REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KILIFI COUNTY

COURT NAME: MALINDI LAW COURT

CASE NUMBER: ELCA/6/2019

CITATION: AMU POWER COMPANY LTD VS SAVE LAMU & OTHERS

JUDGMENT

'1. The background to the present appeal can be summed up as follows: as long ago as 2007, the government of Kenya conceived the Kenya Vision 2030. The Kenya Vision 2030, is the country's development blueprint for the years 2008 to 2030. It aims to transform Kenya into a newly industrializing, middle-income country with an objective of providing a high quality life to citizens by the year 2030. The Vision is based on three pillars: the Economic, Social and Political pillars. The Vision identified a number of flagship projects to be implemented across the country for all sectors. Lamu County was identified to host the LAPSSET project of the Vision 2030. As a result of the accelerated need for electricity to power development, under the economic Pillar, the government of Kenya had coal as among the options floated in the Kenya Vision 2030 as a source of energy. In its search for a site for a coal fired power project, the Government of Kenya settled on Kwasasi, a farming settlement situate about 15 kilometres from the Lamu Port. The appellant became, following an expression of interest by the Government, the successful bidder poised to set up the intended 1050 MW coal fired power plant in Lamu on a build, own and operate basis. As seen from many of the documents in this appeal, the people of Lamu were worried about inter alia air pollution from the coal fired power plant and how its discharge might threaten the marine life that's vital to the local economy. A section of the society was also concerned about the State's international commitments in that they thought the project would make it more difficult for Kenya to meet its commitments under the Paris Agreement regarding climate change.
2. Following the successful bid for the project and the issuance of an EIA Licence to Amu Power by NEMA, the 1st to 6th respondents herein filed in the National Environment Tribunal at Nairobi NET/196/2016 against the appellant herein and the 7th respondent herein (NEMA) faulting the issuance on 7th September 2016 by the 7th respondent to the appellant of EIA License No NEMA/EIA/PSL/3798 which license was to be in respect of the appellant''s power project planned to be established in Lamu County approximately 21 km from Lamu town. That license had been issued pursuant to an EIA study Report completed in July 2016 purportedly made in accordance with Section 58 (1) of the Environmental Management and Coordination Act (EMCA) and Regulation 21 Of Environmental (Impact Assessment and Audit Regulations) 2003.The grounds upon which they based their appeal to the National Environment Tribunal were elaborated on in their "Detailed Statement of the Grounds of Dissatisfaction" as follows:

1. Erroneous approval of the EIA Report
Under this ground it was averred that NEMA erroneously relied on the EIA Report containing poor analysis of alternatives and economic justification which action was contrary to Regulation 16, Regulation 18 sub-Regulation 1 of the EIA Regulations.
That action is also said to have been an infringement of article 10 2D of the Constitution.
The failure to carry out a comprehensive analysis was termed as failure to cooperate with NEMA to protect and conserve the environment in accordance with article 69(2) of the Constitution. It was alleged that the EIA Report created a false image of the need for coal energy in Kenya and failed to consider alternatives to coal while discrediting for alternative forms of energy such as wind water and solar which can better aid in achieving sustainable forms of development.
2. Lack of public participation
Under this ground it was alleged that the EIA study process lacked proper and effective public participation. That Amu Power failed to comply with Regulation 17(2) of the EIA Regulations by failing to have a minimum of at least three meetings with accepted people and concerned parties after approval of the EIA Report. Article 10(1)(a) was also violated by failure to take into account the value and principle of public participation. The meetings Amu Power had held with a number of stakeholders in Lamu as well as the public hearing occurred before the submissions and approval of the EIA project Report at which time it was impossible to sufficiently explain the project effects, and which were not therefore an effective form of public participation since proper information of the project had not been made known. The public hearing was said to be a contravention of Regulation 22(1).
3. Effects on the marine environment
Under this ground it was stated that damage would occur to the marine environment adjacent to the project; that the granting of the year license was in violation of Article 70 in that Article 42 was likely to be denied violated or threatened through possible discharge of thermal effluent thus impacting on the marine biodiversity despite Clause 3.3 in the license by the possible increase in sea water temperature by 9° C. yet the EIA Report does not fully analyze the impact of this change on the marine ecosystem; the 3rd schedule of EMCA Regulations on water quality thus would be violated. NEMA also failed to consider the margin of error inherent in the temperature projections. Their study Report also fails to include thermal discharge into the sea in its ecological and social impact which may have major impacts on a majority of Lamu''s residents who are dependent on fishing and their rights may be infringed since they rely on fishing. This may include a violation of their cultural rights and traditional way of life a set out in Article 44 and 43 of the Constitution. The temperature rise mitigation measures are also said to have been insufficient.
4. Violation of land laws
Under this ground it was stated that the location of the project contravenes land allocation requirements set out in public land laws. That public land falling within mangroves Wetlands riparian areas and the territorial sea is along the beaches or falls within environmentally sensitive areas which should not be allocated in accordance with Sections 11 and 12 of the Land Act. Areas adjacent to the project site contain environmentally and ecological sensitive areas in the form of mangroves beaches, tidal areas, the territorial sea and other wildlife. The decision to grant an EIA license is therefore said to be in violation of Article 62 (4) which requires use of public land in accordance with the relevant statutes.
5. Inconsistencies in the EIA Report
Under this ground it was stated that the EIA Report contained inconsistences that amounted to misrepresentations on the part of Amu Power. The Report which fails to assess certain key components of the project and the license should not have been issued for the reason that the information provided was incorrect. Among the omissions pointed out by the Appellant was lack of crucial details on the amount of land required for the project, lack of information on the 2,000-acre limestone mine concession, a 15 km conveyor belt and coal handling berth at the Lamu port, which issues were allegedly not addressed by the ineffective public consultation process and whose effects

have not been taken into account in the EIA Report.
6. Negative impact on Kenya''s air quality
Under this ground it is stated that the project would have a negative impact on Kenya''s air quality as it will cause air pollution that could potentially lead to adverse health impacts, yet, contrary to operation Condition Number 3.1 of the EIA license, Amu Power failed to conduct an assessment of atmospheric impact on human health despite a relationship between the increase in ambient air pollution levels and the risk of death from various respiratory diseases. It was claimed that operational Condition 3.1 of the EIA licence is also insufficient protection in that it does not make it mandatory for a quality analysis to be carried out before commencing of the operations. Also the proposed air pollution control equipment in the EIA Report fell short of the state of the art control required for Mercury emissions. The license also failed to address the issue of how fly ash would be utilized in order not to have an adverse impact on the environment considering that it may have long-lived radioactive elements. Besides there is no provision for coal ash reuse in the EIA study. Other expressed concerns under this ground are risk of accidental releases undetected leaks or catastrophic failure of the ash pond. By virtue of these objections it is stated that granting an EIA license to Amu Power was in violation of Articles 42 and 70 of the Constitution.
7. Enlarged carbon footprint
Under this ground it was stated that the project will contribute to advanced climate change with high greenhouse gases emissions contrary to Kenya''s low carbon development commitment set out in the National Climate Change Action Plan and the Climate Change Act Number 11 Of 2016 as well as Kenya''s National Determined Contribution submitted to the UNFCC which focuses on renewable energy rather than fossil fuels; that despite the fact that the EIA Report has not conducted a comprehensive analysis of how the project impacts on the attainment of those goals. It is also alleged that the EIA Report does not inform on the full cost of the project including associated climate change damages per year. The omissions led the respondents to conclude that the issuance of the EIA license risked violation of Article 42 and was thus in contravention of Article 42 of the Constitution.
8. Coal dust pollution
It was contended by the appellants that the EIA Report and license conditions failed to provide any mitigation measures to curb coal dust pollution during coal handling and storage in an ecologically sensitive area which risks violation of Article 42 and 70 of the Constitution.
9. Lack of sound mitigation measures
Under this ground it was contended that the EIA license conditions failed to provide for effective mitigation measures to be adhered to by Amu Power during the construction and operation of the project.
10. Compounded unviability of the project.
The respondents averred that NEMA in its decision failed to examine the project in its entirety in the light of all the factors cited in the appeal. NEMA was also unwilling to set up a Technical Advisory Committee to provide external expertise and assess the viability of the project in accordance with Section 61 of EMCA to enable a proper analysis of the Report and the submitted comments, and by failing to do that NEMA violated Section 7 of the Fair Administration Action Act.

6. It is indicated in the Tribunal judgment that whilst before the National Environment Tribunal for the hearing of their case, the parties herein agreed on the following as the issues for determination:
a. Whether the grant of the ESIA Licence by the 1st Respondent is in violation of the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya;
b. Whether the process leading to the preparation of the ESIA Study Report by the 2nd Respondent involved proper and effective public participation;
c. Whether the Respondents conducted a proper analysis of alternatives of the project;
d. Whether the Respondents conducted a proper analysis of the economic viability of the project;
e. Whether the ESIA Study Report prepared by the 2nd Respondent contains adequate mitigation

measures;
f. Whether the 1st Respondent in evaluating the mitigation measures and issuing the ESIA licence discharged its mandate in accordance to the law.

7. Parties filed submissions in the appeal before NET. Judgment was delivered on 26th June 2019.The Tribunal held that its jurisdiction is limited to examining “the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued by NEMA”. It considered the evidence tendered by the respective witnesses and submissions of the parties. It remarked that “the evidence of the expert witnesses for both the Appellant and the Respondents was extremely helpful to the Tribunal and their expertise was not called into question by any of the parties”. The Tribunal noted that the purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects; that the Sustainable Development Goals (SDGs), recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth while caring for the environment; that the purpose of environmental audits is not to hinder development but to ensure economic progress in a country takes into account environmental impacts of the proposed economic activity; that Parliament has identified coal energy as one source of possible energy sources for Kenya; that the Legislature had in 2019 enacted changes in the energy law to accommodate provisions on coal plants (Part V of the Energy Act 2019, (Sections 94 to 116) and those provisions included environmental conditions as considerations to be met before licensing; that the only relevant considerations when setting up coal-powered electricity generation plants are whether there is compliance with the provisions of the Energy Act 2019 and the Environmental Management and Coordination Act, 1999.
8. The Tribunal addressed the first two issues together, namely: A) whether the grant of the ESIA Licence by the 1st Respondent is in violation of the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya and B) whether the process leading to the preparation of the ESIA Study Report by the 2nd Respondent involved proper and effective Public Participation.
9. The Tribunal noted that there needs be strict compliance and adherence to the letter of the law in EMCA and in particular Part VI of the EMCA as read with the relevant provisions of the Environmental (Impact Assessment and Audit) Regulations 2003 (“the Regulations”) made thereunder which have set out the framework of environmental impact assessment, environmental audit and monitoring of the environment and the procedures and processes involved in securing the same; that the Tribunal’s jurisdiction does not allow it to waive provisions of statute or Regulations made thereunder and thus the legal requirements imposed on the appellants herein when undertaking an EIA study have to be strictly complied with considering the nature of the Lamu coal power plant project and its unique position as the first coal power plant proposed to be developed and operated in Kenya. Referring to Principle 10 of the Rio Declaration on Environment and Development, 1992, the Tribunal underlined the importance of public participation, that access to information for the affected persons is important for their meaningful participation in decision and policymaking processes in an informed manner; it considered the ambits of public participation in Constitutional Petition No. 305 of 2012: Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others, accepting the principles and guidelines set out there in that :
a. it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter and that the government agency enjoys some considerable measure of discretion in fashioning those modalities.
b. public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth, that no single regime or programme of public participation can be prescribed and that the only test the Courts use is one of effectiveness.
c. that the programme adopted for public participation must include access to and dissemination of relevant information.

d. public participation does not dictate that everyone must give their views on an issue of environmental governance but the subsidiarity principle must be applied.
e. the right of public participation does not guarantee that each individual's views will be taken as controlling;
f. the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

10. The Tribunal arrived at the conclusion that there was no proper public participation conducted by the Appellant.
11. As to the issue whether the Respondents conducted a proper analysis of alternatives of the project under Regulations 16 (b) and Regulations 18(i) and (j) the Tribunal found that Amu Power conducted an analysis and took into consideration the Project Alternatives in the ESIA Study report it presented to the 1st Respondent and for this finding it referred to Page 254 of the ESIA Study; it found from the appellant's evidence that the appellant had no say in the selection of the location. It stated as follows:
"In the final holding of Nairobi HCCC Petition NO 22 OF 2012: MOHAMED ALI BAADI AND OTHERS vs THE HON. ATTORNEY GENERAL and 7 others the Constitutional Court found that a Strategic Environmental Assessment (SEA) study should have been undertaken with respect to the LAPSETT project and the impact of its various components, of which the Lamu Coal power plant is one of the components. To date, no evidence has been tendered that a SEA has been done or completed and thereby supporting the choice of location. We do not see how a meaningful EIA study could be undertaken in the instant case when the basis for the choice of location and other components of the LAPPSETT project had already been called into question by a superior Court. It appears to us that both the desired project, that is, a coal plant and the desired site of Kwasasi had already been pre-determined even before the SEA for the whole LAPSSET project were completed. This was outside the 2nd Respondent's control."

12. The Tribunal stated further as follows:
"86. Whilst the 2nd Respondent purported to undertake an analysis of the location and project alternatives; their hands were tied on these issues by virtue of the expression of interest. Only a SEA undertaken prior to the expression of interest would have properly considered the location and project alternatives. Accordingly, we find there was a failure to have a proper analysis of the location and project alternatives as these were pre-determined and the exercise thereafter was to merely justify what had already been determined.
87. The omission to carry out a SEA by the Government prior to the expression of interest put stakeholders such as the Kenya Forest Service, a statutory body established under the Forests Act and a lead agency under Section 60 of EMCA, who have the overall functions of management of all state forests and providing plans for utilization of all forests in the country, in difficulty as they remained opposed to the location of the project and its location. They expressed grave concern on the possible impact to mangroves and other forest cover. Their views were not heeded nor could the concerns of any other stakeholder be taken into account on this issue by virtue of the pre-selection of the site and the failure to undertake an Strategic Environmental Assessment in respect of the entire LAPPSETT project."

13. It found that the appellant did not submit a proper detailed architectural or engineering plan of the coal plant or the site plan, whether approved by the Lamu County Government or otherwise, for the preferred pre-selected location and instead referred the Tribunal to a sketch plan of the site accompanied by oral explanations as to where different elements of the plant layout would be set out on the location of the project. It stated that the default in doing so presented a challenge to the

Tribunal in considering some of the mitigation measures proposed; that the lack of specific and current information on where various components of the project would be placed did not give an opportunity for the Tribunal or other members of the public at the study stage, to consider the likely effect of each project component on the environment. To demonstrate the hardship presented by the default, it gave the following example:
"For instance, precise measurement of distances between different features on the site as well as distances of each feature to the fragile sea shore became difficult to examine."

14. Regarding whether the Respondents conducted a proper analysis of the economic viability of the project, the Tribunal noted that it had no jurisdiction under the law to delve into that issue.
15. As to whether the ESIA Study Report prepared by the 2nd Respondent contains adequate mitigation measures during and after the implementation of the project as required by Regulation 16 (c) of the Environmental (Impact Assessment & Audit) Regulations and whether the 1st Respondent in evaluating the mitigation measures and issuing the ESIA licence discharged its mandate in accordance to the law the Tribunal found that the chapter on mitigation measures is one of the largest sections in the ESIA Report. It found that Amu Power had provided mitigation measures for Atmospheric Emissions/Air Quality, Coal Handling and Storage, Ash Yard and Ash-handling, the Coal Conveyor System & the 2000-Acre Limestone Concession Quarry; Ecological Impacts Mitigation, Thermal Effluent & Mitigation Measures, Climate Change & Mitigation Measures, but nevertheless concluded as follows:
"141 We find that, as shown above, that despite the ESIA Study Report prepared by the 2nd Respondent containing mitigation measures as required under EMCA and the Environmental (Impact Assessment & Audit) Regulations, the adequacy of those measures are yet to be subjected to proper public participation and until then may remain mere academic presentations."

16. The Tribunal found that NEMA having issued the EIA licence for the project and imposed conditions in generalized terms without specifically mentioning the matters Amu Power identified for its mitigation proposals, the Tribunal was unable to say with certainty whether there was a proper evaluation undertaken by NEMA in issuing the licence; it stated that the conditions set are inadequate and display a casual approach by NEMA to an otherwise serious and important project; that the conditions imposed ought to have been more comprehensive to bind Amu Power to its commitments as spelt out in ESIA Study report.
17. In the final analysis the Tribunal issued orders as follows:
"155. In furtherance of our powers under section 129(3) (b) and (c) we order the 2nd Respondent, should it still wish to pursue the construction and operation of the project, to undertake a fresh EIA study following the terms of reference already formulated in January 2016, and in compliance with the Director - General''s directive of 26th October 2015, as well as adhere to each step of the requirements of the EIA Regulations on EIA Studies. The fresh EIA study, if undertaken, is to, inter alia, include all approved and legible detailed architectural and engineering plans for the plant and its ancillary facilities (such as the coal storage and handling facility and the ash pit with its location in relation to the sea shore), consideration of the Climate Change Act 2016, the Energy Act 2019 and the Natural Resources (Classes of Transactions subject to Ratification) Act 2016 in so far as the project will utilise sea water for the plant and/ or if applicable.
156. Subject to these steps being undertaken, a fresh EIA study report is to be prepared and presented to the 1st Respondent. The 1st Respondent is directed to comply with the provisions of Regulations 17 and 21, engage with the lead agencies and the public, in the manner and strict timelines provided for under the said law. The 1st Respondent is to share its memorandum of reasons for reaching its decision whether for or against the project with the relevant parties and publish its decision on the grant or refusal to issue an EIA Licence accompanied with a summary of its reasons within 7 days of its decision. Such publication should be in a newspaper with nationwide circulation.

157. These extraordinary measures are necessary to ensure sufficient access to information by the public on a project that will be the first of its kind in Kenya and the East African region."
32. By way of a Memorandum of Appeal dated on 24/7/2019, filed through Messrs. Ochieng', Onyango, Kibet & Ohaga, advocates, the present appellants presented to this Court the following as their grounds of appeal against the decision of the National Environment Tribunal impugned herein: -
1. The Tribunal erred in law and in fact in cancelling the Environmental Impact Assessment Licence (EIA Licence) solely on the basis of purported flaws in the consultation process. The Appellant points out the following grounds as the basis for seeking to overturn the Tribunal's finding that the process leading to the preparation of the ESIA Study by the Appellant did not involve proper public participation:

(i) The Tribunal erred in fact and in law in allowing the appeal despite the failure by the Appellants to tender any evidence to a standard sufficient to discharge the requisite legal burden of proof cast upon them by law.

(ii) The Tribunal erred in law and in fact in entertaining the appeal by the 1st Respondent without first satisfying itself that it had locus standi to urge seek the prayers sought. The Tribunal had no legal basis of regarding the 1st Appellant as a 'community-based organization representing the interests and welfare of Lamu.

(iii) The Tribunal erred in fact and in law in failing to find that the 1st Appellant was not an entity incapable of suing especially as it had tendered no evidence regarding its registration status and who it purportedly represented.

(iv) The Tribunal erred in failing to appreciate that the purpose of public meetings with the affected parties and communities was to explain the project and its effects and to receive oral and written comments for consideration and it therefore was wrong to disregard evidence by the Appellants showing that the project was explained to the 2nd to 6th Respondents and the communities likely to be affected by the project.

(v) The Tribunal, as a consequence, was wrong to place undue emphasis on procedure rather than maintain focus on the substance, the spirit behind public participation.

(vi) The Tribunal was wrong to cancel the 7th Respondent's decision to issue the Appellant with an EIA Licence based solely on the purported flaws in the consultation process. The alleged flaws in the consultation process, if at all, were not serious enough to deprive the consultation process of efficacy.

(vii) The Tribunal was wrong in holding that there was no proper public participation by communities and people of Lamu when no representatives of such people were before it to complain about their non-involvement. The finding has no basis in fact and in law.

(viii) The Tribunal erred in law and in fact in disregarding in its entirety the Appellant's evidence showing that the public participation conducted in the process of preparing the ESIA study and reasonable opportunity had been given to the public, including the Appellants, to know about the proposed project and to give their views thereon. Consequently, the finding that there was no public participation manifested a blatant error of both law and fact.

(ix) The Tribunal erred in law and in fact in disregarding the clear evidence showing that the 1st to 6th Respondents were afforded ample opportunity to participate in the ESIA study process and that

they were so involved at every stage and tendered their views during the entire process. The failure by the Tribunal to put due weight on the evidence adduced by the Appellants and the 7th Respondent regarding the involvement of the 1st to 6th Respondents' involvement in the ESIA study process therefore manifested an error of law and fact.

(x) The Tribunal erred in law and in fact in disregarding the evidence tendered by the Appellant and the 7th Respondent showing that the ESIA study was prepared in full compliance with the Terms of Reference formulated by the Appellant and approved within the discretion of the 7th Respondent.

(xi) The Tribunal erred in law and in fact in blatantly disregarding, mentioning or failing to consider the uncontroverted evidence tendered by the Appellant's witnesses, SANJAY GANDHI and ABDULRAHMAN ABOUD which showed that there was effective public participation in the preparation of the ESIA study process.

(xii) The Tribunal was wrong in disregarding evidence by the Appellants showing the effectiveness of the public participation, the Stakeholder Engagement Chapter of the Environmental Impact Assessment study, the 7th Respondent's evidence as well as the admissions by the various witnesses who testified on behalf of the 1st to 6th Respondents.

(xiii) Having made an express finding at paragraph 43 of the judgment by which it accepted that wide public participation had been undertaken during the Scoping phase for the project, the Tribunal was wrong not to find that this issue as raised by the Appellants in their grounds of Appeal had been satisfactorily addressed. It thus made a finding outside what was pleaded in the appeal.

(xiv) The Tribunal was wrong to conclude that the public participation meetings conducted by the Appellant and exhibited in evidence were 'introductory in nature and not structured to share information on the possible effects and impacts of the project.' This Tribunal's finding was not anchored on any evidence, was speculative and wrong.

(xv) The Tribunal erred in disregarding and/or faulting the clear evidence tendered by the Appellants and the 7th Respondents showing their compliance with Regulation 21 of the Environmental (Impact Assessment and Audit) Regulations, 2003 as regards the publication of the ESIA study and the collection of views from the Public within the period set out in the Notices.

(xvi) The Tribunal was wrong to make a conclusion that the public hearing that was held at Kwasasi was premature and its conclusion that the public hearing was converted into a popularity contest was wrong. The conclusion was not supported by the Minutes of the said Meeting which were not contested by any party.

2. The Tribunal erred in law and in fact in holding that the Appellant did not conduct a proper analysis of the alternatives to the project. The Appellant urges the Court to set aside the Tribunal's findings on this ground on the following bases:

(a) The Tribunal was wrong to disregard the uncontroverted evidence by the Appellant's witness, SANJAY GANDHI, regarding the analysis of the alternatives to the site as well as the evidence contained in the ESIA study.

(b) The Tribunal was wrong to make a finding based on the unpleaded issue that there was no Strategic Environmental Assessment (SEA) study undertaken in respect of the LAPSSET project.

(c) The Tribunal erred in law in making the Appellant liable for the purported failure of a 3rd party

(the Government) to prepare a SEA in respect of the LAPSSET project when the Government was not party to the appeal.

(d) The Tribunal was wrong to shift the burden upon the Appellant to submit a detailed architectural or engineering plan of the coal plant or the site plan without a basis laid by the Appellants and without reference to the applicable law.

(e) The Tribunal erred in law and in fact in constituting itself as a body to handle technical matters by requiring the Appellant to submit before it detailed architectural or engineering plans when it lacked the expertise and the legal mandate to do so.

(f) The Tribunal failed to recognize the expertise of the 7th Respondent and the discretion vested in it by law as to the manner of handling technical matters such as the requirement for detailed architectural or engineering plans.

3. The Tribunal erred in law and in fact in its holding that the ESIA Study did not contain adequate mitigation measures
The Tribunal had no basis upon which to fault some of the mitigation measures it identified as being deficient in the ESIA study:

(i) With regard to Ash Yard and Ash-handling, the Tribunal's findings regarding the insufficiency of the mitigation measures proposed disregarded the unchallenged evidence by the team of experts who prepared the study.

(ii) The Tribunal was wrong to reach the findings regarding the sufficiency of the mitigation measures in relation to the ash-yard and ash-handling when no evidence had been tendered by the 1st to 6th Respondents to challenge the sufficiency of the contents of the ESIA study.

(iii) The Tribunal consequently had no legal or factual basis for reaching the finding that the mitigation measures on the ash yard and ash pit were inadequate.

(iv) The Tribunal's findings that the ESIA study regarding coal conveyor belt system was inconclusive and insufficient were baseless and not anchored in law and in fact as the 1st to 6th Respondents tendered no evidence to controvert the ESIA study in this respect.

(v) The Tribunal's was wrong to reject the mitigation and adaptation measures provided in the ESIA study against climate change merely on the basis of what it termed "a lack of clarity on the consequences of certain aspects of the project." This finding has no foundation in law or in fact.

4. The Tribunal erred in law and in fact in finding that the grant of the Environmental Impact Assessment Licence (EIA Licence) issued to the Appellant by the 7th Respondent was in violation of the Environmental (Impact Assessment & Audit) Regulations and Constitution and/or any such violation was sufficient to result into the cancellation of the EIA Licence.
5. The Learned Chairman and members of the Tribunal erred in law and in fact in making a finding that the ESIA Study lacked completeness and scientific sufficiency' when no evidence had been laid before it by the Appellants to arrive at such a conclusion.
6. The Tribunal erred in law and in fact in finding that the conditions of the Environmental Impact Assessment Licence (EIA Licence) issued to the Appellant by the 7th Respondent were general in nature.
7. The Tribunal otherwise failed to properly exercise its jurisdiction as conferred by s. 129(3) of the Environmental Management & Co-ordination Act.

8. The National Environment Tribunal erred in law and in fact in faulting the studies carried out by the Independent Experts as contained in the appendices to the main Environmental Impact Assessment Study without any other study being tendered by any experts presented by the 1st to 6th Respondents to controvert the findings made by the Independent Experts.
9. The Tribunal was wrong in usurping the jurisdiction that it did not possess and consequently made erroneous findings.
10. The Tribunal erred in its final Orders issued in its Judgement dated 26th June 2019 as the same had no legal or factual basis.

33. It is urged that the Court do allow the appellant's Appeal and issue the following orders:
(a) The decision of the Tribunal dated and delivered on 26th June, 2019 be and is hereby set aside;

(b) That the 7th Respondent's decision granting the Appellant an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/3798 on 7th September, 2016 be and is hereby affirmed;

(c) In the alternative and without prejudice to Prayer (a) above, the Court hereby exercises any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought by including the issuing of and/or proposing additional conditions for inclusion into the Environmental Impact Assessment Licence No. NEMA/EIA/PSL/3798 issued by the 7th Respondent on 7th September, 2016;

(d) In the alternative and without prejudice to Prayer (a) above, the Honourable Court hereby exercises any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought by upholding the Environmental Impact Assessment Licence No. NEMA/EIA/PSL/3798 issued by the 7th Respondent on 7th September, 2016 and, additionally, prescribes any such additional measures as may be undertaken by the Appellant in ensuring that any deficiencies in the EIA study are cured;

(e) The costs of this appeal and of the Tribunal be awarded to the Appellant.

34. On their part, the respondents filed a Cross-Appeal against the Tribunal decision on the following grounds:
1. Alternative analysis
a. The Tribunal erred in law and in fact in its determination of the completeness and scientific sufficiency of the technology alternatives analysis in the ESIA study by failing to consider the evidence led by the respondents/cross-appellants and very requirements of the Regulation 18(1) (i) and (j) of the Environmental Impact Assessment and Audit Regulations 2003 (EIA) Regulations;
b. The Tribunal erred in law and in fact by failing to consider the completeness and scientific sufficiency of the energy supply alternatives analysis and the basis for opting for a coal plant in reference to the environmental and social impact – namely the air quality impacts, ecological impact, public health impact, climate cultural and heritage impacts as required under Regulation 18(1)(b)(i) and (j) of the EIA Regulations;
2. Ecological impact and mitigation measures
a. The Tribunal erred in law and in fact by failing to consider evidence led by the 1st to 6th Respondents/cross-appellants demonstrating deficiencies in the ESIA study assessment of ecological impacts and thus erroneously found that these were adequately covered at paragraph 126 of the judgment;
b. The Tribunal erred in law and in fact at paragraph 127 of its judgment by failing to consider and address evidence led by the 1st to 6th Respondents/cross-appellants on the deficiency of the proposed mitigation measures on marine ecological impacts in the ESIA study thus erroneously finding that the mitigation measures were sufficient;

c. The Tribunal further erred in law and in fact by ignoring the 1st to 6th Respondents/cross appellant''s pleadings evidence and submissions on the failure by the ESIA study to consider the impact of the proposed plant on endangered and critically endangered plant and animal species;
3. Air quality
a. The Tribunal erred in law and in fact by holding at paragraph 107 of its judgment that the mitigation measures for air quality impacts were adequately addressed in the ESIA study thus disregarding or failing to address the 1st to 6th respondent’s cross-appellant’s evidence on the scientific insufficiency of both the assessment of air quality impacts and the proposed mitigation measures;
4. Water quality
a. The Tribunal further erred in law and in fact by ignoring the 1st to 6th respondents/cross appellants’ pleadings evidence and submissions on record to the effect that the discharge of thermal effluent from the proposed coal plant would violate the law;
5. Climate change
a. The Tribunal erred in law in failing to find that the EIA license was issued ultra vires the Climate Change Act 2015;
6. Constitution of a Technical Advisory Committee
a. The Tribunal erred in law and in fact by failing to address the 7th respondent’s irrational failure to exercise its discretion to constitute a technical advisory committee to advise NEMA in its assessment of the ESIA study and report.

35. The respondents/cross-appellants sought the following orders:
i. The appeal be dismissed and the cross appeal be allowed;
ii. The appellant bear the 1st to 6th Respondents/cross-appellants’ costs of the appeal. In the alternative each party to bear its own costs of the appeal.

SUBMISSIONS
Appellant’s Submissions
36. While giving a background to the dispute the appellant pointed out the anticipation of an increase electricity demand in Kenya following the devolved system of government under introduction of intensive economic activities throughout the country. This led to a fast-tracked power generation program intended to increase the generation capacity by over 5,000 MW in 40 months and the government identified coal as one of the sources of energy to drive the development of strategic initiatives in the Kenya Vision 2030. It is stated that the key elements of this program included construction of two coal fired power plants of 900 to 1,000 MW each at Lamu and in Mui Basin. The target was to bring down the cost of power through a more affordable and reliable and stable platform. Land would be acquired (by the government) for the Lamu coal project while KETRACO would develop a transmission line to evacuate power from the power plant through a Public Private Partnership (PPP). The coal power project was part of the LAPSSET corridor project. Amu Power bid successfully and was awarded the tender to develop the coal fired plant on a build-own-and-operate-basis.
37. It is contended that the award of the bid to Amu Power was a confirmation that it had the requirements including technical expertise to construct and operate the coal fired power plant. The tender award has never been challenged so far. Amu Power retained Kurrent Technologies Limited to prepare an ESIA study on the project and presented the same to NEMA.
38. In support of the grounds of appeal it was submitted that given the quality of evidence adduced by the respective parties in the proceedings before the Tribunal the 1st to 6th respondents’ evidence before the Tribunal did not meet the threshold sufficient for the Tribunal to allow the appeal in the terms contained in the impugned Tribunal decision, and that the Tribunal did not evaluate the evidence before it properly and therefore it arrived at the wrong decision; that the ESIA study was

undertaken in strict compliance with the laws of Kenya and the Constitution.
39. As to whether the grant of the EIA license was in violation of the Environmental Impact Assessment and Audit Regulations and the Constitution, it was submitted that according to the evidence of Sanjay Gandhi, it was not.
40. It was specifically pointed out that the report was submitted to NEMA as required; requested the relevant lead agencies to submit their comments as required by law; that the 1st to 6th respondents gave their comments on the project report vide their letter dated 12th November 2015 which contains the names of some of the individual respondent as signatories.
41. It was submitted by the appellant that when the 7th respondent noticed that the project would have a significant impact on the environment, it demanded public consultation and in-depth coverage of the possible impact and mitigation measures thereof under Regulation 10 (3) of the EIA Regulations. It is admitted that Terms of Reference were prepared by Amu Power and submitted to NEMA in January 2016 and the latter approved them, whereupon Amu Power prepared and ESIA study dated 10th July 2016 containing all the matters the study must have as provided for under Regulation 16 of the EIA Regulations; it is asserted that public participation was duly undertaken at all stages in the preparation of the ESIA study report as required by Regulation 17 including public engagement in August 2016.
42. Under Regulation 18 the ESIA report addressed inter alia, the crucial environmental aspects of the project; that as required under Regulation 20, the study was forwarded to the lead agencies for their comments within 14 days; that under Regulation 21 NEMA caused it to be published for two successive weeks in the Kenya Gazette; that newspaper advertisements were carried out both in the Daily Nation and in the Taifa Leo giving the public 30 days to submit views; that the Kwasasi public hearing of 26th August 2016 was conducted after the expiry of the 30 days given in the newspaper notices; that the lead agencies gave their comments within 30 days of the notices.
43. It was upon receipt of both oral and written comments under Sections 59 and 60 of the Act that NEMA published a notice for a public hearing in the Daily Nation of 19th August 2016 and conducted the public hearing on 26th August 2016 and later issued an EIA licence dated 7th September 2016. The Tribunal should therefore, in view of those matters outlined herein above, have upheld the decision to issue Amu Power with licence.
44. Under agreed issue number 2, it was submitted that it was incumbent upon the respondents to prove allegations that they were not offered a reasonable opportunity to know about relevant issues and have an adequate say in the matter. The case of National Association for The Financial Inclusion of the Informal Sector Versus Minister for Finance and Another 2012 eKLR was cited for the proposition that the Constitution does not prescribe how public participation is to be effected and that in every case where violation is alleged it is a matter of fact whether there is such a breach or not; that the 2nd to 6th respondents are all members of Save Lamu the 1st respondent who, from the evidence, was shown to have corresponded with NEMA and Amu Power. It was pointed out that in the letter dated 12th November 2015, Save Lamu claimed to represent over 35 organizations in Lamu county, and that they wrote the letter to submit their concerns about the project and that they did indeed give their views; that the statement they gave is endorsed by 12 other community organizations and another in which the 1st respondent’s second witness, Muhammad Bakar, appeared to be a member. It was submitted that the 3rd respondent had also admitted at the hearing to be a member of Save Lamu and added that the 2nd respondent was a member of Save Lamu too; that the Study indicated that they had attended some of the meetings concerning the project as Save Lamu members, and PW2 had also admitted to having attended a consultant’s meeting at Save Lamu offices on 24th January 2015; that evidence at Page 306P of Volume IV of the record of appeal showed that he was chairman of Water Resource Users Association which is a member of Save Lamu. The 4th respondent and the 2nd respondent are also said to have admitted in their evidence that they were members of Save Lamu. (However the only meeting they appeared to have attended was that of 24th January 2015, held before the ESIA study); that Save Lamu also wrote a letter dated 13th March 2016 on behalf of the communities it represents to give their views

for the ESIA study. Also an undated 50-page letter forwarded by their lawyer Shalom M. Ndiku was cited as further evidence of Save Lamu''s participation. That same lawyer is also said to have attended the public hearing on 26th August 2016 and given the appellant’s comments (which are now contained in annexture “SL15” at Page 370 of Volume 1 of the record of appeal). PW2 is also said to have attended that meeting too and given comments. PW11 is said to have represented his association - Lamu Tourism Association - at the same meeting and in his evidence he is said to have identified the 2nd respondent as one of the persons who attended project meetings, and that he expressly testified that Save Lamu gave its views on the project.

45. It was submitted that Save Lamu does not represent the public at large but that it represents defined sections of Lamu’s society and should be taken to have represented all the communities and groups it has shown to represent and thus it was consulted in the matter.

46. The appellants also averred that paragraph 12 of the appeal was an admission that Save Lamu was given a chance to present its views; that Save Lamu''s own documents show that they were consulted by the lead ESIA expert. The appellant states that the respondents having been consulted, they opposed the project in bad faith. The Appellants maintained that the evidence of Sanjay Gandhi showed a total 31 meetings were undertaken between 9th January 2015 and 25th June 2015 was uncontroverted; that a public stakeholder meeting for civil society organizations was organized by the Ministry of Energy and Petroleum on 14th October 2015; that a company by the name “Africa Practice” was hired by the appellant to conduct door to door physical campaigns in homes in the Lamu archipelago to sensitize residents about the project; that various meetings were held at various locations in Lamu County between 8th August 2016 and 11th August 2016 to share the contents of the ESIA study and specialist studies, and to receive comments. Posters were posted in strategic places and criers were also used to relay messages about the meetings; that public hearing sessions and sensitization missions were conducted in Swahili which is known by most people in Lamu; that the respondents held the misconceived notion that all their views must be taken on board as seen from paragraph 33 of their memorandum of appeal before NET.

47. It is finally averred that even in the event that this court found there was a flaw in the consultation process; that flaw was not fatal to the ESIA study. The appellant urges this Court to find and hold that there was adequate public participation and that the respondents were involved at every stage of the consultation process and they are allowed to give their view as required by the law.

48. As to whether the appellant conducted a proper analysis of the alternatives of the project, the appellant referred to the expression of interest documents the government of Kenya through which the Ministry of Energy wished to have a coal fired power plant constructed. It referred to the evidence of the Lead EIA expert, Sanjay, which it said was uncontroverted, who gave reasons why coal made a viable alternative based on his experience with other power projects. It faulted the evidence of the respondents’ witnesses, one of whom stated that such a plant cannot be justified up to the year 2030 and whom Sanjay criticized as having no technical experience in dealing with power technology especially regarding a coal fired power plant. The evidence the respondents’ witness Hindbar Singh Jabal gave before the Tribunal was dismissed as having been given as testimony before the Energy Regulation Commission.

49. Regarding location alternatives, it was submitted that the study concluded that only option for a port site for receiving coal in bulk was Lamu and the Kwasasi site was chosen because it is where the LAPSSET corridor begins; that 3 routes on Manda Bay were analyzed - and this court was referred to page 254-256 of the ESIA study- for the supply of coal in the study, and only one of them was and one of them was approved.

50. Regarding the issue of scheduling alternatives, it was submitted that these had been analyzed and this court was referred to page 263 of the ESIA study.

51. On the energy supply alternatives, it was submitted that this had been addressed at Pages 256 To 263 of the ESIA study; that the appellant analyzed both the advantages and disadvantages of the various available sources of energy.

52. As to the technology alternatives, it was urged that us combustion technologies coding system technologies had been addressed/analyzed at page 263 -267 of the record of appeal (which is also page 263 -267 in the ESIA study) and a “Once-Through” cooling system had been settled on and reasons therefor given.
53. The “do nothing” option was also analyzed at page 267 of the ESIA.
54. This court is of the view that as the Tribunal held that it''s work was restricted to reviewing the decision of NEMA from an environmental angle, the issue of whether it conducted a proper analysis of economic viability of the project does not arise in this appeal, though submitted on by the appellants.
55. As to whether the EIA study report contained adequate mitigation measures it was submitted for the appellant that the proposed mitigation measures to be taken during and after the implementation of the project were addressed under Chapter 8; that the chapter on mitigation is one of the longest in the ESIA study report and that the chapter length per se confirmed the importance the study placed on mitigation measures; that mitigation measures set out in the study are also backed up by specialized studies carried out by the specialists in the relevant fields and those findings are contained in the appendices to the study as seen in Vol IIB of the record of appeal.
56. It is submitted that atmospheric emissions and air quality, storage, ash yard, ash handling and storage system, coal conveyor system and the 2000-acre limestone concession quarry were all addressed in the ESIA study and for that, the court was referred to Vol IIA and Vol IIB of the record of appeal.
57. It was further submitted for the appellant that marine ecological impacts and terrestrial ecological impacts mitigation was analyzed in the ESIA study as seen in Chapter 8.9 of Volume 2A of the record of appeal.
58. Thermal effluent and mitigation measures are said to have been addressed in the ESIA study as seen in the ESIA study and the court was referred to Vol 2A of the record of appeal. It was urged that there is ambiguity in the Kenyan Regulations regarding this hence the appellant preferred to use to the World Bank Group’s General EHS Guidelines for Wastewater and Ambient Water Quality (April 2007) as stated by Sanjay, it''s witness at the hearing.
59. It was urged that climate change and mitigation and adaptation measures were addressed in the ESIA study and this court was referred to pages 305 to 312 and pages 308 and 309 of the of the record of appeal. It was urged that the project would displace a much higher amount of carbon dioxide than what could be generated by it as electricity be available to the users at the lowest rates; that added benefits revolving around climate change adaptation measures such as free water supply to the community and subsidized health facilities would also be derived. It was denied that the project is in breach of Kenya''s obligations under the Paris Agreement, arguing that the Paris Agreement came into force on 4th November 2016 after the ESIA study had been concluded and EIA license issued to the appellant.
60. It was urged that the respondents never demonstrated to what extent the 7th respondent’s approval of the ESIA study and the consequential issuance of an EIA license failed to meet the requirements of the law and the extent to which the 7th respondent failed if at all in discharging its mandate as provided for under the enabling statute - EMCA.

1st – 6th Respondents’ Submissions On the Appeal and Cross-Appeal

Submissions On the Appeal

61. The respondents invite this court to determine the appeal through the lenses of principles of sustainable development set out in Section 18 of the Environment and Land Court Act 2011 and particularly Section 18(A) (i).
62. The Respondents’ Cross-Appeal is grounded on the claim that the National Environment Tribunal affirmed the sufficiency of some aspects of the EIA study.
63. The respondents opposed the appeal and submitted on 6 grounds as follows

a. Locus standi of the first respondent;
b. Jurisdiction of the Tribunal;
c. Burden of the standard of proof;
d. Public participation;
e. Lack of a proper analysis of alternatives to the project;
f. Adequacy of mitigation measures.

64. On locus standi, they faulted the appellant for contending that in the absence of any evidence of its registration status, the 1st respondent is not an entity capable of suing. Citing Kenya Hotel Limited Versus Oriental Commercial Bank Limited 2018 eKLR at Page 18, they submit that this is a new issue raised on appeal, which this court does not require to consider. They also urge that such a ground is at variance with the appellant's case before the Tribunal where the appellant continuously urged that it adequately engaged the 1st to 6th respondents as required under the legal and regulatory framework for environmental protection and management; that the appellant claimed for the recognition of the legitimacy of its engagements based on its interactions with the 1st respondent as an organization representing the community.
65. Regarding jurisdiction, they cited Samuel Kamau Macharia & Another Versus Kenya Commercial Bank 2012 eKLR Paragraph 68 which states that jurisdiction flows from the Constitution of the law. Arguing that the Tribunal's jurisdiction stemmed from Section 129 (1) (a) of the EMCA which outlines of the reliefs that it may give upon hearing an appeal; that the Tribunal rightfully exercised its jurisdiction within its scope and limitations and even addressed the issue of its own motion at paragraphs 12 and 152 of the judgement, saying that it is not unlimited but purely an appellate jurisdiction in respect of the decisions of the 1st respondent in matters relating to EIA licenses; that the Tribunal exercised its jurisdiction judiciously in arriving at the final orders in its judgment.
66. Regarding the evidence adduced, the burden and standard of proof, the cross-appellants invited the court to consider that the cross-appellants had 17 witnesses 12 of who gave evidence in support of their case. They point out the presence of their documents in support of their appeal as well as the witness statements in the record, and they contend that throughout its judgment the Tribunal engaged with this evidence and the evidence presented by the appellant and made findings of fact on which the judgment was premised.
67. The cross-appellants urge that the Tribunal's approach should not be considered as fundamentally flawed for failing to apply the precepts of the law of evidence and the appellant's claim to that effect lacks basis for the reason that Section 121 of EMCA provides that the Tribunal shall not be bound by the rules of evidence set out in the Evidence Act. Nevertheless, it is stated that this is a new issue rising for the very first time which was neither pleaded nor canvassed before the Tribunal or argued by the appellant in its final submissions to the Tribunal.
68. The cross-appellants reverted back to their submission before the Tribunal to the effect that the onus of proving compliance in such a case fundamentally fell on the project proponent. They referred to the case of MP Patil Versus the Union of India Appeal Number 12 Of 2012, March 13th 2014 where it was held that the onus is not on the objectors to prove the objections by leading scientific evidence at that stage, and that it is the duty of the respondent to examine the worth of the objections raised and the consequences there of; that it was for the project proponent to show that the various apprehensions of the objectors were not well founded and that the project is not likely to result in any environmental damage or cause deprivation of the livelihood and income of the project-affected by persons.
69. They submitted further that Sections 126(1) (2) and (6) of EMCA and Rule 22(6) of National Environment Tribunal Procedure Rules flow from and reflect the fundamental right of access to justice, the Constitutional guarantee to clean and healthy environment and right to a remedy pursuant to Articles 42 and 70 of the Constitution. These guarantees, they urge would be defeated if success before the Tribunal were to be predicated upon a citizen's capacity to marshall scientific evidence to show that the project proponents have not complied with Constitutional and statutory

legal requirements. The Cross-appellants urge that as a matter of good policy, this Court should follow the MP Patil case (supra). However, they point out that notwithstanding that argument, the 1st to 6th respondents did actually marshal adequate evidence, including expert evidence, at the Tribunal.

Regarding Public Participation.

70. The Cross-appellants submitted that the Tribunal's findings of fact and application of the law on the issue of public participation was correct. They reiterated their arguments made in their submissions on public participation before the Tribunal. They distinguished the case of National Association for Financial Inclusion of the Informal Sector Versus Minister of Finance and Another, 2012 eKLR, stating that that decision was made in circumstances concerning law making where there was no established regulatory framework for public participation in contrast to the present circumstances where an elaborate regulatory framework for public participation in the context of environmental governance and management was provided for. They pointed out that public participation begins with Article 10 of the Constitution where it has been enshrined as a national value and principle governance which binds all State officers while they are applying the Constitution and the law; that further, Article 69(f) mandates the State to establish systems of environmental and impact assessment environment audit and monitoring of the environment; that these systems are found in EMCA and EIA Regulations; that the Tribunal correctly identified this framework; that the appellant is now inviting this Court to lower the standard to below that observed by the Tribunal; that any lapse in compliance with the minimum statutory requirements for public participation is sufficient justification for cancellation of an EIA licence. They reiterated that the public engagements undertaken by the appellant were done during the Scoping stage and not after the issuance of terms of reference to the appellant by NEMA and were thus contrary to Regulation 17 (2) requiring the seeking of views of the public after the approval of the project; that even during the Scoping stage there were substantial lapses in the public participation approach taken by the project proponent. They cite, as an example, the KFS complaint to the effect that there was selective involvement of the public as evidence of this. They labelled this is a top-down approach of the kind rejected as unsuitable in a Constitutional democracy in the case of Sustaining the Wild Coast NPC and Others Versus Minister of Mineral Resources and Energy and Others Case Number 3491 Of 2021 High Court of South Africa. Consequently, even the appellant's argument that sufficient public participation was undertaken because of its engagement with Save Lamu should be rejected. They emphasized that as held in the Mui Coal Basin Case (supra), whatever program of public participation is fashioned must include access to and dissemination of relevant information; that the Scoping phase was not the right stage for obtaining the relevant information from the studies undertaken as part of the ESIA report; that the Scoping phase engagements were purely preliminary in nature; that then, there was no provision of critical information necessary to make the consultation effective or meaningful which is an omission that goes straight into the substance of the right to public participation and the right to clean and healthy and environment. To support this claim, they refer to the numerous responses of Sanjay Gandhi to questions put during the Scoping face where he said that specialist studies were yet to be undertaken to establish the potential impacts and mitigation measures which might be required. They refer to pages 1169 and 1170 of Volume 2C of the record. They also refer to pages 1179, 1203, 1238 of Volume 2C of the record. They aver that in those pages of the appeal record, consistent commitment occurred during each of the engagement to provide the findings of the specialist studies to the community. Consequently, the Tribunal's conclusion that there was failure to provide environmental information to make consultation meaningful and effective at paragraphs 69 of the judgment was correct. Citing the Mui Basin Case and in support of the proposition that a public participation program must show intentional inclusivity and diversity the Cross-appellants maintained that they wrote a letter dated 26th August 2016 raising concerns about the inaccessibility of the choice and venue of the public hearing in Kwasasi; that one witness testified about her inability to access the venue due to the

prohibitive cost of getting there by boat; that the said Kwasasi meeting was only fit for the farmers whose land would be acquired for the construction of the plant; that also, the meeting was held on a Friday, a recognized day of prayer for Muslims who form the highest population in the area; that given the effect of the lapses on the part of the appellant, the Tribunal was justified in the revocation of the EIA license.

71. The lack of proper analysis of location alternatives contrary to Regulation 18(1)(j), the Cross-appellants submitted that the appellant had admitted through the evidence of witnesses Sanjay Gandhi and Gideon Rotich that the location of the coal power plant was determined by the government of Kenya as part of the wider LAPSSET project. There was a justifiable basis then for the Tribunal to make a finding that a Strategic Environmental Assessment ought to have been undertaken as recommended in the Mohamed Ali Baadi Case (supra). It was also submitted that contrary to the belief by the appellant the Tribunal's finding on the SEA was not a matter of ascribing liability to the appellant but a matter of ensuring compliance with the framework of impact assessment which include SEAs under Section 57(a) of EMCA and Regulation 42 of EIA Regulations. The Tribunal could also not ignore the decision of the Mohamed Ali Baadi Case(supra).

72. Regarding lack of sufficient information on the placement of various components of the coal fired power plant, it was urged that the Tribunal was speaking first hand, after having visited and partly heard the case at the Kwasasi site and it was clear that Tribunal was correct in saying that this default presented a challenge to it in its attempt to consider some of the mitigation measures proposed.

73. Concerning the requirement of detailed architectural and engineering plans, Section 129 (3)(b) of EMCA was cited as empowering the Tribunal to make any decision that the 7th respondent could have made in the context of the appeal.

74. On the adequacy of the mitigation measures and the 7th respondent's consideration of those measures, it was submitted that contrary to the appellant's contention that the evidence of mitigation measures was unchallenged, the Cross-appellants stated that evidence of David Obura page 6 of Volume IIIA of the record of appeal demonstrated that the adequacy of mitigation measures was challenged during the trial before the Tribunal; that competing testimonies, which the Tribunal grappled with, were given in respect thereof; that considering the admission in the ESIA study that coal ash would contain mercury residues, would be located in a tidal zone and would be monitored for a period of only 2 years out of the likely 25 years lifespan of the project, the Tribunal's findings that there was insufficient information on which assessment of the adequacy could be made met the standard of reasonableness; that the incomplete insufficient, and inconclusive information on the coal handling and storage and the 2,000-acre limestone concession quarry was insufficient and inconclusive to form the basis for NEMA to issue an EIA license as no design of the proposed conveyor belt was included as part of the ESIA study report. The respondents urge that the consequence of absence of information was the issuance of generic license conditions which failed to address the pertinent issue of coal handling and storage once the coal is loaded at the Lamu Port and conveyed over 15 km to the project site, and around the site, and stored. The Cross-appellants recalled their submission at the Tribunal where they had asserted that the importance of this issue to the public was that in their estimation, only 50% of the coal dust would be suppressed, and that storage and handling would occur adjacent to a marine area and close to local populations, with potential environmental and health impacts. They criticized operational license conditions number 3.6 and 3.7 as very generic and lacking specific measures addressing the transportation of the coal. The Tribunal was thus justified in their decision on the issue.

75. Regarding climate change it was pointed out that the Tribunal faulted the ESIA Report for being insufficient and incomplete; that Regulation 16 of the EIA Regulations stipulates that Environmental Impact Assessment Studies must take into account environmental, social-cultural, economic and legal considerations; that the ESIA study in the present case allegedly failed to deal with the legal considerations. This was attributed to lack of awareness of the existence of a statute on the part of the Lead EIA expert; it was pointed out that the testimony of the lead EIA expert Sanjay Gandhi

demonstrated that he had proceeded on the erroneous assumption that the Climate Change Act was still a Bill at the time the ESIA study report was being prepared. see Page 505 of Volume IV. It is stated that the appellant thus demonstrated complete ignorance of the Climate Change Act 2016 and that constituted an error of law; that Section 7(2)(d) of the Fair Administrative Act binds the Tribunal to review any administrative action materially influenced by an error of law, or where an administrator failed to consider relevant issues. It was further argued that the significance of that omission to deal with climate change must be considered alongside the following facts:
a. The concession in the ESIA report was that on a conservative estimate the project would emit 8.8 metric tons of carbon dioxide annually thus increasing Kenya''s annual emissions from 73 metric tonnes to 81 metric tons;
b. This project was coming at a time when Kenya had made a commitment to reduce its emissions by 30% by 2030;
c. The ESIA study report contains no assessment of whether the proposed project is consistent with the Kenya''s national climate change adaptation plan which emphasizes the need to achieve a low carbon climate resilient pathway;
d. Section 3(2) of the Climate Change Act 2016 binds national and county governments in all sectors of the economy to promote low carbon technologies, improve efficiency and reduce emissions intensity by facilitating approaches and update of technologies that support low carbon and climate resilient development.

76. It was submitted that in view of the foregoing, NEMA’s decision to approve a carbon intensive project which on its own could emit huge amount of carbon dioxide without any consideration for its implications against the provisions of the Climate Change Act amounted to a violation of Articles 10 and 21 to observe, respect, protect, promote and fulfill the right to a clean and healthy environment; this was due to the reason that implications based on both domestic law on climate change and Kenya''s commitment and the United Nations Framework Convention On Climate Change had not been addressed.
77. The appellant’s argument that UNFCCC did not come into force until November 2016 was said to be a new argument; nevertheless, it was countered by the fact that Sanjay Gandhi testified that UNFCCC requirements were considered at Page 505 Of Volume IV. It was also submitted for the cross-appellants that in any event, the ESIA study report expressly conceded that it did not consider the physical impact of climate change resulting from increasing GHG emissions; that the Tribunal rightfully applied the precautionary principle as defined in Section 2 of EMCA; that the Tribunal’s observations and revocation of the EIA license based on the appellant and the 7th respondent’s failure to account for the Climate Change Act and the UNFCCC commitments by Kenya were therefore correct and should be upheld.

1st -6th Respondent’s Submissions On the Cross-Appeal.
On the inadequate analysis of technology or alternatives
78. It was submitted that the Tribunal was wrong in holding that the other alternatives analysis were adequate. These included analysis on cooling technologies, analysis of energy supply alternatives, analysis of ecological impact and mitigation measures, analysis of air quality impact and mitigation measures, and analysis of thermal influent water quality impact and mitigation measures.
Failure To Constitute A Technical Advisory Committee
79. Regarding the 7th respondent’s failure to constitute a technical advisory committee, it was submitted that in the present case, the utility of a technical advisory committee usually constituted under Regulation 5(1) of the EIA Regulations is evident due to the significant impacts the respondents and the lead agencies identified, which cover various sectors including air quality, marine life, mangroves, climate, livelihoods and health; another reason was that the technology and designs to be used are new in Kenya. The Constitution of that technical advisory committee, it was urged, would have been key in aiding extensive multidisciplinary interrogation of the proposed

project. It was argued that no reasonable authority would have failed or refused to constitute a technical advisory committee in the face of all those factors. The TAC would have supported NEMA in its comprehensive assessment of all aspects of the ESIA report. It is urged in the present appeal that this issue was not addressed by the Tribunal despite it having been one of the agreed issues. It is averred that failure to constitute a technical advisory committee was unreasonable. The case of William Odhiambo Ramogi and 3 Others Versus the Attorney General and 4 Others & Muslims for Human Rights and 2 Others Interested Parties 2020 eKLR was cited in support of that proposition.
80. In conclusion the cross-appellants aver that the revocation of the EIA license was the only lawful outcome of the appeal that guaranteed Lamu residents rights to a clean and healthy environment, and that the Tribunal's decision and basis for revocation of the license was well grounded in both law and fact. The cross-appellants urged this Court to allow their cross-appeal and dismiss the appeal.

ANALYSIS AND DETERMINATION

Issues Not Raised in The Appeal Before NET.

81. This court has considered the Memorandum of Appeal, the Notice of Cross Appeal and the submissions of the parties. Upon perusal of the Memorandum of Appeal and the Notice of Cross-Appeal, this Court distils the following questions as arising for determination:
i. Whether the issue of locus standi of the 1st respondent ought to be dealt with in the present appeal;
ii. Is the Cross-appeal competently before this court?
iii. Whether the ESIA process met the Constitutional and statutory threshold for public participation and whether the Tribunal erred and thus placed excessive reliance on such compliance over and above the spirit of public participation, to nullify the EIA licence issued by the 7th Respondent;
iv. Whether the ESIA study sufficiently analyzed project and location alternatives;
v. Whether the Report contained adequate mitigation measures;
vi. Whether the EIA complied with the Terms of Reference approved by the 7th respondent;
vii. What orders should issue as to costs.

These issues are addressed as herein below:

Whether The Issue of Locus Standi of The 1st Respondent Ought To Be Dealt With In The Present Appeal;

82. The raising of the issue of locus standi of the 1st Respondent in the present appeal was protested by the cross-appellants on the basis that it was a new issue being raised on appeal. The Appellant's submissions before the Tribunal are contained in page 218-280 of Volume IV of the record of appeal.
83. It must be noted that the parties agreed on issues to be addressed before the Tribunal and the issue of locus standi of the 1st Respondent did not form part of those issues. This is clear from the appellant's own submissions which set out these issues at page 229 to 230 of Vol IV of the record of appeal. Consequently, even at a glance, it would not have been expected that parties would have submitted before the Tribunal on that issue; even if they had done so, it is doubtful that the Tribunal would have considered any issue outside the list of agreed issues.
84. In a manner that critically undermines the authenticity of its argument both ways, the appellant blows both hot and cold regarding the issue of the locus standi of the 1st respondent; the appellant would in its submissions prefer this court to believe that due to its interaction with the 1st respondent and its members, a great proportion of the people of Lamu were consulted and so the statutory and constitutional public participation requirement was met in respect of its ESIA study; in the same breath it is urging this court to find that the 1st respondent lacked locus standi to sue.
85. Issues for determination in an appeal should naturally arise from the evidence given in the

proceedings in the case appealed from. The appellate court's mandate is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect see: Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123.

86. It is therefore the case that issues should not be dealt in the appeal if they never arose in the court below. In the present dispute all the parties had opportunity to file their pleadings and adduce evidence at the National Environment Tribunal. It would appear that before the Tribunal the appellant herein was anxious to persuade the NET that it achieved the requirement of public participation hence its insistence that the 1st respondent and its members were consulted during public participation.

87. In the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 the Court of Appeal held as follows:

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

88. In TMG & another v AP (Application E012 of 2024) [2024] KESC 48 (KLR) (30 August 2024) (Ruling); [2024] KESC 48 (KLR) it was held as follows:

"Looking at the issues that were before the superior courts below, we note that, as the Court of Appeal correctly observed, issues relating to violation of the applicants' constitutional rights were never subject of the litigation before the said courts. Therefore, such issues cannot be raised for the first time at the point of seeking certification as appreciated in Thika Coffee Mills v Rwama Farmers' Co-operative Society Limited (Application 11 of 2020) [2020] KESC 17 (KLR)."

89. Having regard to the foregoing, this court therefore, declines to address the issue of locus standi of the 1st Respondent since it is a new issue raised for the first time in the appeal.

Is The Cross-Appeal Competently Before This Court?

90. Section 129 provides as follows:

"129. Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a)the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

(b)the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

(c)the revocation, suspension or variation of the person''s licence under this Act or its regulations;

(d)the amount of money required to paid as a fee under this Act or its regulations;

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

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may—

(a)confirm, set aside or vary the order or decision in question;

(b)exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

(c)make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

(d)if satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;
(e)if satisfied upon application by any party, review any orders made under paragraph (a).
(4) Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon commencement of this section unless the Tribunal, upon application by a party to the appeal, issue fresh orders maintaining the status quo in accordance with subsection (3)(a)."
91. Section 130 of EMCA provides as follows:
"130. Appeals to the Environment and Environment and Land Court
(1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.
(2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.
(3) Notwithstanding the provisions of subsection (2), where the Director- General is satisfied that immediate action must be taken to avert serious injuries to the environment, the Director-General shall have the power to take such reasonable action to stop, alleviate or reduce such injury, including the powers to close down any undertaking, until the appeal is finalised or the time for appeal has expired.
(4) Upon the hearing of an appeal under this section, the Environment and Land Court may—
(a)confirm, set aside or vary the decision or order in question;
(b)remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
(c)exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
(d)make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
(5) The decision of the Environment and Land Court on any appeal under this section shall be final."
92. According to Section 130 (1) of EMCA, any appeal to be lodged against the decision of NET issued in exercise of its power under Section 129 has to be lodged within 30 days of that decision. The gravamen of the objection to the cross-appeal is that it was filed outside the 30-day period which this court finds to be the case. The issue that arises is whether the Cross-appeal should be entertained by this court.
93. It is clear that the jurisdiction of a Court is granted either by the Constitution or by statute. In the case of Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) the Supreme Court stated: -
"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or Tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or Tribunal by statute law."

94. It has been the law that parties should follow the procedure prescribed for the redress of any

particular grievance prescribed by the Constitution or an Act of Parliament, see the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR Civil Application No Nai 92 OF 1992 (NAI 40/92 UR. In that case the Court of Appeal stated as follows:
"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."
95. Regarding appeals to the Court of Appeal, for example, the filing of a notice of cross-appeal is guided by Rule 95 of the Court of Appeal Rules, LN. 40 of 2022, which provides as follows:
95. Notice of cross-appeal
(1) A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of the contention and nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.
(2) A notice under sub rule (1) shall state the names and addresses of the persons intended to be served with copies of the notice and lodged in four copies in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and record of appeal, or not less than thirty days before the hearing of the appeal, whichever is the later.
(3) A notice of cross-appeal shall be substantially in Form G as set out in the First Schedule and signed by or on behalf of the respondent.

96. It is clear that EMCA does not provide for the filing of a notice of cross-appeal before the National Environment Tribunal, but only the appeal. A cross-appeal is in essence an appeal by a respondent in an existing appeal. Without any provision in EMCA allowing for the filing of a cross-appeal or even a notice of cross-appeal in the manner the Court of Appeal rules do, it is the case then that if the Respondents desired to appeal against any decision of the NET, they should have done it within 30 days provided for in Section 130 (1) of EMCA, just like the Appellant did. Even assuming that time can be extended, which is not an issue in the present appeal, this court finds no order filed before it extending time to enable the Respondents to file any notice of cross-appeal or appeal. The cross-appeal has been filed unprocedurally. Thus this court would be exceeding its jurisdiction if it entertained the cross-appeal herein. For the foregoing reasons, this court finds that the appeal by way of notice of cross-appeal filed on 5th September 2019 by the Respondents herein being premised on no statutory provisions is incompetent and it is therefore struck out.

Whether the ESIA process met the Constitutional and statutory threshold for public participation and whether the Tribunal erred and thus placed excessive reliance on such compliance over and above the spirit of public participation, to nullify the EIA licence issued by the 7th Respondent.
97. As stated earlier while addressing a different issue, the duty of the first appellate court is to reconsider the evidence adduced before the trial court, evaluate it afresh, and draw its own independent conclusions, bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. (See Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123)
98. There is no doubt that the issue presently under discussion constitutes the weightiest ground for appeal in the eyes of the Appellant and this is clear from the fact that it is the one most dwelt on in their submissions. In dealing with this issue, this court should ask itself the following question - did the appellants prove flaws in the public consultation process to the required standard in order to warrant cancellation of the EIA license? The sub-issues arising from this main issue are as follows:
i. Whether a reasonable opportunity had been given to the public including the respondents to know about the project and make their representations;
ii. Whether the Tribunal disregarded the uncontroverted evidence of witnesses which showed there

was public participation;
iii. Whether the Tribunal made a finding at paragraph 43 that wide public participation had been undertaken at a Scoping phase and later contradicted that finding;
iv. Whether the Tribunal erred in holding that the meetings held were introductory in nature and not structured to share information on effects or impact of the project;
v. Whether NET erred by holding that the meeting at Kwasasi was premature;
vi. Did the Tribunal attach more emphasis on procedure rather than the spirit of public participation and hence arrive at an erroneous decision?
99. The NET's approach to this issue as is evident from its judgment is that public participation carried out by the Appellant occurred during the Scoping phase rather than during and after the ESIA study.
100. The Tribunal examined the level of process of public participation undertaken by the respondents and applied the test of the effectiveness of public participation thereat, observing that whereas the Constitution does not prescribe the manner of public participation, regarding Environmental Impact Assessment Studies, EMCA and its Regulations provide a structure of how the public participation exercise should be conducted. It observed that till the date of submission of a project report by Amu Power on 12th November 2015 the parties appeared to proceed on the basis of a project report, but with effect from 17th June 2015, Act No 5 of 2015 amended Section 58(1) of EMCA so that all projects falling within the Second Schedule to the Act required an EIA Study as opposed to a mere project report; that consequently, through a letter dated 26th October 2015, NEMA, in line with the new legal provisions, required Amu Power to undertake an environmental impact assessment study and it required Amu Power to include the following details in its study:
1. Project rationale and justification (especially with regard to the site);
2. Detailed Engineering and related drawings;
3. A comprehensive analysis of project alternatives (site, technology, materials etc);
4. Detailed and comprehensive stakeholder consultation."
101. The Tribunal found that the respondents herein gave their views and comments and took part in ventilating their views leading to the preparation of the Project Report and Scoping stage and even after the Project report but before the EIA study had commenced; that the ESIA Study report contained a very clear Stakeholder Engagement Plan intended to cover the Scoping Phase, the ESIA Study Phase, the Construction Phase, the Operational Phase and the Decommissioning Phase; that a summary of the stakeholder engagement activities all in the year 2015 was presented; NET agreed at Paragraph 43 of its judgment that the evidence produced showed that wide public participation had been undertaken during the Scoping phase for the project report and further held as follows:
"44. However, these were all done before the study had been commenced or conducted or the study report prepared. The meetings that took place from 9th January 2015 to 25th June 2015, well before the EIA Study was itself conducted, were in the Tribunal's view not the meetings contemplated by Regulation 17 of the Regulations which provides at Regulation 17 (2) that the seeking of views of the public could only happen after the approval of the project report by the 1st Respondent.
45. From the table of the summary of the meetings, it will be seen that these were introductory in nature but not structured to share information on the possible effects and impacts of the project on the population and the proposed mitigation measures that the 2nd Respondent would undertake."
102. The Tribunal further found as follows:
"By the time these meetings were taking place the Study process had not commenced and the attendees were informed that subsequent meetings were planned for to provide more details on the concerns they raised. These meetings to explain the project properly and allay the concerns of the residents never took place. Essentially, the proponent had put the cart before the horse by relying on information obtained prior to the EIA Study as the basis for justifying the EIA Study. It also contradicted the directive by the 1st Respondent of 26th October 2015 when the 2nd Respondent was asked to undertake wider public consultation and in-depth coverage of the foreseen impacts and mitigation measures thereof. The directive was intended to cover greater additional consultation and

inclusion of these impacts."

103. The Tribunal proceeded further as follows:
"46. From the evidence of both the 1st and 2nd Respondents no attempt was made to show that public consultation meetings had taken place in line with Regulations 17(1) and 17 (2) for the period from the formulation of the Terms of reference in January 2016 to July 2016 when the EIA study report was concluded. No notice of meetings were issued or meetings held under the requirements of regulation 17. Instead the Respondents sought to circumvent these requirements by repeatedly referring to the meetings at the Scoping and project stage of the process in the year 2015, well before the EIA Study had commenced. At that stage of the project report in 2015, and as pointed out by the 1st Respondents letter, there was lack of access to information that was a prerequisite to a meaningful exercise of public consultation and participation.
47. The danger of relying on the year 2015 meetings is evident from the inaccuracy of certain information presented then… Further meetings ought to have been held to give the correct information during the conduct of a proper study and when data on most of the areas identified by the terms of reference had been collected and verified. Lack of accurate information cannot be the basis of proper and effective public participation.

48. There was no evidence that the Appellants' views or that of other members of the public were sought or received at the ESIA Study phase- Phase II, i.e. the period after 31st January 2016 to 14th July 2016. In failing to engage the public at this stage of the process, there was a breach of the subsidiarity principle and the provisions of regulation 17(2) of the Environmental Impact Assessment Regulations, as no public meeting had been undertaken in accordance with the elaborate procedure provided therein or at all. This breach is further exacerbated by the fact that the 2nd Respondent ignored the directive of the 1st Respondent of 26th October 2015 on the need for greater public participation.

49. As far back as January 2015 and the months following, the residents of Lamu had expressed interest in having their concerns heard and addressed. The failure to hold any meetings from January 2016 to July 2016 and the preparation of a comprehensive EIA Study report without the participation of the persons most affected was contemptuous of these same people and residents who would have the most to sacrifice should the project proceed and impact found to be more severe than that addressed by the 2nd Respondent.

50. … It is presumptuous for a proponent, like the 2nd Respondent did in this case, to proceed with the EIA study, identify the impacts and then unilaterally provide for mitigation measures in complete disregard of the people of Lamu and their views. We therefore find that public participation in phase II of the EIA Study process was non-existent and in violation of the law."
104. The Tribunal observed that the relevant Lead Agencies were approached for their comments; that this was done by a letter dated 18th July, 2016; that the project was published in the Kenya Gazette notice of 29th July 2016; that Newspaper advertisements were published in Taifa Leo of Monday, 18th July, 2016 and of Monday, 25th July, 2016 as well as the publication in the Daily Nation of Tuesday, 19th July, 2016 and of Monday, 25th July, 2016 which invited the public to submit their views and comments on the proposed project within thirty (30) days from the date of Publication.
105. Regarding the propriety of compliance with the publication of the newspaper notices the Tribunal had this to say:
"From the various time-lines given in the newspaper advertisement and the Kenya gazette, the 1st Respondent attempted to comply with the law by providing for a 30-day notice period but having set different start dates for the 30 days it became prejudicial and unfair to parties who wished to respond to these notices as they could not be sure of the last day for presentation of comments as

invited. Essentially, following the last advertisement in the Kenya Gazette, the only logical deadline became the 29th August 2016. Any attempt to deny people their submission of comments before then, including those received on 29th August 2016, was procedurally unfair and made the process defective. Various lead agencies and stakeholder groups submitted their comments in what they believed to be in compliance of Regulation 21 (3) of the Environmental (Impact Assessment and Audit) Regulations, albeit on different dates up to 30th August 2016 and beyond. The said comments are contained at Pages 34-168 of the 1st Respondent's Bundle of Documents"

106. It found that no evidence was adduced to show that the Radio stations used to publicize the project had national coverage as provided for under Regulation 21 (2) (b) of the Environmental (Impact Assessment and Audit) Regulations, yet in its view, the emphasis on nation-wide publication/ announcement was because the impact of such projects, in many instances, were of national interest; that following the submission of the ESIA Study to NEMA for consideration, Amu Power, contrary to the Regulations which required NEMA to do so, conducted 5 public stakeholder consultation meetings which were held at various locations in Lamu County between 8th - 11th August, 2016. To the Tribunal, NEMA thus appeared to have taken a back seat and abdicated its role to Amu Power.

107. The Tribunal also made the following finding:

"57. Upon receipt of both oral and written comments as specified by sections 59 and 60 of the Act, and as provided for under Regulation 22, the 1st Respondent Authority was required to publish a Notice for a Public hearing. The 1st Respondent purported to do this through a paid advertisement in the Daily Nation of 19th August, 2016 (refer: Page 169 of the 1st Respondent's Bundle of Documents). The Public Notice was scheduled to be held on 26th August, 2016. This was in spite of the fact that views were still being received and the deadline given had not lapsed."

108. The Tribunal stated that NEMA, ignoring these defects, nevertheless conducted a public hearing at Kwasasi, the project site, on 26th August, 2016. The Tribunal found that it made no sense for the meeting of 26th August 2016 to be held prior to the last possible day for the close of presentation of views and before all parties had been given an opportunity to present comments as advertised; that the notice of 19th August 2016 was inappropriate and the meeting of 26th August 2016 thus premature as the time under the Kenya gazette had not expired by that date; that the process appeared to be deliberately hurried to either meet the proponents expectations or to lock out members of the public from the process

109. From the evidence of one of the respondents herein, Somo M. Somo, the Tribunal formed the impression that the conduct of the meeting of 26th August 2016 at Kwasasi fell short of that contemplated by the Regulations; that the Kwasasi meeting was not a consultative meeting to explain the nature of the project and its impact as required by the Regulations; that it fast degenerated into a popularity contest, engulfed by an atmosphere of tension, where the participants were split into two groups and a poll of some sort was conducted to establish the numbers who supported as opposed to those against the project; that there was a lack of true and genuine engagement on the merits and demerits of the project at that meeting and it went contrary to Regulation 22 (5).

110. The Tribunal therefore found that for Phase III, the steps taken after the publication of the EIA Study report in July 2016 to September 2016, including the notices issues, time for receipt of comments and the time and venue of meetings were all done in a manner contrary to the Regulations and did not meet the threshold of Regulation 21 of the Regulations for public participation. It observed that NEMA, in issuing the EIA Licence on 7th September 2016 failed to properly consider its own directive of 26th October 2015, the compliance with the same and of the Regulations in so far as the process of consultation was concerned at the second and third phases of the EIA study and further erred by approving the project without considering the views presented after 26th August 2016. It stated as follows:

"We have no hesitation in holding that there was a lack of proper and effective public participation

as required by law. The issuance of the licence was unreasonable in ignoring the prescribed procedure and its own directive, arbitrary and disregarded the views given without providing reasons for refusal to consider the same."

111. In the Tribunal's judgment the case of Musimba v The National Land Commission & Others [2016] 2 EA 260 was distinguished on the basis that in the present dispute, the respondents and other members of the public were giving their views on a project report before the EIA study had been conducted or the report published. The Tribunal stated as follows:
"A vital condition of public participation is access to information. The information contained in the study report had not been made available in good time to members of the public, or at all, nor had there been an effort to undertake the same level of engagement with the public after the EIA study had been conducted and report published. The seriousness of access to information cannot be overstated. Would members of the public have supported the project if certain information in the possession of the 2nd respondent had been availed to them? For instance, if the observations at page 1693-1694 of volume II had been specifically drawn to the attention of the public would there have been a negative or positive reaction by the public? These included identification of potential harm to the biodiversity flora and fauna, air quality that was stated to be potentially hazardous and may cause difficulty in breathing and the climate change effect leading to adverse consequences on human health- the report raises concern on "increased risk of asthma, lung damage and premature death". It continues to raise concern on potential for acid rain which can spread and "can fall from the sky in rain over a widespread area, killing fish and plants" and also the adverse effects on forests and soil and vegetation. (refer page 1693-194 of the ESIA report). There well may be mitigation measures to curb these impacts but it was only fair that the people of Lamu were educated on the adverse impacts identified and within the knowledge of the proponent and thereafter have the mitigation measures explained to them in order to make an informed decision during the period from January 2016 to July 2016 and thereafter at the post study report stage. That is public participation. The lead agents who gave their comments around the 29th August 2016 also had their views disregarded and there is nothing to show that such views were ever considered and accepted or rejected."

112. The Tribunal concluded thus:
"As a Tribunal we lack inherent powers to excuse non-compliance of the rules and Regulations on public participation. Even if we are wrong on this issue of lack of powers to consider the effect of non-compliance and follow the Belize Court decision, we would still find that the flaws mentioned were sufficiently serious to vitiate the process as in this case there was an outright disregard of the need to conduct effective public consultation to the detriment of the public and residents of Kwasasi area and the larger Lamu region surrounding the project site."

113. Public participation and sustainable development are some of the national values and principle of governance under Article 10 of the Constitution of Kenya and are further entrenched in Articles 42 and 69 of the Constitution. I will reproduce the aforestated provisions hereunder, for ease of reference: -
10. National values and principles of governance
(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—(a)applies or interprets this Constitution;(b) enacts, applies or interprets any law; or(c)makes or implements public policy decisions.
(2) The national values and principles of governance include—(a)patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and
(d)sustainable development.

69. Obligations in respect of the environment
(1) The State shall—
(a)..;
(b)…;
(c)…;
(d)encourage public participation in the management, protection and conservation of the environment;
(e)…;
(f)…;
(g)…; and
(h)…
(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
114. It should not ever be thought that the provisions with regard to public participation were idly incorporated in the Constitution and statutes. They are meant to facilitate the engagement with the citizens to enable the making of informed decisions by administrators. In the environment law sector, their inclusion is a clear recognition that the protection of rights to a clean and healthy environment and the right to livelihood, which are closely linked to the right to life, needs to be enhanced. "Environmental impact assessment" (EIA) is defined in EMCA to mean "a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment." It is the citizens living in the areas proposed for certain industrial or other developments who are likely to identify the impacts of the proposed projects on their life, livelihood and cultural rights. Besides, incorporating them in the process of an EIA study may have salubrious effect of saving the authorities from the travails of seeking to identify those problems through costly abstract studies. Such benefit was recognized in the Mohamed Ali Baadi and others v Attorney General & 11 others [2018] KEHC 5397 (KLR) case where the court observed as follows:
"226. It is our view that the Respondents ought to take on board the views and values on environmental management held by communities likely to be affected by decisions affecting environmental resources that are close to them or in which they live (such as decisions on land, the sea, water and forest issues, their livelihood, culture and heritage.)
227. The involvement of the public in environmental decision and policy making must be regarded as important for various reasons. First, the utilization of the views gathered from the public in governmental decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development. This is because the resultant decisions raise an expanded knowledge base on the nature of environmental problems that are to be met by the decision. The decisions help to enrich and cross-fertilize environmental rights.
228. Secondly, developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with appropriate authorities, environmental threats and violations."
115. In the same case the court was alive to the need for collection and collation of all information relevant to a project and it stated as follows:
"174.The purpose of the assessment is to ensure that decision makers consider the environmental impacts when deciding whether or not to proceed with a project. EIAs are unique in that they do not

require adherence to a predetermined environmental outcome, but rather they require decision makers to account for environmental values in their decisions, and to justify those decisions in light of detailed environmental studies and public comments on the potential environmental impacts. Hence, EIA is designed to ensure that planning decisions involving significant effects on the environment are taken by bodies with full information as to the relevant factors.

175.The innovation behind the ESIA and SEA process is the systematic use of the best objective sources of information and emphasizes on the use of best techniques to gather information. The ideal ESIA and SEA process would involve a totally bias free collation of information about environmental impact, produced in a coherent, sound and complete form, considering impact in an integrated manner. It should then allow the decision maker and members of the public to scrutinize the proposal, assess the weight of predicted effects and suggest modifications or mitigation where appropriate. Thus, environmental assessment is both a technique, and a (physical and social) scientific process."

116. It is that information that helps in the crafting of decisions that may affect the local populace, often in ideal situations enabling both mitigation and adaptation measures in the establishment, implementation and decommissioning stages of the projects. In Mohamed Ali Baadi (supra) the court observed as follows:

"109. … one of the issues implicated in this Petition is what is now generally recognized minimum requirements for existence of environmental democracy, namely, "the tripartite of the so-called access rights in environmental matters, namely, (a) access to information, (b) participation in decision-making, and (c) access to justice." These three access rights have the common denominator that they empower individuals to have a meaningful voice in decisions that affect them and their development. The Constitution of Kenya and Environmental Law recognizes these three access rights."

117. It is beyond controversy that except for the meeting of 26th August 2016 which was in any event also said to have been opposed by stakeholders as being inconveniently scheduled and assigned a wrong venue, all the previous public participation occurred during the Scoping phase and before the ESIA study.

118. The Environmental (Impact Assessment and Audit) Regulations, 2003, particularly Regulations 17, 21 and 22, give statutory expression to the public participation requirement. The regulations provide as follows: -

17. Public participation

(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—

(a)publicize the project and its anticipated effects and benefits by—(i)posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

(ii)publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

(iii)making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

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

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

(d)ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all

public meetings for onward transmission to the Authority.

21. Submission of comments
(1) The Authority shall, within fourteen days of receiving the environmental impact assessment study report, invite the public to make oral or written comments on the report.
(2) The Authority shall, at the expense of the proponent—
(a)publish for two successive weeks in the Gazette and in a newspaper with a nation-wide circulation and in particular with a wide circulation in the area of the proposed project, a public notice once a week inviting the public to submit oral or written comments on the environmental impact assessment study report; and
(b)make an announcement of the notice in both official and local languages at least once a week for two consecutive weeks in a radio with a nationwide coverage.
(3) The invitation for public comments under this Regulation shall state—
(a)the nature of the project;
(b)the location of the project;
(c)the anticipated impacts of the project and the proposed mitigation measures to respond to the impacts;
(d)the times and place where the full report can be inspected; and
(e)the period within which the Authority shall receive comments.
(4) The notice to be published in the newspaper as specified under sub regulation (3) shall be in Form 8 set out in the First Schedule to these Regulations.
22. Public hearing
(1) Upon receipt of both oral and written comments as specified by section 59 and section 60 of the Act, the Authority may hold a public hearing.
(2) A public hearing under these Regulations shall be presided over by a suitably qualified person appointed by the Authority.
(3) The date and venue of the public hearing shall be publicized at least one week prior to the meeting—
(a)by notice in at least one daily newspaper of national circulation and one newspaper of local circulation;
(b)by at least two announcements in the local language of the community and the national language through radio with a nation-wide coverage.
(4) The public hearing shall be conducted at a venue convenient and accessible to people who are likely to be affected by the project.
(5) A proponent shall be given an opportunity to make a presentation and to respond to presentations made at the public hearing.
(6) The presiding officer shall in consultation with the Authority determine the rules of procedure at the public hearing.
(7) On the conclusion of the hearing, the presiding officer shall compile a report of the views presented at the public hearing and submit the report to the Director-General within fourteen days from the date of the public hearing.
119. In examining the evidence adduced before the Tribunal, this court will establish whether those provisions were complied with or not. However, the starting point for such a discussion is the 2015 EMCA amendment which made all Second Schedule projects under the Act to be subject to EIA studies. The Appellant was not the first person to be affected by the said amendment of EMCA undertaken at around that period. The respondents in the Mohamed Ali Baadi case (supra) also experienced the rigour of the statutory changes with regard to the conduct of their SEA and EIA for the mother project of whom the coal fired project herein is a mere component. The argument by the Respondents and the Interested Parties in that case was that SEA was not legally required at the commencement of the LAPSSET Project, and that it only became necessary after the amendment to the law by Act No. 5 of 2015 which inserted the new Section 57A to provide for SEA, and to give

effect to the guidelines on SEA that NEMA had passed in 2012. In that case they argued that while the NEMA Guidelines of 2012 provided for SEA, they were not yet effective because they did not have statutory backing until 2015, which argument was rejected by that court.

120. As from June 2015, it was therefore not discretionary upon NEMA as to whether or not it should order and ESIA study for any project falling under the Second Schedule of EMCA. In respect of the present case, by the time the law in Section 58(1) of EMCA was amended, the appellant had not been awarded any environmental impact assessment licence; the amendment thus overtook that event and rendered the appellant liable to conduct an EIA study, hence the NEMA letter of 26/10/2015. That study had to comply with the EMCA provisions and the EIA regulations which were already in place by then.

121. Looking at the regulations, it is also clear that, in perfect harmony with the interpretation that ought to have been accorded to Section 58(1) of EMCA by the appellant on 26th October 2015, Regulation 17 (1) requires the seeking of public views during the process of conducting an environmental impact assessment study and Regulation 17 (2) provides for collecting of public views after the approval of the project report by NEMA.

122. The Appellant submitted at page 19 of their submissions that public participation was undertaken at all stages in the preparation of the ESIA study report as provided for under Regulation 17(1) of the EIA regulations. For this, the Appellant referred this court to pages 393-407 of Vol IIA and pages 1155-1406 of Vol IIC of the record of appeal.

123. This court has referred to Pages 393-407 of the record of appeal, those pages comprise of a portion of the ESIA study report and at Page 393 there is an index which lists i) stakeholder engagement activities undertaken, ii) a stakeholder engagement plan, iii) a grievance mechanism and iv) a resettlement action plan as its items. Under the “item stakeholder engagement activities undertaken” at Page 394 -396 of the record of appeal, the Appellant gave a schedule of the activities and date and place they took place. It would appear that the activities began on 9th January 2015 and ended on 25th June 2015 and that they were undertaken in different places such as Subira Hotel, Hindi, Lamu Museum, Bargoni Primary School, Mokowe, Ardhi House Lamu, Kwasasi Project Site, Pate Island, Serena Hotel, Sarova Panafric Hotel and Malindi among others. This evidence only buttresses the observation by the Tribunal that these public participation events took place before the ESIA study was ordered by NEMA vide the letter dated 26th October 2015.

124. Whatever activities the Appellant undertook were supposed to be as per the amendment of Section 58 of EMCA vide Act No. 5 of 2015, which amendment required that all projects falling within the Second Schedule to the Act should have an EIA Study Report and not a mere project report. The new Section 58 (1), (2) and (3) had the following provisions: -

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

(2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

125. This court notes the travails the Tribunal laboured under while determining whether the Appellant was bound by the amended provisions of Section 58 of EMCA, evident in the Tribunal’s statement that the its jurisdiction does not allow it to waive provisions of statute or Regulations

made thereunder, and that thus the legal requirements imposed on the appellants herein when undertaking an EIA study have to be strictly complied with.

126. While this court agrees with the Tribunal's observations regarding non-waiver of compliance with statute or regulation thereunder, it notes that this was a straightforward issue not needing any belabouring for the simple reason that the amended law arrived earlier than the EIA Licence the Appellant was expecting while preparing a project report, and also, in any event, earlier than the implementation of the appellant's project on the ground. Therefore, in this court's view, it is incorrect for the Appellant to rely on meetings held between 9th January 2015 and 21st June 2015 as evidence of public participation in compliance with the amended provisions.

127. A look at Pages 1155-1406 of Vol IIC of the record of appeal which the Appellant has referred this court to in support of their compliance with the amended provisions shows that the stakeholder engagements appear to have been undertaken before 26th October 2015 when an ESIA study was ordered by NEMA. Consequently, this court agrees with the Tribunal on its observation that the public participation was not conducted in accordance with the amended provisions of Section 58 of EMCA as read with Regulation 17.

128. Condition 4 in the letter dated 26th October 2015 by which NEMA ordered an environmental impact assessment study, required Amu Power to include detailed and comprehensive stakeholder consultation. There is no doubt that NEMA was aware of the Scoping exercise conducted earlier by Amu Power, but it nevertheless went ahead and ordered the study to be conducted to include comprehensive stakeholder consultation. The order by NEMA was prospective and not retrospective. It is the activity that took place after the letter by NEMA that was consequential for the purpose of the validity of the Appellant's ESIA study. Therefore, it was a serious error for the appellant to have simply collected all the evidence of stakeholder engagement it had done while the law had not been amended and during the scoping period, to include it in its ESIA study and claim that it had conducted sufficient public participation in the study.

129. Regarding compliance with Regulation 21 of the EIA Regulations requiring NEMA to invite the public to make oral or written comments on the report within 14 days of the report, this Court has analyzed the evidence before it. The Appellant refers this Court to Page 430-436 of VOL I of the record of appeal. It is noteworthy that at page 428, there is a letter dated 14th July 2016 written by one Francis Chwanya, Head of NEMA's EIA Section, acknowledging receipt of the EIA study report submitted by the Appellant, and that date should be taken as the date of receipt of the EIA study report within the meaning or Regulation 21.

130. Fourteen (14) days from that date would have expired on 28th July 2016. However, on 18th July 2016, the project was advertised in Swahili language in the Taifa Leo newspaper of that day. On 19th July 2016, the Project was advertised on page 31 of the Daily Nation Newspaper. On 25th July 2016, the project was advertised again in the Daily Nation Newspaper. On the same date (25th July 2016) the project was again advertised in Taifa Leo Newspaper.

131. The gazette notice envisaged under Regulation 21 (2) was published on 29th July 2016, one day after the period provided for in Regulation 21 (2)(a). It is clear that for the publication in the Daily Nation and Taifa Leo newspapers, that regulation was complied with. However, it is self-evident that compliance with Regulation 21 (2) (a) regarding the gazette notice was not fulfilled. In any event, this court can only see one gazette notice of 29th July 2016 at Page 435 of VOL I of the record of appeal. It is not possible to determine if any other gazette notice issued in connection with Regulation 21(2) (a).

132. At Page 437 of Vol I of the record of appeal, this court has seen an order commissioned by the Appellant on 21st July 2016 for an announcement/advertisement to be aired through Radio Salaam and Sifa FM for two days, that is, on 22nd July 2016 and 1st August 2016 on Radio Salaam at various hours of the day and also on 25th July 2016 and 2nd August 2016 on Radio Sifa FM at various hours of the day. This was commissioned through a communications company called Al-Waslila Communications Limited. This court is persuaded that the requirement under Regulation 21 (2) (b) was to that extent complied with by the Appellant. However, one of the issues raised by the NET is

that there was no proof of nationwide coverage by these radio stations before it, and this court also finds none. So whereas the announcements were made, lack of proof of nationwide coverage on the part of the radio stations employed for the purpose rendered it impossible for the NET to find that the Regulation 21 (2) (b) had been complied with to the letter.

133. Turning to the newspapers, a look at the notices issued by NEMA, reveals that the newspaper advertisements in the Daily Nation and Taifa Leo complied with the requirement of Regulation 21 (3) (a), (b), (c), (d), and (e) and 21 (4). However, this court has noted that one of the issues raised by the Tribunal was that NEMA failed to wait for the complete 30 days expressed in their notice for the collection of the oral and written comments from the public.

134. On that issue, it is an inescapable fact that the public hearing was held on 26th August 2016 yet the last date of publication of the gazette notice relating to the project was on 29th July 2016. An elementary mathematical computation shows that the convening of that public hearing earlier than expected ate into the 30 days provided by Regulation 22 by three days, such that anyone who would have desired to submit comments on 27th, 28th and 29th August 2016 was unable to do so before the public hearing. This court is unable to comprehend why the public hearing was held 3 days earlier, on 26th August 2016 instead of at the earliest, on 29th August 2016.

135. Does the convening of the public meeting on 26th August 2016 and the submission of comments within 30 days have any nexus? The answer in the eyes of this court is “yes”. It can be surmised that the very purpose of inviting comments is to enable NEMA obtain information from all members of the public who are affected; therefore, bringing forward the date of the public meeting must have cut off some members of the public from making submissions.

136. Public views on a single project may be greatly divergent. It is highly unlikely that all participants in a public participation stage of such a massive project may contribute like views; the diversity of propositions from the public in such scenario may mean that some may be adopted wholesale by the project proponent; it is likely that they may, if implemented, affect other citizens who are of the opposed view. It is thus the public hearing which would have acted as a plenary, bringing all the opposing opinions together, to enable further deliberations arrive at suitable solutions, including compromised or moderated stances on previously contentious issues. This court is therefore of the view that NEMA’s omission to wait for the full run of the 30 days, adversely affected the public participation process in a great way in that some of the public views that would have been collected in those last 3 days were not so collected.

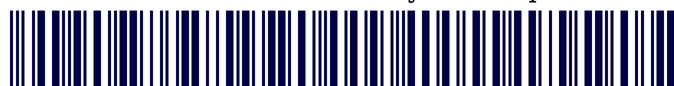
137. Notwithstanding this observation, this court also notes that there was opposition to the holding of the public hearing on 26th August 2016 based on various considerations. One was that the Kwasasi site was said to be only beneficial to the local farmers whose land would be compulsorily acquired for the project. Other parties considered accessibility of the site to be problematic, for example, bearing in mind that some would have to hire expensive transport and cross the sea to reach the said venue.

138. Further, there is record of opposition on the basis that there was selective involvement of the public with regard to that hearing. This court has been referred by the Respondents to Page 422-423 Vol I of the record of appeal, which was part of the comments by the Director, Kenya Forest Service, one Emillio N. Mugo, attached to a letter dated 18th November 2015. The comments are undated. However, based on the date of the letter they are attached to, they must have been made long before 26th August 2016. They are not directly connected to the attendance list of the meeting that took place on 26th August 2016, and so they are therefore not relevant for the purpose of proving that the meeting was not properly constituted. Nevertheless, it still remains on the record that those comments went a long way to poke holes into the adequacy of the public participation that had occurred during the Scoping phase and before the project approved and the EIA Study submitted, to the extent that they further support the NET finding, and this court’s finding too, that Regulation 17 of the EIA Regulations was not complied with. It is quite gripping that such a vital body as KFS, responsible for the conservation of sensitive ecological areas along the Kenyan coastline, could raise such serious concerns of inadequacy of an environmental management plan; consequently, this

Court wonders whether there was sufficient consultation with other vital stakeholders in the environment sector, even before the project approval and submission of the EIA study. That kind of uncertainty adversely affects the credibility of the appellant's claim that there was sufficient public participation conducted before the EIA study.
139. The appellant laid great reliance on the expert evidence of Sanjay Gandhi, urging that it was uncontroverted. The oral evidence of Sanjay Gandhi and the other appellant's witnesses called by the Appellant during the Tribunal hearing on the issue of public participation did not suffice to cure the fundamental lapses that afflicted the Study, as seen herein above, and could not therefore redeem it from the condemnation it attracted. Besides, the test regarding expert evidence was set out in the Mohamed Ali Baadi case (supra), which this court fully adopts, in which it was held as follows:

"66. While expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account. Four consequences flow from this.
67. Firstly, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
68. Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A Court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the Court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
69. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is cogent and give reasons why the court prefers the evidence of one expert as opposed to the other. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact.
70. A further criterion for assessing an expert's evidence focuses on the quality of the expert's reasoning. A Court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd. v. Minories Finance Ltd. and Another, Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A Court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.
72. In our view it is correct to state that a Court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a Court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the Court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a Court to choose which of competing hypotheses is the more probable."
140. The magnitude of the coal fired power project, according to this court's observation, is such that it would affect not just a large number of people and institutions but directly impact on the environment, hence the need for compliance with the regulations to the letter during an ESIA study and after. As the conclusion of this Court is that Regulations 17, 21 and 22 of the EIA Regulations regarding public participation were not fully complied with as required, the Tribunal's decision was therefore justified and should be upheld.

141. It has been said in the past that the EIA study is a tool targeting sustainable management of the environment. That there is an urgency to address societal challenges due to the earth's environmental crisis and its capacity to sustain human wellbeing, and that in this context transformations towards sustainability move to the centre stage and are increasingly being institutionalized within global scientific and policy discourses; that sustainability involves re-orientation and restructuring of governance processes and actions and involving multiple actors - See: Sustainability Transformations, Environmental Rule of Law and The Indian Judiciary: Connecting The Dots Through Climate Change Litigation. Gitanjali N. Gill and Gopichandran Ramachandran Environmental Law Review, 2021 Vol 23 (3) 228-247. As the world environmental leadership gathers in international fora and plenaries laboriously thrashing out resolutions regarding climate change, plastic pollution and other issues of life or death implications for mankind, many nations have formulated policies and enacted laws such as EMCA and thus institutionalized or adopted the EIA study and development plans as tools for localized or domestic environmental management and conservation. Often the overriding intent of such policies and legislations is to diffuse the precautionary principle into the environmental management and protection strategies.
142. In Kenya, EMCA and the Physical and Land Use Planning Act, if implemented strictly for their intended effect, create an impressive participatory framework, and they may eliminate processes or outcomes deleterious to the environment. Public participation is not optional in planning and environmental management in Kenya. The public participation principle and the precautionary principle are inextricably intertwined, but the former serves the latter in a great way. Courts in Kenya can not wring their hands and restrain themselves from acting in favour of the environment where the impact of a proposed project is uncertain, for the precautionary principle is ingrained into our environmental law. The court should be guided by that principle, which is only one of the principles that seek to protect the environment as contained in Section 3(5) of EMCA. Eleven years after EMCA came, Article 10, article 69(1)(d) and (2) as well as Article 70(1) and (3) of the Constitution followed Section 3(5) of EMCA and further ameliorated the environmental protection framework by constitutionalizing public participation and the precautionary principle. It is the case then that if in a proposed project all the steps prescribed by such a praiseworthy environmental protection and management framework as that which this country inaugurated long ago in 1999 upon the enactment of EMCA have not eventuated, or if some of them have been omitted, then it is a self-inflicted burden, and not a light one, that is incumbent upon the project proponent in default, to demonstrate that no harm will befall the environment if the project is executed as proposed. The court in Ken Kasing'a v Daniel Kiplagat Kirui & 5 others [2015] KEHC 1181 (KLR) held as follows:
"73. 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 is given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment. It is informative that one of the principles of environmental law is the precautionary principle. The precautionary principle applies where there is uncertainty as to whether a matter has potential to cause environmental harm. The approach in the face of such uncertainty is to exercise caution, and where possible, stop the activity that is suspected to have potential to cause environmental harm. The burden of proof in instances where the precautionary principle is invoked, in my view, ought to rest upon the proponent of the project, who needs to demonstrate that the project at hand is not harmful to the environment or that the harm to the environment is tolerable, owing to the greater public benefit, especially where there are no better alternatives to the project. It is important to weigh the risks and benefits of a particular transmitter station before confirming that its presence is safe to the environment. This was not done in our case."
143. The issuance of the licence on the basis of a fundamentally flawed process of public



participation was contrary to the dictates of Articles 10 and 69(1)(d) and (2) of the Constitution. As aptly stated in Macfoy v United Africa Co. Ltd [1961] 3 All ER 1169, an act founded on nothing cannot stand. The court in that case gave the following dicta:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse ..."

144. In answer to the first sub-issue therefore and having regard to the letter and spirit of the law in Section 58 EMCA and Regulation 17 EIA Regulations, it can not be stated with certainty that a reasonable opportunity had been given to the public including the respondents to know about the project and make their representations. On the second sub issue, it can not also be stated that the Tribunal disregarded the uncontroverted evidence of witnesses which showed there was public participation; it only applied the proper test to that evidence to arrive at its conclusion, right in my view, that there was insufficient public participation. As to the sub-issue whether the Tribunal made a finding at paragraph 43 that wide public participation had been undertaken at a Scoping phase and later contradicted that finding, this court disagrees that there was any such contradiction. The Tribunal relied on the record of evidence in a wholistic manner without agreeing to be swayed to its decision purely by the evidence of the appellant's experts. This court also finds that the Tribunal did not err in holding that the meetings held were introductory in nature and not structured to share information on effects or impact of the Amu Power project. Also, this court's own analysis as seen above in this judgment demonstrates that the Tribunal did not err by holding that the meeting at Kwasasi was premature.

145. Upholding a public body's action while it is clear that it violates the constitutional or statutory provisions goes against the very doctrine of legality. In Daniel Ingida Aluvaala & another v Council of Legal Education & another [2017] KEHC 2775 (KLR) it was held as follows:

"13. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law."

146. In conclusion therefore and in answer to the last sub-issue framed above, this court's finding is that the Tribunal did not unduly place excessive reliance on such compliance over and above the spirit of public participation because no public partition that could satisfy the provisions of the EMCA and the EIA regulations had been conducted.

147. It is axiomatic then that the issuance of the EIA licence by NEMA to the appellant ignored certain serious omissions with respect to public participation and the licence so issued was therefore a nullity ab initio.

Whether The ESIA Study Sufficiently Analyzed Project And Location Alternatives

148. This court has noted that what emanated from the Appellant as evidence is that the proposed project was a product of an expression of interest by the government of Kenya through the Ministry of Energy and Petroleum to set up a coal fired power plant at a particular location in Lamu. The import of this is that the location of the site was already predetermined.

149. The requirement for project location alternatives is contained in Regulation 16 (b) of the Environmental (Impact Assessment And Audit) Regulations, 2003. The Appellant points out pages 253-267 Vol IIA of the record, containing the ESIA Study, as proof of having conducted an analysis of location alternatives. This court upon perusing Page 253 notes that it is an index that directs one to Page 2 of the Project Alternatives Section of the ESIA which is at Page 254 of the record of appeal. In that section, the Appellant concedes that the project location was predetermined by the

Government of Kenya who are responsible for providing land to establish the power plant. Without further elaboration, the report states as follows:

"…it is understood that the MoEP (the ministry) identified the proposed coal power plant location, based on technical, environmental and operational criteria which includes transportation of coal in bulk. One of the criteria was to have the coal power plant site located away from populated areas as well as away from other LAPPSET project activities as the site will probably be designated under the Protected Areas Act."

150. The report stated that the costs of building the SGR from the Mui Basin where coal can be mined to Lamu was prohibitive and the other option is to have the coal delivered to Kenya through a Port. The Port of Mombasa was said to be densely built up and congested and consequently, large coal tankers would cause detrimental coal dust impact within the port. Consequently, the only option for a port site for receiving imported coal in bulk was Lamu, a port endowed with a natural deep harbor, and which had already been selected as the genesis of the LAPPSET mega project; that based on the above requirement, it was established that the coal power plant should be located within Manda Bay.

151. It is urged that three locations were considered for the project location on the basis of their ability to provide viable transport route for supply of coal in bulk. However, this court notes that all of them are within the Lamu area around the Manda bay, and within the LAPPSET project genesis site. Disadvantages of all those other locations other than Kwasasi, were given on Page 256 of the record of appeal. It was stated that of the three alternatives, the County Assembly and County Government of Lamu had approved just the Kwasasi site, for the construction of the 1050MW Coal Power Plant.

152. The Tribunal noted that the project proponent conceded that it had no say in the selection of the location. The detailed criteria for the choice of the project location site was therefore not presented to the Tribunal for consideration since the choice had been made earlier by the Ministry without the participation of Amu Power. However, the Tribunal recalled the case of Mohamed Ali Baadi [supra] as having ordered a Strategic Environmental Assessment study to be undertaken with respect to the entire LAPSSET project and the impact of its various components of which the coal power plant was one to be made clear. The Tribunal noted that no evidence had been tendered that a SEA had been conducted or completed to support the Ministry's choice of location. The Tribunal stated as follows:

"We do not see how a meaningful EIA study could be undertaken in the instant case when the basis of the choice and location and other components of the LAPPSET project had already been called into question by a superior court."

153. The Tribunal also stated as follows:

"Whilst the 2nd Respondent purported to undertake an analysis of the location and project alternatives, their hands were tied on these issues by virtue of expression of interest. Only a SEA undertaken prior to the expression of interest would have properly considered the location and project alternatives. Accordingly, we find there was a failure to have a proper analysis of the location and project alternatives as these were predetermined and the exercise thereafter was to merely justify what had already been determined."

154. This court cannot fault that finding by the Tribunal. The very purpose of a Strategic Environmental Assessment (SEA) is to avoid, at the higher echelons of any administration, mere episodic bouts of attention to persistent environmental issues, or knee-jerk reactions to development proposals likely to have far-reaching ramifications, some deleterious to the environment, and to provide a reliable and planned framework for the protection of the environment for a foreseeable period of time within a defined geographical expanse.

155. Indeed, SEA is defined in Section 2 of EMCA as follows:

"strategic environmental assessment" means a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives;"

156. While cautioning myself that the government was not a party to the appeal, I must also find that

it is not the case that the Tribunal wrongfully made the Appellant liable for the failure of the government to prepare an SEA in respect of the LAPSET project; the Tribunal merely examined the effect of failure to comply with a previous judgment of a superior court compelling the conduct of the SEA; that it led to the impropriety of conducting an ESIA study on individual components of the LAPPSET project.

157. This issue though unpleaded, was properly addressed by the Tribunal because it arose from a judgment delivered in our legal system and which affects the environment of the geographical expanse covered by LAPSET which includes the project location.

158. This Court possesses jurisdiction under Article 22 and 23 of the Constitution in respect of enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights; Rights in the bill include the right to a clean and healthy environment. Urging that the court should not address a determination on such an issue, which is deemed to be part of a public record, would be tantamount to telling the court to shut its eyes to matters of serious environmental concern that arose from non-implementation of court orders, which is not in accord with proper judicial practice with regard to precedent and public policy. It will hardly be proper for this court, and it will indeed seem noxiously selective to an objective observer, for this court to deal with issues regarding a component of the LAPSSET mega project separately while shutting its eyes and ears to what was said to be wrong with the entire LAPSSET mega project that hosts that component.

159. In the Mohamed Ali Baadi [supra] counsel for the Petitioners had submitted that a SEA was required by (a) a necessary reading of the Constitutional provisions on the right to sustainable development, (b) statutory law and regulations, and (c) international law principles and best practice; he further submitted that no SEA was conducted but instead the LAPSSET Project was started with an EIA Licence which addressed only the first three berths of the Lamu Port, yet the Project involved other components such as construction of an oil pipeline, railway and a coal power plant. Mr. Ouma, NEMA's Compliance Officer, confirmed in a sworn affidavit that the larger LAPSSET Project would have to be subjected to the Strategic Environmental Assessment (SEA) process, and that a feasibility study for the SEA had been submitted to the NEMA in January 2017. Mr. Wairagu, the expert witness for the 1st -6th respondents in the said case, testified that SEA was not done before the development of the LAPSSET Master Plan because it was not a legal requirement at the time the Master Plan was prepared. He further testified that SEA only became a legal requirement in 2015. He was, then, engaged in 2016 to conduct the SEA. He testified that only the first stage of the SEA process for the LAPSSET Project has been concluded. The court in that case observed as follows:

"177. On the other hand, NEMA Guidelines define Strategic Environmental Assessment (SEA) as "a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programs (PPP) and evaluate the inter-linkages with economic and social considerations." SEA is a family of approaches that uses a variety of tools, rather than a single, fixed, prescriptive approach. The SEA process extends the aims and principles of Environmental Impact Assessment (EIA) upstream in the decision-making process, beyond the project level, when major alternatives are still possible. As NEMA states in its guidelines, "SEA is a proactive approach to integrate environmental considerations into the higher levels of decision-making."

178. Hence, during a SEA process, the likely significant effects of a Policy, Plan, or Program (PPP) on the environment are identified, described, evaluated, and reported. The full range of potential effects and impacts are covered, including secondary, cumulative, synergistic, short, medium, and long-term, permanent, and/or temporary impacts.

179. Stuart Bell & Donald McGillivray authoritatively state that EIA and SEA should be an iterative process, in which information that comes to light is fed back into the decision making process. First, a truly iterative process would ensure that the very design of the project, plan, or programme would be amended in the light of the information gathered and secondly, and also ideally, it would also involve some kind of monitoring of environmental impact after consent or approval has been given."

160. The plea of the respondents in the Mohamed Ali Baadi case (supra) that a SEA was not necessary prior to implementation of the LAPSSET mega project was rejected by the court which went further to hold as follows:
“181. As a consequence, the Respondents and the 1st and 3rd Interested Parties argue, that there was nothing improper in the 5th Respondent embarking on the SEA process after the commencement of the LAPSSET Project. In the same vein, the 7th Respondent argued that the nature of SEA is such that it can be conducted both ex ante and ex post – and neither modes of conducting it are privileged. Neither mode of conducting SEA, the 7th Respondent insisted, is more prudent or preferred than the other. Hence, the Petitioners should allow the SEA process to be completed.
182. On our part, we are not persuaded that SEA was not a required legal step prior to the EMCA amendments of 2015 as the Respondents and the 1st and 3rd Interested Parties argued. It is true that a new section 57A of EMCA was added in 2015 which specifically provided for SEA. However, as early as 2003, NEMA’s own regulations -the Environmental (Impact Assessment and Audit) Regulations, 2003 - at Regulation 42 provided as follows:
42 (1) Lead agencies shall in consultation with the Authority subject all proposals for public policy, plans and programmes for the implementation to a strategic environmental assessment to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others.
(2) The assessment carried out under this regulation shall consider the effect of implementation of alternative policy actions taking into consideration -
(a) the use of natural resources;
(b) the protection and conservation of biodiversity;
(c) Human settlement and cultural issues;
(d) Socio-economic factors; and
(e) the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of built environment of historic or cultural significance.
(3) The Government, and all the lead agencies shall in the development of sector or national policy, incorporate principles of strategic environmental assessment.
183. It seems clear to us that NEMA envisaged that SEA will be required for some Projects with significant environmental and cumulative impacts where Policies, Plans and Programmes are implicated. There was no need to have specific backing in the text of the statute for this aspect of the regulations to be effective. Indeed, NEMA (the 8th Respondent) does not contest that it had the requisite authority to pass the Regulations in 2003 – and that they were not ultra vires. If so, it follows that the Regulations were in effect, and needed to be adhered to even prior to the passage of the amendment to EMCA of 2015.
184. Indeed, in his affidavit deposed on 02/11/2012, Zephaniah Ouma, the 8th Respondent’s Deputy Director in charge of environmental compliance and enforcement, explicitly stated as follows regarding the requirement of SEA for the LAPSSET Project:-
That the larger LAPSSET Program (excluding the 3 berths and associated infrastructure) will have to be taken through a Strategic Environment Assessment (SEA) which report the 5th Respondent is yet to submit though duly notified.
185. This is as explicit an admission as one can get from the 8th Respondent that they were aware that SEA was required before the 2015 amendments to EMCA. It is noteworthy that Mr. Ouma’s affidavit was deposed on 02/11/2012 – three years before the EMCA amendments which the Respondents claim made SEA compulsory.
186. Given the analysis above, it is our finding and conclusion that the proponent of the LAPSSET Project was duty bound to conduct SEA before the commencement of any of the individual Project''s components. Our conclusion is based not only on the text and content of the law but on the nature and magnitude of the LAPSSET Project. This is a necessary reading of the environmental governance principles contained in our Constitution including Articles 10, 69 and 70. These Articles among other

things require a proactive approach to integrate environmental considerations into the higher levels of decision making for projects with the potential to have significant inter-linkages between economic and social considerations."

161. It is hardly surprising to find that stringent cries protesting potential environmental degradation, social displacement and climate change effects were received in response to the announcement of the Amu Power project.

162. It is possible that most of these issues now being raised are such that they would have formed a part of feedback in a Strategic Environmental Assessment study of the entire LAPPSET mega project. However, as is now evident, a completed LAPSSET SEA study was not placed before the Tribunal, and this court has not seen it either. It would be placing the cart before the horse, to have the LAPPSET project components developed on the ground before the conduct the LAPSSET SEA.

163. From the above analysis, the conclusion of this court therefore is that there was no credible or reliable analysis of project location alternatives.

Whether The ESIA Study Report Contained Adequate Mitigation Measures.

164. The grounds for challenge to the coal fired project on the basis of lack of sound mitigation measures are contained in paragraph 67 and 68 of the detailed statement of the grounds of the appellant's dissatisfaction filed under Rule 4 (3) (c) of the NET Rules.

165. It was stated that the EIA license conditions failed to fully provide effective mitigation measures that the Appellant must adhere to in the construction and operation of the project, and that failure could result in further negative impacts on the environment, communities and their livelihoods in breach of the state's duty to protect them under Articles 42, 69 and 70 of the Constitution.

166. It is the case of the Appellant herein that mitigation measures were adequately addressed in the ESIA study, but which argument is repulsed by the 1st -6th Respondents, who point to the ash yard, ash pit, and conveyor belt as being some of the components of the project lacking in sufficient mitigation measures.

167. At Paragraph 101 of the Tribunal's judgment, it noted that the ESIA proposes mitigation measures to be taken during and after the implementation of the project under Chapter 8 – at Pages 275-392 of the Main ESIA Study.

168. Under Paragraph 102, the Tribunal noted the areas which the ESIA report attempted to cover in terms of analyzing mitigation measures.

169. Regarding the atmospheric emissions/air quality, mitigation measures, the Tribunal considered the Appellant's analysis alongside the evidence of the expert witness of the Respondents and concluded that no evidence had been laid to challenge the mitigation measures proposed in regard to that area.

170. Regarding coal handling and storage, the Tribunal also found that the mitigation measures provided were adequate.

171. The Tribunal however found the proposed mitigation measures on the ash yard and the ash pit to be inadequate.

172. As for the mitigation measures on the coal conveyor system and the 2000-acre limestone concession quarry, the Tribunal found that information supplied in the ESIA was incomplete, insufficient and inconclusive to form the basis for the 1st Respondent's decision to issue a licence.

173. On the ecological impact mitigation, the Tribunal found that this had been addressed appropriately subject to the issue of public participation.

174. Regarding thermal effluent mitigation measures, the Tribunal noted that the Appellant proposed compliance with the World Bank Group's General EHS Guidelines and EHS Guidelines for Thermal Power Plants. This court is of the view that the Tribunal held back from pronouncing itself expressly of the adequacy of the mitigation measures regarding thermal effluent owing to the fact that the Appellant by committing itself to the World Bank Group's General EHS Guidelines and EHS Guidelines for Thermal Power Plants, was aspiring to an adequately high standard.

175. As for the issue of climate change mitigation measures, the Tribunal noted that the Appellant's chief witness, Mr. Sanjay Gandhi had confirmed the ESIA Study Report's failure to comply with the provisions of the Climate Change Act, 2016, and that therefore, the provisions of climate change within the report are incomplete and inadequate. This court finds that to be the correct position.
176. Regarding the positively appraised mitigation measures mentioned above, the Tribunal qualified them, stating as follows:
"141 ... despite the ESIA Study Report prepared by the 2nd Respondent containing mitigation measures as required under EMCA and the Environmental (Impact Assessment & Audit) Regulations, the adequacy of those measures are yet to be subjected to proper public participation and until then may remain mere academic presentations."
177. By this statement, the Tribunal effectively disqualified as invalid all the mitigation measures set out in the ESIA study on the sole basis that they had not been subjected to public participation. This court has already found in the earlier parts of this judgment that there was no evidence of sufficient public participation in the ESIA study. It is plain to see overriding significance of the Constitutionally prescribed feature of public participation in all activities in the public sphere, without which any other compliance with the law fades into insignificance.
178. The Tribunal having found all mitigation measures to be satisfactory in the other areas except those regarding 4 items -the ash yard and the ash pit, the coal conveyor system, the 2000-acre limestone concession quarry and climate change - the burning question that arises is whether this court requires to go into the nitty-gritties of the evidence to determine whether or not the Tribunal was correct in its verdict that they were inadequately addressed.
179. It is clear that perchance this court examines them and overturns the Tribunal's verdict thereon, they will subsequently be struck down by a very overarching finding reached by this Court in this very judgment to the effect that public participation regarding the entire ESIA Study Report was unsatisfactory. It would not therefore be necessary for this court to attempt to examine that detailed evidence on those 4 items to determine whether or not the Tribunal was correct because either way, the project and the study remain condemned due to insufficient public participation. It is for the Appellant to ensure that during the next ESIA Study preparation exercise, sufficient public participation as well as all appropriate mitigation measures are included in the whole process.

Whether the EIA complied with the Terms of Reference approved by the 7th respondent.

180. The Appellant forwarded for the 7th Respondent's approval the Terms of Reference which the 7th Respondent approved vide a letter of 29th January 2016. The Terms of Reference are contained at Page 591-624 of Vol I of the record of appeal. Terms of Reference are meant to guide a project proponent on how they should carry out the study. In respect of the Appellant's project, the chief components of the terms of reference were:
• appropriate stakeholder engagement through public consultations regarding the scope and preparation of the ESIA and the results of the Scoping study;
• development of mitigation measures to be considered in the design of the project including environmental impact mitigation;
• project alternatives analysis including scheduling alternatives, energy supply alternatives, technology alternatives and the 'do-nothing' alternatives.
181. This Court has already upheld the Tribunal's finding that public participation regarding the entire ESIA study was inadequate and that even when they had been sufficiently included in the study report, the overall merits of the mitigation measures analysis were solely predicated on whether they had been interrogated by way of public participation. The court has also found that project location analysis was solely dependent on the government's arbitrary choice. Lastly, the very fact that no SEA had been conducted by the government in respect of the LAPPSET mega project in accordance with the holding in Mohamed Ali Baadi (supra) disqualifies as improper any ESIA study that may be prepared for any of the LAPPSET component projects.

182. With all the errors and missteps regarding the EIA study and process as noted in the preceding discourse, it is inconceivable that a conclusion can be reached that the EIA study complied with the terms of reference approved by the 7th Respondent. Consequently, this Court's finding is that the Terms of Reference approved by the 7th Respondent were not complied with by the Appellant.

What orders should issue as to costs.

183. The Appellant came to this court hopeful that it could persuade it to overturn the Tribunal's decision regarding various issues in its judgment and failed to convince this court to do so. Ordinarily, costs follow the event, but this is environmental litigation involving weighty constitutional and legal issues, the ventilation of which is in the public interest. Consequently, it appeals to this court to order that each party shall bear their own costs.

Conclusion.

184. In the end, this court finds that both the Appeal and the Cross-Appeal before it lack merit and the Appeal is dismissed and the Cross-Appeal is struck out, but with no orders as to costs in either case. The Decision and Orders of the National Environment Tribunal in its judgment delivered at Nairobi on 26th June, 2019 in the Tribunal Appeal No. Net/196/2016 is hereby upheld.

185. As I pen off, I thank all the counsel involved in this matter for their very detailed incisive analysis in their very detailed submissions in this complex matter, which greatly assisted in the illumination of the various issues arising in the appeal.

Dated, signed and delivered at Malindi on this 16th day of October, 2025.

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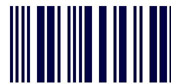
SIGNED BY: HON. JUSTICE MWANGI NJOROGE



THE JUDICIARY OF KENYA.

MALINDI ENVIRONMENT AND LAND COURT

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