REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CONSTITUTIONAL PETITION NO.13 OF 2015

MOFFAT KAMAU……..…….....…..1ST PETITIONER

MBUGUA NJUGUNA KITHUKI ....….....….2ND PETITIONER

SAMUEL MAINA KAMAU…....…….....……3RD PETITIONER

PATRICK KIIRU WANJIRU……...….....…4TH PETITIONER

SAMMY KARAYA MWANGI…...….....……5TH PETITIONER

SIMON MWICHIGI ……..…..…….....……6TH PETITIONER

JOHN THIGA MBUGU…….…….....……7TH PETITIONER

JOHN NDEMENGE…….....…8TH PETITIONER

MAHUGU GATEBE NJUGUNA…….....….9TH PETITIONER

DAVID KINYANJUI KAMAU…….....….10TH PETITIONER

VERSUS

AELOUS KENYA LIMITED…….....….1ST RESPONDENT

KINANGOP WINDPARK LIMITED.....…2ND RESPONDENT

KINANGOP WINDPARK LEASES LTD…..…. 3RD RESPONDENT

NATIONAL LAND COMMISSON ….....4TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY…….....……..5TH RESPONDENT

MINISTRY OF ENERGY AND PETROLEUM.....….6TH RESPONDENT

COUNTY GOVERNMENT OF NAKURU……...…7TH RESPONDENT

COUNTY GOVERNMENT OF NYANDARUA .....8TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE….....…9TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....10TH RESPONDENT

JUDGMENT

(Constitutional Petition alleging violation of various rights in the constitution including the right to a clean and healthy environment and the right to property; petition hinged on the development of a wind park in Kinangop area; EIA licences issued for the development of the farm initially on one site for a limited megawatt production on numbered wind turbines; project upscaled to higher megawatt production needing additional turbines; project eventually being moved to a different site of 38 plots covering a larger coverage area in square kilometres; EIA licence merely varied to accommodate the expanded project; whether fresh EIA was required; held that the scope of the project had fundamentally changed and a new EIA was mandatory; factors considered of when variation may be allowed without need of a new EIA; petition allowed on this ground)

PART A : INTRODUCTION AND PLEADINGS

1. This is a constitutional petition that was commenced on 23 March 2015 by ten individuals. They aver that they are land owners and residents of various administrative areas within Kinangop Wind Farm Location, whereupon Aeolus Kenya Limited (Aeolus or 1st respondent) and Kinangop Wind Park Limited (KWPL or 2nd respondent) have been licenced to develop a 60 Megawatt (MW) Kinangop Wind Park Project (hereinafter the Project). The wind farm is situated in Kinangop Plateau on the border of Nakuru and Nyandarua Counties.

2. On 16 April 2015, a list of 1053 persons was filed as persons who are also in support of the petition.

3. In the petition, it is pleaded that the Project was initiated by Ecogen Wind Farm Limited (Ecogen) in the year 2002 as a 30MW project, and later from January 2008 to the date of the Petition, by Aeolus. In August 2005, the National Environment Management Authority (NEMA or the 5th respondent), issued to Ecogen an Environmental Impact Assessment (EIA) licence for a 30MW project. In April 2009, the project was scaled up from 30MW to 50MW. In January 2008, the project ownership structure changed from a joint venture of Ecogen and Kenya Electricity Generating Company Limited (Kengen) to Aeolus Kenya Limited. In November 2009, a new EIA was completed by Aeolus and submitted to NEMA to upscale the project from 30MW to 50MW. NEMA gave the approval. In May 2010, the EIA was varied from 50MW to 60MW at the request of Aeolus and approval was given by NEMA. It is pleaded that whereas Aeolus claims to have conducted the requisite EIA and approval given by NEMA, the procedure set out under Part VI of the Environmental Management and Coordination Act, 1999 (EMCA) was not substantially complied with in the issuance of the original EIA licence and the subsequent up-scaling of the project from 30MW to 60MW. The following are pleaded as the particulars of non-compliance.

> *(i) The first proponent of the project, Ecogen Wind Farm Limited did not carry out adequate consultation and sensitization of the project among the people in the affected areas.*
>
> *(ii) The 2nd and 3rd EIA licences were issued as a matter of formalities and administrative discretion without consultation of the affected persons' concerns and genuine confirmation of the project impact on the residents.*
>
> *(iii) To date NEMA has never addressed itself to the concerns of the people on whether a wind farm project can be implemented and operated amidst thousands of people residing in the industrial site and eking out of it agrarian livelihoods.*

(iv) The Kinangop Wind Park Project does not observe the applicable minimum distance requirement between wind turbine generators and residential premises of 1000 metres given that the 2nd respondent plans to install 38 turbines of 1.6MW capacity standing at 80 metres and having a rotor diameter of 82.5 metres.

4. It is averred that the proponents of the project are yet to acquire through purchase or lease the area of 16 Km Sq that constitutes the wind farm. Instead, they are set to acquire 38 plots measuring 40m X 40m each to operate the project. The petitioners contend that the mode of rolling out the project as adopted is illegal, fraudulent and mischievous at it seeks to avoid acquisition through purchase or lease of the land that constitutes the Wind Farm. It is averred that the leases for the 38 plots show the following :-

(i) The option to purchase or lease the parcels out of which 38 plots of 40mX 40m each will be demarcated confirms that indeed the 2nd respondent intends to acquire- albeit through forced sale- all the land that comprises the wind farm.

(ii) The land owners will be barred from interfering with the wind project and specifically they should not erect any building or permanent structures whatsoever of more than 6 metres in height within 750m of the premises. Similarly, the land owners are barred from growing or cutting any trees, shrubs or bushes of more than 6 metres in height within 750m of the premises.

(iii) The 2nd respondent will have the right to construct and maintain in on under or over the land at any time during the 60 years' lease term, any pipes for the benefit of the premises on which, in the opinion of the 2nd respondent, are necessary or desirable in connection with the wind farming activities.

(iv) The 2nd respondent will have the right to retain and operate wind blades on wind turbines or similar structures (if any) incidental to the use of the premises that oversail, overhung, or protrude onto or over the land or any neighbouring property.

(v) The 2nd respondent will have the right to construct and maintain such drainage system at the premises as may be required by the tenant to ensure adequate drainage of rain water away from the wind turbines and other structures erected on the premises.

5. The petitioners have pleaded that the leases for the 38 plots of 40m X 40m have been procured fraudulently and illegally on the following grounds :-

(i) The affected petitioners were not furnished with copies of lease prior to signing and execution of the same.

(ii) The affected petitioners signed only a single page of the 16 paged leases and the other pages were not disclosed or provided until the leases were registered.

(iii) In fact the affected petitioners did not appear before Francis Maina Njonjo to execute the leases and in any event they had no benefit of independent legal advice prior to the said execution.

(iv) At no time during the alleged public hearings for the EIA process were the petitioners informed and or consented that land within 750m from the leased 40m X 40m plots will be subjected to limitation of use. The bulk of that land subject to limitation is actually owned by the neighbours of the 38 owners of the 40m X 40m plots.

(v) The affected land owners did not at any time express, informed or voluntary consent to have any part of their land charged by the proponents and owners of the wind project.

(vi) The affected land owner did not at any time give express, informed or voluntary consent to give to the 2nd and 3rd respondents the first option to purchase or lease their land.

(vii) The affected land owners were not at any time informed or notified that the 40m X 40m plots would cater for all the needs and exigencies of the wind project as it has subsequently become apparent.

6. It is pleaded in the petition that the Kinangop wind farm is situated in agricultural land and that to date, the 1st – 3rd respondents have not obtained a change of user to industrial use. It is stated that the 1st -3rd respondents purport that a change of user is only necessary for the 38 plots of 40m X 40m.

7. The petitioners have averred that under Article 42 of the Constitution, they are entitled to a clean and healthy environment. They contend that the wind farm project will violate their rights as follows :-

(i) The dignified life in a clean and healthy environment will cease to be possible upon the conversion of the petitioners' agragrian habitat into a wind farm for industrial generation of electricity.

(ii) By its very nature a wind farm is an industrial location/site for the generation of electricity… and that under Article 42 of the Constitution, the respondents are prohibited from compelling them to reside in and eke out their agrarian living in an industrial site.

(iii) At the very minimum the petitioners aver that the Government of Kenya, its agencies and officials are enjoined under Article 42 of the Constitution, to operate within human habitat under residential or agrarian use. In the premises, unless and until the 1st -3rd respondents have acquired by purchase or lease of the 16KM square land for the wind farm, the proposed wind project cannot operate in conformity with Article 42 of the Constitution.

(iv) Given the size of the wind turbines that the 1st – 3rd respondents seek to install for their wind project the petitioners aver that there must be a minimum distance of 1000m of wind turbines from residential premises, let alone the distance of 750m stipulated in the leases for the 38 plots of 40m X 40m.

8. It is the view of the petitioners that the wind park has also violated their right to property in the following way :-

(i) The conversion of the 16 km sq Kinangop Wind Farm into an industrial site will degrade and devalue the Petitioner's properties and quality of life.

(ii) The implementation and operation of the wind project will occasion imminent displacement of the residents within the wind farm and the adjacent areas.

(iii) The implementation and operation of the wind project before the 1st -3rd respondents have acquired the actual area for their industrial needs is a scheme to force the residents to sell to them land on the cheap.

(iv) Whereas the wind project will actually affect thousands of land owners the 1st -3rd respondents have not compensated them or even acknowledged the adverse impact on them.

(v) The 1st -3rd respondents have fraudulently caused some of the land owners to sign leases that effectively set the stage for them to easily acquire these parcels by taking away the rights of the land owners to deal with their properties.

(vi) The 3rd respondent has fraudulently charged the properties of some land owners without their voluntarily obtained consent and approval.

9. In the petition, the petitioners have asked for the following orders :-

(a) That a declaration be issued to declare that the Kinangop Wind Park Project is illegal for being in violation of the rights of the Petitioners and other residents of the Kinangop Wind Farm.

(b) That a declaration be issued to declare that the 1st and 2nd respondents have illegally acquired EIA licences for the Kinangop Wind Park.

(c) That an order of certiorari be issued to bring into this Honourable Court and quash the decision of NEMA in the letter dated 9 March 2011, approving the 60MW Kinangop Wind Park Project.

(d) That a declaration be issued to declare that pursuant to Articles 28 and 42 of the Constitution, the minimum distance between the wind turbine generator and residential premises applicable to Kinangop Wind Park Project is 1000 metres.

(e) That an order of permanent injunction be issued to restrain the 1st – 3rd respondents to stop the implementation and operations of the Kinangop Wind Park Project until they have acquired land for the wind farm that ensures a minimum distance requirement of 1000 metres from the wind turbine generators to residential premises within Kinangop Wind Farm and adjacent areas.

(f) That a declaration be issued to declare that the EMCA, 1999, is inconsistent with Articles 28 and 42 of the Constitution to the exent that it does not provide for the minimum distance requirement applicable to wind farm projects for generation of electricity.

(g) That an order of mandamus be issued to compel the Government of Kenya to provide for the minimum distance requirement applicable to Wind Farm Projects pursuant to its obligations under Articles 21, 42, 43, and 70 of the Constitution.

(h) That an order of prohibition be issued to prohibit the implementation and operation of the Kinangop Wind Park Project until the Government of Kenya has provided for the minimum distance requirement applicable to Wind Farm Projects pursuant to its obligations under Articles 24, 42, 43, and 70 of the Constitution.

(i) That a declaration be issued to declare that the 1st -8th respondents have violated the rights of the Petitioners to protection of the law and freedom from discrimination protected by Article 27 of the Constitution.

(j) That a declaration be issued to declare that the conversion of the Petitioners' habitat on Kinangop Plateau into a wind farm by the 1st – 3rd respondents amounts to violation of their rights to human dignity enshrined in Article 28 of the Constitution.

(k) That a declaration be issued to declare that the implementation and operation of the Kinangop Wind Park Project threatens to violate and will amount to a violation of the rights of the petitioners and other residents of the Kinangop Wind Farm to protection of property enshrined in Article 40 of the Constitution.

(l) That a declaration be issued to declare that NEMA has granted EIA licences to the 1st and 2nd respondents in violation of Article 42 of the Constitution, read with Part VI of EMCA, 1999.

(m) That a declaration be issued to declare that the 5th -8th respondents have violated the Petitioner's rights to fair administrative action enshrined in Article 47 of the Constitution in connection with their decisions, actions and omissions in relation to the Kinangop Wind Park Project.

(n) That a declaration be issued to declare that the National Land Commission- the 4th respondent- has violated Article 67(2) (4) of the Constitution in relation to the implementation of the Kinangop Wind Park Project.

(o) That a declaration be issued to declare that the Lease dated 17 May 2013 between Mahugu Gatebe Njuguna, the 9th petitioner herein, and Kinangop Wind Park Leases Ltd, the 3d respondent, is null and void for being in violation of the 9th petitioner's rights under Articles 40, 42, and 47 of the Constitution.

(p) That an order of certiorari be issued to bring into this Honourable Court and quash the lease dated 17 May 2013, between Mahugu Gatebe Njuguna and Kinangop Wind Park Leases Ltd.

(q) That an order of permanent injunction be issued to prohibit the Police and Administration officials from entering the premises of the Petitioners on any matter relating to the Kinangop Wind Park Project.

(r) That a declaration be issued to declare that the acts, omissions and involvement of the Government of Kenya and its officials in the implementation of the Kinangop Wind Park Project are unlawful and violate the rights and fundamental freedoms of the Petitioners and other residents and land owners of Kinangop Plateau protected by Articles 28, 31, 40 and 47 of the Constitution.

(s) That an order of Certiorari be issued to bring into this Honourable Court and quash the decision of the Deputy County Commissioner Nyandarua County contained in a letter dated 20 March 2015.

(t) That an order for compensation of the Petitioners for violation of their rights and freedoms under Articles 27, 28, 31, 40, 42 and 47 of the Constitution.

(u) That the costs of this Petition be borne by the respondents in any event.

10. The petition is supported by the affidavit of Mr. Moffat Kamau, the first petitioner. He is the registered proprietor of the land parcel Nyandarua/Kinangop/935 situated within the Kinangop Wind Farm. The land is approximately 100 metres from Wind Turbine Generator NO. 7 and 8 of the Kinangop Wind Farm Project. He has averred that his co-petitioners are residents and registered or equitable owners of various land parcels within the Kinangop Wind Farm. He has stated that besides himself and his co-petitioners, the wind project will affect thousands of other residents and land owners, amongst whom, 319 land owners have objected to the wind project. He has annexed a schedule of names of these persons. He has averred that he and his co-petitioners have instituted the petition pursuant to Articles 22, 70 and 258 of the Constitution in order to secure their own rights and those of the affected community. He has then more or less repeated the averments in the petition on how the wind project commenced, how the EIA licences were obtained, how the project was upscaled, and how NEMA gave approval. He has stated that the 1st – 3rd respondents were enjoined to acquire through lease or purchase the entire 16km sq wind farm before they could lawfully implement the project. He has deposed that since inception, the project has always been controversial and as early as March 2005, their then advocates wrote a letter raising concerns on the environmental impact of the wind project on their habitat.

11. He has deposed that in 2004-2005, Ecogen held several meetings in their townships during which people were informed about the proposed wind project and its socio-economic benefits to the people. He has stated that virtually all the people had no knowledge or information about electricity generation using wind turbines and what would be the possible impact of a wind farm. He is of the view that the 2005 EIA licence could not have been issued on the basis of informed consent and involvement of the local community. Moreover, he has averred that there was no consensus among the local community about the benefits of the wind project vis-à-vis its drawbacks.

12. He has averred that in view of this, in the year 2010, Aeolus had to carry out additional community sensitization and stakeholder consultations so as to overcome resistance to the project by an overwhelming majority of the people. As part of these consultations, he has stated that three meetings, each barely lasting two hours, were held in November 2010, at Heni Social Hall, Mwendandu Shopping Centre and Magumu Shopping Centre. He has deposed that during these meetings there was fierce opposition to the project because of the proponents' narrow definition of stakeholders as the land owners whose land the wind turbine generators would be erected. He believes that to date, the respondents have

never genuinely and objectively addressed their concerns as to how the project would impact on the people living within and adjacent to the wind farm and the minimum distance between wind turbines and residential premises. He has deposed that whereas the project proponents stated during the EIA process that adequate steps would be taken to ensure that residential premises would be a safe distance from the wind turbines, to date they have not stated what that safe distance is and how many people would be affected as a result thereof.

13. He has deposed that he is aware that the Wind Turbines Bill, 2012, of the United States of America, proposes the following at Section 4 (4) :-

4. If the height of the wind turbine generator is –

> *(a) greater than 25 metres, but does not exceed 50 metres, the minimum distance requirement is 500 metres;*
>
> *(b) greater than 50 metres, but does not exceed 100 metres, the minimum distance requirement is 1,000 metres;*
>
> *(c) greater than 100 metres , but does not exceed 150 metres, the minimum distance requirement is 1,500 metres;*
>
> *(d) greater than 150 metres, the minimum distance requirement is 2,000 metres.*

14. He has stated that from the information availed, the wind farm will have 38 turbines of 1.6MW capacity, standing 80 metres and having a rotor diameter of 82.5 metres. He has pointed out that EMCA, does not set out the minimum distance between the wind turbine generator and residential premises. He has averred that given that the Kinangop Wind Park Project is reportedly the first in a series of projects under the Power Africa Initiative spearheaded by the US President, Barrack Obama, the petitioners believe that at the very minimum the project should observe the minimum distance requirement under the US, Wind Turbines Bill, 2012, and therefore the minimum applicable distance should be 1000 metres. He has stated that if a minimum distance of 750 metres and above is applied, then there should be no residential premises within the entire 16 Km Sq Kinangop Wind Farm and that by dint of Article 42 of the Constitution, the wind farm cannot be implemented in conformity with the Kenyan supreme law.

15. He has deposed that one of the leases, that signed by the 9th petitioner, contains the following terms :-

> *9.7 Interference with Permitted User – Not to do or permit to be done any act which may or may have the effect of reducing or interfering with the ability or capability of the wind farm to generate electricity and in particular and without limitation :*
>
> *9.7.1 Not to grant any lease or other rights over any other part of the land in favour of any third party for purposes similar to the Permitted User;*
>
> *9.7.2 Not to construct or permit to be constructed any airstrip or aerodrome on any part of the land other than those in existence as at the date hereof;*
>
> *9.7.3 Not to erect or cause or permit to be erected any building, improvement or other permanent structure of more than six metres in height (6m) within Seven Hundred and Fifty Metres (750m) of the premises;*
>
> *9.7.4 Not to grow cultivate or permit to be grown or cultivated any trees, shrubs or bushes or more than six metres (6m) in height within Seven Hundred and Fifty Metres (750m).*

16. Concerning the above terms, he has averred that the direct consequence of erecting 38 turbines whilst observing the distance requirement of 750m is that the entire 16 Km sq of the Kinangop Wind Farm cannot safely contain residential premises. He has deposed that the 1st-3rd respondents are currently

undertaking a misinformation campaign that only residential premises within 130 metres from the wind turbines would be adversely affected. He has averred that besides the plots where the wind turbines will be erected, many other land parcels will be affected but those persons are yet to be deemed as stakeholders or affected persons.

17. He has deposed that in view thereof, the EIA licences issued to Ecogen by NEMA in August 2005 and the subsequent variations in November 2009 and May 2010, cannot be valid. He has asked that the said EIA licences be quashed.

18. It is his view that various officials of the Government of Kenya are involved in a massive scheme to intimidate and coerce the affected persons to accede to the implementation of the project despite its adverse impacts. He has averred that the Ministry of Energy & Petroleum has coordinated a political campaign resulting in the political leaders abandoning their people. It is averred that Kshs. 1,000,000/= was released to one Honourable K.K Kinyanjui the Member of Parliament of Kinangop to facilitate a stakeholder sensitization. A sensitization meeting was purportedly held on 26 October 2014 at Hon. Kinyanjui's Olive Resort in Naivasha but the meeting was only attended by a few of the affected persons generally perceived to be supporters of the project but the majority were not residents of Kinangop Wind Farm. He has averred that there have been expressions of support and opposition to the project. It is averred that on 23 February 2015 over 1,500 affected people staged a protest march and demonstrations along the Nairobi-Nakuru Highway. Five of the protestors were arrested and locked up at Magumu Police Station. It is also averred that on 24 February 2015, over 200 police officers were deployed to give security to the investors and guard the surveyors and valuers. It is said that the officials of the investors and the police were hostile towards the representatives of the affected persons. It is said that they were tear-gassed and live bullets shot at them; one person was fatally wounded, four seriously injured and around twenty sustained minor injuries. A report was made to the Independent Medical Legal Unit and the Human Rights Commission.

19. He has continued to depose that the Government has been brazenly and unapologetically partisan towards the project. He has said that he has even petitioned the President to intervene.

20. He has deposed that he believes that there is a scheme to implement the project in the knowledge that soon after the wind farm starts generating electricity the residents will have no choice but to sell their parcels of land on the cheap. This it is said, will deprive them of their parcels of land and their chosen homes.

21. He has averred that the 9th petitioner on 18 March 2015, was visited by the County Commissioner of Nyandarua, together with the area Chief, Assistant Chief, District Officer, the CEO of the 1st respondent, a village elder and 10 police officers to intimidate him and his family to accede to the project. It is said that the sons of the 9th petitioner fled so as to avoid being coerced and intimidated.

22. Kinangop Windpark Limited, and Kinangop Windpark Leases Limited, the 2nd and 3rd respondents, responded to the petition through the replying affidavit of James Wakaba. He is the Chief Executive Officer of the two named companies. He has filed a lengthy replying affidavit of 88 paragraphs. Inter alia, he has stated that Kinangop Wind Park Ltd (KWP) is a Special Purpose Vehicle established to construct and operate a wind farm in the Kinangop region. The equity investors are entities registered in South Africa, Mauritius and Norway, while debt is provided by Standard Bank South Africa. The value of the project is Kshs. 13 Billion. The project represents one of the first Independent Power Producer projects of Kenya's Vision 2030 spearheaded by the Government of Kenya. He has explained that the wind park harnesses energy from wind, known as "green energy" because production of such energy does not pollute the surrounding environment. To produce this green energy, KWPL will be using 38 modern wind turbines. These are rotated by wind which turns rotors that cause the wind turbine generator to produce electricity. He has averred that the electricity produced will be sold to Kenya Power and fed to the national grid for the greater benefit of the Kenyan economy. To kick start the project, KWPL did negotiate with various land owners in Kinangop area to lease to the company small portions of land measuring 40m X 40m for installing the wind turbines. Two of the turbines will be on land owned by KWPL and for which KWPL has title to. KWPL holds 36 valid leases of these plots of 40m X 40m

obtained voluntarily from individual farmers directly affected by the project where the other 36 turbines will be situated. All farmers who have leased their plots have been compensated for the next 5 years and will continue being compensated for use of their land for the whole life of the project. He has averred that the 9th petitioner, Mahugu Gatebe Njuguna, has a valid lease for which he has already been paid rent for 5 years with regard to the portion measuring 40m X 40m. It is said that he has not entered into any legal process to have the lease cancelled. He has stated that many of the residents of Kinangop are not opposed to the project and many do support it. He has averred that the project will actually affect the petitioners positively by the growth that will come as a result of the green energy project. He has averred that the petitioners have not demonstrated how their rights are being violated.

23. He has stated that all legal and regulatory processes have been met and KWP have obtained the relevant approvals and licences including the following:-

(a) An EIA Licence – The first licence was issued in August 2005 and the licence has been amended from time to time to take into account amendments in size, scope and ownership of the project. (The said licences were annexed)

(b) Electric Power Generation Licence.

(c) Clearance from the National Museums of Kenya.

(d) Building permits from the County Governments of Nakuru and Nyandarua.

24. He has averred that it is incorrect for the petitioners to state that all land within the 16 km sq strip must be acquired. He has stated that they only need to secure land on which to construct the turbines and the turbine generators, which are 38 in number, and this has been done through lease agreement with the private owners themselves.

25. He has stated that due diligence was carried out in line with internationally accepted practices for project finance. An EIA was carried out and stakeholder consultations held including a workshop held on 16 December 2004. He has annexed a report of the said stakeholder consultations and an update carried out in 2008. He has averred that it is erroneous to state that there was no informed consent and involvement of the local community as their concerns were taken into account. He has deposed that in the year 2010, there was further sensitization of the local community by Aeolus Limited, not because of any resistance, but owing to the fact that the investors wanted to be more accountable and afford more people opportunity to ask all questions that would matter to the residents and have satisfactory answers. During this second round of sensitization and consultation, three big meetings were held in Heni, Mwendaandu and Magumu on 2 November 2010, 12 November 2010, and 19 November 2010 respectively. These meetings were attended by 165, 138 and 82 participants respectively. A Community Liaison Office has been set up in Magumu area to address any concerns that the residents may have and a grievance mechanism has been put in place.

26. He has stated that every resident of Kinangop area is a stakeholder but not every stakeholder will derive a direct benefit in terms of rental payments for the leased land or payment for easement. This is restricted to the owners of land where the turbines will be situated.

27. On the issue of safe distance, what they term as the set back area, he has deposed that this is determined by the Environmental Management Coordination (Noise and Excessive Vibration Control) Regulations, 2008. He has deposed that it has been determined through scientific studies and confirmed by NEMA that the set back distance is 130m from the centre of the turbine. Within this distance, there should be no permanent residence as the noise level may disturb sleep. All matters to do with safety are included within this set back distance. Other activities such as farming, grazing and business can go on as usual. Because of this set back distance, the affected land owners will be compensated for not living within this distance. There will be agreements to be signed and these are ready. On the USA Bill provided by the petitioners, he has deposed that there is no evidence that such has become law or that such law is applicable in Kenya or that it supercedes a NEMA licence. He has averred that the petitioners' belief on

the set back distance of 1,000 metres is without any basis at all and is a way of armtwisting the 2nd and 3rd respondents to compensate them since they have land within the 1000 metre set back which is beyond the set 130 metres. He has stated that if we follow the argument of the petitioners that there should be no residence within the 16 sq km, then it is unlikely that any wind park project will ever be set up in Kenya. He has deposed that there are many instances of wind turbines being built much closer to dwellings including in Ethiopia where a trip was organized and which the 10th petitioner attended.

28. On the lease of the 9th respondent which has a set back distance of 750 metres, he has explained that this was an error on the part of the advocate who drafted the leases and it has been agreed that this will be varied to 130 metres. He has deposed that all land owners falling within the set back distance of 130 metres will be fully compensated and those who will need to move residences will be compensated based on a model used by the Kenya Electricity Transmission Company (KETRACO). He has deposed that the KETRACO model pays 15% for wayleave but their plan is to pay 30%.

29. He has denied that they have used the Administration or the Ministry of Energy and Petroleum or any other person to harass or intimidate the people of Kinangop. He has averred that all information regarding the project is accessible and is even in the clean development mechanism website of the UN.

30. He has averred that the petitioners have been on a smear campaign and create tension in the area for no reason at all. He has stated that if the petitioners are of the view that the EIA should not be believed, they should satisfy the court with facts on how the setting of wind turbines will affect their land, their lifestyles, property, health and their way of life. He has deposed that if any person affected within the set back distance does not agree to the compensation offered, then these turbines will be moved away.

31. He has further averred that only the turbines within the set back distance should be the subject of concern of the petitioners and not the whole project. He is of the view that if the petitioners have a concern over the EIA then they should proceed to the National Environmental Tribunal.

32. He has deposed that they have always listened to the petitioners and other residents whenever issues arise and a comprehensive negotiation process has been in place since July 2014 of which the 9th petitioner is one of the negotiating team. He has averred that the petitioners and other persons have caused them delays and losses and has forced the project into a force majeure situation. They have threatened to burn the offices of the 2nd and 3rd respondent, destroyed wind mast data collection equipment and forced the contractor to abandon work. As a result, the project is on the verge of collapse with grave consequences to Kenya's Vision 2030. It is deposed that one of the farmer's houses who is in support of the project has been burnt down and that for unknown reasons, the petitioners have politicized the project. He has stated that the Ministry of Energy and Petroleum was at some point engaged as arbiter and some amicable agreements were reached.

33. He has deposed that during a demonstration along the Nakuru-Nairobi Highway, the demonstrators invaded one of the homes of a supporter of the project by name of James Kahama, and they burnt down his house and threatened others perceived to be supporting the project.

34. He is of the view that none of the rights of the applicants have been violated and if they would listen with open minds, they will arrive at the same conclusion and join hands with the investor. He has given an example of Ethiopia where there are wind parks within residential areas with set back distances of 180m and where people, crops and animals can happily co-exist. He has deposed that they have taken some of the residents to the Ethiopia Wind Farm and to the Ngong Wind Farm in their bid to educate them. But the tours dissatisfied the petitioners because they were not in the list of those who attended or they failed to appreciate the facts. He has denied any threat of expropriation of the land of the petitioners.

35. With regard to the 9th petitioner, he has deposed that he is aware that he and his son, the 8th petitioner, have had issued regarding the subdivision of their land and after subdivision, the turbine fell on the plot allocated to the 9th petitioner's daughter and this has caused friction among family members who feel that she stands to benefit from the project. With a view to settle the issue amicably, the Deputy County

Commissioner requested the family members to attend his office vide the letter dated 20 March 2015.

36. On the issue of planning, he has averred that this has been done pursuant to County Planning laws, and the small plots where the turbines are to be situated have authorization to be used as light industry plots, and the remainder of the land to remain agricultural. He has annexed various approvals of this.

37. On the leases, he has deposed that these are contracts between the registered owner and the tenant. He has stated that the petitioners could not have appeared to execute leases, as they have none, save for Mahugu Gatebe who it is said appeared before counsel and executed the lease of his own free will. He has been paid Kshs. 500,000/= being lease for 5 years. He has explained that the lease is charged on the small plots of 40m X 40m and not the whole land. He has stated that there is agreement that these small 40 X 40m areas will be carved out and new numbering given so that the larger title is not encumbered.

38. He has stated that the Government stands to suffer financially as it is required to compensate the project for the adverse financial impact of civil commotion in accordance with the Government Letter of Support. He has stated that jobs and other opportunities stand to be lost. So too other benefits to the community such as upgrading of roads and a corporate social responsibility program in the sum of Kshs. 270,000,000/=.

39. The 5th respondent, NEMA, filed a replying affidavit sworn by Zephania Ouma the Acting Director for Compliance and Enforcement. He has averred inter alia that on 24 January 2005, Ecogen Wind Farms Ltd, submitted an Environmental Impact Assessment Study Report to NEMA. Through a letter dated 25 January 2005, the Study Report was submitted to lead agencies. The Ministry of Energy gave its comments through a letter dated 3 February 2005. NEMA also received comments from the District Environment Office, Nyahururu vide a letter dated 14 February 2005. Further comments were received from Kahangi Farmers Group through a letter dated 22 February 2005. The notice of the study was publicized in the Kenya Gazette and the newspapers for the public to submit their comments. The project was then approved after consideration of all comments received and the conditions of approval were indicated to the proponent through a letter dated 18 July 2005. The proponent indicated its acceptance of the conditions of approval. Ecogen was thereafter issued with an EIA Licence on 31 August 2005. Through a letter dated 14 November 2007, Ecogen requested NEMA to extend the EIA Licence for a further 2 years. Extension was granted on 20 November 2007. In March 2009, Aeolus Kenya Limited, the 1st respondent, proposed to vary the project from 30MW to 50MW and further lodged a notification of transfer of the licencee. It also submitted an addendum to the EIA Project report to cater for the variations proposed to be made. The addendum project report for 50MW was circulated to the lead agencies for their sectoral comments. Comments were received from Kenya Wildlife Service, Energy Regulatory Commission and Kenya Power and Lighting Company Limited. After considering the views of the stakeholders, a Certificate of Variation of EIA Licence was issued to Kinangop Wind Park Limited on 16 November 2009. On 15 April 2010, Kinangop Wind Park Limited applied for a further variation upgrading electricity generation from 50MW to 60MW. A certificate of variation was issued on 12 May 2010. On 2 November 2011, Kinangop Wind Park Limited applied for extension of the licence for a further period of 24 months. NEMA required a site verification exercise which was conducted on 26 January 2012. A certificate of variation of EIA licence extending the licence for 24 months was issued on 4 May 2012.

40. Mr. Ouma has averred that pursuant to the foregoing, NEMA undertook all necessary due diligence and complied with all legal requirements before issuance of the licence. He has deposed that the petitioners never submitted their comments despite the advertisement of the project and cannot now blame NEMA for issuing the licence.

41. On behalf of the 6th, 9th and 10th respondents, an affidavit sworn by Engineer Joseph Njoroge, the Principal Secretary in the Ministry of Energy and Petroleum was filed. He deposed inter alia that Kenya, being a developing country is desirous and has accelerated the process of fully achieving a middle income status by the year 2030. As part of this strategy, the Government has planned to increase electricity power generation from the current 1664MW by an additional 5000MW. Kenya is also a State Party to the UN Convention on Climate Change under which the Kyoto Protocol was formulated. Under Kyoto, a Clean

Development Mechanism (CDM) is envisaged to enable reduction of emissions that have adverse effects on the climate. The Government thus encourages the development of power projects that do not affect the environment adversely and it is against this background that the Kinangop wind power project and the geothermal projects in Ol Karia have been supported. It is deposed that the various EIAs have been conducted in relation to this project and that the petitioners were consulted and sensitized. The Government gave a letter of support dated 26 July 2013 to Kinangop Wind Park Limited in favour of the project. Frustration of the project by political events would lead to loss on the part of the Government in terms of payouts to the power company since the Government would be liable to pay certain sums of money as a consequence. He has averred that the petitioners have not proved in any way that there would be adverse effects arising from the project and that in fact they stand to benefit immensely. He has stated that all mitigation and rehabilitative measures have been undertaken including close monitoring on site. He has deposed that the petitioners have not tendered any evidence, legal authority or scientific proof that the wind turbines have to be at least 1000 metres away from dwelling houses. He has averred that if any farmer has an issue with his lease, that is the realm of private law. He has deposed that there will be no relocation of persons. On administrative interference he has deposed that the Deputy County Commissioner wrote the letter dated 20 March 2015 merely to invite the complainant Geoffrey Njuguna Mahugu and his family for purposes of administratively receiving his complaint and discuss the way forward. He has denied any attempts to intimidate or coerce the petitioners. He has deposed that the Ministry of Energy has taken upon itself to try and resolve conflicts and that the issues were amicably resolved following such facilitation.

42. Twenty three Interested Parties applied to be enjoined to these proceedings and their application was allowed. They did file a replying affidavit sworn by Laban Muremi Njuguna. He and the other interested parties and others have are the ones who have leased out their parcels of land for the project. They have leased out portions of 1600 sq meters or 0.0395 acres out of their parcels of land. They were paid Kshs. 500,000/= as down payment. It is deposed that they have obtained consents of the Land Control Board to subdivide their land. Before accepting the project, they underwent public participation, training and sensitization programs, organized by the Ministry of Energy and Petroleum, NEMA and the experts from Kinangop Wind Park Limited where the wind project was demystified. As part of the awareness program 22 of them were taken to Ethiopia to see similar turbines. Mr. Njuguna has deposed that he has witnessed discontent among residents driven by competition as to where the turbines will be located due to the expected compensation. He has deposed that the original leases were renegotiated, part of which was to amend the set back distance from 750m to 130m, and payment of rent to be done upfront for the 25 years that the leases are for. Under the current arrangement, all the land parcels belonging to the 1st – 10th petitioners are not affected with the exception of the 7th and 9th petitioners. The Interested Parties have also attacked the list of those claimed to be in support of the petition. They have averred that some of the persons in the list had died way before this suit was commenced and that some persons in the list have denounced it. It is their belief that the petitioners are driven by malice, gossip and jealousy.

43. The 8th respondent, the County Government of Nyandarua, filed Grounds of Opposition to oppose the petition. Inter alia it is averred that the Wind Turbine Bill, 2012 cited by the petitioners does not form part of the laws of Kenya. It is also denied that the 8th respondent has intimidated or coerced its constituents as alleged by the petitioners.

44. I did not see any responses filed by the 1st, 4th , and 7th respondents.

PART B : SUBMISSIONS OF COUNSEL

45. Mr. Kibe Mungai, counsel for the petitioners, to buttress his written submissions (which I have read), submitted inter alia that when the project was first conceived by Ecogen in the year 2005, it was implemented as a 15MW project in a parcel of land measuring 50 acres of land owned by one Ruth Nduta Mburu. This land is in Karati. When the 1st and 2nd respondents came into the scene, they wanted an upgraded version for 50MW in an area of 11 km sq. He submitted that the area was now different. Later the area was expanded to 16 km sq which is the site in issue. He submitted that electricity cannot be generated here without buying or leasing the land as it is a residential and not an industrial area. He

submitted that the first EIA licence could not be transferred as the site location was different. He submitted that an EIA needed to be done for the second site since it was a new site. He relied on Sections 58 and 59 of EMCA and the EIA Regulations of 2003. He submitted that no new EIA for this 16 km sq site was done and any licence is therefore null and void. He submitted that the people in this new site needed to be consulted but that they were not consulted. He submitted that consultation was only done prior to the EIA of 2005 but new consultation needed to be done for the site of 16 km sq. He submitted that the public were not invited to make comments. He submitted that electricity generation is a hazardous undertaking and a set back distance is important. He submitted that the minimum distance should be 500m to guard against blade throw. He submitted that the initial set back distance was 750m which could be satisfied in the land owned by Ruth, which was of 150 acres, but this cannot now be satisfied in the smaller parcels where the turbines are to be situated. He submitted that there is also risk of noise and danger from the pipes. He wanted a set back of 1km enforced. He submitted that EMCA has no provision for wind farm activities and NEMA has never done its own independent EIA. He submitted that NEMA has abdicated its duties. He submitted that the petitioners have suffered extreme coercion and physical violence and the project cannot be rammed down their throats. He submitted that it is their right to refuse the wind farm. He stated that one cannot live in a wind farm and they should not be forced to live in an industrial site. He wondered why the proponents do not just pay and buy out the farms.

46. On the legality of the EIA licences, Mr. Kibe noted in his written submissions that Rule 17 of the EIA Regulations were not met in that :-

(i) Ecogen did not publicize the anticipated effects and benefits of the project as required by the regulations.

(ii) Ecogen did not place posters in strategic public places in the vicinity of the proposed project site informing the affected parties and communities of the proposed project.

(iii) Ecogen did not hold at least three public meetings with the affected parties and communities to explain the project and its effects and to receive their oral and written comments.

(iv) Ecogen's consultants did not receive and therefore transmitted no oral and written comments to NEMA from the affected parties and communities.

(v) As a matter of fact during the sole meeting convened by Ecogen on 16 December 2004, there was no attendance by affected parties and communities except the lady land owner and a local watchman/farmer.

47. Mr. Kibe further submitted that the EIA licence for 30MW was fraudulently obtained as Ecogen only sought for a licence to develop a 15MW facility. He also submitted that the decision of NEMA to vary the project from 30MW to 50MW was illegal. He submitted that NEMA was enjoined to hold public hearings which it did not. He submitted that under Articles 1, 10, 27 , 47 and 57 , of the Constitution , and Sections 58-62 of EMCA, public consultation was necessary. He submitted that EMCA has no effective mechanism for realisation of Article 69(1)(f) of the Constitution and is therefore unconstitutional to the extent that it does not provide for an effective mechanism to realize the petitioners' rights under Articles 28 and 42 of the Constitution concerning the wind park project. He submitted that unless the Government prescribes minimum distance requirements for wind farm projects the said projects cannot be viable within neighbourhoods of high density. He asked for an order of prohibition to prohibit implementation of the Kinangop Wind Park project until the Government provides for the minimum distance requirement.

48. Mr. Kibe also relied on various authorities which I have read and considered together with some material on wind farms and set back distances.

49. Mr. Njonjo, on the part of the 1st, 2nd and 3rd respondents, submitted inter alia that the petition is hinged on the erroneous belief that the wind park will affect the environment around the petitioners and that it will hurt their way of life, health and economic activities. He submitted that the investor does not need the use of the whole area and the argument that the investor is required to acquire the whole of the

land is erroneous. He submitted that this is a Green Energy project which has minimal or no impact at all on the environment.

50. On the allegation that the EIA licences were not properly acquired, Mr. Njonjo submitted that the EIA was wholly undertaken according to law; that there were meetings and consultations. He submitted that the EIA was professionally done and the petitioners have not submitted any report to contradict the same. He submitted that the EIA was advertised. On the variations of the licences, he submitted that these were done in line with the law and the scaling up of the project has not affected the petitioners. He wondered if the petitioners would be better off with a 30MW project. On the minimal set back distance, he submitted that this is done on the basis of noise levels and is not plucked from the air and studies have shown a set distance of 130m is adequate.

51. Ms. Kithinji for the 5th respondent made both written and oral submissions. She submitted inter alia that the provisions relating to the EIA as provided in Sections 58, 59, 60, and 63 of EMCA were followed to the letter. She submitted that the petitioners have not tabulated how their right to a clean and healthy environment has been breached by the licencing of the project. She submitted that there is no Kenyan law which requires a set back distance of 1km. She was of the view that there has not been any violation of Articles 28, 40, 42 and 47 of the Constitution or of the provisions of EMCA. On the variation of the EIA licences, she submitted that these were done in accordance with the EIA Regulations in EMCA. She submitted that there has never been any objection received to the project and no one has ever filed anything to oppose the project. She refuted the insinuation that the project was to be done in one individual's land. On the variations of the licences, she submitted that the same were only for transfer and for upscale and an addendum to the EIA was done and submitted. She submitted that since the year 2005, there has been continuous stakeholder engagement. On the argument that EMCA is not aligned to the Constitution, she submitted that EMCA underwent a review in the year 2015 to align it to the Constitution.

52. She submitted that this Court has no jurisdiction to quash an EIA licence and submitted that this falls under the jurisdiction of the National Environment Tribunal. She submitted that the jurisdiction of this court is only appellate on the decision of the Tribunal.

53. Mr. Njoroge, State Counsel , for the 6th , 9th and 10th respondents, submitted inter alia that there is no case as against the 6th , 9th and 10th respondents. He submitted that the petition has failed to describe the manner of infringement of the petitioners' rights by the 6th , 9th and 10th respondents. He submitted that the only allegation is that the said respondents aided in the violation of the petitioners' rights but that no evidentiary material of such has been tabled. He submitted that there has been no demonstration of the violation of the right to a clean and healthy environment which in his view could only be shown through an EIA report submitted by the petitioners. He wondered on what scientific reasoning the petitioners claim the set back distance and cannot rely on an American legislation. He further submitted that there was no proof of any violation of the right to property; that there is no evidence of displacement and no valuation report indicating that the adjacent sites will decrease in value. He argued that on the contrary, the project will bring economic benefits and the economic portfolio of the area will rise. On public participation, he submitted that there were various meetings, public barazas and fact finding missions.

54. For the 7th respondent, counsel associated himself with the submissions of the other co-respondents.

55. For the 8th respondent, Mr. P.K. Kamau submitted inter alia that the petition does not disclose any cause of action against the 8th respondent and should be dismissed. He submitted that the County Commissioner is not an agent of the County Government.

56. On the part of the interested parties, Mr. Gichukie Ribathi, submitted inter alia that the interested parties, being the registered owners of the land parcels in issue should be allowed to enjoy their rights as provided for in the Land Registration Act, 2012 and the Constitution of Kenya. He submitted that the project is founded on private agreements. He submitted that other than the 9th petitioner, none of the other petitioners have shown any evidence of proximity to and within the project. He submitted that one cannot

tell which distance each of them is from the turbines despite the spirited argument that the set back distance should be 1km. He submitted that if the 9th petitioner was not happy with the lease, the same has an exit clause which he can exercise. He submitted that the provisions of EMCA were complied with. 57. In his reply, Mr. Kibe submitted that the variation could not have been properly done as the site was different. He further submitted that the licence fees paid was for a 15MW project and nothing extra was paid for an upgrade to 50MW. He submitted that there has been a wrong and that damages of Kshs. 1 million should be awarded to each petitioner.

58. After the submissions of counsel, I thought it fit to visit an existing wind farm and the site in issue. We did visit the Ngong Wind Park situated in Ngong Forest. The said wind park is managed by Kengen and I must say that I did learn a lot from the said visit. My experience therein has gone a long way in enabling me appreciate the issues at hand. My sincere gratitude to Mr. Joshua Were, Engineer Samuel Mwaluma and Engineer Naomi Ngeno, of Kengen, for allowing us into the facility and for the accommodation and useful information that they gave to this court. A site visit to the Kinangop Wind Farm could not however materialize in time and I opted to proceed to write this judgment without the benefit of a visit to the said site.

PART C : ANALYSIS AND DECISION

59. There are some objections raised to the veracity of this petition that I would first wish to address. It has been stated that this court has no jurisdiction to entertain this suit for if the petitioners were not happy with the EIA licences issued, they ought to have filed suit before the National Environmental Tribunal (NET). That argument is fatally flawed and is made without comprehension of the nature of the suit and the forum upon which it is filed. The case before this court is a constitutional petition alleging violations of various rights enshrined in the Constitution, including a violation of the right to a clean and healthy environment provided for in Article 42 of the Constitution, and the right to property provided for in Article 40 of the Constitution. Of course part of the argument that the right to a clean and healthy environment has been violated is anchored on the EIA licences issued. But that does not change the character of the suit, which is a Constitutional petition and the NET does not hear Constitutional petitions. Its mandate is only to hear appeals on NEMA decisions. But even if this was suit based purely on a NEMA decision, it does not mean that this court has no jurisdiction. The jurisdiction of this court as given in Article 162 (2) (b) and Section 13 of the Environment and Land Court Act, 2011, means that the court can hear any matter related to environment and land and this is one such matter. I see no need to say more as such argument was adequately addressed in the case of ***Ken Kasinga vs David Kiplagat & 5 Others, Nakuru ELC, Petition No. 50 of 2013 (unreported)***.

60. There have also been arguments presented that this is not a proper constitutional petition as it does not meet the test in ***Anarita Karimi Njeru vs Republic (1976-80) 1 KLR 1272***. In other words, that it does not adequately set out the nature of right in the Constitution that has been violated and the manner in which it has been violated with precision. I do not see substance in this argument as the petitioners have tabled the Articles of the Constitution that have been violated, including Articles 40 and 42, and the manner in which they have been violated. It could be that the petitioners could as well have filed an ordinary suit, but I do not think that this alone makes this petition incompetent.

61. I hold that this petition is properly before this court and I will proceed to address it.

62. There are of course many issues raised in this petition, but to me, the core issue is whether or not the Kinangop Wind Park as envisaged and as actualized, is in conformity with the law, specifically the Environmental Management and Coordination Act, 1999 (EMCA) and the Constitution. It is the argument of the petitioners that the Wind Park was not implemented in accordance with the law and has violated their constitutional rights to a clean and healthy environment as provided in Article 42 of the Constitution. They have also argued that the Park has violated their rights to own property as provided for in Article 40 of the Constitution among several other alleged violations of the Constitution.

63. Before I go far, I feel that it is necessary to give a history of the Wind Park, which I have got from the material presented.

64. From what I have seen, the idea of a wind park or wind farm, in the Kinangop area was first envisioned by Ecogen Wind Farms Ltd (Ecogen) probably sometimes in the year 2004 or so. They then commissioned an Environmental Impact Assessment (EIA) for the proposed wind farm. As initially envisaged, the wind farm was to cover no more than 2km sq. The plan was to install a 30MW wind farm in two phases. The first phase was to comprise the development of 9 turbines of 1650KW each (about 15 MW). The second phase was to comprise a further 9 turbines. There would be a 11-12km transmission line owned by Kenya Power & Lighting Company Limited (KPLC) to Suswa Sub-Station where electricity would be sold to the national grid. I have gathered this from the EIA report that was prepared on 18 January 2005. It is not very explicit on whose land the site was to be, although there is mention in Paragraph 4.2.6 of the EIA report that the plot owner is Esther Mburu, who it was said has leased her land for 1 year to Ecogen for testing of the wind farm and is willing to lease/renew the contract. This EIA report was circulated to the relevant lead agencies and advertised for persons to forward their comments. The lead agencies did give their comments and there were also comments made by a group of farmers who described themselves as Kahanei Farmers Group. It seems as if the project was well received and there were no objections to it.

65. Subsequently, Ecogen did get an EIA licence from NEMA which was issued on 31 August 2005. The licence was noted to be for a "proposed wind farm in South Kinangop" and the location would be in "Karati, South Kinangop, Nyandarua." No specific land parcel was mentioned in this EIA licence. The licence issued was a Licence No. 0000216 for a duration of 24 months.

66. On 14 November 2007, Ecogen did apply for an extension of the licence for a further 2 years. It was mentioned in the application for extension that the project was behind schedule. This request for an extension was allowed by NEMA on 20 November 2007. The extension was for a further 2 years to expire on 1 September 2009.

67. In January 2008, the project ownership moved from Ecogen (Joint venture with Kengen) to Aeolus Limited, the 1st respondent. The project was to be operated by Kinangop Wind Park Limited, a subsidiary of Aeolus. Aeolus upscaled the project from 30MW to 50MW with no proposed change on the land area of the park site which remained 2 km sq.

68. I have seen an Environmental Project Report for a proposed wind park in South Kinangop, that appears to have been prepared in November 2008. I am not too sure about this Project Report, which is annexed in the affidavit of Mr. Wakaba who swore the affidavit on behalf of the 2nd and 3rd respondents, for it is not signed. A signature is of course mandatory under Regulation 18 of the Environmental (Impact Assessment and Audit) Regulations, 2003 (EIA Regulations) contained in EMCA. Be as it may, the Executive Summary of this Project Report states that the same is being conducted because of the expansion of the project. The EIA Project Report does contain the name of Esther Mburu as the site owner and does state that she has signed a 30 year lease. This is paragraph 4.2.6 of the report. In the project summary sheet, the location of the project is said to be LR No. Nyandarua/Karati/325 . The land area was noted to be 11 km sq of which approximately 1% would be used for the project.

69. In March 2009, a variation of the licence was applied for. The variations as noted in the application for variation, were three fold. The first was on the transmission line (probably the route of it), the second was on change of ownership of the project, and the third was for upscale to 50MW. The environmental changes were that there will be additional turbines which would increase by 10.

70. On 16 November 2009, NEMA did issue a Certificate of Variation of the original EIA licence. The licence did note the upgrade from 30MW to 50MW.

71. In April 2010, another application for variation, to upscale the project from 50MW to 60MW was applied for. This was again accepted by NEMA who issued a Certificate of Variation, varying the project to 60MW on 12 May 2010.

72. I have seen another variation of 8 March 2011, annexed in the affidavit of Mr. Wakaba, where the project was upscaled from 60MW to 61MW although I have not seen the application for it.

73. On 1st November 2011, Kinangop Wind Farm Ltd (KWPL), applied for a variation of the licence for purposes of extension of the original licence. On 21 November 2011, NEMA did write to KWPL vide which they stated that they required a site verification exercise, since the licence was issued in 2005 , and there needed to be an assessment of any emerging changes on the state of the proposed site. A site visit was made by NEMA on 26 January 2012. In the report that emerged, the officers did recommend that the proponent should forward any report of risk awareness meetings and seek approval from the Kenya Civil Aviation Authority (KCAA). There was also proposal to do research with Kenya Wildlife Service (KWS) as the site is an important bird area. In a letter dated 1 February 2012 addressed to KWPL, NEMA did ask that there be further risk awareness meetings as there were now mixed feelings on the project. KWPL was also required to undertake research with KWS, National Museums of Kenya, Birdlife International, and Nature Kenya, to assess the suitability of the site vis-à-vis the migratory birds flyway.

74. On 26 April 2012, NEMA did issue an extension of the licence for a further 24 months.

75. Prior to the issuance of this extension, a report described as *"Addendum Environmental and Social Impact Assessment for the Kinangop Wind Park Project"* was prepared in November 2011 by Aeolus. This "Addendum" does mention in its introduction, that The Standard Bank of South Africa (probably financiers), did commission an EIA Gap Analysis which was then done by Environmentalistes San Frontiers (ESF). It is mentioned that ESF did identify some gaps between the existing project documentation and the relevant international environmental and social standards. Regretfully, the gap analysis by ESF was never annexed by any of the parties and I do not have the benefit of it. The "Addendum" continues to state that it "*forms a supplement to the existing environmental and social impact study report that was completed in August 2008 and EIA licence issued thereafter by NEMA."* I think this is in reference to the EIA Study Report that I noted was dated November 2008. The only licence issued shortly thereafter by NEMA was a variation in November 2009 up scaling the project from 30MW to 50MW which was before this " Addendum".

76. It is in this "Addendum", that for the first time, it is mentioned that the wind park will be situated in 38 land parcels and the names of the owners of these land parcels given. Subsequently, there were applications for extensions of user of these land parcels to include wind turbines. These were advertised in the Daily Nation Newspaper of 5 September 2011, and it appears that permission was granted. There were also applications for planning permission to erect the turbines which were granted.

77. There appears to have been some consultations with the community for I have seen some minutes of meetings held on 2 November 2010 and 12 November 2010. I have also seen some evidence that the lawyers for the 1st, 2nd and 3rd respondents were engaged on the ground in sensitization exercises. Persons were also taken to visit other wind farms in Ngong and in Ethiopia. On my part I do not think it can be said that the public or the petitioners were not engaged, at least at this point in time.

78. However, I do think there is a pertinent issue raised as to the manner in which the licences were varied. The licence as initially issued appears to have envisaged the project to be based on one site, that is the land parcel Nyandarua/Karati/325, or the land of Esther Mburu, for that is what is implied in the EIA report of 2004. But the wind farm that is meant to be established is not to be situated in this land parcel. It is not disputed that the wind farm is now to be situated in some 38 parcels of land owned by different persons which are not part of the land parcel Nyandarua/Karati/325. These 38 land parcels are identified at page 44 of the "Addendum EIA report". It cannot therefore be that the site where the project is now to be implemented is the same site as captured in the original EIA and the unsigned EIA study report made in 2008. Of additional significance, the project does not now cover 2 km sq, noted in the EIA report of 2005 for which a licence was issued, but now covers 16 km sq. This is an addition of about 800% in size of the original project. Further, the output is now at 61 MW, up from the initial 30MW, a more than 100% increase.

79. Mr. Kibe's argument, on behalf of the petitioners, is that given this change in the status of the project, there needed to be done a new EIA report and reliance could not be made on the old report of 2005.

80. Ms. Kithinji sought refuge in Regulation 25 of the EIA Regulations which deals with variations of

EIAs. She submitted that a variation can be granted without the necessity of a new EIA. I have looked at this provision which is drawn as follows :-

> *25. Variation of licence*
>
> *(1) Where a proponent wishes to vary the terms and conditions on which an environmental impact assessment licence has been issued, the holder of the licence may apply for a variation of the environmental impact assessment licence in Form 9 set out in the First Schedule to these Regulations accompanied by the prescribed fees.*
>
> *(2) The Authority may issue a certificate of variation of an environmental impact assessment licence in Form 10 set out in the First Schedule to these Regulations.*
>
> *(3) A variation of an environmental impact assessment licence issued under regulation 24 may be issued without the holder of the licence submitting a fresh environmental impact assessment study report if the Authority is satisfied that the project if varied would comply with the requirements of the original licence.*
>
> *(4) Where an environmental impact assessment is required under this Regulation, the provisions of Part II of these Regulations shall apply.*

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

82. The situation in my view is similar to where a project is to be sited. If the water bottling plant is to be sited in land parcel No. 1 and after some time the project has to move to land parcel 2, I think it will also be a stretch to say that the project is the same and a variation may be issued without the necessity of a fresh EIA. We have to be shown that the issues arising in land parcel No. 1 are precisely similar to the issues in land parcel No. 2, and this can only be through a new EIA.

83. In my opinion, NEMA must require a new EIA where the situation that has arisen may lead to a suspension, revocation, or cancelation of the licence issued. Under Regulation 28 of the EIA Regulations, a licence may be cancelled if :-

> *(a) The licencee contravenes the conditions set out in the licence.*
>
> *(b) Where there is a substantial change or modification of the project or in the manner in which the project is being implemented.*
>
> *(c) The project poses an environmental threat which could not be reasonably foreseen before the licence was issued.*
>
> *(d) If it is established that the information or data given by the proponent in support of his application for an environmental impact assessment licence was false, incorrect, or intended to mislead.*

84. I do not think that it can be said that NEMA has exercised its discretion judiciously, in a situation where it issues a variation without requiring a fresh EIA, where the project has substantially been changed or been modified. Where there is such a scenario, NEMA must require a fresh EIA before issuing a variation of the licence. Indeed, as I have mentioned, where such scenario exists, NEMA has mandate to revoke such a licence. If it has mandate to revoke such a licence, then at the very least, it must require a fresh EIA before giving any variation of the existing licence.

85. It is nowhere in the statute, but in my view, a project may be deemed to have substantially been changed or been modified where some of the matters listed in Regulation 18 of the EIA Regulations exist. These include :-

(a) Change in the proposed location of the project.

(b) Change in the national legislative and regulatory framework, baseline information and any other relevant information related to the project.

(c) Change in the objectives of the project.

(d) Change in the technology, procedures and processes to be used in the implementation of the project.

(e) Change in the materials to be used in the construction and implementation of the project.

(f) Change in the products, by-products and waste generated by the project.

(g) Change in the description of the potentially affected environment.

(h) Change in the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short term and long term effects anticipated.

(i) Change in the alternative technologies and processes available.

(j) Change in the analysis of alternatives including project site, design, and technologies and reasons for preferring the proposed site, design and technologies.

(k) Change in the environmental management plan such as changes in measures for eliminating, minimizing, or mitigating adverse impacts on the environment including cost, time frame and responsibility to implement measures.

(l) Change in the action plan for the prevention and management of foreseeable accidents and hazardous activities.

(m) Change in the measures to prevent health hazards and security in the working environment for the employees and for the management of emergencies.

(n) Change in gaps in knowledge and uncertainties.

86. Of course NEMA has mandate, to weigh whether or not the above situations only go to vary the project or whether they go to the very root of the project, in which case the project must be deemed to be a new project, and not a variation of the first project. Where on assessment, the project is deemed to be a totally different project, then NEMA must cancel the existing licence and require a completely new EIA for the new project. Where NEMA feels that this is only a variation, but the pith and core of the project remains the same, it may vary the licence, but at the very least, where the above scenarios exist, such variation needs to be issued only after a fresh EIA is conducted and proper mitigation measures taken into account. On receipt of this EIA report, NEMA may indeed realize that the project does not measure up as a mere variation and may require that a new EIA licence be applied for. What is important is that where

there is a substantial change in the project, a fresh EIA must be required.

87. I can draw parallels between this case and that of ***R (Mageean) vs Secretary of State for Communities and Local Government & Cornwall Light and Power (2010) EWHC 2652*** . In the year 2003 the developer requested a screening opinion (a decision on whether or not an EIA is required) for the development of a wind turbine on certain land in Highdown area. The local authority was of the opinion that the development required an EIA. A second opinion was sought from the Secretary of State who directed that the development was not one which needed an EIA. In the year 2006, the surrounding area, the Cornwall and West Devon mining landscape, was designated a World Heritage Site. In the year 2007, planning permission was applied for and rejected, the planning authority holding that "the proposed development would be detrimental to the appearance and character of the landscape and, as such, is contrary to development plan policies which seek to protect the landscape, including World Heritage Sites." This decision was challenged. The court held that there had been a material change in the circumstances by the declaration of the area as a World Heritage Site after the earlier directive of the Secretary of State that the project did not need an EIA. Robinson HHJ, at paragraph 44 of the judgment, reasoned as follows :-

> *"For the reasons already given, I consider that the correct question was whether the change could realistically lead to the first defendant deciding that the proposed wind turbine was EIA development, i.e that it would be likely to have significant effects on the environment. In my judgment, the World Heritage Site designation was potentially material in this sense, such that the Inspectorate should at least have considered whether or not to refer the screening direction back to the first defendant for re consideration. I have already referred to the physical proximity and intrinsic importance of the World Heritage Site. For many developments on the appeal site no issue may arise, but the proposed wind turbine has a hub height of 50 metres and a blade tip height of 81 metres, and the appeal site is on elevated ground. At the very least, therefore, I consider the Inspectorate should have addressed its mind to whether the screening direction should have been referred back to the first defendant on the grounds that it could realistically effect the screening decision."*

88. It is more or less the same situation in our hands. NEMA never sought a fresh EIA despite the fundamental change in the character of the project. The only EIA report that for sure exists is the 2005 report. I am sceptical about the EIA Study Report said to have been prepared in November 2008, for as I have mentioned, the same is not signed. So too, the "Addendum EIA Report", that was prepared in the year 2011.

89. It cannot therefore be said that NEMA sought a fresh EIA before issuing the licence of variation of the project. The move to change and/or modify the initial project, from the 2 km sq situated in one land parcel, to 16 km sq, situated in 38 land parcels was no doubt a substantial change or modification of the project. It ought to have attracted NEMA to either revoke the initial licence, under Regulation 28, or at the very least, to ask for a new EIA, before issuing a variation of the existing licence. Save for the site inspection, NEMA never sought a fresh EIA and as I have mentioned in the preceding paragraph, it cannot be said that a fresh EIA was ever presented to NEMA for consideration before the variation of the licence. The applications seeking to vary the licence, that were presented by the proponents, only mentioned the upscale of the project by Megawatts and additional turbines, but there was no mention in the application that the project will now be situated in a different site. Indeed, it can very well be argued, that NEMA has never formally sanctioned the new site of the project, and this being the case, it will be contrary to law to allow the development of the wind farm in the 38 plots, which are new sites for the project.

90.It has been my view, which I still hold, that where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. I cannot put it any better than I did in the case of ***Ken Kasinga vs Daniel Kiplangat Kirui & 5 Others, (supra)*** where I stated as follows at paragraph 73 of the judgment :-

> *"I am prepared to hold that where a procedure for the protection of the environment is provided by*

law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project has been given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment."

91. In the case at hand, I am of the opinion that the petitioners have demonstrated that there was impropriety in the manner in which the EIA licences were varied, and in the manner in which the proponents of the project intend to implement the project, on a site (the 38 plots) that has never before been subjected to full EIA. It is on this point, that I am of the view that the petition must succeed, at least in so far as it relates to the violation of the right to a clean and healthy environment.

92. That said, I think that there are a couple of points that I need to emphasize. First, it is not necessary for a person who presents a cause touching on the right to a clean and healthy environment to demonstrate that he is directly affected by any project or that he stands to suffer personal loss or injury. Under Section 3 (4) of EMCA, a person who brings an action touching on the right to a clean and healthy environment is permitted to bring such action without demonstrating any personal loss or injury, provided the action is not frivolous or vexatious, or is not an abuse of the process of court. There have been arguments in this suit that the petitioners are not directly affected, as the project is not going to be situated in their land parcels, but in the land parcels of different people (the interested parties). That may be so, but as I have shown above, it is not necessary for the petitioners to demonstrate any personal injury or loss.

93. The above provision of EMCA is echoed in the Constitution of Kenya, 2010, at Article 70 which is drawn as follows :-

Article 70. Enforcement of environmental rights

1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

(3) *For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.*

94. If a person applies that his right to a clean and healthy environment enshrined in Article 42 has been violated or under threat, he does not need to demonstrate any personal loss or injury. The argument that the petitioners have no mandate to file this petition because they do not stand to be affected by the project, for the reason that it is not situated in their parcels of land, is not therefore a valid argument. Any person, even an individual not resident and who owns no land in the Kinangop area, could as well have filed this petition. In the same vein, it is enough that there are petitioners in the matter. The addition of the other names, said to be in support of the petition, and which have been impugned by the interested parties, mean nothing. The issue at hand is not a competition on whether there are more people who support the

project, than there are who do not, or vice versa. The point at hand is a legal point, on whether or not proper procedure has been followed before allowing the project to proceed on the 38 parcels of land in the Kinangop area. It is utterly irrelevant whether there are more or less people in support of the project.

95. The second point is the argument raised by the respondent that the project is a clean project that does not pollute the environment. It was dubbed a "Green Project". The importance of it was drummed, especially by the State, who are eager to implement the project as part of the Vision 2030 agenda. I have no doubts about the benefits of such project. However, all projects, whether "Green" or not, and however beneficial, must be implemented in accordance with the environmental laws of the country. There should be no shortcuts taken. Where an EIA is required, let that be done, and let the same be done properly. This court is not going to overlook the importance of such a process, on the arguments that the project at hand is of immense economic benefit to the country. True, we need to develop, and we need to take strides towards achieving our development goals. But this needs to be done within the proper legal framework, so that we do not commit the same mistakes that have been committed by our predecessors, which mistakes have led to the degradation of the environment, not to mention climate change. The world is now struggling to mitigate such aftershocks and it falls upon this generation to do things right in so far as the protection of the environment is concerned. The starting point is of course following all proper procedures as outlined in the law relating to environmental protection. This court is not going to be shy to point out mistakes where they have occurred and to require proper procedure to be followed, the importance of the project notwithstanding, for we have a higher mandate to ensure that the environment is protected for this and the future generations.

96. I feel that I also need to emphasize and clarify, that this judgment does not mean that the Kinangop Wind Project cannot be actualized or operated. It can. But it can only proceed if proper procedures are followed and a green light properly given in accordance with the law. It behoves upon the proponents of the project to get their act together, follow the law and see whether their project will be given the go ahead. This judgment should not therefore be interpreted as a victory for those who are against the project over those who are for the project. It is a judgment that merely insists that proper EIA procedures need to be followed.

97. Finally, I must emphasise that there is no place for violence in a civilized society. I have been disturbed by the reports of loss of life and destruction of property. Two camps clearly emerged, those for, and those against, the project. There is room for differences of opinion, but there is no place for violence. Emotions must be held in check. If one party is of the opinion that there is a violation of his/her rights, the proper recourse is to follow the procedures laid down in the law of the land, not to apply the law of the jungle. May shame be upon all those who proceeded to destroy any property, cause injury, or cause loss of life, merely because the other person held a different opinion. I hope that those arrested, if found guilty, will face the full force of the law.

98. I have not forgotten that this petition called for numerous orders; 22 orders were sought in this petition. I have assessed all these. Among these prayers was an order for the setting of a minimum set back distance of 1000 metres. I regret that I am unable to give this order. The setting up of a minimum set back distance is nowhere in the law and I will have to leave that to NEMA and other experts to determine, whether in EMCA or in regulations, or specific to a particular project. There was attempt to rely on a USA Bill. Whether or not such Bill was passed into law is irrelevant for USA law does not apply in Kenya. One cannot import foreign legislation and argue that it applies to Kenya. So too fails the prayers that Kinangop Wind Farm must acquire land that ensures a set back distance of 1000 metres. I have also not seen the place of the argument of the petitioners that a wind park cannot be implemented where persons are resident and I have not seen anything wrong in persons giving out their land or part of it to be used as a wind farm. In the visit at the Ngong wind park, I could see people and animals walking freely and unhindered within the wind farm. It appears as if technology would allow for the implementation of a wind park where persons are resident. But this of course has to be subjected to proper scrutiny through an EIA.

99. I cannot also go as far as to state that EMCA is unconstitutional for not declaring a set back distance for wind projects and I am unable to issue an order of mandamus to compel the provision of a set back

distance, or an order of prohibition, to prohibit this or other wind park projects until a set back distance is provided for. As I have stated, I will leave that to the discretion of the experts depending on the nature of the project at hand.

100. I have not found any violation of any of the petitioners' constitutional rights in so far as it relates to the right to property under Article 40. Subject to following the law, there was nothing wrong in the interested parties leasing their parcels of land for the development of a wind farm. I do not see how the property rights of the petitioners were affected by this act. They still retained their properties and nothing has been presented to show that the project would adversely affect their properties or the ownership of them. I am unable to declare that the leases held by the interested parties are null and void for violating the constitution. Neither can I quash the lease of Mahugu Gatebe Njuguna as requested in the petition. If the said person wants to opt out of his lease, he is free to follow the private law path and seek a cancellation of his lease. There is also no place for the argument that the land where the wind farm is to be situated must be purchased. I have not seen any law that would outlaw a lease of land for the development of a wind farm. Indeed, I gathered from the site visit in Ngong, that the Kengen wind park is actually leased from the Kenya Forest Service, and Kengen does not own the land where the wind park is situated.

101. There are a raft of other prayers sought such as declarations for fair administrative action; that the National Land Commission has violated Article 67 (2) (4) of the Constitution (which provision I have not seen though there is Article 67(2) (a) – (h) which sets out the functions of the National Land Commission); a permanent injunction to stop the police from entering the premises of the petitioners in matters related to the wind park project; a declaration that the acts of the Government of Kenya and its officials in implementation of the project are unlawful; and certiorari to quash the decision of the Deputy County Commissioner in the letter dated 20 March 2015. I have not seen any merit in all these prayers and I decline to grant the same.

102. The final prayer was for compensation of the petitioners for violation of their constitutional rights. I have not been shown any loss that the petitioners have suffered. Mr. Kibe asked for the sum of Kshs. 1 Million as compensation for each petitioner but the basis of this was never given and I have not seen any foundation for such a claim. The court of course has discretion to make an award of general damages where there has been violation of a right but in the circumstances of this suit, and in exercise of my discretion, I opt not to make any award in general damages to the petitioners.

103. The final issue is costs. I think the petition is merited in so far as it relates to the manner in which the EIA licences, especially the variations were granted. Costs are in the discretion of the court. In exercise of my discretion I will give costs to the petitioners but I will cap the costs at Kshs. 2 million all inclusive to be paid by the 1st , 2nd , 3rd and 5th respondents jointly and/or severally, for it is these entities that had obligation to ensure that all EIA licences were properly applied for and issued. In arriving at this figure, I have considered all factors deemed relevant, including but not limited to the nature of the prayers sought, the evidence tendered, the time taken, and the number of attendances made both in court and on site visits and the novelty and complexity of the matter.

104. The final orders that I choose to issue are as follows :-

> *(a) That it is hereby declared that the variation of the EIA licences issued upgrading the project to 60MW and later to a 61MW project on new sites situated in 38 plots without requiring a fresh EIA to be provided was contrary to the Environmental Management and Coordination Act, 1999 and to the EIA Regulations, 2003.*
>
> *(b) That it is hereby declared that the failure to abide by the EIA Regulations, 2003 potentially threatened the rights of the petitioners to a clean and healthy environment provided under Article 42 of the Constitution*
>
> *(c) That it is hereby ordered that in the event that the proponents of the Kinangop Wind Park project wish to proceed, a fresh and proper EIA following the provisions of the Environmental*

Management and Coordination Act, 1999, and the EIA Regulations, 2003, must be conducted and considered on merits, for the new site of 38 land parcels.

(d) That the petitioners shall have the costs of this petition capped at Kshs. 2 Million all inclusive.

105. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of March, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Mr Kibe Mungai present for petitioners.

Mr Njonjo present for 1st - 3rd respondents.

N/A for 4th respondent.

Ms Kithinji present for 5th respondent and holding brief for Ms. Ontiti for 8th respondent.

Mr Kamunya present for 6th, 9th and 10th respondents.

Ms Jeniffer Ndeda holding brief for Mr Gichukie Ribathi for interested parties.

No appearance on part of 7th respondent

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU