned judge observed that a case of violation of intellectual property rights is not a matter to be addressed by a Petition to enforce fundamental rights (paragraph 134). He relied on **Sanitam Services (EA) Ltd -vs- Tamia Limited & 16 Others, Nairobi Petition No. 305 of 2012; [2012] eKLR**, in which the court held that a breach of intellectual property rights can be enforced through the legal mechanisms provided by statute or the common law, and that the invocation of the Constitution, particularly Article 22, was not necessary to enforce ordinary rights (paragraph 10).

254. The appellate court (Musinga J.A) agreed with Majanja J., that if indeed the appellants had violated the intellectual property rights of the broadcasters, a Petition to enforce fundamental rights and freedoms was not the proper recourse, as there exists a definite legal regime for the resolution of such complaint (paragraph 136).

255. Section 35(4) of the Copyright Act provides an avenue for redress, in the event of an infringement. It thus provides: "infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for the infringement the following reliefs shall be available to the plaintiff" a relief by way of damages, injunctions, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of their proprietary rights;

(b) delivery-up of any article in possession of the defendant which appears to the court to be an infringing copy; or any article used or intended to be used for making infringing copies...".

256. The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in **S -vs- Mhlungu, 1995(3) SA 867 (CC)** the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority judgment as follows [at paragraph 59]: "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

257. Similarly the U.S Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (**Ashwander-vs- Tennessee Valley Authority, 297 U.S 288, 347 (1936)**).

258. From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd Respondents claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright -infringement claim, and it was not properly laid before that court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellant Court."

55. In essence the Supreme Court affirmed the often cited Court of Appeal case of **"The Speaker of the National Assembly -vs- James Njenga Karume [1992] eKLR** on the question of the exhaustion doctrine where the court held:-

"...Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of

Parliament, that procedure should be strictly followed.”

56. In the recent case of **Mohamed Ali Baadi & Others -vs- The Hon. Attorney General & 8 Others (LAPSSET PROJECT) (2018) eKLR** a five (5) judge bench had occasion to consider the issue of jurisdiction in regard to the jurisdiction of the High Court vis-à-vis the Environment and Land Court on the one hand and the exhaustion doctrine in regard to matters and/or issues that fall under the jurisdiction of other statutory bodies. On the question of the jurisdiction of the High Court and the Environment and Land Court, in matters where there were cross cutting issues falling under the jurisdiction of the two courts, the judges were of the view that both the High Court and the Environment and Land Court had concurrent jurisdiction and that either court could entertain a matter that raised hybrid issues. The court in the **Lapsset** Case (Supra) was of the view that in determining which court should determine a matter raising hybrid issues, there should be an inquiry as to what was the most substantial question or issue in the controversy. The court applied the test laid in the case of **Suzzane Butler & 4 Others -vs- Redhill Investments & Another [2017] eKLR** where the court stated as follows:-

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the courts utilize the predominant purpose test. In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for lands but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction or works. The court must first determine whether the predominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a town house.

Ordinarily, the pleadings give the court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. The test accords with what other courts have done and therefore lends predictability to the issue.”

57. We agree that there will be cases where there is a mixture of causes of action and cross cutting issues. It would not be prudent in such instances to separate the issues that the Environment and Land Court can deal with, and the other issues that the High Court would have jurisdiction to deal with, so that each of the courts deals with the issues that it has jurisdiction over. Such a procedure would breed confusion and act as an impediment in the expeditious administration of justice. We are of the view that the **“predominant test”** should be appropriately applied in hybrid cases at the earliest opportunity, and probably, some guidelines in the form of practice directions should be developed to provide guidelines on how courts should deal with cases raising hybrid issues since such cases are recurrent in the High Court, the Environment and Land Court and the Employment and Labour Relations Court, which are courts of equal status with the High Court.

58. It is our understanding that the objection by the 3rd and 5th Respondents in this matter is predicated on the exhaustion doctrine as set out in the case of **“The speaker of National Assembly -vs- James Njenga Karume”** [supra]. The Respondents have submitted that the matter ought to have been dealt with under the dispute resolution mechanism set out under EMCA and more specifically under Section 129 thereof which provides as follows:-

129. Any person who is aggrieved by-

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;

(b) The imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) The revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(d) The amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) The imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

59. The Court of Appeal in the case of **Republic -vs- NEMA ex parte Sound Equipment Ltd - CACA No. 84 of 2010 [2011] eKLR** considered the mandate and function of National Environmental Tribunal established under Section 125 EMCA. It was their determination that challenges to Environmental Impact Assessment study reports and/or Environmental Impact Assessment Licences should be made to the National Environmental Tribunal and not to the regular courts. In essence therefore, the Tribunal should be accorded the first opportunity to consider the matter and it is only after it has made a decision that a party can refer the matter to the Environment and Land Court by way of an appeal.

60. In the present Petition(s) the Petitioners have raised a multiplicity of issues and the challenge of the validity of the Environmental Social Impact Assessment (ESIA) study conducted on the project is but one of the issues. The Petitioners have raised issues touching on breach of constitutional right of access to information; deprivation of land without compensation; and violation and breach of the National Values enshrined under the Constitution as relates to good governance, public participation and transparency in the conception and implementation of the Itare Dam Project. The court in the case of **Republic -vs- Independent Electoral and Boundaries Commission [IEBC] & Others Ex parte. The National Super Alliance (NASA) Kenya [2017] eKLR** reviewed and considered the application of the exhaustion doctrine and held thus:-

(46) What emerges from our jurisprudence in these cases are at least two principles: While, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature and interests involved including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal

acknowledged in the Shikara Limited case, the High Court may, in exceptional circumstances find the exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

(47) This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau & 9 Others -vs- Aelous (K) Ltd [2016 eKLR.

61. The Environment and Land Court established under Article 162 (2) (b) of the Constitution derives its jurisdiction from the Constitution and Section 13 of the Environment and Land Court Act No. 19 of 2011.

Article 162 (2) (b) provides:-

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a)

(b) The environment and the use and occupation of, and title to, land.

Parliament under sub Article (3) was empowered to determine the jurisdiction and the functions of the courts contemplated in clause (2) of Article 162 and in exercise of that mandate Parliament enacted the Environment and Land Court Act No. 19 of 2011. Section 13 of the Environment and Land Court Act sets out the jurisdiction of the court and provides as follows:-

13(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the court shall have power to hear and determine disputes-

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) Relating to compulsory acquisition of land;

(c) Relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) Any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights of fundamental freedom relating to land under Articles 42 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

(5) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including-

(a) Interim or permanent preservation orders including injunctions;

(b) Prerogative orders;

(c) Award of damages;

(d) Compensation;

(e) Specific performance;

(f) Restitution;

(g) Declaration; or

(h) Costs.

This court thereof has jurisdiction to hear and determine constitutional issues arising under Articles 42, 69 and 70 relating to the protection of the environment and the enforcement of environmental rights.

62. We are of the view that given the broad nature of the issues pleaded in the Petition(s), which no doubt will involve the interrogation and interpretation of various constitutional provisions in reaching a determination, that the National Environmental Tribunal (NET) is not a suitable forum to have the issues determined. We therefore hold that the exhaustion doctrine would be inapplicable in the present matter and it is our determination that the court is properly seized with jurisdiction to hear and determine the issues raised by the Petitioners in the Petition(s).

2. Whether reasonable and/or adequate public participation was undertaken before the Itare Dam Project was implemented?

63. The Petitioners and the interested parties have submitted that there was no sufficient consultation and/or adequate public and stakeholder participation before the Itare Dam Project was conceptualised and implemented. The Petitioners have faulted the Environmental Social Impact Assessment (ESIA) Study report for the project arguing that they were not involved and did not participate in its preparation. They submit the ESIA study report was prepared without their consultation and/or input. In the final submissions the Petitioners indicated that they were indeed not opposed to the project but that they wished their concerns to be taken into account to ensure that the project was implemented in a sustainable manner. They sought that a fresh ESIA study report be undertaken where their views and concerns would be taken into account. This somewhat was a departure from the Petitioners' pleadings as per the Petition where they emphatically sought the stoppage of the project.

64. Notably, the Petitioners' contention was that the project proponents only consulted a limited number of people who were all from within Nakuru County and the project site at Ndoinet. The Petitioners argued that the residents who were downstream and who stood to be affected by the project considering that their rivers which have their source from the Mau complex catchment area would dry up owing to diversion of the water to the dam were not consulted and there was no public participation where they were involved. On that account they impugned the ESIA study report on the project and asserted the same was invalid and a nullity. The 3rd Respondent, Rift Valley Water Services Board through the replying affidavit and the further affidavit sworn by Eng. Japheth Mutai, CEO in answer to the Petition refuted the Petitioners averments that there was no adequate consultation and/or public participation and set out inconsiderable detail the various public forums that were organized to sensitize the public and to discuss the project. He explained there were public advertisements of the ESIA study report published in the Daily Nation Newspaper inviting people to make their comments and/or objections. The 3rd Respondent's expert witness, Zablon Oonge who testified before the court and at the Dam Site affirmed that he was personally at all the public sensitization meetings. His view was that the ESIA study report he prepared on the project complied with all the NEMA requirements and it was his view that there was adequate and sufficient public participation as the views of the public and stakeholders were sought and the same taken into account in the preparation of the report.

65. In determining whether there was sufficient and/or adequate public participation before the implementation of the Itare Dam Project was commenced, it is necessary that we set out the legal framework that underpins the process of public participation. The requirement for public participation in issues of governance and other matters affecting the public is now anchored in the Constitution. The preamble of the Kenya Constitution recognizes **"the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law"**. It also acknowledges the citizen's **"sovereign and inalienable right to determine the form of governance of our country..."**.

66. Article 1 of the Constitution bestows the sovereign power on the people to be exercised only in accordance with the Constitution. It is the Petitioners contention that the Itare Dam Project was conceptualized and implemented in violation of Article 10 of the Constitution which provides the National Values and Principles of Governance as hereunder:

10(1) The national values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them-

- (a) Applies or interprets this Constitution;
- (b) Enacts, applies or interprets any law; or
- (c) Makes or implements policy decisions.

(2) The national values and principles of governance include-

- (a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- (c) Good governance, integrity, transparency and accountability; and
- (d) Sustainable development.

67. Article 69 of the Constitution enlists the obligations the state has in regard to the environment and inter alia provides:-

69(1) The state shall-

- (a) **Ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;**
- (b)
- (c)
- (d) **Encourage public participation in the management, protection and conservation of the environment.**
- (e)
- (f) **Establish systems of environmental impact assessment, environmental audit and monitoring of the environment;**
- (g)
- (h) **Utilize the environment and natural resources for the benefit of the people of Kenya.**

(2) Every person has a duty to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

68. It is evident that while the state and/or indeed any state organ has a duty and/or obligation to involve and engage the members of the public in consultations before embarking on any project where the input of the public is required, such public participation is not the only consideration to be taken into account. There is always need to balance the various competing interests particularly where mega infrastructural developments are involved. There is necessity to consider whether the developments can be undertaken in a manner that does not compromise the environment in a negative way. In other words, the development must have regard to the conservation and protection of the environment and must be demonstrated to be sustainable.

69. In the instant matter the Itare Dam Project was of such nature and magnitude that an ESIA study report needed to be undertaken as provided under Section 58 EMCA in conformity with the Environmental Management and Coordination (Impact Assessment and Audit) Regulations of 2003. Section 58 EMCA provides as follows:-

(1) Any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the second schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of any project specified in the second schedule shall undertake a full environmental impact assessment study and submit an EIA study report to the authority prior to being issued with any license by the Authority. PROVIDED that the authority may direct that the proponent forego the submission of the EIA study report in certain cases.

70. We note and it is not disputed by the Petitioners that in this matter, both a project report and an ESIA study report were undertaken in compliance with Section 58(1) and (2) of EMCA. The Petitioners' assertion however, is that, their views and input were not sought and were therefore not taken account of in the preparation of the ESIA study report. They contend there was no public participation. NEMA, the 4th Respondent in reply to the averments that there was no public participation through the affidavit sworn by Prof. Geoffrey Wahungu, CEO asserted that the ESIA licence was issued to the 3rd Respondent after all the procedural prerequisites to the issue of the licence were observed and complied with. NEMA affirmed that the initial Environmental Impact Assessment (EIA) report submitted by the 3rd Respondent to it on 21st April 2015 was subjected to stakeholders review and that one of the lead agencies namely the Water Resources Management Authority (WARMA) made their response that they had no objection subject to a number of operational conditions as set out in their letter dated 4th May 2015 ("GW3"). The County Government of Nakuru approved the project as designed. NEMA further stated that after reviewing the EIA project report they determined a full study of the project entailing wider public and stakeholder consultation with in-depth evaluation of potential impacts was required and accordingly on 4th June 2015 wrote to the 3rd Respondent to undertake a full study on the project and furnish a report. The 3rd Respondent in compliance thereof submitted an Environmental and Social Impact Assessment (ESIA) study report for the project on 18th February 2016.

71. The ESIA study report was shared with the lead agencies and stakeholders for them to furnish any views on the proposed project. The ESIA was additionally pursuant to Regulation 21 of the Environmental Management and Coordination (Impact Assessment and Audit) Regulations published in local dailies, the Star Newspaper 27th April 2016 and the Daily Nation 27th April 2016. The report was further advertised through "Sauti ya Mwananchi Radio" for 5 days running from 6th to 10th September 2016. The project was further published and advertised by NEMA vide Kenya Gazette Notice No. 6858 of 28th August 2016. In all the publications and advertisements all interested and affected persons were invited to submit comments on the project. Notably, the Gazette Notice provided as follows:-

"The National Environment Management Authority invites members of the public to submit oral or written comments within thirty (30) days from the date of publication of this notice to the Director-General, NEMA, to assist the authority in the decision making process of the plan."

72. Kenya Electricity Generating Company (Kengen) one of the stakeholders vide a letter dated 25th May 2016 sought clarifications on

issues raised thereon that were appropriately furnished. NEMA having been satisfied that the 3rd Respondent had complied with NEMA requirements on the submission of an ESIA study report approved the construction of the proposed Itare Dam Supply Water project and issued an EIA licence on 26th October 2016.

73. On the basis of the foregoing, NEMA, the 4th Respondent submitted that the EIA licence on the project was issued in compliance with the law after all the requirements were met by the 3rd Respondent. The 4th Respondent referred the court to the cases of **Patrick Musimba -vs- National Land Commission & 4 Others [2016] eKLR** and **Isaac Gitoho and 2 Others -vs- Director General NEMA and Another [2017] eKLR** where the issue of lack of public participation was raised as a central issue by the parties objecting to the respective projects in those cases. In both matters, the court held that where the members of the public were facilitated and afforded an opportunity to make their views known and they failed to avail themselves of the opportunity, there was nonetheless compliance. The 5 Judge Bench in the **Patrick Musimba** case (supra) at paragraph 151 of the Judgment stated:-

“There is also adequate evidence that pursuant to Section 21 of the Environmental Impact Assessment and Audit Regulations, LN 101 of 2003, the 2nd and 3rd Respondents caused to be published in the Newspapers of the 6th November 2012 and 13th November 2012 notice to the public inviting comments within 60 days on the project. The said notices which were also published in the Kenya Gazette also disclosed the anticipated impacts and proposed mitigation measures. The notices were all published prior to the Environmental Impact Assessment Licence being issued and some comments were indeed received, taken into account and acted upon by the 3rd Respondent.”

74. We have reviewed the Petition and the affidavits sworn in support of the Petition and we are of the view that the affidavits sworn in reply thereto by Eng. Japheth Mutai of the 3rd Respondent and Prof Geoffrey Wakhungu of the 4th Respondent adequately addressed the concerns and allegations raised by the Petitioners. The affidavits detail how the public was involved in the process. This evidence was buttressed by the evidence of Dr. Zablon Oonge who testified as the expert witness who was responsible for the preparation of the ESIA study report. He explained how the public meetings were conducted. The essence of the Environmental Impact Assessment Study is to assess both the positive and negative impacts of a project and in case of any negative impacts to consider the mitigation measures to be taken. Under Regulation 17, the Environmental Impact Assessment Study must involve the public. The residents of any area liable to be affected by a development project must be given the opportunity to give their views on the effects of the project. After the EIA study report is compiled the same has to be subjected to public scrutiny for comments before a licence is issued by NEMA. In the present Petition, there is evidence that there was public engagement and the ESIA report was put out for public scrutiny as required under Regulation 17 of the EMCA (Impact Assessment Audit) Regulations of 2003.

75. What constitutes public participation has generated considerable judicial debate but there appears to be consensus that:- **“What matters is that at the end of the day a reasonable opportunity is afforded to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”**This is what the court held in the case of **Commission for the Implementation of the Constitution-vs- Parliament of Kenya & Another (Petition No. 454 of 2012) (unreported)** where the court dealt with the constitutionality of the Leadership and Integrity Act No. 19 of 2012 which had been challenged on the basis, among others, that there was no public participation in its enactment.

76. It is our view, public participation cannot mean that every person must be heard and/or involved during the process of public hearings and/or that the views received during such public hearings must be accepted. It is sufficient that the views have been made and to the extent possible factored in the final report that will be implemented. If the position was that whenever there is an organized group or interested persons, who have voiced objection to a development project, the project should be stopped, there would be impediment to development as there will be no one project that will have one hundred percent approval rating. The courts, in the face of at times unwarranted objections have to consider and evaluate the objections having regard to the wider interest of the public. In the present matter, it is our view that the wider public interest in the project outweighs the interest of those opposed to the project.

77. On the basis of our evaluation of the evidence and the material placed before us we find and hold that there was adequate and sufficient public consultation and participation in regard to the issue of the EIA Licence approving the construction of Itare Water Supply Dam in Nakuru. The public and all stakeholders were afforded the opportunity to air their views and to participate in the process leading to the approval of the project. We hold the Petitioners and the interested parties had the opportunity to voice their concerns during the public forums and/or when the EISA report was published both in the Daily Newspapers and/or the Kenya Gazette.

3. Whether the Petitioners’ right to access information was violated;

78. This issue is intertwined with the preceding issue that we have discussed relating to the question whether or not there was adequate public participation in regard to the conceptualization and approval of the Itare Dam Project. The Petitioners have alleged that the project was not being undertaken in a transparent manner and that the proponents of the project failed to provide public documentation relating to the project and/or carry out consultative meetings with all the affected parties. Particularly, the Petitioners claim that the residents downstream were not consulted yet they depended on the rivers that have their source in the Mau catchment area where the project is sited. The Petitioners allege that the rivers will be adversely affected and are likely to dry up owing to diversion of the water to feed the dam being constructed.

79. The 3rd Respondent, the proponent of the project refuted the Petitioners’ allegations that the project was being undertaken in an opaque manner and in the detailed replying affidavit sworn by Eng. Japheth Mutai the 3rd Respondent explained that the project was being carried out transparently. The 3rd Respondent averred that all members of the public were afforded the opportunity to participate citing the various public hearings that were held in the lead up to the preparation of the Environmental Social Impact Assessment (ESIA) Study Report. The 3rd Respondent further averred that after the ESIA study report was prepared the same was widely published both through the print media and through the official Kenya Gazette and that this afforded every affected and/or interested person including the Petitioners and the interested parties the opportunity to raise any objections if they had any to the project. They did not do so.

80. Under Article 35 of the Constitution every citizen has right of access to information and the state has an obligation to facilitate such access to any information held by the state and to publish and publicize any important information that affects the public. Thus in regard to any development project that is undertaken by the government and/or any agency of the government that affects the public or has the potential to affect and/or have any impact on the public, there is a duty on the part of the developer to avail all necessary information and to facilitate access of the information by the public.

81. Article 35 of the Constitution provides as follows:-

- (1) Every citizen has a right to access to-**
 - (a) Information held by state; and**
 - (b) Information held by another person and required for the exercise of protection of any right or fundamental freedom.**
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
- (3) The state shall publish and publicize any important information affecting the nation.**

82. The 3rd Respondent has submitted that the Petitioners', other than Ecosystem Social Economic Development Organization (ESEDO), an NGO who are the 1st Petitioner in Petition No. 44 of 2016 never made a request for information. In regard to ESEDO, the 3rd Respondent contends that the same being a Non-Governmental Organization and not a citizen as envisaged in Article 35 of the Constitution was not entitled to make any request for information. See the case of **Kituo cha Sheria & Another -vs- Central Bank of Kenya & 8 Others [2014] eKLR** where Mumbi, J. held that the application of Article 35(1) of the Constitution is limited to natural persons, and secondly, a request for information would be a prerequisite before a party could be held to be in violation of Article 35(1) of the Constitution. The Judge in the case stated as follows:-

"43. However, as this court held in the Nairobi "Law Monthly Co. Ltd -vs- Kenya Electricity Generating Co. Ltd & Another HC Petition No. 278 of 2011" relied on by the 1st Respondent, the right to information under Article 35 (1) is limited to natural persons who are citizens of Kenya. The court agreed in that case with the decision of Majanja, J. in Famy Care Limited -vs- Public Procurement Administrative Review Board & Another HC Petition No. 43 of 2012 in which the learned judge in declining to issue the orders sought by the Petitioner, a limited liability company incorporated in India took the view that the right to information under Article 35 is limited in that it can only be enforced by natural persons. He observed at paragraph 18 of the judgment that:-

"The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to Kenyan citizens. Unlike other rights which are available to "every person", or "a person" or "all persons" this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term "person" and citizen as applied in Article 35.

44. The learned judge therefore concluded that:

"A reading of the Constitution and an examination of words "person" and "citizen" within the Constitution can lead to one conclusion. That the definition of a Citizen in Articles 35(1) and 38 must exclude a judicial person and a natural person who is not a citizen as defined under Chapter Three of the Constitution."

45. The second limitation, which has been alluded to by the Respondents, is that there must be a request for information before a party, entitled to that information can allege violation. Even where a citizen is entitled to seek information under Article 35(1), he or she is under an obligation to request for it. Only if it is denied after such a request can a party approach the court for relief."

83. We agree with the Learned Judges views and interpretation of Article 35 of the Constitution that only a citizen of Kenya has a right to access information held by the state or by another person which information may be required for the exercise of protection of any right or fundamental freedom. The right to access the information is triggered once a request is made to the party who holds the information such that, if the access is denied, then a violation occurs and it is only after there has been a request and a denial of access to the information that an aggrieved citizen can approach the court for appropriate remedies/ redress.

84. In the present Petition(s) there is no demonstration by the Petitioners that they made any request to access any information held by the Respondents and they were denied access to any such information. The 3rd Respondent's assertion that whatever information that was available on the project was shared during the public hearings conducted during the Environmental and Social Impact Assessment (ESIA) Study and subsequently when the ESIA study report was published remains unchallenged. There is ample evidence that the public hearings were conducted by the 3rd Respondent and further there is evidence, that Regulations 17 and 21 of the Environmental Impact Assessment and Audit Regulations regarding publication and Gazettement of the ESIA Study Report was complied with by NEMA, the 4th Respondent herein.

85. In the circumstances, it is our determination that there was no violation of the Petitioners' right of access to information.

4. Whether in implementing the Itare Dam Project, the Respondents acted in violation of Articles 10, 42 and 69 of the Constitution;

86. The Petitioners have submitted that in implementing the Itare Dam Project the Respondents acted in violation of Article 10 of the Constitution which sets out the National Values and Principles of Governance. Further, the Petitioners argue that the Respondents failed to have any regard to Article 42 of the Constitution which provides that every person has the right to a clean and healthy environment. The Petitioners additionally contend that the Respondents failed to observe the obligations imposed on them under Article 69 of the Constitution in respect of the environment. Notably, the Petitioners argue that the Respondents did not ensure that the development would be sustainable and would conserve and not compromise the environment.

87. The Petitioners' allegation of violation of Article 10 of the Constitution was predicated on the contention that there had been no public participation and/or consultation before the project was given approval. We have earlier in this judgment dealt with the issue of public participation. We were satisfied that there was no violation of Article 10 of the Constitution having regard to the public hearings that were conducted by the 3rd Respondent and subsequent publication of the ESIA both through the media and the official Kenya Gazette. The essence of carrying out a ESIA study is to ensure there is participation by all concerned and interested parties and to enable all the positive and adverse effects relating to a project to be identified and proposals for the mitigation of the adverse impacts to be considered. The Petitioners as well as all the interested parties; were afforded the opportunity to participate during the study and to air their views on the project. It is our view that there was transparency in the manner the project proposal was handled and it is our view the same cannot be impugned on the basis of non-compliance with Article 10 of the Constitution. There is no standard measure that can be applied to gauge compliance with Article 10 of the Constitution and therefore each case has to be evaluated on its own peculiar facts and circumstances. Lenaola, J. (as he then was) in the case of **Consumer Federation of Kenya (COFEK) –vs- Public Service Commission & Another [2013] eKLR** stated as follows respecting what constitutes adequate public participation:-

“...regarding Article 10 of the Constitution, one of the national values and principles; of governance enshrined therein is that of “the rule of law, democracy and participation of the people. The Petitioner has latched on the phrase “participation of the people” in a selected manner. I have said that there is no express requirement that “participation of the people” should be read to mean that “the people” must be present during interviews but taken in its widest context that their input is recognized. There is no answer to the 1st Respondent’s assertion that it called for, and received, information regarding the applicants and it used it during the interviews. That is sufficient participation in my view”.

88. In the present Petition there is evidence that during the ESIA study and following the publication of the report, affected and interested stakeholders were contacted directly and while some chose to make their presentations/observations others chose not to. WARMA and KENGEN raised their concerns which were taken account of in the final report. The County Governments enjoined in the Petition as interested parties notably the County Governments of Kericho, Nyamira, Narok, Bomet, Kisumu, Kisii, Homa Bay and Siaya though aware of the project did not participate in the public participation process in regard to the project. It is our view that the Petitioners and the interested parties have come forward to air their concerns too late after the issues that they have put forward were in fact dealt with by the project proponent during the project conceptualization and during the ESIA study. It was not made clear to us why the County Governments named as interested parties did not involve themselves during the public hearings and/or why they never aired their responses, concerns and/or objections during the public scrutiny of the ESIA report after the publication and advertisement in the Kenya Gazette. It cannot be acceptable that they were not aware of the project. They definitely were. The participation of the interested parties in these proceedings were lacklustre and mute which puts to question their perceived interest in the project.

5. Whether the Petitioners' right to a clean and healthy environment has been violated;

89. Article 42 of the Constitution provides:

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 the 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.

The import of Article 42 and Article 69 of the constitution in regard to development projects is that such developments have to be sustainable in terms of environmental protection and conservation and have to take account of both the present and future generations. The 4th Respondent, NEMA is the body mandated under Section 9 EMCA to exercise general supervision and co-ordination of all matters relating to and affecting the environment and is charged with the responsibility of implementing all policies relating to the environment. Under Article 69(1)(f) of the Constitution it is envisaged that EIA will be conducted through systems that have been set out by the state. It provides thus:-

69(1)(f) The state shall establish systems of environment impact assessment, environmental audit and monitoring of the environment.

90. The 4th Respondent submits that the State has through EMCA Section 58 and the subsidiary legislation vide Legal Notice No. 101 of 2003 set out the appropriate systems for carrying out environmental audit as discussed earlier and contends that the ESIA study Report carried out on Itare Dam project was in compliance with Section 58 of EMCA and EIA Audit Regulations of 2003. The 4th Respondent to buttress its submissions made reference to the case of **Patrick Musimba -vs- National Land Commission & 4 Others (2016) eKLR** where the 5 judge bench held that not all the views of the attendees at a public forum need to be taken into account in order to validate the process of public participation. They held that it was sufficient that a sample of stakeholders were involved. The judges observed:-

“The fact that the views given by attendees at a public forum are all not taken into consideration does not vitiate the fact that there has been compliance with the requirement for public participation ... in the instant case there was facilitation. The public and other relevant stakeholders were involved as the 4th Respondent (NEMA) undertook its statutory mandate.

There is undisputed evidence (see paragraph 5 of the 3rd Respondent's affidavit sworn by Zephania Ouma on the 27th October, 2014) that the Kenya Wildlife Service, the Ministry of State for Planning, the Kenya Forest service and the National Museums were all involved. These were all stakeholders with different interests."

91. The 4th Respondent (NEMA) is the agency who plays the oversight role of ensuring that the process of carrying out the ESIA study is adhered to as provided under EMCA and the Environmental Impact Assessment and Audit Regulations Legal Notice No. 101 of 2003. The 4th Respondent's replying affidavit sworn by Professor Geoffrey Wahungu on 3rd March, 2017 details how the process of carrying out the ESIA study was undertaken and it is evident that the process as set out under Section 58 EMCA and Regulations 21 of the Environmental Management and Co-ordination (Impact Assessment and Audit) Regulations (Legal Notice No. 101 of 2003) was complied with. There was stakeholder involvement, public hearings conducted by the 3rd Respondent and there was publication of the ESIA inviting comments from the Public as required and there was ultimately publication of the ESIA report through the official Kenya Gazette on 26th August, 2016 again inviting comments from the public.

92. Regulation 17(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003 requires the proponent of a project to inter alia:

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 of the proposed project for two successive weeks in a newspaper that has a nationwide circulation; (iii) a qualified coordinator being appointed to receive and record oral and written comments and where necessary translate such comments received during the public meetings and (iv) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage at least once a week.

93. We have reviewed the replying affidavit by Prof. Geoffrey Wahungu and the evidence by Dr. Zablon Oonge who testified before us and we are satisfied there was substantial compliance with Regulations 17(1) of the Environmental (Impact Assessment and Audit) Regulations, 2003. Similarly, we are satisfied that the 4th Respondent (NEMA) discharged the obligation imposed upon it by Regulations 21 and 22 where it is enjoined prior to making any decision on the ESIA Report to invite the public through the print media and in a prescribed format to make oral and written comments on the ESIA report.

94. The Petitioners apart from alleging non consultation and lack of public participation have not demonstrated in what manner their right to a clean and healthy environment was violated by the Respondents. To the contrary the available evidence suggests that 3rd Respondent who is the Project Proponent followed all the laid down procedures to get the project approved. The 4th Respondent (NEMA) who is mandated under the law to exercise general supervision and coordination and to ensure the environment is not degraded, was satisfied the project development was sustainable. The ESIA Study Report which NEMA reviewed and subjected to public scrutiny met the threshold necessary for NEMA to issue the EIA licence approving the implementation of the project. The Petitioners did not adduce any evidence to contradict the evidence tendered by the 3rd Respondent's expert witness which clearly discounted the Petitioner's averment that the construction of the Dam would lead to the reduction of water in the rivers flowing downstream from the Mau catchment area and the eventual drying up of the rivers.

95. The Expert's evidence was emphatic that the project only affected about 6% of the total Sondu Miriu Water Catchment area and that only about 4% of the water flow from the Itare River would be utilized for the dam and the water flow would not be significantly interfered with. The Expert was clear that the Dam would harvest and store flood water from the rains and an environmental water spillway would ensure there was uninterrupted water flow downstream throughout the year. The Expert in his evidence when the court visited the Dam site at Ndoinet was able to explain and demonstrate how the water spillway would function. The Expert further in his evidence explained the water tunnel to be constructed through the forest from the water storage to the outlet on the eastern side would have no adverse effects to the environment and neither would the water pipes that will be used to distribute the water to Molo, Elburgon, Njoro and Nakuru as they will run along the public roads.

96. On the basis of the evidence before us we find no basis to hold that there was any violation of the Petitioner's rights under Article 42 and 69 of the Constitution. We find that the Respondents indeed took into account all environmental considerations including the sustainability of the development project from an environmental perspective.

6. Whether the NEMA Environmental Impact Assessment (EIA) Licence for the project was validly issued after due process;

97. From our discussion in the previous three sections in this judgment covering the issue of public participation, access to information and whether or not the Petitioners right to a clean and healthy environment was violated, we have held there was no demonstrated evidence of any violations as alleged by the Petitioners. We have in particular held that there was adequate public participation in regard to the Itare dam Development project and that the Environmental Social Impact Assessment (ESIA) study for the project was carried out in compliance with the law.

98. The Petitioners have faulted the ESIA report and have endeavoured to point out the inadequacies in the report albeit in a generalized manner. The Petitioners contended that there would be transfer of water from the Lake Victoria Basin and diversion of rivers draining into the lake and that would lead to the low lying areas becoming arid and semi-arid. It was the Petitioners position that the construction of Itare Dam would adversely affect the entire ecological system of the Sondu Miriu basin and the rivers flowing out of the Mau catchment area including the Sondu Miriu River would have their water flows greatly reduced and could end up drying up. The Petitioners averred there was no consultation before the project was approved. The Petitioners in Petition No. 44 asserted that no Environmental and Social Impact Assessment had been undertaken at all. The Petitioners in Petition No.45 though admitting an Environmental and Social Impact Assessment had been undertaken, contended that the same had been carried out selectively, intimating that they were not consulted and that the study was restricted to Nakuru County and the dam site area only.

99. Our view is that the Petitioners were in effect challenging the ESIA study that had been conducted by the 3rd Respondent for the project

and further the validity of the EIA licence issued by NEMA for the project. To enquire into the validity or otherwise of the ESIA study conducted on the project would in our view amount to this court arrogating unto itself jurisdiction that it does not have. The Court of Appeal in the case of **Republic -vs- NEMA Ex parte Sound Equipment Ltd [2011] eKLR** made it clear that any challenge to Environmental Impact Assessment Licences should be made to the National Environmental Tribunal (NET) established under Section 125 EMCA. The NET is a specialist Tribunal staffed with highly qualified professionals and is therefore well suited to deal with and adjudicate on technical issues relating to the environment. Under Section 125 EMCA the members of the National Environmental Tribunal are as hereunder:-

- a) A chairman nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the High Court of Kenya.**
- b) An advocate of the High Court nominated by the Law Society of Kenya.**
- c) A lawyer with professional qualifications in environmental law appointed by the minister, and**
- d) Two persons who have demonstrated exemplary academic competence in the field of environmental management appointed by the Minister.**

100. Under Section 68(1) EMCA, it is NEMA that has the duty and obligation to undertake the environmental audit of any project. Section 68(1) provides:-

- (i) The authority shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment.**

The Itare Dam project development certainly was likely to have significant effect on the environment and it was on that account NEMA requested for a full audit study on the project to be undertaken. The audit was carried out by the 3rd Respondent resulting in the ESIA study report that was the basis for NEMA to issue the EIA licence for the project. It is this ESIA study report and the EIA licence by NEMA approving the project that the Petitioners challenge through the Petitions.

101. It is our view that the Petitioners ought in the first instance to have challenged the veracity of the ESIA study report before the National Environmental Tribunal and could only come before this court by way of appeal from the decision of the Tribunal. The Petitioners cannot properly challenge the ESIA report before this court once it has been demonstrated (which we have held it has been) that the ESIA study report was procedurally prepared in compliance with the law. We have determined that the threshold for public participation was met and that there was sufficient stakeholder engagement in the preparation of the ESIA report and consequently we find no basis upon which we can impugn the ESIA study report. The Respondents in our view satisfied the constitutional and statutory requirements in the preparation of the ESIA report. This court would only have interfered with the ESIA report if it was demonstrated and established there were constitutional and/or statutory violations that would otherwise affect the credibility of the report. No such violations have been proved and/or established.

102. Having held that the Respondents did not violate any constitutional and/or statutory provisions in the conduct of the ESIA study for Itare Dam project, it is our determination that the environmental impact assessment (EIA) licence issued by NEMA for the Itare Dam water supply project was valid.

7. Whether the proposed construction of Itare Dam Project violates any constitutional or statutory provisions of Kenya Laws and/or any regional/international treaties or protocols to render it notimplementable;

103. From our foregoing discussion in this judgment, we have made findings and held that the Petitioners, in spite of making allegations of violations of both the constitutional provisions and statutory provisions they did not furnish any evidence and/or proof of any of the alleged violations. In Nakuru Petition No. 9 of 2017, the Petitioners alleged and contended that the Respondents failed to adhere to international principles set out in various Treaties and International protocols. The Petitioners merely mentioned the treaties and their provisions but did not particularize the alleged breaches and neither was any proof provided and/or noncompliance thereof demonstrated.

104. We have reviewed the Environmental Social Impact Assessment report and it is evident from the report under part 3 titled - **“Description of applicable National Environmental Legislative, Policy, Administrative and Regulatory Framework”** (Pages 2-36 - 2-79) that the study considered and reviewed the applicable constitutional and National Environmental Legislative Legal framework as well as the applicable international conventions, treaties and agreements. The ESIA report considered the following conventions and treaties: The Kyoto Protocol (air quality), International Treaties and agreements which included 1891 agreement, 1902 agreement, 1960 (a) & (b) agreements, 1925 agreement, 1949 agreement, 1950 agreement, 1959 agreement and 1967 agreement. Some of these agreements related to the utilization of Lake Victoria Basin Waters. Under the consideration of the International Conventions, Treaties and Agreements the ESIA report concluded as follows:

“Under the treaties outlined above, Kenya, Ethiopia and Tanzania are under no obligation regarding the use of the waters flowing to Lake Victoria and the Nile basins. It is clear that there has been no agreement on the utilization of the waters of Lake Victoria direction; involving all riparian states.....

There is therefore, nothing in policy or law to stop Kenya from pursuing essential alternatives regarding the use of Lake Victoria basin waters to enhance agricultural productivity or to improve the living standards of her people.”

105. We note further that even the initial ESIA project report carried out in 2014 before the full study was conducted in 2015/2016 the same National Laws and the International treaties and agreements were considered by the Respondents at pages 3-15 to 3-49 and factored in the ESIA report (2014). We in the circumstances do not agree with the Petitioners that any international treaty or convention or agreement has

been breached by the Respondents in the implementation of the Itare Dam Water Supply Project. The Petitioners have not specified what international treaty or convention or agreement has been violated and in what manner and we find that in that regard there is lack of specificity. As the matter stands, it is not possible to determine what right the Petitioners complain of having been violated as there is lack of precision. Our view is that in regard to the Petitioners claim of violation of the constitution as relates to Article 2(5) and (6), the Petition fails the test laid in the case of **Anarita Karimi Njeru -vs- R [1979] I KLR1 272** where the court held that there was necessity from a person seeking redress for an alleged constitutional violation to be specific as to the right violated and provide particulars of the violation. The court in the case stated as follows:-

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

106. The principle in the **Anarita Karimi Njeru** case (Supra) was reinforced through legislation by the enactment of the **“Constitution of Kenya (Protection of Rights and Procedure Rules 2013)”** where under Rule 10(2) it is provided that Constitution Petitions are required to contain inter alia:-

- (i) The facts relied upon,**
- (ii) The constitutional provision violated,**
- (iii) The nature of the injury caused or likely to be caused,**
- (iv) The relief sought.**

107. The Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society for Human Rights Alliance & 5 others (2013)eKLR** further amplified the position when it held:-

“It was the High Court’s observation that the Petition before it was not the “epitome of precise, comprehensive, or elegant drafting” yet the principle in Anarita Karimi Njeru (Supra) underscores the importance of defining this dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitutional and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional Petitions is an extension of this principle.”

108. In the Petition(s) before us, the Petitioners have generally made unsubstantiated allegations of constitution violations without giving particulars as to the allegations and the manner of alleged infringements. We are constrained to agree with the 3rd Respondent’s submission that the Petitioners’ Petition(s) lack specificity and that puts into question the competency of the Petition. A party alleging a violation or threatened violation of his rights or fundamental freedoms must state with some degree of precision the right of fundamental freedom violated or threatened with violation and must show some form of evidence to demonstrate the violation and/or threatened violation of that right. We in the premises do not consider that the Petitioners have established that the construction of the proposed Itare Dam Project would violate any constitutional rights of the Petitioners and neither has it been shown that the implementation of the project would be in breach of any statutory provisions and/or Regional or international treaties or conventions.

8. Whether the Petitioners land rights were violated in any manner by the Respondents;

109. The Petitioners in Petition No. 44 of 2016 (Nakuru) have alleged that their Constitutional right to property was violated. The Petitioners contended that the implementation of the Itare Dam Project was likely to affect and interfere with their private land rights. The Petitioners averred that even though the government had promised and undertaken to compensate the community members whose land was affected by the project before the project was commenced, the government had failed to do so. The Petitioners therefore submit that the Respondents have acted in violation of Article 40(3) of the Constitution by embarking on the implementation of the Itare Dam Project without complying with the constitutional provisions that require that where private land was required for public purpose, and therefore liable to be compulsorily acquired, prompt and just compensation should be paid to the land owner. Article 40 of the Constitution provides:-

40(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya;

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation:

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) requires prompt payment in full, of just compensation to the person, and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

110. The Land Act No. 6 of 2012 under Sections 107 to 133 make provisions in regard to the procedure and process of carrying out compulsory acquisition in regard to land required for public purpose under Article 40(3) of the Constitution. The National Land Commission (NLC) is the agency that is mandated under the law to carry out and oversee the process relating to compulsory acquisition of land. The Petitioners have alleged that their land was confiscated by the government for the project without due process being followed. The Petitioners have submitted that the Respondents action have not only violated the national laws but international laws as well and cites Article 17 of the Universal Declaration of Human Rights (UNDHR) 1948 which in part provides as follows:-

(1) everyone has a right to own property alone as well as in association with others.

(2) no one shall be arbitrarily deprived of his property

Article 14 of the African Charter on Human and People's Right (ACHPR) provides as follows in regard to right to property:-

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

111. The Petitioners' contention is that the Respondents deprived them of their land parcel **Tinet/Kabongoi/Ndoinet/Kiptororo Settlement Scheme** without payment of any compensation and seeks relief from the court.

112. The 1st Respondent (Petition No. 44 of 2016), Rift Valley Water Services Board refuted the Petitioners allegations and maintained the Itare Dam Project is not being implemented on any private land but is on public land that was set aside during land demarcation way back in 1982. The Respondents' assert that land parcel **Ndoinet Settlement Scheme/1497** was specifically set apart for the dam site and that is where the dam is being constructed. The 1st Respondent stated that land parcel **Ndoinet Settlement Scheme/1497** where the dam is being constructed borders **Tinet/Kabongoi Settlement Scheme** but is not part of that scheme as claimed by the Petitioners. The 1st Respondent annexed a surveyor's report on Itare Dam dated 26th July, 2012 (“**JMI**”) which showed the delineation of the dam site in relation to the settlement land. In the preamble to the surveyor's report it is observed thus:-

“During the demarcation of settlement schemes for the settlement of the Ogiek community and other landless Kenyans the dam site was reserved and is registered as Ndoinet Settlement Scheme/1497 and borders Tinet/Kabongoi Settlement Scheme on its Southern boundary.”

The survey exercise as per the report was carried out between 25th January, 2012 to 7th March, 2012. The scope of the exercise was:-

- **To Re-establish and monument the external boundaries of the dam.**
- **Determine the extent of encroachment if any.**

Inter alia the findings as per the report were as follows:-

(i) The dam area is approximately 258 Hectares.

(ii) There is a camp for forest evictees inside the dam area.

(iii) There were 12 homesteads who had encroached on the dam area. None of the persons who had encroached had any ownership documents and they were fully aware the area they were residing in was reserved for the dam.

113. The Respondents in the premises have submitted that the Petitioners have not shown and/or demonstrated that they had any property rights over the site where the dam is being constructed and consequently they cannot claim violation of property rights, under the Constitution. We have reviewed the evidence and the submissions and it is our view that the Petitioners have not proved they had any property ownership rights over the land where the dam is being sited that were capable of being violated by the Respondents. A right must be shown to have existed before a court of law can decree a violation of such a right. The evidence placed before us shows the Itare Dam is being constructed on a site that was set apart for the purpose of constructing a dam during land demarcation. The surveyor's report only identified 12 homesteads within the dam site area and clearly stated they were persons who knew they were in encroachment. The forest evictees' camp within the dam site area must have been consciously set up. The Resettlement Action Plan prepared as part of the ESIA study process annexed to the 4th Respondent's (NEMA) affidavit as “**GW12(b)**” appropriately addressed the question of compensation of these persons who were found to have either directly or indirectly been affected by the project. It is our view thereof that any affected persons (not necessarily the Petitioners) were identified during the Environmental and Social Impact Assessment Study and would be dealt with in accordance with the Resettlement Action Plan (RAP) Report prepared in December 2015 as part of the ESIA process.

114. On the issue whether or not there was violation of the Petitioners' property rights we have come to the conclusion that the Petitioners

have not proved the Itare Dam is being constructed on the land belonging to them or the community. The land on which the dam is being constructed is public land that was set apart for the project. We make a finding that there was no violation of any property rights of the Petitioners.

Conclusion and Disposal:

115. We have in our review, discussion and analysis of the identified issues for determination shifted through the evidence and material furnished by the parties. On the basis of the evidence before us, we do not consider that the Petitioners have proved the violations or threatened violations of the Constitution that they have alleged. The evidence in our view fell far short of proving that Articles 2, 10, 35, 40, 42, 69 and 70 of the Constitution had been violated by the Respondents. It was the burden of the Petitioners to prove there was violation. That burden was not discharged to the required standard. On the contrary, we are satisfied the Respondents have availed sufficient evidence to confirm there was compliance with the provisions of the Constitution and other relevant legislation in regard to matters relating to the environment in the conceptualization and implementation of the Itare Dam Water Supply Project.

116. The upshot is that we find no merit in the consolidated Petitions and the same are hereby ordered dismissed.

Costs:

117. Though ordinarily the costs would follow the event, we are mindful that the award of costs is within our discretion. The Petitioners brought the Petition on behalf of the public and the Petition may rightly be considered to fall under the class of public interest litigation. We do not think it would be prudent to penalize the Petitioners with costs as that could act as an impediment to access to justice particularly in public interest litigation.

118. We order that parties bear their respective costs of the petitions.

JUDGEMENT DATED, SIGNED and DELIVERED at NAKURU this 19TH DAY of OCTOBER 2018.

J. M. MUTUNGI D. O. OHUNGO M. N. KULLOW

JUDGE JUDGE JUDGE

In the presence of:

..... for the 1st to 8th Petitioners

.....for the 1st and 2nd Respondents

.....for the 3rd Respondent

.....for the 4th Respondent

.....for the 5th Respondent

.....for the 1st Interested Party

.....for the 2nd Interested Party

.....for the 3rd Interested Party

.....for the 4th Interested Party

..... for the 5th Interested Party

.....for the 6th Interested Party

.....for the 7th Interested Party

.....for the 8th Interested Party

.....Court Assistant

.....Court Assistant

J. M. MUTUNGI D. O. OHUNGO M. N. KULLOW

JUDGE

JUDGE

JUDGE