REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 22 OF 2012

IN THE MATTER OF ARTICLES 22, 70 AND 258 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 22, 27, 35, 42, 43, 44 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2 (5) & (6), 10, 60, 62, 69, 70, 73 AND 258 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

MOHAMED ALI BAADI AND OTHERS.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL & 7 OTHERS.....RESPONDENTS

SUMMARY OF FINDINGS AND ORDERS

A. On the Question of Jurisdiction

i. The Court found that the case presented by the Petitioners is a hybrid one, where majority of the issues raised involved the interpretation and application of fundamental rights and freedoms which gives this court jurisdiction. In making the said conclusion, the Court determined that the correct test to utilize is the "predominant purpose test" as defined in paragraph 105 of this judgment.

ii. The Court similarly found that there is a narrow class of cases where the exhaustion doctrine in environmental-related controversies does not mandatorily oust the jurisdiction of this court as the first port of call for litigants. This is so where the alternative fora do not provide an accessible, affordable, timely and effective remedy.

iii. The Court, in addition, made a finding that the controversy presented in this case is not pre-mature for the reason that the Strategic Environmental Assessment (SEA) of the LAPSSET Project has not been concluded. The court also concluded that the proactive approach to environmental governance which includes the precautionary principle which this court is required by our Constitution to apply, makes the present controversy ripe for consideration even before the conclusion of the SEA process. Differently put, the doctrine of ripeness did not preclude this Court from hearing and determining this case.

In the result, it is our order that this Court is seized with the jurisdiction to hear and determine the Petition filed herein.

A. <u>On the Question of Procedural Infirmities of the LAPSSET Project</u>

i. The Court found that the process of Strategic Environmental Assessment (SEA) was a required legal step prior to embarking on the Environmental and Social Impact Assessment (ESIA) process or implementation of any of the individual components of the LAPSSET Project. This is by virtue of Regulation 42 of the Environmental (Impact Assessment and Audit) Regulations, 2003 as well as the magnitude of the LAPSSET Project, and the significant environmental and cumulative impacts of the Project which implicated Policies, Plans and Programmes.

ii. The Court further found that there was no need to have specific backing in the text of the EMCA for Regulation 42 of the Environmental (Impact Assessment and Audit) Regulations, 2003 to be effective. Hence, the Respondents and the 1st and 3rd Interested Parties were legally required to comply with the Regulation 42 (on SEA) even prior to the passage of the amendment to EMCA of 2015 which introduced section 57A of EMCA (providing for SEA in the legislative scheme).

iii. The Court also found that beyond the text and the content of EMCA and its Regulations, a necessary reading of the environmental governance principles contained in our Constitution including Articles 10, 69 and 70 made it mandatory for the Project Proponents to carry out SEA before embarking on any of the individual components of the LAPSSET Project. These constitutional provisions, 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.

iv. The Court found that the Project Proponents had failed to carry out Strategic Environmental Assessment (SEA) before embarking on the individual components of the LAPSSET Project as they were duty-bound to do. This made the entire LAPSSET Project procedurally infirm.

v. The Court further made findings that the Project Proponents failed to adhere to the EIA Licence issued in the following ways:

a. The Project Proponents violated Condition 2.3 of the EIA Licence which required them to compensate the local fishermen and *"in consultation with the Fisheries Department* [to] *provide improved fishing gear and modern fishing landing sites with adequate infrastructure such as power, access roads and cold rooms"*.

b. The Project Proponents failed to adhere to Condition 2.23 of the EIA Licence which clearly required the 5th and 7th Respondents to develop a detailed Environmental Monitoring and Management Plan (EMMP) for the first three berths of the proposed Lamu Port. At the very minimum, the EMMP to be developed had to contain the baseline environmental data and specific monitoring indicators, which can be used to compare the data being collected in a structured way at determined frequency levels.

vi. Additionally, regarding the EIA Licence conditions, the Court found that there was no illegality, and it was not a violation of the EIA Licence for the Project Proponent to compensate Kenya Forest Services for the mangroves rather than the local community directly. The Project Proponent was at liberty to select an institutional arrangement that it felt would be effective for the purpose of the replanting of the mangrove forests as long as the means chosen was rationally related to the purpose. That test was satisfied here.

vii. The Court made a finding that project proponents of projects which are likely to have significant environmental, social, cultural and other impacts are required by the principles of environmental governance in our Constitution, EMCA as well as EMCA

Regulations and Guidelines to consider and assess external costs of the projects, policies, plans and programmes associated with proposed projects as part of the ESIA and SEA Processes. These include the applicability of alternatives; the issue of intergenerational equity; the probability and the costs of calamitous events including oil spills and epidemics associated with the expected high rates of urbanisation; and the welfare losses – both monetary and non-monetary to be borne by the local population – including loss of opportunity costs associated with the new developmental path. Such consideration, assessment and estimation of external costs should be included in the ESIA and SEA Reports, and NEMA is duty-bound to consider them before issuing licences.

viii. The Court found that the Project Proponents of the LAPSSET Project and its associated infrastructure failed to consider, assess, estimate and report on the external costs of the first three berths of the Lamu Project as well as the entire LAPSSET Project. This amounted to a procedural inadequacy in the preparation and consideration of the ESIA and SEA Reports.

In the result, the Court makes the following orders to remedy these procedural infirmities and inadequacies in the ESIA and SEA Processes:

I. Regarding, the EIA Licence, the Court remands the Licence back to NEMA for re-consideration. In re-considering the EIA Licence for the first three berths of the proposed Lamu Port, NEMA must comply with the following guidelines:

a) The ESIA Report must consider, assess, estimate and report on the external costs of the first three berths of the proposed Lamu Port;

b) The Project Proponent must prepare a detailed Environmental Measuring and Monitoring Plan (EMMP); and

c) All the other guidelines specified later on in this disposition in relation to the ESIA and SEA.

II. The EIA Licence re-consideration process must be done within one year from the date hereof and a report filed in this Court to confirm compliance.

III. For the avoidance of doubt, the orders of this Court on remand of the EIA Licence to NEMA means that the EIA Licence is returned to NEMA for further action in accordance with this judgment, and the said EIA Licence shall in the meantime

remain valid and operational pending any further orders of this Court in accordance with this disposition.

IV. *Regarding SEA, the Court directs that NEMA must satisfy itself that the final SEA Report adequately considers all the guidelines given in this disposition in reconsidering the EIA Licence when assessing each of the individual components of LAPSSET Project and its associated infrastructure.*

(C) <u>On Whether the County Government of Lamu was Involved in the Conceptualization and Implementation of the LAPSSET Project and if not the Consequences of Such Non-Involvement</u>

The Court found that even though the LAPSSET Project is an initiative of the National Government, the Constitution requires consultation, cooperation and co-ordination between the National Government and County Governments in the performance of their functions. As a necessary implication of the subsidiarity principle - a recognition that the County Government more closely reflects the concerns, preferences and choices of the local population and that those most affected by a policy, legislation, or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account – the Lamu County Government needs to be involved in the LAPSSET Project, and, in particular those components – like the construction of the Lamu Port and the Mega-City which are located and implemented within the County. Such involvement must, at the minimum, include basic consultation and co-ordination between the two levels of government on the project in question or under consideration.

In the result, the Court orders that the Project Proponents must, going forward, implement the LAPSSET Project in consultation, cooperation and co-ordination with the 2nd Interested Party (Lamu County Government) and other affected counties and government agencies.

(D) <u>On Whether there was Sufficient Public Participation in the Conceptualization and Implementation of the LAPSSET Project</u>

i. The Court found that the Constitution of Kenya (at Articles 10, 69 and 70) and EMCA obligated the Project Proponents of the LAPSSET Project to fashion an effective

programme of public participation by the local community in Lamu County during the conceptualization and implementation of the LAPSSET Project and its various individual components. Such a programme of public participation must include adequate notification, education and information, review and reaction and, finally, consultation, dialogue and interaction with the local population who will be affected by the Project.

ii. The Court concluded that the proper standard of ascertaining whether there is adequate public participation in environmental matters is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. Further, the Court concluded that failure to adhere to set statutory provisions on public participation is a *per se* violation of the constitutional requirement of public participation and yields an inescapable conclusion that the project which did not so comply suffered from inadequate public participation.

iii. The Court found that in the present case no evidence was tendered by the Project Proponents to demonstrate that the steps prescribed under Regulations 17, 22 and 23 of the Environmental (Impact Assessment and Audit) Regulations, 2003 were adhered to. As such, the Court reached the conclusion that there was a *per se* violation of the requirement of public participation required in our Constitution and the EMCA.

In the result, the Court remands the EIA Licence back to NEMA for re-consideration after the Project Proponents satisfy NEMA that they have complied with Regulations 17, 22 and 23 of the Environmental (Impact Assessment and Audit) Regulations, 2003 and have otherwise fashioned a programme of public participation which is effective, inclusive and is appropriate for the scale of the issue involved.

Regarding SEA, the Court directs that NEMA must satisfy itself that the on-going SEA Process similarly considers effective and inclusive public participation in its assessment of each of the individual components of LAPSSET Project and its associated infrastructure.

(E) <u>On Whether the Petitioners' Right to Access Information was Violated</u>

i. The Court found access to information is a key pillar in the environmental governance scheme in our Constitution because effective public participation in decision-making depends on full, accurate and up-to-date information.

ii. The Court further found that the right of access to information in environmental matters constitutes two aspects:

a) A "passive" aspect which includes the right of the public to seek from public authorities, and the obligation of public authorities to provide information in response to a request.

b) An "active" aspect which includes right of the public to receive information and the obligation of authorities to collect and disseminate information of public interest without the need for a specific request.

iii. In the present case, the Court found that while the Respondents met the statutory requirements as to disclosure of the ESIA Report, no evidence was tendered to demonstrate that the relevant information leading to the conception of the LAPSSET Project, and the preliminary studies (if any) undertaken were availed to the Petitioners to enable them to fully participate in the Project before implementation commenced. The Court, thus, concluded that to this extent the Petitioners' rights to access information on the Project were violated.

In the result, the Court orders that going forward the Project Proponents crafts, as part of the public participation requirement ordered above, a demonstrably effective programme to disseminate information on the LAPSSET Project and, specifically those aspects affecting Lamu County, to the Petitioners.

(F) <u>On Whether the Petitioners Rights to a Clean and Healthy Environment has been Violated</u>

The Court made a finding that the LAPSSET Project Proponents have not put in place adequate mitigation measures consistent with the principle of sustainable development as required by the Constitution and statutory law to minimize the adverse environmental impacts of the proposed Lamu Port Project, and that this failure creates a verifiable and imminent risk

to the violation of the right to a clean and healthy environment of the Petitioners and residents of Lamu County.

In the result, the Court orders that the Project Proponents fully complies with the mitigation measures they have identified in the ESIA Report as approved by NEMA and, where these prove inadequate to modify them in consultation with the local population and NEMA, and as part of the public participation programme ordered above.

(G) Whether the Petitioners' Traditional Fishing Rights Have Been Violated

On the question whether the Petitioners' traditional fishing rights have been violated, the Court reached the following findings and conclusions:

i. ***First***, the Court found that the more than 4,700 fishermen from Lamu County have traditional fishing rights to the routes and zones immediately next to the archipelagic waters of Lamu Island within the national waters of Kenya and within Kenya's Exclusive Economic Zone (EEZ). This is as a consequence of the over-arching right constituted by a progressive and holistic reading of our Bill of Rights and, in particular, Articles 26, 28, 40, 42, 43 and 70 of the Constitution, as well as a necessary reading of general principles of International Customary Law.

ii. ***Second***, the government may only regulate or interfere with these traditional fishing rights for compelling and substantial objectives, justifiable in a modern democratic society such as the conservation and management of the resources, or development of a project of national interest as required by Article 24 of the Constitution.

iii. ***Third***, even where the Government has made a determination that it is necessary to limit the traditional fishing rights of the local fishermen, it must do so subject to full and prompt compensation as provided for under Article 40(3)(b) of the Constitution.

iv. ***Fourth***, given the dynamic and indeterminate way in which the government, even after the exercise of all due diligence and good faith, compensates local fishermen for the loss of traditional fishing rights, the government may yet incur further obligations to the local fishermen after the initial compensation. In particular, the government is obligated to give the local fishermen priority to fish for food and commercial purposes over other user groups as part of the State's obligations to the local fishermen as indigenous communities.

v. ***Fifth***, the Court found that it is a clear violation of the law for the 5th and 7th Respondents to have failed to compensate the local fishermen even after identifying

them with specificity, conceptualizing a credible methodology for internalizing their costs, and a precise method of approximating their loss in monetary terms. Further, the Court also found this compensation was required as a pre-requisite to embarking on the project in the EIA Licence issued on 27/03/2014.

vi. ***Sixth***, the Court found that it is a further constitutional violation verging on discrimination under Article 27 of the Constitution for the 5th and 7th Respondents and the 1st Interested Party to have proceeded to promptly compensate land owners whose property was compulsorily acquired for the LAPSSET Project after identifying the correct land owners yet delay and/or fail to pay the equally agreed compensation for the local fishermen.

vii. ***Seventh***, for the avoidance of doubt and flowing from the above findings, the Court finds that the local fishermen are entitled to full and prompt compensation for the loss of their traditional fishing rights and that the failure or delay to compensate them is unfair, discriminatory and a gross violation of their rights to their traditional fishing rights and their right to earn a living.

In the result, the Court orders as follows:

I. That the Project Proponent must pay out the full and prompt compensation to the local fishermen as assessed and accepted by the Project Proponent and as earlier identified in this judgment. For the avoidance of doubt the total compensation of all the different components as per the Project Proponent's own accepted documents is Kenya Shillings One Billion Seven Hundred and Sixty Million Four Hundred and Twenty Four Thousand (Kshs. 1,760,424,000.00).

II. That the Project Proponents must make these payments and meet the obligations identified in the document entitled "Fisheries Resource Valuation and Compensation: A Report for Consideration by Lamu Port and Coal Plant Power Generation Company in Lamu" within one year of today.

III. That the Project Proponents are directed to file a written report to this Court on the progress made in this regard within one year of today.

(H) <u>On the Petitioners' Rights to Culture</u>

The Court found that if the LAPSSET Project is implemented in the manner projected now, it runs the risk of irreversibly violating the various components of the right to culture of the

Petitioners and other indigenous residents of Lamu County. In particular, the Court found as follows:

i. ***One***, that the failure to have prior consultation with the indigenous community in Lamu Island about the potential cultural impacts of the LAPSSET Project on the culture of the Lamu Island was a violation of the Petitioners' right to culture as enshrined in Articles 11(1) and 44 of the Constitution and various international treaties.

ii. ***Two***, that this failure to consult is a continuing one to the extent that a proponent of a development project is not obligated to only consult at the point of conceptualization of a project but is duty-bound to design on-going consultations with the local indigenous communities throughout the project cycle.

iii. ***Three,*** that the failure by the Government to draw up a Management Plan to preserve Lamu Island as a UNESCO World Heritage Site despite various declarations by UNESCO that it does so amounts to a violation of the right to culture of the Petitioners and the local Lamu Community.

iv. ***Four,*** that the failure to design a specific, measurable and actionable Plan in consultation with the Lamu residents on how to protect the cultural identity of the region during and after the construction of the Proposed Lamu Port and the mega-city is a violation of the right to culture of the Petitioners and the residents of the region and needs to be remedied.

In the result, the Court orders as follows:

I. That as part of its renewed programme of public participation ordered above, the Project Proponents do include a demonstrably specific programme for consultation with the Petitioners and the other Lamu Island residents about the impact the LAPSSET Project is likely to have on their culture as a distinct indigenous community and how to mitigate any adverse effects on the culture.

II. That within one year of today, the Project Proponents design a specific, measurable and actionable Plan in consultation with the Lamu Island residents on how to protect the cultural identity of the region during and after the construction of the Lamu Port and mega-city.

III. That in its re-consideration of the EIA Licence as ordered above, NEMA satisfies itself that these two components related to the right to culture have been taken into account.

IV. *That the Project Proponents are directed to file a written report to this Court on the progress made in this regard within six (6) months of today.*

V. *That the government is hereby directed to draw up a Management Plan to preserve Lamu Island as a UNESCO World Heritage Site as requested by various declarations by UNESCO within one year of today.*

VI. *That the Honourable Attorney General does file a report to this Court on the progress made in drawing up this Management Plan to preserve Lamu Island as UNESCO World Heritage Site within six (6) months of today.*

(I) <u>On the Issue of Costs</u>

On the issue of costs, bearing in mind that the Petitioners have largely succeeded in their claims, and that this was a public interest litigation, and further that the Petitioners expended substantial costs in availing the experts and witnesses for their testimonies, the Court orders the Respondents to pay the Petitioners the basic expert and witness costs.

Orders accordingly.

Signed, Delivered, and Dated at Malindi this _____day of_____2018

.....	.....	.....	.....
P. Nyamweya	**J. Ngugi**	**B. T. Jaden**	**J. M. Mativo**
Judge	**Judge**	**Judge**	**Judge**

ORIGINAL