



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 825 OF 2012**

**IN THE MATTER OF SECTION 84(1) OF THE PREVIOUS CONSTITUTION & ARTICLES 22, 23, AND  
165(3)(b) AND 70 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER SECTION 70(a) AND 71(1) OF THE PREVIOUS CONSTITUTION AND  
ARTICLES 26, 27(1), 28, 35, 42 & 44 OF THE CONSTITUTION**

**BETWEEN**

**FRIENDS OF LAKE TURKANA TRUST.....PETITIONER**

**VERSUS**

**THE HONORABLE ATTORNEY GENERAL (Being sued on behalf of the  
Government of the Republic of Kenya).....1<sup>ST</sup> RESPONDENT**

**THE KENYA POWER & LIGHTING COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**KENYA ELECTRICITY TRANSMISSION CO. LTD...INTERESTED PARTY**

**JUDGMENT**

**The Parties**

The Petitioner is the Friends of Lake Turkana Trust, a Registered Trust whose objects include; protecting and conserving the waters of Lake Turkana, championing the rights and interests of the communities within the Lake Turkana Basin, working with the local communities to champion for their rights and ensure the communities' involvement in decisions on issues relating to Lake Turkana, as well as promote community involvement in peace initiatives to enable a search or homegrown solutions in the elusive search for peace in the region.

The First Respondent is the Attorney General who is sued on behalf of the Government of Kenya.

The 2<sup>nd</sup> Respondent, the Kenya Power & Lighting Company Limited is a public limited liability company incorporated in Kenya which carries on the business of transmission and distribution of electrical power

In Kenya.

The Kenya Electricity Transmission Company Limited which is the Interested Party, is a State Corporation registered on 2/12/2008 under the Companies Act (Cap 486 Laws of Kenya).

This suit was first filed in the Constitution & Human Rights Division of the High Court by way of Petition Number 214 of 2010. The suit was transferred to this Court pursuant to the provisions of Article 162 (2) (b) of the Constitution. The backbone of the petition is an alleged memorandum of understanding entered into by the Government of Kenya and Government of Ethiopia in the year 2006 for the purchase of 500 MW of electricity from Gibe III as well as an \$800 million grid connection between Ethiopia and Kenya.

The Petitioner in this respect avers that the Government of Ethiopia has launched a 25-year national master-plan to vastly increase production of electrical power, through the construction of water resource schemes, that is, a cascade of dams for the purpose of generating hydro-electric power along the Omo River. Three of the schemes, Gibe I, Gibe II and Gibe III will take place in on the upstream part of the river while two others Gibe IV and Gibe V are envisaged. According to the Petitioner, Gibe I is complete while Gibe II was commissioned on 13/1/2010. Further, that Gibe III entails the construction of a Roller Compacted Concrete gravity dam 240 meters tall, whose reservoir will have storage capacity of 11.75 cubic meters, a surface area of 211 square kilometers and a length of 151 km. It is expected to generate 1,870MW of which 900MW are to be exported to Kenya, Djibouti and Sudan.

### **The Petitioner's Case**

The Petitioner filed a Petition and a Supporting Affidavit sworn by Joshua Angelei, both dated 10/6/2010. Subsequently on 16/5/2011, the Interested Party successfully made a formal application seeking joinder as an interested party to the suit. As a result, the Petitioner obtained leave and filed an Amended Petition dated 23/1/2012. The Petitioner prays for the following orders in the Amended Petition dated 23/1/2012:

- a. The court be pleased to issue an order of mandamus compelling the Government of Kenya and the Kenya Power and Lighting Company Limited to make full and complete disclosures of each and every agreement or arrangement entered into or made with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of 500MW from Gibe III including, but not limited to, the Memorandum of Understanding signed in 2006.
- b. The Court be pleased to issue an order of prohibition strictly enjoining and prohibiting the Government of Kenya and the Kenya Power and Lighting Company Limited from entering into further agreements and/or making further arrangements with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of 500MW from Gibe III including, but not limited to implementing the Memorandum of Understanding signed in 2006 until and when a full and thorough independent environmental impact assessment on the potential effects of Gibe III project on Lake Turkana and the affected communities has been undertaken.
- c. Such other or further orders the court deems just and equitable to grant.
- d. Costs of the petition.

The reliefs sought are premised on grounds that, first, by agreeing to purchase 500MW of electricity from the Government of Ethiopia, the Respondents are acting in a manner that will deprive the members of the affected communities their livelihood, lifestyle and cultural heritage and attachment to Lake Turkana, in violation of Articles 26, and 28 of the Constitution, unless restrained by the Court. Further, that the

proposed purchase will impinge the fundamental liberties and freedoms of members of the affected communities.

Secondly, that the Government of Kenya has failed to act as a public trustee, in violation of Article 62 and 69 of the Constitution, by failing to conduct a full, proper and thorough comprehensive impact assessment on the potential effects of construction and operation of Gibe III before committing itself to the purchase of the said 500MW. Thirdly, that the arrangements between the Government of Kenya and Government of Ethiopia will jeopardize the environment for the present communities around Lake Turkana and also threaten their cultural heritage.

The Petitioner avers that the construction of Gibe III project is shrouded in secrecy to the extent that the World Bank stopped the process of considering and evaluation of Government of Ethiopia's request for funding, citing lack of transparency as well as absence of a competitive bidding process in the selection of the main contractor. The Petitioner further avers that out of intense criticism which had adverse impacts on the external funding particularly from the African Development Bank, two Environmental Impact Assessments were carried out addressing the upstream and downstream parts of River Omo. The Petitioner maintains that the assessments were designed, and that the data was specifically selected with a predetermined objective for validating the completion of the project.

The Petitioner stated that the findings of the said assessments were that there would be little adverse environmental impact along the river, which can easily be mitigated, but massive positive environmental benefits in terms of controlling and stabilizing water flow. It is the Petitioner's averments that these assessments have been subject of criticism by scholars calling into question their scientific basis, methodology employed as the conclusions therein defied both facts and logic. The Petitioner further alleged that the integrity of the agencies which conducted the assessments have been questioned on the basis of conflict of interest on the part of the lead consultant, which is intimately associated with the project's main contractor. The Petitioner avers that the assessments expressly acknowledge that they are restricted to considering the potential environmental impact in Ethiopia and not on Lake Turkana and the affected communities whereas the said lake is the drainage basin of the Omo River.

The Petitioner averred that it is unanimously agreed among scholars that the project will have severe impact on Lake Turkana hence the communities will be adversely affected. Thus in response to the criticisms, both the African Development Bank and Government of Kenya engaged in a program of public consultation with the affected communities in which the Petitioner claims to have actively participated. The Petitioner however claims that the said consultations were mere public relations exercises, there having been no serious engagement undertaken. The Petitioner alleges to have attended various meetings where the Government of Kenya repeatedly declined to disclose the nature and details of the 2006 Memorandum of Understanding with the Government of Ethiopia. Further, the Petitioner alleged that officials from Government of Kenya and Government of Ethiopia announced that the environmental concerns were addressed, but that they ignored the request from the Petitioner to elaborate how the concerns were being addressed.

The Petitioner further averred that the Permanent Secretary of the Ministry of Energy has directed the 2<sup>nd</sup> Respondent to enter into a Power Purchase Agreement with the Government of Ethiopia notwithstanding that there has been no compliance with the mandatory provisions of Sections 27, 28 and 30 of the Energy Act, 2006 as well as other regulatory requirements. The Petitioner contends that all the information available in the public domain reveals the Government of Kenya's intention to proceed with its arrangements with Government of Ethiopia despite the potential deleterious consequences on the communities around Lake Turkana.

The director of the Petitioner in the Supporting Affidavit annexed various reports and studies on Lake Turkana in respect to the activities conducted thereon such as fishing, and the potential effects of the project on the lake. The deponent also annexed other reports to his Further Affidavit sworn on 6/6/12. Oraro and Company Advocates, the advocate for the Petitioner, filed submissions dated 14/2/2013.

### **The 1<sup>st</sup> Respondent's Case**

Patrick Nyoike, the then Permanent Secretary and Accounting Officer of the Ministry of Energy swore a Replying Affidavit on 8/9/2010, wherein he deponed that there is no contract executed between the Government of Kenya and Government of Ethiopia regarding the purchase of 500MW of electricity from the Gibe III Dam Project, and that the Petition is therefore premature and misplaced. The Permanent Secretary deponed further that the Government of Kenya had no control over the Gibe III construction project allegedly being undertaken in the Republic of Ethiopia.

The deponent further stated that before any agreement for purchase of electric power can be entered, the Energy Regulations require that the Energy Regulatory Commission must issue a license and in doing so, it must take into consideration the impact of the project on the social, cultural or recreational life of the community concerned. Moimbo Momanyi, Litigation Counsel in the office of the Attorney General filed submissions dated 18/4/2013 on behalf of the 1<sup>st</sup> Respondent.

### **The 2<sup>nd</sup> Respondent's Case**

Raphael Njoroge Mwaura, the Power System Development Manager and Acting Chief Manager Planning Research and Performance Monitoring of the 2<sup>nd</sup> Respondent swore an affidavit on 31/8/2010 in response to the Petition. The deponent stated that the 2<sup>nd</sup> Respondent did not get an opportunity to respond to, and clarify the position because the Petitioner failed to send any correspondence to it. It was his disposition that despite there being preliminary discussions between the 2<sup>nd</sup> Respondent and the Ethiopian Electric Power Corporation, there has been no agreement reached either on price or quantity, on the purchase of the electric power.

The deponent stated that there is no transmission line between Kenya and Ethiopia and that any transmission line between the two countries would be constructed by Kenya Electricity Transmission Company Limited and not the 2<sup>nd</sup> Respondent. The deponent admitted that a feasibility study for a transmission line had been conducted and explained that the study was part of a plan pursued by the Government of Kenya for a system of regional interconnection, which would allow the sale of excess electrical power amongst the countries in the East African Region. It was his disposition that the 2<sup>nd</sup> Respondent had been working with the Government of Kenya to investigate the possibilities of entering into agreements with power companies in other countries within the East African region for the import and export of excess electrical energy.

The deponent further stated that despite the 2<sup>nd</sup> Respondent's ingenuities, there had been no directive for it to enter into any agreement with Government of Ethiopia as alleged. It was his disposition that before any agreement for the purchase of the electrical power can be entered into, the 2<sup>nd</sup> Respondent would have to obtain a license from the Energy Regulatory Commission for the importation of electricity.

The deponent explained that the Ethiopian Electric Power Corporation has several power stations including Gibe I and II which are already commissioned on the Omo River. Further that the Ethiopian Electric Power Corporation and Government of Ethiopia are working on their own plans, and that the construction of Gibe III project was not at the instigation of the 2<sup>nd</sup> Respondent. It was his disposition that even if the 2<sup>nd</sup> Respondent were to purchase power, the power would come from a network of the

Ethiopian Electric Power Corporation and therefore it would not be possible to tell from which power station the electric power comes from.

The deponent further stated that the Ethiopian Electric Power Corporation is considering exporting electrical power, as it already does so to Sudan and Djibouti when there is surplus power generated to Ethiopia's power requirements. In summation, the deponent stated that if the 2<sup>nd</sup> Respondent did not purchase electric power from Ethiopia, then it would have to generate more power from fossil fuel which will have adverse effect on the environment. The 2<sup>nd</sup> Respondent's Advocates, Hamilton, Harrison & Mathews Advocates, filed submissions dated 15/3/2013.

### **The Interested Party's Case**

Duncan Macharia, the Company Secretary/Head of Legal Services of the Interested Party swore a Further Affidavit on 19/9/2012 in response to the Petition. He deponed that the Interested Party's mandate is to develop, design, construct and maintain a high voltage electricity transmission infrastructure, that will form the backbone of the National Transmission Grid in line with Kenya's Vision 2030's National Electricity Supply Master Plan. He stated that in implementing its core function, the Interested Party intends to construct numerous high-voltage transmission infrastructure including lines, switch gears and sub-stations in Kenya as well as inter-connectors to the East African Region and beyond, and that its flagship project is the construction of the Ethiopian – Kenyan electricity interconnection project.

The deponent explained that the project develops the establishment of power trade between Ethiopia and the rest of Eastern Africa, including Kenya which will benefit from increased electricity supply that will boost industrial growth which has been hampered by the affordability of grid connected power, as well as rural electrification. He deponed further that the project's socio-economic effects include at the local level, income derived from short term employment, trade of goods and services within the vicinity, and nationally, sustainable and reliable supply of electricity.

Secondly, that the project will propel Kenya towards achieving the Millennium Development Goals through economic growth, hence improve living conditions of its citizens. The deponent stated that the transmission line will conduct power from clean sources of energy from Ethiopia thereby reducing the fossil fuel based thermal energy and hence mitigating emission of greenhouse gases and local pollutants associated with thermal energy.

The deponent cited an intergovernmental body based in Ethiopia known as East African Power Pool and deposed that its sole mission involves pooling electrical energy resources in a coordinated and optimized manner that aims at providing affordable, sustainable and reliable electricity in the region. It was his submission that the Ethiopia – Kenya interconnection project is in line with East African Power Pool's Master Plan (which he annexed as Exhibit "DM2"), which aims to develop a regional power pool from the seven Eastern African countries and regularize, stabilize and ensure generation of, and exchange of power through regional electricity interconnections. The deponent outlined the specific objectives of the East African Power Pool to include: the optimization of the usage of energy resources; the increase of power supply in the region; the reduction of electricity production costs; and creation of an environment that is conducive for investment.

The deponent also referred the Court to an annexure to his affidavit marked "DM1" being the Environmental Social Impact Assessment Report (EISA) on the the construction of the Ethiopian – Kenyan electricity interconnection conducted by the Interested Party, in compliance with the Environmental Management and Coordination Act and the Constitution, to ensure that the communities

concerned have their right to clean and healthy environment protected.

The deponent stated that the communities concerned were consulted and involved throughout the process. It was his disposition that the Interested Party considers the right to life sacrosanct and has clear environmental policies guided by the principle of sustainable development, local legislation and internationally acceptable benchmarks. Moreover, that the measures of arresting any adverse effects arising out of electricity transmission are complementary to those of other authorities within the energy sector, and therefore it is inconceivable that any power purchase agreements would negate the very fundamental aspect of people's livelihoods as alleged.

In further response to the Petition, the deponent stated that whilst the Interested Party acknowledges that the state is duty bound to protect the rights and freedoms under Articles 26, 27(1), 28, 35, 42 and 44 of the Constitution, they are not absolute rights, for reasons that the enjoyment of such rights by virtue of Article 19(1) (c) is subject to limitations contemplated in the Constitution, and by virtue of Article 20(2) to the greatest extent consistent with the nature of the right or fundamental freedom.

Humphrey & Company Advocates, counsel for the interested party filed submissions dated 15/3/2013.

### **The Issues and Determination**

After carefully considering the pleadings and submissions made by the parties herein, it is not disputed that the issues arising are of a transboundary nature, as the origin of the dispute herein is the construction of dams in Ethiopia, which the Petitioner claims will have adverse effects on Lake Turkana in Kenya. It is the Petitioner's claim that the said dams are being constructed in River Omo, which is an international river to which both Kenya and Ethiopia are riparian states, and which the Petitioner claims is a dominant source of water for Lake Turkana.

It is also evident from the Respondents' and Interested Party's pleadings that there are negotiations between the Kenyan and Ethiopian Governments and state agencies to source hydroelectric power that will be generated as a result of the constructions of the said dams. The issues therefore arising from the parties responses to these sets of facts are as follows:

1. Whether this Court has jurisdiction to intervene and address issues arising from any agreement entered into between the Kenyan Government and Ethiopian Government for the purchase of electricity from Ethiopia.
2. If the answer to the previous issue is in the affirmative, whether the fundamental rights and freedoms of the Petitioner have been infringed, or violated, and what the Respondents' and Interested Party's obligations are, if any, in this regard.
3. Whether the Petitioner is entitled to the relief sought.

### ***Whether this Court has jurisdiction to intervene and address constitutional issues arising from an agreement between the Kenyan Government and Ethiopian Government***

The Petitioners have argued that this Court has jurisdiction to entertain the dispute herein pursuant to the provisions of section 84 of the previous Constitution which gave the High Court original jurisdiction to hear and determine any dispute regarding the enforcement of fundamental rights and freedoms guaranteed by the Constitution. Further, that similar provision is now provided in Articles 22, 23, 70 and 165 (3) (b) of the Constitution which grants the High Court original and unlimited jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

In response, the Respondents submitted that the issues arising in this Petition are outside of the court's jurisdiction, for reasons that the construction of Gibe III Dam is being undertaken by the Government of Ethiopia within its territory, which is outside the realm of this Court. The Interested Party submitted that Gibe III Dam may raise a number of environmental concerns for Lake Turkana, but that this Court was not the proper forum for their resolution as it has no jurisdiction to rule on the actions of another state.

The Interested Party in particular made lengthy submissions on the issue of this Court's jurisdiction and submitted in this regard that the Government of Kenya was not in any way involved in the construction of the Gibe III Dam, but was proposing through the Interested Party to construct an interconnecting transmission line which will be used in the power exchange trade between Ethiopia, Egypt, Uganda, Tanzania, Malawi, Kenya, and ultimately the rest of the Eastern African Region. Further, that Ethiopia had a right to develop its natural resources, and referred the Court in this regard to the **United Nations General Assembly Resolution 1803 (XVII) of 14/12/1962** which provides for the principle of permanent sovereignty over natural resources. The Interested Party also relied on the **Case Concerning East Timor Portugal v Australia** where the International Court of Justice observed that sovereignty over the economic resources is, for any people, an important component of the totality of their sovereignty.

The Interested Party further submitted that the limitation of the principle of permanent sovereignty requires that a state to, in developing its resources, have due regard for the environment of neighboring states. It was counsel's submission that Gibe III Dam may raise a number of environmental concerns for Lake Turkana, but that this Court was not the proper forum for their resolution as it has no jurisdiction to rule on the actions of another state. Further, that by the Petitioner focusing on the environmental impacts of the construction of the dam was in an attempt to have the Court adjudicate over a subject that it does not have jurisdiction to explore. Lastly, the Interested Party quoted the case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** where the Court of Appeal stated that jurisdiction is everything, and submitted that the Court ought to confine itself to actions within the Kenyan state.

This Court recognizes that it is an accepted general principle and presumption in national law and public international law that the jurisdiction of states and courts is territorial, and that there should be some substantial and genuine connection between the subject matter and the territorial base in cases that concern a foreign element. In addition, it is also a settled principle in public international law that there are certain immunities arising from the status of parties as sovereign states. In this regard no state has jurisdiction over another state, and no state is allowed to exercise through its own courts jurisdiction over another state, unless the other state expressly consents, or unless a state resorts to sanctions allowed under international law.

It is also a settled position that national courts are also incompetent to determine subject matters that are positively regulated by international law, and particularly transactions relating to the validity, meaning and implementation of intergovernmental agreements or treaties which create agencies, institutions or funds that are subject to the rules of public international law. (See the texts by **Ian Brownlie, Principles of Public International Law, 4<sup>th</sup> Edition (1990), Oxford University Press** at chapter XV and by **Hans Kelsen, Principles of Public International Law, 2<sup>nd</sup> Edition (1967), Holt Rinehart and Winston Inc** at pp 357-365 in this regard)

In the present Petition, there is no foreign state or foreign and/or intergovernmental entity that is a party that would make this court incompetent to hear and determine this petition. The Petitioner and the Respondents are all Kenyan entities and are resident within the Kenyan territory. In addition the subject matter of the petition before the court concerns the Petitioner's fundamental rights and freedoms, and alleged violations of the same by the Respondents. The Petitioner also bases its claim on the Kenyan Constitution including its Bill of Rights which is applicable within the Kenyan territory. This court can

therefore apply the Constitution to the parties herein, and has jurisdiction to this extent pursuant to Articles 22, 23, 70 and 165(3)(b) of the Constitution.

In addition under section 13(3) of the Environment and Land Act of 2012, the Environment and Land Court is also given jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

The facts that the subject matter of the petition is an agreement entered by the Kenyan Government with the Ethiopian State, and that the alleged violations of the rights of the Petitioner arises in a transboundary context, and may have originated from transactions that were undertaken in Ethiopia do not on their own operate to limit access to this Court, or this Court's jurisdiction. This is for the reason that this Court is obliged to consider any issue raised as to whether the actions of the Respondents in this regard has resulted in a violation of the Petitioner's rights, and whether the Respondents are subject to any constitutional and statutory duties and responsibilities under Kenyan law when entering into such an agreement.

Going forward, and for the avoidance of doubt, this court's jurisdiction to hear the present petition is therefore with respect to the alleged violation of the Petitioner's constitutional rights by the Respondents and the Respondents' obligations if any in this regard, and the remedies if any, that the Petitioner is entitled to.

### ***Whether the fundamental rights and freedoms of the Petitioner have been violated and the Respondents' Obligations***

This being a constitutional petition, it is now a well settled principle that the Petitioner ought to demonstrate with some degree of precision the right it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation – see **Anarita Karimi Njeru vs Republic (1976- 80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance vs Attorney General and Others Petition No.229 of 2012**. This Court will proceed to examine the arguments made in this respect, and on the Respondents' duties and obligations, if any.

#### *On the right to life and dignity*

The Petitioner avers that by agreeing to purchase 500MW of electricity from the Government of Ethiopia, the Respondents' actions will deprive the members of the affected communities of their livelihood, lifestyle and cultural heritage, amounting to a violation of their right to life and dignity as enshrined under Articles 26 and 28 of the Constitution. The Petitioner submitted that the Government of Kenya should recognize the imperatives of the affected communities' right to a clean and healthy environment, and the right to life. Counsel contended that the fundamental value to protect the environment has particular salience for communities around Lake Turkana as they cannot survive without the lake, and the lake is unlikely to survive the construction of a cascade of dams along the Omo River.

The Petitioner invited the Court to take heed and give full effect to the holding of the African Commission on Human and People's Rights in the case of **Ogoni v The Government of Nigeria** in interpreting Article 24 of the African Charter that the right recognize to a clean and safe environment is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.

It was also the Petitioner's submission that the right to life includes an environmental as well as cultural



component. In support of this submission, counsel referred the decision of this Court in the case of **Waweru v Republic (2006) 2 EA 349, 357**. The Petitioner also relied on the decision of the New Delhi High Court in **Balachandra Bhikaji Nalwade v Union of India & Ors** on the doctrine of sustainable development which has resulted in the development of concepts of the 'Polluter Pays principle' 'Onus of Proof' and the 'Precautionary Principle.'

Counsel for the Petitioner cited various provisions of international instruments and the Constitution that make provisions for indigenous communities including Article 27(1) of the International Covenant on Civil and Political Rights and the following Articles of the Kenyan Constitution: Article 42 on the right to a clean and healthy environment, Article 44 on the right to use the language and participate in culture, Article 27(4) in respect of discrimination, and Article 56 which requires the state to put in affirmative action programs designed to cater for marginal groups. Counsel submitted that a person is entitled to seek redress in addition to other remedies and the High Court has powers to make orders or give appropriate directions pursuant to Article 70(1) & (2) of the Constitution, where the person alleges that their right to a clean environment is or is likely to be denied, violated, infringed or threatened.

Lastly, the Petitioner submitted that the Government of Kenya under Article 69 of the Constitution is the trustee for the country's natural resources and that it is this duty that requires the Government to take positive steps to identify and study the nature and extent of domestic or international threats to the country's resources, and share the results of its inquiry with the public as a prelude to concerted action to counter such threat. Consequently, it was incumbent upon Government of Kenya when it learnt of Gibe III to undertake its own independent studies of its probable effects on Lake Turkana.

In response, the 1<sup>st</sup> Respondent submitted that as there is no power purchase agreement entered into between the Government of Ethiopia and Government of Kenya, no constitutional rights accrue to the Petitioner and none has been violated.

The 2<sup>nd</sup> Respondent in its submissions disputed the accuracy and relevance of the documents relied upon by the Petitioner to show the violation of its rights, on account of some of the reports being undated and predating the construction of the dams on Omo River, and others are not being consistent in their presentation. It submitted that the said reports cannot therefore be a basis on which a declaration of infringement of rights can be made. In addition, it was also argued by the said Respondent that the effect of the various reports was to show that there are many other factors other than the Gibe Dams that affect the flow of water from the Omo River into Lake Turkana, including agriculture and irrigation schemes, and that there is a conflict of opinion regarding the impact the Gibe III project may have on Lake Turkana.

The Interested Party on its part submitted that the enjoyment of freedoms in the Bill of Rights is subject to limitations contemplated in the Constitution pursuant to Article 19(1) (c) and 20 (2) of the Constitution. It was its submission that economic, social and cultural rights are also provided for under Article 43 of the Constitution and in the International Covenant on Economic, Social and Cultural rights, as well as the African Charter on Human and People's Rights (Banjul Charter) which Kenya had ratified. Further, that the obligation to fulfill economic, social and cultural rights requires positive measures by the state, including state provision of public services such as infrastructure, water, electricity, sanitation, heating, sewerage, drainage, roads, healthcare facilities and emergency services.

The Interested Party further submitted that provision of electricity is intrinsically part of the economic, social and cultural rights recognized by states. Counsel added that these rights were not subservient to civil and political rights, such as the right to life, but are considered just as important.

This court has carefully considered the submissions made. This court had opportunity to consider the nature of rights to dignity, life and a livelihood in **Joseph Letuya and Others vs The Attorney General and Others**, ELC No 821 of 2012 (O.S) when it stated as follows in this regard:

**“This court recognizes that the right to livelihood neither has an established definition nor recognition as a human right at the national or international level. However, the right to a livelihood is a concept that is increasingly being discussed in the context of human rights. This concept has mention in various international human rights treaties which are now part of Kenyan law by virtue of Article 2(6) of the Kenyan Constitution. Article 25 of the Universal Declaration of Human Rights (UHDR) does mention livelihood in relation to social security and states that:**

**“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food...and the right to security in the event of unemployment, sickness, disability widowhood, old age or other lack of livelihood in circumstances beyond his control.”**

In addition, Article 6(1) of the International Covenant on Economic, Social and Cultural Right (ICESCR) states that the States Parties “recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.” The right to adequate standard of living as defined under Article 11 of ICESCR includes right to food, clothing, right to adequate housing, right to water and sanitation with an obligation to progressively improve living conditions.

These rights are also now expressly provided in the directive principles and Bill of Rights in the Kenyan Constitution. The Preamble to the Constitution, which directs this court as to the considerations to be taken into account when interpreting this Constitution, proclaims that the people of Kenya, when making the Constitution were committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. Likewise, the national values and principles that bind this Court when interpreting the Constitution under Article 10 of the Constitution include human dignity, equity, social justice, human rights, non-discrimination, protection of the marginalized and sustainable development.

Article 28 provides for the right of inherent dignity of every person and the right to have that dignity respected and protected. Lastly, Article 43(1) of the Constitution expressly provides for economic and social rights as follows:

**“(1) Every person has the right—**

**(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;**

**(b) to accessible and adequate housing, and to reasonable standards of sanitation;**

**(c) to be free from hunger, and to have adequate food of acceptable quality;**

**(d) to clean and safe water in adequate quantities;**

**(e) to social security; and**

**(f) to education.”**

**It is therefore evident from the foregoing provisions that their purpose is to ensure that persons to whom they apply attain a reasonable livelihood.”**

It is evident from the foregoing that the right to life, dignity and economic and social rights are all connected and indivisible, and it cannot be said that one set of rights is more important than another. All these rights of necessity need to be observed for person to attain a reasonable livelihood.

This Court in this regard notes that the 2<sup>nd</sup> Respondent has admitted that there have been negotiations with the Ethiopian Electric Power Corporation for the purchase of electricity from Ethiopia Government. The Interested Party also admitted to the existence of the Ethiopia – Kenya electricity interconnection project in line with the **Eastern Africa Power Pool and East African Community Master Plan Volume 1**, prepared by SNC Lavalin International Inc. in association with Parsons Brinckerhoff and dated May 2011, which it annexed as its exhibit “DM2”.

I have perused section 3 of the said report on “Generation Supply Study and Planning Criteria (WBS 1200 )” and note that from the tables at page 4-9 of the said section that future planned hydroelectric projects in Ethiopia from which the power will be sourced will be Gibe III and Gibe IV projects. Further, according to section 4 of the said report on “Supply - Demand Analysis & Project Identification (WBS 1300)” at page 4-21 of the said section, the Gibe 111 project was to be completed in 2013, while Gibe IV is due for completion in 2016.

The Petitioner has relied on various reports and documents to show that the people of Turkana depend on Lake Turkana for their livelihood and that that the construction of the Gibe dams by the Ethiopian Government on the Omo River will affect their right to a livelihood. I do agree with the 2<sup>nd</sup> Respondent that some of the documents relied upon by the Petitioner are not dated nor clearly presented. This Court however found two documents to be relevant and clear in their presentation on the issue raised by the Petitioner, of the effects of the Gibe dams on Lake Turkana.

The first was the commentary by the Africa Resources Working Group dated May 5, 2008, and titled **‘Environmental and Social Impacts of the Proposed Gibe III Hydroelectric Project in Ethiopia’s Lower Omo River Basin’** which was annexed by the Petitioner as its Exhibit “JA-6A”, and which summarized its findings on the transboundary issues of the said Gibe III Hydroelectric project on the Omo Delta and Lake Turkana at page 7 of the report as follows:

- **“ The Omo River is a transboundary river. It contributes at least 80 percent of the waters of Lake Turkana (some estimates are close to 90 percent). Its terminus is at the northern end of Kenya’s Lake Turkana, and most of the Omo Delta is in Kenya. A sharp reduction in the Omo’s downstream flow volume such as would accompany the Give 111 project, would cause a significant retreat of Lake Turkana (see section below).**
- **Lake Turkana in northwestern Kenya is a 250 kilometer long closed drainage basin with a 7500 square kilometre body, Satellite imagery studies indicated that at least 500 square kilometers of deltaic sediments have been newly exposed during the past twenty-five years through a combination of sedimentation and lake-level recession.**
- **Much of the Omo Delta, as well as the northern and north-eastern of Lake Turkana is already intensively utilized for recession cultivation, livestock herding and settlement by the region’s agro pastoralists (who also engage in fishing). Lake retreat, with the accompanying loss of seasonal flood waters, nutrients and sediments, would severally stress and possibly eliminate these agropastoral systems. Unavoidably, these changes would bring more pressure to bear on the remaining resources in the entire Kenya – Ethiopia (and Sudan) border region. (A number of more specific concerns is summarized**

in a later section).

- There are clear precedents for the omission of Ethiopia-Kenya transboundary concern with regard to the Omo River, prior to the 2006 Gibe 111 EIA. For example, the World Bank, in a 2004 documents, states ‘There is no significant use of the Omo River by any other country and the river enters Lake Turkana within the boundaries of Ethiopia. It should therefore be relatively easy to negotiate a ‘no objection’ from Kenya should that be required for multilateral/bilateral funding.’ The World Bank was already actively investigating the economic potential for hydroelectric development along the Omo River by the early 1970s (including with field-based in the Lower Omo), and so well familiar with the region.”

The second report relied on by this court was that by International Rivers, titled **Ethiopia’s Gibe 3 Dam: Sowing Hunger and Conflict**. Although this report is undated, the court notes that it is relevant as it cites and relies on reports published up to and including the year 2009, and more importantly, at page 3 refers to the Memorandum of Understanding signed in 2006 between Kenya and Ethiopia for the purchase of 500 MW from Gibe 3, and the existence of the East Africa Power Pool when discussing the key players in the Gibe 3 Dam Project. The transboundary impacts of the Gibe 3 Power project are discussed at pages 6-7 of the said report as follows:

“ The Omo River and Lake Turkana constitute the Omo-Turkana basin, shared by Ethiopia and Kenya. The Gibe 3 dam poses serious hydrological risks to Lake Turkana, which receives up to 90% of its water from the Omo River. An oasis of biodiversity in a hash desert, Lake Turkana supports 300,000 people and rich animal life. Hundreds of thousands of fisherfolk and pastoralists will be affected if the lake’s fragile ecosystem is stressed to the brink of collapse. Over recent years the lake has been shrinking and becoming progressively more salty, leaving the region highly vulnerable to climate change impacts. If the water level continues to fall, the lake’s fragile balance could be destroyed.

Gibe 3 Dam will reduce the available river flow to Lake Turkana in several important ways. First, the lake will be particularly vulnerable during the filling of Give 3’s reservoir, whose storage capacity (11.75b m) will likely take two years or more to fill. The Omo river’s inflow to Turkana is predicated to be cut by 50% or more during reservoir filing. While the ESIA has identified an alarmingly low minimum flow release of 25m/sec, Salini is contractually required to only release 15m/sec during reservoir filling far below the average flow during the driest month (61 m/sec) and only a fraction of the average annual flow (438 m/sec).

After reservoir filling, Lake Turkana will remain vulnerable as inflow from the Omo River is reduced by three factors. First, the ARWG study predicts that 50-75% of the reservoir water could be lost due to underground cracks in geological rock formations. Addition water will be lost to evaporation in massive reservoir. Finally, the government of Ethiopia hopes to attract large-scale irrigation to the Omo Valley, which would require further abstraction of waters available to Lake Turkana.

The ARWG study indicates that Gibe 3 could lead to a drop in Lake Turkana’s depth of 7-10 meters (23-33 feet). Yet the impact of Gibe 3 on Lake Turkana is barely acknowledged in the project’s impact assessment, and is dismissed with claims that the project will benefit, not harm, the lake. Project preparation has fully ignored Kenya’s customary downstream water rights in this shared river basin. No documentation indicates that the government of Kenya was informed of the dam’s impacts to Lake Turkana.”

It is evident from the said reports that there is a likelihood of adverse impact of the Gibe III hydroelectric Project on Lake Turkana and the communities that depend on the said lake for their livelihood. However, this court notes that there has been no report or evidence tendered by the Petitioner as to the actual effect of the Gibe III hydroelectric project and the infringement of its rights in this respect, and that all the reports relied upon were assessing the possible effects of the said project at the planning and implementation stages. This court cannot therefore at this stage make a finding that the Petitioner's rights to dignity, life, livelihood and cultural and environmental heritage have been infringed, in the absence of concrete evidence in this regard.

*On the right to information*

The Petitioner alleges that the Government of Kenya has refused to disclose the nature and details of the 2006 Memorandum of Understanding despite of the national values spelt out under Article 10 of the Constitution, which include governance, integrity, transparency and accountability, that bind the state, all its organs, and State and public officers. The Petitioner contended that the affected communities are entitled to this information pursuant to Article 35(1) of the Constitution.

Further, that the Government, under sub-Article (3) of Article 35 of the Constitution is under a duty to publish and publicize this information as well as to collect, disclose and disseminate environmental information on the possible impact of the Gibe III damming project on Lake Turkana. It is the Petitioner's averments that it has actively participated in what the Government of Kenya refers to as public consultations with the affected communities over the power purchase from Ethiopia, but which in reality turned out to be a public relation exercise.

Lastly, it was the Petitioner's submission that there is a growing international consensus following the decision of the European Court of Justice in **Case of Guerra & Others v Italy**, that governments have a duty to collect, disclose and disseminate environmental information. Counsel submitted that the right to information in the environmental context is also provided for in Principle 10 of the Rio Declaration on Environment and Development of 1992, to which Kenya is a party.

The 2<sup>nd</sup> Respondent on its part contended that that before any agreement for the purchase of the electrical power can be entered into, it would have to obtain a license from the Energy Regulatory Commission for the importation of electricity pursuant to the provisions of Article 27 to 30 of the Energy Act. The 2<sup>nd</sup> Respondent submitted further that the Petitioner has an opportunity to make representation to the Energy Regulatory Commission on all matters relating to the environment and the impact on Lake Turkana, prior to the 2<sup>nd</sup> Respondent obtaining a license to import electricity from Ethiopia. As a result, the statutory protection and remedies will come into effect and be at the disposal of the Petitioner when the 2<sup>nd</sup> Respondent makes such application. Consequently, counsel submitted that there is no infringement of any fundamental rights by the 2<sup>nd</sup> Respondent, and therefore the proceedings are premature.

The Interested Party averred that there is an intended construction of the Ethiopian – Kenyan electricity interconnection, and in view of that project it has conducted an Environmental Social Impact Assessment whereby communities concerned were consulted and involved. The Interested Party contends that the electricity interconnection project is still at the planning phase and that it intends to fully comply with the provisions of the Energy Act when time comes.

This Court is alive to the right to access information that is provided under Article 35 of the Constitution as follows:

**“Every citizen has the right of access to -**

- a. information held by the state**
- b. information held by another person and required for the exercise of the protection of any right and fundamental freedom”**

Mumbi Ngugi J. in Nairobi Law Monthly Company Limited V Kenya Electricity Generating Company & 2 Others [2013] eKLR held that

**“.....what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.”**

However, the same court made observations that even though **“the right to information implies entitlements to the citizen to information, it also imposes a duty on the State with regard to provisions of information. Thus the State has a duty not only to proactively publish information in the public interest – this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicize any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State.**

Specifically in relation to the right to and access to environmental information, Article 69 (1) (d) of the Constitution places an obligation on the State to encourage public participation in the management, protection and conservation of the environment. This court in exercising its jurisdiction under the Environment and Land Court Act section 18 is also obliged to take into account the principle of sustainable development including the principle of public participation in the development of policies, plans and processes for the management of the environment and land.

Such public participation can only be possible where the public has access to relevant information, and is facilitated in terms of reception of views. It is the view of this Court that access to environmental information is therefore a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.

It is also now an accepted principle in international law that such access to environmental information is necessary to meet the goals of sustainable development. It was stressed in Chapter 8 of Agenda 21 that all stakeholders in the environment should have access to the relevant environmental information relating to products or activities that have an environmental impact. Principle 10 of the Rio Declaration on Environment and Development, 1992, also provides as follows:

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

Further, it has been held by the European Court of Human Rights in the cases of Guerra v Italy (1998) 26 EHRR 357 and Oneryildiz v Turkey (2005) 41 EHRR 20 that there is a positive obligation on the part of public authorities to supply information about the risks involved in living in close proximity to an

environmentally sensitive use, particularly one which poses a risk to their right to life.

In the present petition the Respondents and Interested Party admit that there are intentions of importation of electric power from Ethiopia. The Petitioner has shown that the harnessing of such electricity in Ethiopia is likely to affect its right to life and a livelihood and its cultural and environmental heritage as detailed out in the foregoing. I find that this risk imposes a positive duty upon the Respondents and Interested Party to provide the Petitioner with the all relevant information in relation to importation and/or purchase and transmission of electric power from Ethiopia.

On the arguments put forward by the Respondents and Interested Party on the provisions of sections 27 to 30 of the Energy Act, I note that these provisions require that a license be obtained for the generation, importation or exportation, transmission or distribution or supply of electrical energy or consumers. Further, that the intended applicant of a license or permit to give notice by way of public advertisement in two national and one regional newspaper of wide circulation of its intended application. Following the public advertisement, any person or body of persons desirous of making any representation or objection to the grant of the license or permit, is allowed to do so in writing to the commission, when after the commission may hear the objections in public and subsequently make known its decision within 30 days of the hearing.

It is my finding that the provisions of the said Act are not applicable in the circumstance of the present Petition as the information the Petitioner specifically requires is information relating to the terms of any agreements entered into between the Kenyan Government and Ethiopian Government as to the purchase of electricity.

#### *On the Respondents' Obligations*

I will now proceed to consider the issue of the Respondents' and Interested Party's obligations if any, with respect to the issues raised in this petition. The Constitution spells out obligations and duties in respect of the environment at Article 69 as follows:

#### **“(1) The State shall—**

**(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;**

**(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;**

**(c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;**

**(d) encourage public participation in the management, protection and conservation of the environment;**

**(e) protect genetic resources and biological diversity;**

**(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;**

**(g) eliminate processes and activities that are likely to endanger the environment; and**

**(h) utilise the environment and natural resources for the benefit of the people of Kenya.**

**(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.”**

It is expressly stated in these provisions that the environment and natural resources such as Lake Turkana are to be managed and used in trust for the enjoyment and benefit of the Kenyans, including future generations. It is also noteworthy that Lake Turkana is classified as a World Heritage Site having been inscribed in 1997 under the UNESCO Convention Concerning Protection of The World Cultural Natural Heritage of 1972 (see <http://kenyalaw.org/treaties/treaties/74/UNESCO-Convention>).

Furthermore, Kenya is a State Party having accepted the Convention on 5<sup>th</sup> June 1991 (see <http://whc.unesco.org/en/statesparties/KE/>). Article 4 of the Convention requires a State Party to do all it can to protect, conserve and transmit to the future generation the cultural and natural heritage sites.

**“Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.”**

In addition, a key guiding principle that this court is obliged to apply in exercising its jurisdiction under section 18 of the Environment and Land Court Act is that of sustainable development, including the precautionary principle. The precautionary principle is an approach to the protection of the environment that is based on taking precautions even if there is no clear evidence of harm or risk of harm from an activity or substance.

The precautionary principle has different perspectives in its application, as stated in **The Judicial Handbook on Environmental Law** by Dinah Shelton and Alexandre Kiss published by the United Nations Environment Programme in 2005 . Firstly, scientific uncertainty should not be used as a reason not to take action with respect to a particular environmental concern; secondly, action should *affirmatively* be taken with respect to a particular environmental concern; thirdly those engaging in a potentially damaging activity should have the burden of establishing the absence of environmental harm; and lastly a State may restrict imports based on a standard involving less than full scientific certainty of environmental harm.

Thus, even though the power purchase agreements may not have been entered into between the Respondents and the Government of Ethiopia, and even if no concrete evidence of the harm suffered by the Petitioner has been tendered, it is my finding that the Respondents and Interested Party being the state agencies that are the key actors in the agreements and projects that involve the purchase of electricity from the Ethiopian Government, have a duty to establish that no environmental harm arises from the said agreements and projects. I in this respect agree with the decision of this Court (Mumbi Ngugi J.) in **Abdalla Rhova Hiribae & 3 Others v The Hon. Attorney General & 6 Others, Nairobi High Court Petition No. 14 of 2010**, wherein the Court stated as follows:

**“However, the fact that the projects are not ongoing and no constitutional violations have occurred makes it essential that the prescriptions of the Constitution with regard to the protection and conservation of the environment, and with regard to proper land use, be complied**



**with and the necessary plans incorporating all aspects of the Tana Delta's Land and resource use and development as contemplated under Article 60 and 69 be incorporated..."**

I am also guided by the decision of the Supreme Court of India in **M. C. Mehta v. Kamal Nath and Others, 1 SC 388 (1997)**, in which the said Court considered the government the trustee of all natural resources that are by nature meant for public use and enjoyment, and extended the doctrine of the public trust to ecologically important values, such as preserving freshwater, wetlands and riparian forests. Using this doctrine, the Court quashed a lease of ecologically fragile land granted for a private motel, and ordered the government to take over the area and restore it to its original condition.

It is thus the finding of this court that the Respondents and Interested Party as trustees of the environment and natural resources owe a duty and obligation to the Petitioner to ensure that the resources of Lake Turkana are sustainably managed utilized and conserved, and to exercise the necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the Government of Ethiopia in this regard.

***Whether the Petitioner is Entitled to the Relief Sought.***

The Petitioner seeks an order of mandamus to compel the Government of Kenya and the Kenya Power and Lighting Power Company to make full and complete disclosure of each and every agreement or arrangement entered into or made with the Government of Ethiopia including its parastatals, relating to the proposed purchase of 500 MW of electricity from Gibe III. In addition the petitioner seeks an order of prohibition against the said Respondents prohibiting them from entering into any such further agreements and arrangements with the Government of Ethiopia until an independent environmental impact assessment on the potential effects of Gibe III project on Lake Turkana and the affected communities has been undertaken.

The 1<sup>st</sup> Respondent in this regard submitted that an order of mandamus cannot issue against it as the prayer is premised on a non-existent power purchase agreement alleged to have been executed between the Government of Kenya and Government of Ethiopia. Further, that the Government of Kenya cannot be compelled to disclose that which does not exist and therefore that the petition ought to fail. It was further submitted by the 1<sup>st</sup> Respondent that the Government of Kenya cannot be barred from purchasing power from Government of Ethiopia in the future, noting that such a transaction would be for the benefit of the public. Counsel submitted that the Petitioner's claim is based on conjecture and speculation, and therefore no cogent legal question for determination by the Court arises.

The 2<sup>nd</sup> Respondent on its part submitted that there is no evidence to show any assertions made by the Petitioner for the request of information on agreements made between Government of Kenya and Government of Ethiopia, and that the Court will not grant such an order without evidence of prior demands made.

As regards the orders of prohibition, the 2<sup>nd</sup> Respondent submitted that there have been preliminary discussions for the purchase of electrical power from Ethiopia. However, there is no agreement for the purchase of electricity from Ethiopia. Secondly, that there is no transmission line between Kenya and Ethiopia. Thirdly, that if the 2<sup>nd</sup> Respondent does enter into an agreement for the purchase of electricity from Ethiopia, then it would be supplied from a surplus in the Ethiopian network and not from Gibe III. Lastly, that the 2<sup>nd</sup> Respondent would first need to obtain a license from the Energy Regulatory Commission.

The Petitioner has also asked this court to prohibit the Respondents from entering into any further

agreements until a comprehensive environmental impact assessment of the Gibe III project has been undertaken. The 1<sup>st</sup> Respondent in this respect contends that section. 58(1) and (2) of the Environmental Management and Coordination Act, and the Environmental (Impact Assessment and Audit) Regulations, 2003 places the duty to conduct and Environmental Impact Assessment upon the proponent of a project. Consequently, that the Government of Kenya had no obligation under domestic law to conduct an Environmental Impact Assessment on the potential effects of Gibe III project on Lake Turkana, as it is a project undertaken in Ethiopia by the Government of Ethiopia.

The 2<sup>nd</sup> Respondent made similar arguments, and submitted that that the construction of Gibe III Dam and all other dams on the Omo River are constructed in Ethiopia by the Government of Ethiopia, and therefore the construction is not controlled by the Government of Kenya or the 2<sup>nd</sup> Respondent. Counsel submitted that as a result, the only party that can look at the cascade of power generating dams on the Omo River is the Government of Ethiopia which is not a party to the petition, and in particular, outside the jurisdiction of the Court. Counsel contended that the Petitioner's recourse lied in the Ethiopian courts or the African Commission.

The Interested Party on its part submitted that it had commissioned an Environmental and Social Impact Assessment (EISA) in compliance with Section 58(1) and (2) of the Environmental Management and Coordination Act and Rule 16 of the Environmental (Impact Assessment and Audit) Regulations, 2003. Its counsel submitted that the report concluded the project has low overall environmental impacts as it will source energy from green sources namely hydro-electric power, thus reducing environmental consequences of thermal energy production that is currently used to complement hydro-power production in Kenya. Counsel contended that this consideration is the basis upon which World Bank agreed to fund the construction of the interconnection project.

The orders sought by the Petitioner are availed by Article 23(3) of the Constitution which provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including an order of judicial review, of which orders of mandamus and prohibition are part. In addition, under section 13(7) of the Environment and Land Court Act of 2012, this Court in exercise of its jurisdiction under the Act, shall have power to make any order and grant any relief as the Court deems fit and just, including prerogative orders, which are in essence judicial review orders.

In considering whether or not to grant the relief sought by the Petitioner, this court is guided by the scope of the orders of mandamus and prohibition as outlined by the Court of Appeal in **Kenya National Examination Council vs. Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal No. 266 of 1996** As for an order of prohibition the court stated as follows:

**“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”**

Thereafter the court went ahead to answer the question on the scope and efficiency of an order of mandamus and stated that :-

**“.....an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be**

performed.”

In the present petition the Petitioner has established their right to information as provided for under the Constitution, and this Court has found that there is a positive duty on the part of the State to provide the environmental information sought by the Petitioner. This court has also established that the Respondents and Interested Party as custodians of the environment and natural resources are under certain duties and obligations including ensuring that there is public participation in the sustainable management, protection and conservation of the environment. It is thus this Courts' finding that the Petitioner is for these reasons entitled to the order of mandamus sought.

On the order of prohibition sought, the issue that comes to the fore is whether the decision sought to be prohibited is one that is amenable to judicial review orders, notwithstanding that the grounds for judicial review may have been established arising from the findings on the Respondent's and Interested Party's obligations stated in the foregoing. This issue arises because the decision sought to be prohibited is one that is made in what are traditionally referred to as the exercise of prerogative powers of the Executive.

The position in law in this regard as stated by the House of Lords in the **Council of Civil Service Unions vs Minister for the Civil Service (1985) A.C 374** is that the exercise of a prerogative power is in some circumstances reviewable. The criteria to be used by the courts in determining whether the exercise of a prerogative power is justiciable was stated in **R vs The Secretary of State for Home Department ex parte Bentley (1994) 1. Q.B. 349** at 363 as follows:

**“The question is simply whether the nature and subject matter of the decision is amenable to judicial process. Are the Courts qualified to deal with the matter, or does the decision involve such questions of policy that they should not intrude because they are ill equipped to do so?”**

Decisions made in exercise of prerogative powers that relate to conduct by the government of foreign policy and relations with other states, including the making of treaties, have been held not to be subject to judicial review, mainly because they involve questions of policy that the courts are ill equipped to address. See in this respect **Ex P. Molyneux ,(1986) 1 WLR 331, R vs Secretary of State for Foreign and Commonwealth Affairs ex. parte Rees-Mogg. (1994) O.B 552 and R (on the Application of Wheeler) vs Office of the Prime Minister, (2008) All E.R. (D) 333**

It is my thus my finding that the decision whether or not the Kenyan Government should enter into future agreements with the Ethiopian Government is one that will be influenced by economic and political judgments and perspectives, that this court is not adequately equipped to decide on. In addition it is my view that the more important consideration that will secure the Petitioner's interests in the circumstances of this petition is that it is availed all relevant information to facilitate their participation in any decisions made in this regard, which request this Court has already found to be merited.

In addition, this court agrees with the Respondents that the obligation to conduct an environmental impact assessment under the Constitution and domestic law is with respect to projects undertaken in Kenya. However, this court would like for the record to point out that environmental impact assessments are also now a general principle in customary international law arising from the obligation on states to cooperate with each other in good faith, in mitigating transboundary environmental risks. International instruments also now commonly provide that states should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects.

The International Court of Justice in the **Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (The Danube Dam Case) 37 ILM (1998) 162** which involved a protracted dispute

between Hungary and Slovakia over the construction and operation of dams on the river Danube, found both States in breach of their legal obligations. It called on both countries to carry out the relevant treaty between them and held that newly developed norms of environmental law were relevant for the implementation of the Treaty. Further, that the Parties could, by agreement, incorporate them through the application of several of the Treaty's articles. The court stated as follows in this regard:

**“The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.”**

Coming to the context of the present petition, the specific obligations of performance in this regard of the Kenyan and Ethiopian Governments with respect to the conduct of an environmental impact assessment will have to be determined by the terms of any agreements entered into as to the construction of, and/or sourcing of the electric power from the Gibe Dams. This Court therefore agrees with the Respondents' and Interested Party's submissions that to the extent that such a determination will thereby involve the Ethiopian Government, the Kenyan Courts are not the appropriate forum to determine if, and what obligations exist in this regard.

I have also perused the Environmental and Social Impact Assessment (ESIA) Report on the Ethiopia-Kenya Power systems Interconnection Project annexed as Exhibit “DM 1” by the Interested Party. I note that the project with regard to which the said assessment was conducted is described at page 3 of the report as follows:

**“The Ethiopian – Kenya Power Interconnection project involves establishing the power transmission facilities (power transmission line and substations) between Ethiopia and Kenya to export up to 2000 MW. The Interconnecting transmission link between Ethiopian and Kenya is approximately 1100 km along. The power system analysis and the preliminary results at the economic/financial evaluation show preference for a solution which is based on long distance +500 Kv bipolar line HVDC link.**

**The HVDC line design shall include the economic optimization of the conductors while considering applicable international standards. The lines shall be protected against lightning discharges by two earth wires. One ground wire and one OPGW type. The recommended configurations in the Ethiopia – Kenya Interconnection Project features are... In normal operation, the rectifier station will be Wolayta/Sodo in Ethiopia and Suswa in Kenya. The proposed 500 kV HVDC transmission line is on conventional lattice self-supported steel towers of approximated height 45 m.”**

It is therefore evident that while the said social and environmental impact assessment addresses the impact of erecting the electricity transmission lines from Ethiopia to Kenya, it does not address the impact of the construction of the Gibe dams on Omo River, and does not therefore adequately address the Petitioner's concerns. However, as noted in the foregoing, the Petitioner's recourse in this regard will have to be pursued in the relevant regional or international fora.

### **The Orders**

This Court therefore allows the Petitioner's Petition only to the extent of the following orders:

- a. I hereby grant an order of mandamus directed to the Government of Kenya, the Kenya Power and Lighting Company Limited, and the Kenya Electricity Transmission Company Limited compelling them to forthwith make full and complete disclosure to the Petitioner of each and every agreement or arrangement entered into or made with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of electricity from Ethiopia and/or the Gibe III project including, but not limited to, the Memorandum of Understanding signed in 2006.
- b. I direct the Government of Kenya, the Kenya Power and Lighting Company Limited, and the Kenya Electricity Transmission Company Limited to forthwith take the necessary steps and measures to ensure that the natural resources of Lake Turkana are sustainably managed, utilized and conserved in any engagement with, and in any agreements entered into or made with the Government of Ethiopia (including its parastatals) relating to the purchase of electricity.
- c. I decline to grant the order of prohibition sought by the Petitioner to enjoin and prohibit the Government of Kenya and the Kenya Power and Lighting Company Limited from entering into further agreements and/or making further arrangements with the Government of Ethiopia (including its parastatals) relating to the proposed purchase of electricity from Ethiopia and the Gibe III project until an independent environmental impact assessment on the potential effects of Gibe III project on Lake Turkana and the affected communities is conducted.
- d. This being a matter of public interest, I order that each party bears their own costs.

Orders accordingly.

Finally, I must express my sincere gratitude to the counsels of all the parties in this Petition for their invaluable research and the authorities cited, all of which have been taken into account in coming up with the decision, even if not specifically referred to.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY 2014.**

**P. NYAMWEYA**

**JUDGE**



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