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.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF ENVIRONMENT,

WATER AND NATURAL RESOURCES.....2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF INFORMATION

AND COMMUNICATION AND TECHNOLOGY.....4TH RESPONDENT

CABINET SECRETARY, MINISTRY

OF TRANSPORT AND INFRASTRUCTURE.....5TH RESPONDENT

CABINET SECRETARY, MINISTRY

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

KENYA PORTS AUTHORITY.....7TH RESPONDENT

NATIONAL ENVIRONMENT AND MANAGEMENT

AUTHORITY.....8TH RESPONDENT

AND

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF LAMU.....2ND INTERESTED PARTY

THE LAPSSET CORRIDOR DEVELOPMENT

AUTHORITY.....3RD INTERESTED PARTY

AND

THE GLOBAL INITIATIVE FOR ECONOMIC,

SOCIAL AND CULTURAL RIGHTS.....1ST AMICUS CURIAE

THE CENTRE FOR INTERNATIONAL

ENVIRONMENT LAW.....2ND AMICUS CURIAE

JUDGMENT

A. INTRODUCTION AND PROCEDURAL BACKGROUND

1. This Petition concerns the design and implementation of the Lamu Port-South Sudan-Ethiopia-Transport Corridor project ("the LAPSSET Project").

2. The LAPSSET Project is a transport and infrastructure project in Kenya that, when complete, will be the country's second transport corridor. Kenya's other transport corridor is the Mombasa - Uganda transport corridor that passes through Nairobi and much of the Northern Rift.

3. The LAPSSET Project as initially designed involved the following components, namely:- a 32-berth port at Manda Bay in Lamu; an inter-regional standard gauge railway from Lamu to Juba and Addis Ababa, the South Sudan and Ethiopian capitals respectively; a road network and oil pipelines from South Sudan and Ethiopia; an oil refinery at Bargoni; three international airports and three resort cities, namely; Lamu, Isiolo and Lake Turkana shores. Additionally, it was designed to include a multi-purpose High Grand falls Dam along the Tana River.

4. This Petition was launched in the High Court at Nairobi on 25th January 2012. On 26th January 2012, the file was transferred by an order of the Court to the High Court of Kenya at Malindi, being the nearest Court with jurisdiction over the area in which the subject matter is situated.

5. On 25th June 2012, the Court certified the case under Article 165 (4) of the Constitution as raising substantial questions of law. On 3rd July 2013, the Honourable the Chief Justice constituted a bench of three judges comprising of Justices Mwera (Presiding), Mureithi and Meoli to hear and determine the case. However, in the intervening period the Hon. Justice Mwera was elevated to the Court of Appeal. This necessitated reconstitution of the bench. At this point the file was transferred to the High Court of Kenya, at Nairobi.

6. There was a lull in the proceedings details of which are unnecessary to rehash. However, in January 2017, the Honourable the Chief Justice appointed the present bench to hear and determine this matter. Initially, the bench consisted of five judges, namely, Nyamweya J., Prof. Ngugi J., Thuranira-Jaden J., Onguto J., and Mativo J. Sadly, after the completion of the hearing and finalization of the judgment, Onguto J. tragically and suddenly passed away on 1st March 2018, just a week before the first scheduled date for the delivery of this judgment.

7. Owing to the fact that the five judge bench had been appointed by the Honourable the Chief Justice under Article 165 (4) of the Constitution, the remaining members of the bench sought directions from the Honourable the Chief Justice. The Honourable the Chief Justice directed the remaining members of the bench to decide on how to proceed. Upon deliberations, the remaining members of the bench decided that given that the trial had been completed, bench conferences conducted, and a unanimous decision reached at the time of Justice Onguto's untimely demise, we would proceed and deliver this judgment.

8. Our decision was informed by various considerations including the fact that this judgment would still constitute a majority decision, and dictates of judicial economy and the need to avoid unnecessary inconvenience and expenses to the parties in light of the provisions of Article 159 of the Constitution. Consequently, this decision is

rendered as a unanimous four judge decision, even though the bench was initially appointed as a five-judge bench.

9. The remaining members of the bench wish to seize this opportunity to acknowledge and appreciate the late Justice Louis Onguto's immense contribution to this judgment.

10. Owing to the complexity of the matter and the number of expert witnesses who had been lined up by the parties to testify, the Court, with the concurrence of the counsels for the parties, directed that a site visit be undertaken and that the expert witnesses give oral evidence. This was informed by the need for the Court to get a clear picture of the project, the area in question as the expert witnesses would be able to point out areas of interest to the Court in the course of their evidence. A site visit report was prepared by the Deputy Registrar, which is part of the Court record.

11. The Court held a session at the Malindi High Court on 22nd May 2017. On 24th May 2017, the Court visited the site, viewed crucial areas which had featured prominently in the pleadings and part of the evidence analysed later in this judgment was rendered at the site. Further hearings were held at the Malindi High Court in May 2017 and in Nairobi during the months of June and September 2017.

12. During the site visit, the Court, the advocates and some witnesses took a boat ride through the Mkanda channel, which had been dredged to increase its depth to accommodate larger vessels. The court viewed coral rocks excavated from the sea bed in the channel during the dredging.

13. The Court also viewed the ongoing construction of the first three Berths out of the proposed thirty two Berths of the proposed Lamu port. Similarly, the Court also viewed the area where the remaining proposed twenty eight berths would be constructed. The ongoing construction work for the first three Berths includes dredging the area in question to deepen the sea and reclaiming part of the sea. The Court was again shown evidently silty and turbid waters in the area surrounding the construction site.

14. Other key areas pointed to the Court are the areas where mangrove forests are said to have been cleared to pave way for the construction of the first three Berths. The

proposed site for the rest of the Berths is currently covered by mangrove trees, but the Court was informed these will be cleared to pave way for the construction of the remaining Berths. The Court was also shown a model of the design for the proposed Lamu port which when complete will include an industrial area, a modern city and residential area.

15. The Court, with the concurrence of the parties, adopted an unconventional procedure in hearing the Petition. Some of the expert witnesses had travelled from overseas and, due to travel logistics in part necessitated by the site visit, they needed to be heard first as securing their further attendance would be expensive and inconvenient. The Court, therefore, heard the expert witnesses for both parties at the site notwithstanding the fact that the Petitioners had not yet closed their case. In effect, owing to the peculiar circumstances, the Court heard the Respondents' expert witnesses before the Petitioners had formally closed their case.

16. Some of the expert witnesses were only available at particular times and were, again, with the concurrence of the parties examined at different times during the hearing.

17. This unusual procedure warrants a further explanation. It was informed by the following reasons:-

(a) the time constraint discussed above considering that a further site visit could have meant a further delay to this case and owing to logistics, could even translate to more than one visit which in the final analysis would cause unnecessary delay in determining this case;

(b) the need to afford each party's witness the opportunity to not only adduce evidence at the site but also to point out, identify, and relate their testimony to the crucial areas at the site;

(c) the decision could not and did not prejudice either side considering the nature of the evidence was basically professional/expert evidence and all the parties had exchanged in advance the reports prepared by their experts;

(d) each party was afforded the opportunity to cross-examine the opponents' witnesses; and

(e) lastly, it is a constitutional requirement that in exercising judicial authority, the Court shall be guided by the principles stipulated in Article 159 (2) of the Constitution

among them justice shall not be delayed and that justice shall be administered without undue regard to procedural technicalities.

18. In the next sections, we shall set out the parties' respective cases.

B. THE PETITIONERS' CASE

19. The Petitioners are residents of Lamu County.

20. The Petitioners' case is set out in the Amended Petition dated and filed on 6th February 2015. The Petitioners also filed various affidavits and reports in support of the Petition. The Petitioners aver that the LAPSSET Project was designed and implemented in violation of the Constitution and statutory law. Additionally, the Petitioners complain that the project will have far reaching consequences on the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and effects of the fish species and marine life. In other words, the Petitioners claim that the LAPSSET Project will have far reaching environmental effects adverse to them, which have not been adequately taken into consideration in the design and implementation of the LAPSSET Project. Finally, the Petitioners claim that if the project is implemented as designed, it will affect their cultural heritage and way life as well as their livelihoods.

21. It is important at the outset to point out that the Petitioners informed the Court during the hearing and in their final submissions that they are not opposed to the LAPSSET Project as a mega infrastructural project. Rather, they oppose the manner in which the LAPSSET Project was conceptualized and implemented in violation of the Constitution and statutory law. Additionally, they are opposed to the manner in which the LAPSSET Project was designed, in their estimation, without putting in place adequate measures to mitigate the adverse effects of a project of such a great magnitude. In particular, the Petitioners' case is that the manner in which the LAPSSET Project is being implemented violates statutory and constitutional principles and values among them sustainable development, transparency, public participation, accountability and specifically violates their constitutional rights to earn a livelihood, a clean and healthy environment, cultural rights and the right to information.

22. It is also alleged that the County Government of Lamu was not involved in the planning and implementation of the LAPSSET Project contrary to the principles of devolution enshrined in the Constitution. This is particularly so, complained the Petitioners, as the LAPSSET Project will have substantial and irreversible long-term consequences for the Lamu region.

23. A summary of the various affidavits filed in support of the Petition is as follows.

24. **Umar Omar,** vice chair of Lamu Tourism Association and a Resident of Lamu, in an affidavit filed on 24th March 2017 avers that the LAPSSET Project should not continue in the absence of adequate measures to protect the livelihoods of the local communities and measures to protect archaeological sites and the environment.

25. **Somo Mohamed Somo Bwana**, the chairman of Lamu Beach Management Unit swore the affidavit filed on 24th March 2017 and also testified in Court. He denied that the fishermen were consulted; he cited failure or neglect to mitigate against the effects of the LAPSSET Project and feared that their culture will be eroded.

26. **John Francis Dyer**, a resident of Lamu for more than 14 years and the chairman of the Lamu Resident Tourist Association, swore an affidavit filed on 24th April 2017. He also testified in Court. His evidence was that tourism plays a key role in the economy of Lamu, yet his Association was not involved in the Environmental and Social Impact Assessment (ESIA) process.

27. Mr. Dyer testified that the marine ecosystem in Lamu is complex in that it comprises of the largest mangrove forests in Kenya, fish breeding grounds, sea grass and coral reefs all of which are critical for sea life, which includes rare species of fish and tortoise. He stated that mangrove forests and corals offer protection to shorelines against sea waves.

28. On the effects of dredging, Mr. Dyer stated that sea pollution will negatively impact on sea life and this will negatively affect tourism. He cited absence of mitigation in the ESIA Report to counter the adverse effects of the LAPSSET Project, and specifically pointed out the absence of provision to mitigate loss of the corals and fishing.

29. In addition to the affidavit evidence, the Petitioners called three expert witnesses, namely, **Dr. David Obura**, a scientist in marine studies who has undertaken coral studies for 25 years, **Ernie Niemi**, a consultant with over 40 years experience, and **Dr. Mark Chernaik** whose doctoral studies and research focussed on intersection of molecular biology and environmental toxicology. Their evidence is discussed later in our analysis of the issues in this judgment.

C. RESPONSES TO THE PETITION

30. The Petition was opposed by all the Respondents and the 1st and 3rd Interested Parties. The Lamu County Government, the 2nd Interested Party, was, however, in support of the Petition. The 1st to 6th Respondents and the 3rd Interested Party were all represented by the Honourable Attorney General and filed a joint response.

31. On 5th June 2012, the Global Initiative for Economic, Social and Cultural Rights and the Centre for International Environment Law were, by consent, allowed to participate in these proceedings as 1st and 2nd *amici curiae* respectively. However, neither of them participated in the trial and nor did they file any pleadings.

32. A summary of the respective responses is as follows.

i. 1st to 6th Respondents' and 3rd Interested Party's Response

33. The 1st Respondent is the Honourable Attorney General who is impleaded in his capacity as the principal legal adviser of the Government of Kenya. The 2nd to the 6th Respondents are the Cabinet Secretaries in charge of the Ministries in the Government of Kenya of Environment, Water and Natural Resources; Land, Housing and Urban Development; Information, Communication and Technology; Transport and Infrastructure; and Energy and Petroleum respectively. The 3rd Interested Party is the LAPSSET Corridor Development Authority, which is the authority in charge of planning, co-ordinating and implementing the LAPSSET Project. It was created through a presidential order in Kenya Gazette Supplement Number 51, Legal Notice No. 58.

34. **Silvester Kasuku,** the Director General of the LAPSSET Corridor Development Authority, in his Replying Affidavit, averred that the LAPSSET Project forms part of the broad Kenya Vision 2030 Flagship Projects. He averred that it is a regional project

that is supported by inter-governmental organizations such as COMESA, SADC, EAC and IGAD, and is, hence, a high priority national and regional project. He further averred that it forms part of a long term national economic strategy devised to help Kenya attain an industrialized middle-income status by the year 2030. Mr. Kasuku further deponed that the LAPSSET Project constitutes development programmes which will affect the social economic and environmental aspects of citizens of Kenya positively and contains matters relating to protection of the environment.

35. In his affidavit, Mr. Kasuku also averred that the government has expended massive resources on the feasibility studies conducted in 2011, the ESIA process and partial implementation of the LAPSSET Project. He averred that the EIA License was issued as required. Furthermore, that a technical team of officers from the National Land Commission, Ministry of Housing and Urban Development, Ministry of Agriculture, Livestock and Fisheries, Kenya Forest Service, Kenya Wildlife Service and Kenya Ports Authority was created to revalidate the list of the affected persons and recommend appropriate compensation. In addition, that the areas classified as World Heritage Sites by United Nations Education Scientific and Cultural Organization (UNESCO) will not be affected.

36. Mr. Kasuku also averred that the environmental, cultural and heritage issues related to the LAPSSET Project have been addressed. He further averred that no information has been kept secret, and that the project's massive international infrastructural development is meant to open up all the areas especially in the North eastern parts of Kenya where there have previously been claims of marginalization. The LAPSSET Project, averred Mr.Kasuku, will also link Kenya with other Africa interland economies such as Ethiopia and Sudan. As such, Mr. Kasuku averred, the LAPSSET Project once completed will have beneficial ripple effects on all other sectors of the economy. He also asserted that the interests of the nation are paramount over those of an individual or just one community.

37. **Michael Mwangi Wairagu** an environmentalist and social safeguard expert with 27 years experience and a NEMA lead expert, testified on behalf of the 1th to 6th Respondents and the 3rd interested Party. His evidence is discussed later in this judgment.

ii. 7th Respondent's Response

38. The 7th Respondent is the Kenya Ports Authority (K.P.A), which is established under the Kenya Ports Authority Act[1] and charged with the responsibility of *inter alia* constructing, operating, and maintaining ports within the Republic of Kenya. It is the implementing agent of the LAPSSET Project on behalf of the Ministry of Transport and Infrastructure.

39. The 7th Respondent filed a Statement of Response to the Amended Petition on 2nd March 2015. It was stated therein that the LAPSSET Project will benefit the residents of Lamu both economically and culturally, and that the ESIA Report indicates that all the negative effects will be sufficiently mitigated. The 7th Respondent further stated that the Project comprises of a resort City which will boost, protect and preserve the cultural, heritage and history of Lamu, and that the proposed Lamu Port will not destroy or harm the cultural tradition of Lamu, since it will be constructed three kilometres away from the Lamu Island.

40. It was further stated by the 7th Respondent that that the constitutional rights alleged by the Petitioners are not absolute, and that over 40 million Kenyans will benefit from the LAPSSET Project. It was also stated that the government has fulfilled its constitutional duty to publish and publicize any important information and that the 7th Respondent has upheld all the principles of governance. Further, the 7th Respondent added that the project is subjected to monthly monitoring evaluation reports, and all results produced so far have not disclosed serious adverse effects.

41. **Eng. Peter Oremo,** the Project Manager assigned to the LAPSSET Project by the KPA, swore a Replying Affidavit filed on 2nd March 2015 and also testified in Court. He stated that the ESIA of the first three berths of the Lamu Port was carried out and its outcome made public. Eng. Oremo stated that the ESIA Report was prepared and handed over to the 8th Respondent who issued a letter of approval with a condition that land compensation be made to those affected. He attached the ESIA Report to his Replying Affidavit. He further stated that the money for compensation was released to the 1st Interested Party.

[1] Cap 391, Laws of Kenya.

42. Eng. Oremo deponed that Heztech Engineering Services was appointed to carry out public participation awareness and dissemination of information regarding the construction of the first three berths. He annexed correspondence to support the averment that there was public participation. Eng. Oremo further averred that a proposal by the Ministry of Transport to engage in a wider public participation was complied with and a stakeholders meeting was held in Lamu on 2nd August 2012. Further, he averred, that prior to that meeting the government had organized 16 public participation forums between 6th February 2012 and 3rd May 2012.

43. Regarding the mangroves trees, Eng. Oremo stated that Ksh. 8,000,000/= was released to the Kenya Forest Service to enable them plant the mangrove trees elsewhere, to replace those destroyed during the construction of the first three berths. On dredging, he stated that measures are in place to combat its effects on sea life. Eng. Oremo also pointed out that ESIA Report recommended compensation to the fishermen.

iii. 8th Respondent's Response

44. The 8th Respondent is the National Environmental Management Authority (N.E.M.A.) which is established under the Environmental Management and Co-ordination Act[2] (EMCA). It is charged with the responsibility of *inter alia* co-ordinating environmental management activities and conservation of the environment.

45. **Zephania Ouma,** the 8th Respondent's acting director for compliance and enforcement, denied breach of the Petitioners' fundamental rights or breach of its obligations under the EMCA, in an affidavit sworn on 2nd November 2012. Mr. Ouma further averred that the ESIA Report for the initial three berths and associated infrastructure was generated after the ESIA process and submitted to NEMA.

46. In a further affidavit sworn on 24th February 2015, Mr. Ouma averred that the 5th Respondent received an EIA Licence for the construction of the first three berths in accordance with EMCA. He exhibited a copy of the licence which stipulated several conditions to be observed before construction and during operations and reiterated the 8th Respondent's commitment to good environmental management. He asserted that the

[2] Act No. 8 of 1999.

responsibility of the management and control of ports used for international trade is a preserve of the national government and not county governments. He reiterated NEMA's commitment to fulfilling its constitutional obligations to have a clean and healthy environment.

47. In a Supplementary Affidavit filed on 19th June 2015, Mr. Ouma averred *inter alia,* that, the Petitioners are determined to obstruct the implementation of a noble project. Mr. Ouma confirmed that the larger LAPSSET Project would have to be subjected to the Strategic Environmental Assessment (SEA) process, and that a feasibility study for the SEA was submitted to the 8th Respondent in January 2017.

iv. 1st Interested Party's Response

48. The 1st Interested Party is the National Land Commission established under Article 248 (2) (b) of the Constitution and the National Land Commission Act[3] charged with the responsibility of *inter alia* managing and administering public land on behalf of the national and county governments.

49. **Brian Ikol,** the 1st Interested Party's Deputy Director in charge of legal affairs and enforcement, swore a Replying Affidavit filed on 24th March 2017. He averred that prior to commencement of the acquisition of land for the LAPSSET Project, the 1st Interested Party received the ESIA Report and the appropriate approvals. He further avers that funds were thereafter remitted to the 1st Interested Party and payments processed and paid to all persons dislodged by the Project. Lastly, he also emphasized that the LAPSSET Project is a key project for the realization of Vision 2030 and which will greatly improve the country's economy.

v. 2nd Interested Party's Response

50. The 2nd Interested Party is the County Government of Lamu established under Article 6 as read together with the 1st Schedule to the Constitution.

51. **Siyat Osman Ibrahim,** the County Secretary of the 2nd Interested Party in a Replying Affidavit filed on 16th March 2017, reiterated the mandate of the 2nd Interested Party

[3] Act No. 5 of 2012.

under the Fourth Schedule to the Constitution. He averred that the 2nd Interested Party was sidelined and kept in the dark.

52. He also averred that the development of the project requires proper safeguards, to ensure that it is sustainable and environmentally friendly and has no adverse effects on the residents. He insisted on proper analysis to prevent environmental degradation and resultant side effects, and the need for consultation and cooperation.

D. THE ISSUES AND ANALYSIS

53. Having perused the pleadings and having heard the parties respective submissions, as well as the evidence tendered before us, we have identified the following nine issues for determination:-

a. Whether this Court has jurisdiction to entertain this case;

b. Whether the LAPSSET Project is procedurally infirm;

c. 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;

d. Whether there was sufficient public participation in the conceptualization and implementation of the LAPSSET Project.;

e. Whether the Petitioners' rights to access information were violated;

f. Whether the Petitioners' rights to a clean and healthy environment have been violated;

g. Whether the Petitioners' fishing rights as a species of socio-economic rights have been violated;

h. Whether the Petitioners' cultural rights are threatened;

i. What reliefs, if any, the Petitioners are entitled to.

54. In this Part, we will deal with the first eight issues *in seriatim*. We will deal with the ninth issue in Part **E** below. Before we analyse each of the issues, we wish to say something about the nature of this case and the nature of the evidence we received.

55. As pointed out earlier, though this case is a Constitutional Petition, we departed from how most constitutional cases are heard because of its nature. In particular, the Court conducted a site visit as earlier described. Additionally, the Court received *viva voce*

evidence from expert witnesses, who provided the Court with important information which we have used to reach our conclusions herein below.

56. In view of this, it is important for the Court to give a brief overview of the principles that informed our analysis of the evidence received from the experts.

57. Expert evidence forms an important part of litigation. This is because it is vitally important for the Courts to get the necessary help from those skilled in particular fields and in the different technologies in forming an opinion and coming to a conclusion.

58. Some expert evidence would be based on the result of field visits and site inspections and in other cases the opinions will be treated on analytical reports. Under section 48 of the Evidence Act[4] opinions of science or art are admissible if made by persons specially skilled in such science or art. A person specially skilled in art or science is therefore deemed to be an expert. The term science or art usually means any branch of learning which requires a course of previous habit of study in order to obtain competent knowledge of its nature.[5]

59. The first and foremost requirement of a party who calls an expert witness is to establish the credentials of the person as an expert, or one who is especially skilled in that branch of science, to the satisfaction of the Court. That, is, the witness should fall within the definition of 'specially skilled' as laid down under section 48 of the Evidence Act.[6]

60. The question whether a person is specially skilled within the above provision is a question of fact that has to be decided by the Court and the opinion of the expert is also a question of fact and if the Court is not satisfied that the witness possesses special skill in the relevant area, his or her opinion should be excluded.[7] Failure to prove the competency of a person a party calls into the witness box as an expert presents a real risk of evidence of such a person being ruled out as irrelevant.

---

[4]Cap 80, Laws of Kenya.

[5] *Judges and Environmental Law*, *A Handbook for the Sri Lankan Judiciary*, Environmental Foundation Limited, at page 125 Available at www.sljti.org-Accessed on 20th October 2017.

[6] Section 48. (1). When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. (2) Such persons are called experts.

[7] *H.A. Charles Perera vs M. L. Motha* 65 NLR 294.

61. The expert witness, in our view, ought to explain the reasoning behind his opinion. In scientific evidence, the reasoning may be based on the following:- site inspection reports, analytical reports, evidence of other witnesses, and the evidence of the experts.[8] Opinion expressed must be confined to those areas where the witness is specially skilled. The weight to be attached to such an opinion would depend on various factors. These include the circumstances of each case; the standing of the expert; his skill and experience; the amount and nature of materials available for comparison; the care and discrimination with which he approached the question on which he is expressing his or her opinion; and, where applicable, the extent to which he has called in aid the advances in modern sciences to demonstrate to the Court the soundness of his opinion.[9]The opinion of the expert is relevant, but the decision must nevertheless be the judge's.[10]

62. Reflecting on conflicting expert evidence brings into focus a passage from a judgment by **Sir George Jessell MR** in the case ***Abringer vs Ashton***[11] where he used the phrase *"paid agents* " while describing expert witnesses. Almost 100 years later **Lord Woolf** joined the list of critics of expert witnesses. In his ***Access to Civil Justice Report***, Lord Woolf stated thus:

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."[12]

63. The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. To be practically of assistance to a Court, however, expert evidence must also provide as much detail as is necessary to allow the Court to determine whether the expert's opinions are well founded.

64. While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing

[8] *Judges and Environmental Law*, *A Handbook for the Sri Lankan Judiciary,* Environmental Foundation Limited, Chapter four.
[9] Ibid.
[10] *The Queen vs K.A. Wijehamy* 61 NLR 522.
[11] {1873} 17 LR Eq 358 at 374.
[12]Lord Woolf MR*, Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1995, p. 183.

expert evidence and determining its probative value.[13] This is no easy task. Expert opinions are admissible to furnish Courts with information which is likely to be outside the Courts' experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.[14]

65. Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To our mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues require specialized, technical or scientific knowledge only an expert in the field is likely to possess.

66. While expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account.[15] Four consequences flow from this.[16]

67. **Firstly**, expert evidence does not "trump all other evidence."[17] It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.[18]

68. **Secondly,** a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence.[19] To do so is a structural failing.[20] A Court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the Court in forming its views on the expert testimony

[13] Evan Bell, *Judicial Assessment of Expert Evidence*, Judicial Studies Institute Journal, 2010 Page 55.
[14] *State v. Pearson and Others* (1961) 260 Minn. 477.
[15] *Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons* [2010] E.W.C.A. Civ 54.
[16] *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR.
[17] Ibid.
[18] Ibid.
[19] *Ndolo vs Ndolo,* Nairobi Civil Appeal No. 128 of 1995 {1996}eKLR, *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros. vs Augustine Munyao Kioko* {2006}eKLR.
[20] *Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) vs. Simmons* [2010] E.W.C.A. Civ. 54.

and *vice versa*. For example, expert evidence can provide a framework for the consideration of other evidence.

69. **Thirdly,** where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is cogent and give reasons why the court prefers the evidence of one expert as opposed to the other. **Fourthly**, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact.[21]

70. A further criterion for assessing an expert's evidence focuses on the quality of the expert's reasoning. A Court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In ***Routestone Ltd. v. Minories Finance Ltd. and Another***[22] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A Court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.

71. Where there is a conflict between experts on a fundamental point, it is the Court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.[23]

72. In our view it is correct to state that a Court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it.[24] A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative[25] or manifestly illogical.[26] Where a Court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the Court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must

[21] *Jakto Transport Ltd. v. Derek Hall* [2005] E.W.C.A Civ. 1327.
[22] *Routestone Ltd. v. Minories Finance Ltd. and Another* {1997} BCC 180, [1997] 1 EGLR 123.
[23] *Shah & Another vs Shah & Others* {2003} 1 EA 290.
[24] *Drake v. Thos Agnew & Sons Ltd.* [2002] E.W.H.C. 294.
[25] *Gorelik vs. Holder* 339 Fed. App 70 (2nd Cir 2009).
[26] *Golville vs Verries Pechet et du Cauval Sciete Anonyme* (Court of Appeal (Civil Division), unreported, 27 October 1989).

therefore be clearly identified so as to enable a Court to choose which of competing hypotheses is the more probable.

73. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.[27]

74. Next, we will analyse each of the issues for determination and come to our findings.

a. Whether this Court has Jurisdiction to Entertain this Case

75. The issue of jurisdiction was first raised by counsel for the 1st to 6th Respondents and the 3rd Interested Party in a Notice of Preliminary Objection dated 16th March 2017 and filed on the same date. During a regularly scheduled mention on 24th March 2017, counsel for the 1st to 6th Respondents and the 3rd Interested Party stated that he did not wish to pursue the Preliminary Objection. However, the issue was again raised in both oral and written submissions by the said Counsel, as well as Counsels for 7th Respondent and the 1st Interested Party.

76. Mr. Motari for the 1st to 6th Respondents and the 3rd Interested Party in his submissions submitted that the EIA Licence for the first three berths of the proposed Lamu Port had already been issued, and that the Licence can only be challenged at the NEMA Tribunal pursuant to section 129 of EMCA. He relied on a number of decisions including: ***Okiya Omtatah Okoiti & 2 Others vs A.G & 3 Others***;[28] ***Patrick Musimba vs. National Land Commission & 4 Others***[29]***;*** and ***Republic vs National Environmental Managemental Authority.***[30]

77. Mr. Motari also raised two other jurisdictional arguments. First, he argued that the Inter-Governmental Relations Act provides a mechanism for resolution of disputes between the National and County Governments. Yet, he argued, Lamu County has not registered such a dispute under the Inter-Governmental Relations Act. In short, Mr.

[27] *Makita (Australia) Pty. Ltd. v. Sprowles*, [2001] N.S.W.C.A. 305.
[28] [2014] eKLR.
[29] [2015] eKLR.
[30] [2011] eKLR.

Motari argued that Lamu County has not exhausted the dispute resolution mechanisms provided under the Inter-Governmental Relations Act. Second, Mr. Motari argued, in essence, that the suit was premature as it was challenging the SEA process which is yet to be concluded. He submitted that the critiques by the Petitioners about the SEA process ought to be submitted to the SEA Review and not presented as a suit in Court.

78. In his final submissions, Mr. Miller for the 7th Respondent submitted that if any party desired to challenge the adequacy of the ESIA study and the EIA Licence, such a challenge ought to be raised at the National Environment Tribunal before appealing to the High Court, hence, Mr. Miller argued, this is not the proper forum. For this proposition, Mr. Miller also cited ***Okiya Omtatah Okoiti & 2 Others vs A.G & 3 Others***.[31]

79. Miss Njuguna for the 1st Interested Party cited Article 165(5)(b) of the Constitution and submitted that this Court has no jurisdiction over the matters in issue; and that jurisdiction lies in the Environment and Land Court (ELC). She relied on ***R vs Karisa Chengo & 2 Others***[32] and ***United States International University (USIU) vs A.G***.[33] Counsel also cited ***Okiya Omtata Okoiti & 2 Others vs A.G & 3 Others***[34] while agreeing with Mr. Miller that the adequacy of EIA Licence conditions can only be challenged before the NEMA Tribunal.

80. Mr. Waikwa's response to the issue of jurisdiction was that while Article 162 and 165(2)(b) of the Constitution seem to take away environment and land matters jurisdiction from the High Court, given the range and nature of the questions posed by the petition, it was right and proper for the Honourable the Chief Justice to empanel the present bench under Article 165(4) of the Constitution. That the range of issues raised are more appropriate for determination by the High Court than the Environment and Land Court (ELC). This is because, he argued, the environmental and land issues raised cannot be extricated from the other constitutional issues which need to be determined in this case.

[31] {2014}eKLR.
[32] {2017}eKLR.
[33] {2012}eKLR.
[34] {2014}eKLR.

81. The objection raised by the Respondents and the Interested Parties on jurisdiction dwelt on four issues, namely:

i. that the controversy should have been registered by Lamu County as a dispute between Lamu County and the National Government under the Inter-Governmental Relations Act, and submitted for alternative dispute resolution;

ii. that a party desiring to challenge the adequacy or otherwise of an EIA Licence ought to move to the NEMA Tribunal and not to this Court;

iii. that, in any event, if the case is to be presented to Court it should have been filed at the ELC; and

iv. that the Strategic Environmental Assessment process is ongoing hence this suit is pre-mature.

82. We will deal with each of these four objections sequentially below.

83. We have no doubt that issues of jurisdiction should be determined at the earliest possible opportunity. This is because jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See ***Owners of the Motor Vessel "Lillian SS" vs Caltex Oil Kenya Limited (1989) KLR 1.***

84. A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in ***The Matter of the Interim Independent Electoral Commission***,[35] discussed the issue of jurisdiction in the following manner:

" Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution; by statute law, and by principles laid out in judicial precedent.... the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the Court, is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by the Constitution".[36]

[35] Constitutional Application No. 2 of 2011 (unreported).
[36] *Samuel Kamau Macharia vs. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

85. In the words of Chief Justice Marshall of the U.S. Supreme Court in ***Cohens vs. Virginia***:-[37]

"*It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."*

86. The first jurisdictional hurdle to this suit erected by the Respondents is the Inter-Governmental Relations Act. The argument, as we understand it, is that to the extent that there is a dispute between Lamu County and the National Government, that dispute should have been resolved under the dispute resolution mechanisms under Part IV of the Inter-Governmental Relations Act as required by Article 189(3) of the Constitution.

87. We can easily dispose of this jurisdictional hurdle. Its resolution is hinged on the definition of a "dispute" under the Inter-Governmental Relations Act. Section 30(1) of the Act defines a dispute under the Act as an "inter-governmental dispute". Our decisional law has provided more specific and contextual definition. In particular, Justice Onguto provided a useful construction of what an "inter-governmental dispute" is in ***Isiolo County Assembly Service Board & Another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & Another***.[38] In pertinent part, the Learned Judge said:

The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or a person on the other hand. A dispute between a person or state officer in his individual capacity seeking to achieve his own interests or rights would not equate an intergovernmental dispute. A dispute between two or more county governments would however equate an intergovernmental dispute. See section 30(2)(b) of the Act. By the better reason, it would also follow that where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government

[37] 19 U.S. 264 (1821).
[38] [2016] eKLR.

whether county or national, then such a dispute would rank as an intergovernmental dispute.

What precisely amounts to an intergovernmental dispute is not expressly detailed either under the Constitution or the Act. Guidance may however be retrieved from both Articles 6 and 189 of the Constitution as well as from the Act. Articles 6 and 189 provide for respect, cooperation and consultation in the conduct of the two governments' mutual relations and functions. The focus appears to be performance of functions and exercises of powers of each respective level of government. Section 32 of the Act however appears to precipitate even a commercial dispute as an intergovernmental dispute when the Section expressly refers to "any agreement" between the two levels of government or between county governments. The agreement, in other words, is not limited to that of performing functions or powers or that of guiding relations.

88. This is a Petition brought by residents of Lamu County. It cites violations of certain fundamental rights affecting the people of Lamu County. It is not, by any definition, a dispute between the two levels of government. Lamu County is only enjoined to the suit as an interested party. Lamu County did not bring the suit; and neither is it a principal party to the suit. It would be to over-stretch the meaning assigned to "dispute" under the Inter-Governmental Relations Act were we to require the suit to be submitted for resolution under Part IV of Inter-Governmental Relations Act.

89. In any event, to require a suit alleging violations of fundamental rights by citizens to be submitted for resolution under Part IV of Inter-Governmental Relations Act would, in our view, unnecessarily limit access to rights given to individuals under Article 22 of the Constitution to challenge any alleged violations of the Bill of Rights. See: ***County Government of Nyeri vs Cabinet Secretary, Ministry of Education, Science and Technology & Another***.[39]

90. We now turn to the second jurisdictional hurdle raised by the Respondents and the 1st Interested Party. We appreciate, as Mr. Miller and Mr. Motari pointed out, that EMCA avails a number of adjudicatory mechanisms for environmental matters that members of

[39] [2014] eKLR.

the public can utilize to secure environmental rights and enforce environmental laws without necessarily having recourse to the High Court. The key mechanisms are the Committee established under section 31 of EMCA and the National Environment Tribunal.

91. The functions of the Committee under section 31 is to investigate any complaints or allegations against any person or against NEMA in relation to the condition of the environment in Kenya. However, its decisions are only useful as findings and recommendations to the National Environment Council. The issues raised in this petition and remedies sought are therefore not appropriate subjects for the Committee established under section 31.

92. The National Environment Tribunal, on the other hand, is empowered to inquire into the matters arising from refusal to grant or transfer a license, imposition of any condition, limitation or restriction on a license, the amount of money required to be paid as a fee and the imposition of an environmental improvement order by the Authority.[40] It was the opinion of Mr. Miller and Mr. Motari that the Petitioners should have filed their grievances at the Tribunal.

93. In our view, the mandate of the Tribunal is limited to the matters provided for in section 129 of EMCA. Of all the functions of the Tribunal under Section 129 of EMCA, the only applicable one would be Section 129(1)(a) to the extent that the Petitioners challenge the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued by NEMA to the LAPSSET Project's proponent. However, the scope and range of issues, rights and controversies involved in the present dispute surpasses the narrow question of the conditions which can be imposed as part of the EIA License. Indeed, it is notable that section 129(1)(b) to (e) are only applicable when a licensee is challenging the terms of a license by NEMA.

94. While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute **(*See The Speaker of National Assembly vs James Njenga Karume***[41]), the exhaustion doctrine is

[40] See also EMCA section 129.
[41] {1992} KLR 21.

only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of ***Dawda K. Jawara vs Gambia***[42] it was held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

95. In the case of ***R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya***[43] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held:

[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the ***Shikara Limited Case****, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.*

[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.

See also ***Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others****.)*[44]

96. In our considered opinion, the Tribunal is not a suitable forum for the purpose of settling environmental conflicts at community level as disclosed in this Petition. In addition, the design of the Tribunal is such that it does not envisage the participation of all interested parties, such as developers, government, the community, non-governmental organizations, and environmental groups in a joint effort aimed at restoring the environment and agreeing on their sustainable use. Differently put, the multiplicity of parties and the polycentricity of issues in a case such as this one makes it unsuitable for the Tribunal.

[42] ACmHPR 147/95-149/96-*A decision of the African Commission of Human and Peoples' Rights.*
[43] {2017}eKLR.
[44] {2016}eKLR.

97. We are fully aware of the provisions of Article 165(5)(b) of the Constitution which limits the jurisdiction of the High Court with respect to matters falling within the jurisdiction of the Courts set up under Article 162(2) of the Constitution. Article 162(2)(b) provides for the establishment of a Court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

98. The Environment and Land Court (ELC) is established under section 4 of the Environment and Land Court Act.[45] Section 13 of the Act provides that ELC has powers to hear and determine disputes:

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

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

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

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

99. The ELC also has powers 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.[46]

100. The Supreme Court in ***Republic vs Karisa Chengo & 2 Others***[47] amplified and pertinently held that each of the Superior Courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution or by a statute as permitted by the Constitution. The holding in this case however, does not resolve the knotted question of which court among the High Court and the two equal status Courts under Article 162(2)(b) should be seized of jurisdiction in controversies in hybrid cases. Hybrid cases are cases where issues cut across the exclusive jurisdiction reserved for each of the three courts. As demonstrated by the issues identified above, this is one such hybrid case.

[45] Act No. 19 of 2011.
[46] Section 13 (3) of the ELC Act.
[47] {2017} eKLR.

101. In earlier cases, our superior Courts approached the question using the lens of concurrent jurisdiction. This approach is exemplified by ***Ledidi Ole Tauta & Others vs. Attorney General***[48] where a three judge bench of the High Court after deeply discussing the question held *inter alia:*

….having regard to the Constitutional provision under Article 165(3) (b) and section 13(3) of the Environment and Land Court Act, in Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and a party could bring such matters either before the High Court and/or before the Environment and Land Court.....

102. Similarly, in ***Patrick Musimba vs. National Land Commission & 4 Others***[49] the Petitioner challenged the manner in which compulsory acquisition of land had been conducted in Kibwezi Constituency and the process of the Environmental and Social Impact Assessment (ESIA) for the construction of the Standard Gauge Railway (SGR), another mega-infrastructural project. A preliminary objection was raised by the Respondents challenging the jurisdiction of the Court on the ground that the Court empowered to hear and determine such matters was the ELC established under the Environment and Land Court Act[50] as read with Article 162 of the Constitution. The Respondents submitted that both Articles 162 and 165 of the Constitution limited the jurisdiction of the High Court. They further argued that the presiding Judges empanelled by the Chief Justice were not qualified to handle the Petition as they had not been appointed as ELC Judges. The Respondents further argued that the jurisdiction of the Court could only flow from the appointment of the Judge.

103. After a wide-ranging analysis and consideration of the applicable provisions of the Constitution and in particular, Articles 165(3), 162(2) and (3), and section 13 of the Environment and Land Court Act, and the amendments thereto, the five Judge Bench of the High Court held as follows: –

[48] {2015} eKLR.
[49] {2015} eKLR.
[50] Supra.

In its strict sense the "jurisdiction" of a Court refers to the matters the Court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court.

The jurisdiction of the High Court was unlimited save only as provided by the Constitution. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of the Constitution. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3) (e) of the Constitution further confirmed that the High Court's jurisdiction could be extended further pursuant to any statutory provision. For example the Judicature Act which conferred the specialized admiralty jurisdiction. The Constitution however did not provide for any other written law to limit the jurisdiction of the High Court.

Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limited the High Court's jurisdiction in that respect ….

A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.

….. It could not have been the intention of the draftsmen of the Constitution that when the Court was faced with a mixture of causes of action touching on the Constitution, especially on fundamental rights, a separationalistic approach was to be adopted by the Court and half the claim dispatched to one Court as the other half was retained.

104. A similar position was held by a three-judge bench in ***Leisure Lodges Ltd v Commissioner of Lands & 767 others***[51] citing the above decisions.

105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in

[51] [2016] eKLR.

the controversy is. For example in ***Suzanne Butler & 4 Others v Redhill Investments & Another***[52] the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

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

106. One of the grievances raised by the Petitioners in this case is that their right to a clean and healthy environment is threatened. The Constitution confers standing upon a person who alleges that a right to a clean and healthy environment has been violated. It provides:-

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

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

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

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

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

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

[52] {2017} eKLR.

107. It should be recalled that the jurisdiction of this Court under Article 22 and 23 of the Constitution is one for enforcement of fundamental rights and freedoms guaranteed under the Bill of Rights. Article 165(3)(b) confers upon this Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

108. In our view, this case raises a hybrid of pertinent Constitutional issues majority of which fall within the jurisdiction of this Court. These issues include:-

i. whether the LAPSSET Project has been conceptualized and is being implemented in accordance with the Constitution and statutory law including the principles of public participation and access to information;

ii. alleged violation of the Petitioners' rights to a clean and healthy environment. As argued later in this judgment, a healthy and clean environment is closely linked to the right to life, hence its violation, is a threat to life;

iii. the right to livelihood including alleged violations of fishing rights which are also closely linked to the right to life; and,

iv. *protection of cultural rights and alleged violation of the principles and values of good governance are all justiciable Constitutional issues*;

109. In addition to the above, one of the issues implicated in this Petition is what is now generally recognized minimum requirements for existence of environmental democracy, namely, "the tripartite of the so-called access rights in environmental matters, namely, (a) access to information, (b) participation in decision-making, and (c) access to justice."[53] These three access rights have the common denominator that they empower individuals to have a meaningful voice in decisions that affect them and their development. The Constitution of Kenya and Environmental Law recognizes these three access rights.

110. As pointed out later in this judgment, the above rights are also intertwined in that achievement and application of each impact on realization of the others. For instance, access to information ensures that all persons who choose to participate in

[53] Csaba Kiss and Michael Ewing (eds*), Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries European Regional* Report published by The Access Initiative Europe. Available at <http://www.accessinitiative.org> Accessed on 21 October 2017.

environmental decision-making are equipped with the necessary, or at least, basic facts about quality of their environment and their legitimate expectation on the same.[54]

111. Thus, violation of rights to a clean and healthy environment can easily lead to the violation of other rights in the Bill of Rights such as the right to life. Yet, the determination of violations or threats of violation of any rights in the Bill of Rights undoubtedly falls within the province of this Court.

112. It is also correct to state that Environmental Law has been described as Administrative Law in action,[55] for the reason that environmental conflicts often depend on the exercise of administrative decision-making powers. Such powers, if not properly exercised can be challenged by way of a Constitutional petition which is also within the jurisdiction of this Court.

113. Where such failures occur, the citizens have a right to move to Court to seek appropriate reliefs such as prohibition, *mandamus*, *certiorari*, declaration of unconstitutionality, Judicial Review, or otherwise of the challenged decisions, damages or any other relief that the Court may deem just and appropriate.

114. In our view, Article 165(3)(d) of the Constitution donates to this Court the jurisdiction to entertain any challenges concerning the failure to comply with any constitutional and statutory obligations and the present dispute raises like questions. Indeed, given the facts identified in the paragraphs above, it would amount to an abdication by this court of one of its core mandates were it not to seize its jurisdiction in the present case.

115. Considering the above issues, the relevant Constitutional provisions cited above, the statutory provisions relating to the jurisdiction of the NET, and in particular section 129 of EMCA, the statutory provisions creating the jurisdiction of ELC, and our established jurisprudence, we find that the issues this Court has been invited to determine in this case transcend beyond the statutory mandate of the NET and the ELC. Accordingly, we strongly hold the view that this Court has jurisdiction to entertain this matter. In fact, as we have alluded to above, to decline jurisdiction as suggested would in our view

[54] Ibid.
[55] *BP Southern Africa (Pty) Ltd vs MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) 151.

amount to an act of this Court abdicating from its Constitutional and statutory mandate, which we cannot do.

116. The Respondents and the 1st and 3rd Interested Parties also alluded to the argument that this suit is not ripe and should, therefore, not be before the Court. This argument is based on two related positions taken by the Respondents and the 1st and 3rd Interested Parties. The first one is that SEA was not required as a legal step in the conceptualization and implementation of the LAPSSET Project until 2015 when the law was amended to include the SEA Process as a legal requirement in a project of this magnitude. This issue is directly related to arguments made about the procedural infirmities of the LAPSSET Project which we discuss at length in the next section of this judgment.

117. The second argument by the Respondents and the 1st and 3rd Interested Parties on ripeness is that, following the amendment to the law and the insertion of section 57A to EMCA making SEA compulsory, the 5th Respondent has begun the SEA Process which is on-going. This SEA process, the 8th Respondent, in particular insisted, is at its initial stages. What is in place is a Draft SEA Report, they argued. As such, all the concerns which the Petitioners have about the entire LAPSSET Project will be taken into account when completing the SEA Process. Indeed, the 5th and 7th Respondents invited the Petitioners to present their critiques to the Consultants hired for purposes of completing the SEA. These Consultants are led by the expert witness called by the 1st – 6th Respondents.

118. Differently put, the jurisdictional hurdle erected by the Respondents and the 1st and 3rd Interested Parties in this regard is that the SEA process is on-going and that, therefore, any challenge to it is pre-mature. The argument is that more intense public participation and scientific ascertainment of potential adverse impacts and cumulation of effects of various projects within the larger infrastructural Project happens at this second stage of SEA. Rather than challenge the draft SEA Report in Court or seek to halt the various components envisaged under the Project, the correct procedure and prudent measure would be, then, for the Petitioners to more aggressively participate in the SEA process and seek to influence it by communicating their methodological and substantive concerns. Assuming that the SEA process works as it should, the procedural,

methodological and substantive critiques raised by the Petitioners would be taken into account during the second phase of SEA and the rights of the Petitioners would then be adequately protected.

119. This is an attractive argument but it fails as a jurisdictional hurdle for two reasons. First, as we have observed above, one of the arguments upon which the Petitioners pivot their Petition is what they urge is procedural impropriety of embarking on a mega-infrastructural project of this magnitude without SEA. They challenge the legal position taken by the Respondents and 1st and 3rd Interested Parties that SEA was not required. The Petitioners would thus like the Court to pronounce itself on the prospective consequences of failure to conduct SEA if indeed one was required.

120. Second, the Petitioners' undergirding argument is that the methodological flaws in the SEA process are bound to generate outcomes which will be devoid of substantive environmental and cultural concerns of the Petitioners at a time when the path and design of the Project would be inescapably established. At that point, therefore, it would be futile and moot to challenge the SEA process.

121. This second argument harkens back to the evolution of Environmental Law from its origins in the landmark ***Trail Smelter Arbitral Tribunal Decision (United States v Canada)***[56] in 1941 when Environmental Law was conceived as a *reactive* regime to minimise environmental damage after it has occurred or become inevitable to a *proactive* approach to ensure that action is taken to reduce, mitigate and manage environmental impacts before they happen. This proactive approach has come to be known as the precautionary principle in environmental governance and adjudication.

122. Hence, given this precautionary principle and other principles of good environmental governance and adjudication which we enumerate later in this judgment, and which are required by our Constitution, we are persuaded that this is a ripe controversy for consideration. Additionally, to the extent that an argument is made that SEA should have been carried out before the commencement of the LAPSSET Project and none was undertaken at the commencement of the LAPSSET Project, then, the question whether

[56] 35 AJIL 684.

the LAPSSET Project was procedurally infirm is a ripe question for consideration by this Court.

123. The issue of the procedural infirmity of the LAPSSET Project is the question we turn to next.

b. Whether the Project is Procedurally Infirm

124. The Petitioners have, *inter alia*, based their constitutional attack on the LAPSSET Project upon procedural defects in the conceptualization and implementation of the Project.

125. The Petitioners' anchor argument was that the entire process of conceptualization and implementation of the LAPSSET Project is irredeemably flawed. The Petitioners' argue that the proponents of the Project have proceeded in complete disregard of basic Constitutional principles and statutory law and in total contempt of the people of Lamu and the Lamu County government. In particular, the Petitioners insisted that the entire Project suffers from the following procedural infirmities:

i. That the ESIA was not adequately done;
ii. That the EIA Licence requirements were not adhered to;
iii. That SEA was not done at the commencement of the Project as legally required;
iv. That when ultimately embarked upon, SEA was not properly done to adequately account for all public policies, plans, programs and impacts of the Project;
v. That works started on the Project before the EIA Licence was issued contrary to the law; and
vi. That, in any event, the proponents of the LAPSSET Project failed to facilitate adequate public participation as required by the Constitution and EMCA.

126. We will address the last sub-issue, namely, whether there was adequate public participation, in the next section of this judgment.

127. Regarding the adequacy of ESIA and SEA, the Petitioners' case was as follows.

128. Counsel for the Petitioners submitted that no SEA was conducted but instead the LAPSSET Project was started with an EIA Licence which addressed the first three

berths of the Lamu Port, yet the Project involved other components such as construction of an oil pipeline, railway and coal power plant. In counsel's submissions, well defined goals ought to have been identified early and incorporated in the assessment of the Project's viability in conformity with the principles of sustainable development which requires a precautionary approach with regard to human health, environmental protection and sustainable utilization of natural resources.[57]

129. Counsel pointed out what he saw as significant gaps in the SEA such as inadequate program alternatives, inadequate assessment of threats to local water supplies, air pollution and threats to marine life.

130. The Petitioners called an expert, **Ernie Niemi**, to bolster their case that there were serious inadequacies in the ESIA and SEA Processes for the Project. Ernie Niemi holds a Bachelors degree in Chemistry from the University of Oregon and a Masters Degree in City and Regional Planning from Harvard University. He has worked as a consultant for over 40 years assessing external costs of projects that affect the environment. None of the other parties contested or impugned the Petitioners' characterization of Mr. Niemi as an expert witness.

131. Mr. Niemi tabled in evidence, his 110-page report on the expected external costs of the proposed commercial port at Lamu. His report was based on empirical data collected on his two visits to Lamu, and a review of various literature which included critiques on both the ESIA and SEA. Mr. Niemi testified that the reason for undertaking ESIA is to balance the benefits of a project against the external costs so that the decision makers can decide whether to proceed with the project. His brief was to study the ESIA Report and SEA, and determine their adequacy in identifying external costs of the LAPSSET Project and the mitigation measures suggested.

132. Mr. Niemi visited Lamu twice and met community leaders for discussions. He also interviewed the local populace and reviewed the ESIA Report and SEA to determine the external costs. To him, both the ESIA Report and the SEA do not provide adequately

[57] Counsel cited International Law Association's *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2002, paragraph 4.2.

for the external costs of the Project which are core in enabling decision makers to make a decision.

133. Mr. Niemi testified that the Project will have significant negative effects. For example, he testified that the destruction of mangroves as well as the construction of the Proposed Port will negatively affect the fish (both in terms of numbers and diversity) yet, in his opinion, this was not captured in the ESIA Report. Mr. Niemi also concluded that there will be negative air effects due to pollution. Further, he opined that oil spills will have an immediate impact yet the ESIA Report does not provide for this. Additionally, increased population will impact on water supply. Mr. Niemi testified that the appropriate goal of an ESIA process is not to compensate purely financial costs but to restore the standard of life those affected by the Project to the level they enjoyed before the Project. While Mr. Niemi was categorical that no amount of mitigation measures in a project can reduce external costs to zero, Mr. Niemi testified that neither the ESIA Report nor the SEA provided adequate information to enable a Policy Maker to understand the problem or any specific mitigation measure that would reduce the problems created by the LAPSSET Project to acceptable levels of adverse impacts.

134. During cross-examination, Mr. Niemi maintained his line of evidence. He, however, conceded that it was possible that the compensation offered to the fishermen could adequately compensate the families affected by the Project. He also added that the LAPSSET Project would be beneficial to the local society specifically and the Kenyan economy generally and that he was, in principle, not opposed to the infrastructural project.

135. Another expert of the Petitioners was Dr. **Mark Chernaik. Dr. Chernaik** obtained his law degree from the University of Oregon. He then conducted his doctoral studies and research at John Hopkins University School of Public Health focused on the intersection of molecular biology and environmental toxicology. His testimony focused on what he identified as significant inadequacies of the ESIA and SEA process. He confirmed that he has undertaken similar evaluations of other ESIA Reports in other parts of the world. He stated that the SEA contains inadequate information about the impacts of the Lamu Port and its associated infrastructure on the environmental and social well-being of Lamu County. Thus, the SEA, according to Dr. Chernaik, fails to

serve the purpose of informing stakeholders and decision makers on how to safeguard the environmental and social well-being of Lamu County from impacts of the Project.

136. In Dr. Chernaik's opinion, the SEA Report contains inadequate analysis of program alternatives. In particular, he noted that the section on alternatives in the SEA is limited to only three LAPSSET components, namely, the railway, highway and the oil pipe line. As such, all other components such as the dams and the size of the port were completely overlooked. His opinion was that there is also inadequate assessment of threats to local water supplies, in that while the SEA recognized the potential of Lamu Port to overload the water resource supply at Lamu Island, it did not contain a quantitative assessment of how this impact would be averted or mitigated.

137. Dr. Chernaik was also of the view that the SEA contained an inadequate assessment of threats to air quality caused by the resultant traffic congestion associated with the LAPSSET infrastructure. Further, Dr. Chernaik opined that the SEA should have presented quantitative information using available air pollutant modelling tools about the extent to which the traffic congestion would degrade air quality, so that adequate mitigation measures could be designed and implemented. On the inadequate measures to mitigate threats to marine resources, Dr. Chernaik was of the opinion that the SEA failed to identify specific resources to adequately respond to major oil spills if any were to occur in Lamu.

138. According to Dr. Chernaik, the SEA was also inconsistent with the ESIA Report in that it incorrectly assumed that the ESIA was comprehensive for 32 berths when the ESIA Report was undertaken for the first three berths only. In addition, Dr. Chernaik concluded that the ESIA has not undertaken an adequate environmental monitoring and management plan and oceanographic studies had not been completed. Further, Dr. Chernaik opined that the SEA does not contain adequate assessment and mitigation measures of the impact on project affected persons, as one of the potential consequences of the LAPSSET Project is the displacement of persons and burgeoning of the population of Lamu. Lastly, Dr. Chernaik stated that while the SEA acknowledges the environmental and social concerns raised about the LAPSSET Project, it contains limited information about the cumulative impacts of the Lamu port and associated LAPSSET infrastructure.

139. During cross-examination, Dr. Chernaik freely stated that his views could be incorporated in the ongoing SEA process. On his methodology, he admitted that he did not visit the LAPSSET site but relied on his review of the SEA and the ESIA Reports on the Project that were availed to him.

140. The Petitioners also called **Dr. David Obura** as an expert witness. Dr. Obura, a scientist in marine studies who has undertaken coral studies for 25 years, holds a BSc in Zoology from Harvard University and a PhD degree in marine biology from the University of Miami. He is a Fellow and member of various professional and working groups on coral reefs and marine science. Dr. Obura reiterated that the ESIA Report as presented was on a very small scale compared to the overall LAPSSET Project as it was for the first three of the thirty-two berths of the Proposed Lamu Port and only for one of the eight major components. There was, thus, need for a SEA for the entire LAPSSET Project to be undertaken.

141. Dr. Obura's specific comments on the ESIA Report were as follows. First, he was of the opinion that it was poorly structured and organized and thus affected readability and comprehension leading to a minimal ability to distinguish between the minor and major impacts of the Project. In his opinion, this hindered the Proponent's ability to devise meaningful monitoring and mitigation actions. Second, Dr. Obura opined that the ESIA Report did not attempt to quantify the external costs of the Project whether in monetary terms or in environmental and social terms. Consequently, in his view, the true value of the Project especially to those sectors of society most strongly impacted is in question.

142. Third, Dr. Obura conceded that the survey on the Project's impact on marine ecology was acceptable, although he thought that the sea grass and mangroves' surveys should have been done more extensively. He also thought that the sediment modelling was preliminary. However, it was his view that the ESIA Report did not clearly distinguish the different zones of the impact in terms of the sacrificial areas where habitat would be lost completely; the buffer zones of direct biological impacts determined by construction and operational characteristics; the zones of broader direct biological impacts determined by water currents; and the zones of broader socio-economic

impacts. Dr. Obura also opined that the consideration of the impact to marine habitat and species in the ESIA Report was completely inadequate.

143. Fourth, Dr. Obura identified as a weakness of the ESIA Report the poor consideration of the Project's impact on two key socio-economic activities namely fisheries and marine transport. Fifth, Dr. Obura stated that there was lack of adequate biological information and classification of impacts which meant that the sections on monitoring plan in the ESIA Report were inadequate.

144. Dr. Obura was cross-examined during the Court's resumed session in Nairobi in the month of June, 2017. He clarified that though he is a marine biologist and a registered NEMA expert, he rarely undertakes ESIAs to avoid any conflict of interest. He explained that he is often consulted to review and critique ESIAs on marine ecology as there are not many marine scientists in Kenya. He urged that the SEA should consider his recommendations.

145. We must first point out that Dr. Obura's testimony was not without any controversy.

146. Counsel for the 8th Respondent attempted to discredit Dr. Obura's testimony by availing a letter that seemed to suggest that Dr. Obura was not a licensed NEMA Lead Expert as he had claimed. We are unable to uphold this attempt to discredit this witness because:- **(a)** Counsel had the opportunity to raise it during cross-examination but never did so, and only filed a letter from NEMA after the witness had concluded his evidence; **(b)** No application was made to recall the witness; and **(c)** the witness testified as an environmental expert and not as a licensed lead expert and his credentials as an environmental expert were not questioned.

147. In a rejoinder to the said allegations, Counsel for the Petitioners filed an affidavit by Jason Mwamidi filed on 20th September, 2017 which adequately rebutted the said allegations and even annexed documents showing that the witness was a licensed lead NEMA expert. We find no reason to doubt the qualifications and credibility of this witness.

148. Additionally, we must also point out that we had the opportunity to listen to, question and observe all the three expert witnesses called by the Petitioners. They each gave their testimonies clearly and freely. They were unguarded and answered questions without hesitation even in cross-examination. It was clear to us that the witnesses understood their areas of specialization well, and we are confident that we can rely on their testimonies.

149. On the SEA, Mr. Waikwa submitted that one was required from the commencement of the LAPSSET Project, yet none was conducted by the proponent of the Project until January, 2017 which is four years after the ESIA for the first three berths was conducted. Mr. Waikwa submitted that the LAPSSET Project integrates so many components including an oil pipeline, railway, international air ports among others and that, therefore, being a project of such breadth and complexity, a SEA was required at its commencement. This is because, Mr. Waikwa submitted a SEA provided cumulative, synergistic and global impacts of the Project which would help provide a wholesome and complete picture of the environmental and other costs of the Project. Mr. Waikwa's submission was that the failure to conduct SEA at the commencement of the Project was a fatal procedural flaw in the conceptualization and implementation of the Project. This is because, Mr. Waikwa argued, SEA was required by (a) a necessary reading of the Constitutional provisions on the right to sustainable development, (b) statutory law and regulations, and (c) international law principles and best practice.

150. In summary, Mr. Waikwa stated that all government actions must comply with the Rule of Law and the Constitution.[58]Also, the conditions imposed by NEMA were disregarded and that the entire process of conceptualization and implementation of the LAPSSET Project is irredeemably flawed, in that it proceeded in total disregard of basic Constitutional principles. He cited failures/breaches of the law by NEMA. Mr. Waikwa's overall submission was that the manner and sequence in which the Respondents have undertaken the processes required by the Constitution and statutory law including the ESIA and SEA processes were a sham and a formality meant to provide a *post facto* justification as opposed to being real checks on the feasibility and viability of the entire project or its individual sub-components.

[58] Supreme Court of Canada, *In Re Secession of Quebec*, {1998} 2 SCR 217, and *Jabalpur vs S.S. Shukla* [1976] INSC 129.

151. On procedural propriety and adequacy of the LAPSSET Project, Mr. Motari for the 1st to 6th Respondents and the 3rd Interested Party, submitted that each project comprising of the LAPSSET Project will undergo an independent ESIA as required. Also, the SEA report submitted by Mr. Michael Mwangi Wairagu was in draft form and will be subjected to public review/critique, hence, the Petitioners will be consulted and involved. He added that their complaints are premature. Counsel also submitted that prior to 2015, SEA was not a legal requirement.

152. The 1st - 6th Respondents called **Michael Mwangi Wairagu** as an expert witness. Mr. Michael Mwangi Wairagu confirmed he holds a Masters degree in Forest Hydrology from Toronto University, having earlier obtained a BSc in Forestry from Moi University. Mr. Wairagu who is an environmentalist and social safeguard expert with 27 years experience and a registered NEMA Lead Expert, testified that his role is to instil environmental safeguards in the LAPSSET Project. Further, that he was the team leader of Repcon Associates which prepared the SEA Report. He stated that the seven components of the LAPSSET Project were subjected to a SEA and the first three berths of the Proposed Lamu Port component were granted an EIA License.

153. Mr. Wairagu testified that SEA was not done before the development of the LAPSSET Master Plan because it was not a legal requirement at the time the Master Plan was prepared. He further testified that SEA only became a legal requirement in 2015. He was, then, engaged in 2016 to conduct the SEA. He testified that only the first stage of the SEA process for the LAPSSET Project has been concluded. On the strength of the SEA report his firm prepared, NEMA gave the authority to proceed to the detailed, second SEA stage. He also stated that the public were involved at the second stage, and the issues raised included land compensation, protection of marine environment, protection of cultural heritage sites, service delivery within Lamu Town, and fear of loss of jobs. Further, Mr. Wairagu testified that after discussing with the public, it was realized that 80% of the local income is derived from the fishing industry.

154. Mr. Wairagu also stated that each component of the LAPSSET Project will be preceded by full ESIA studies in line with EMCA, and that EIA Licences issued before the SEA was undertaken, would be amended to capture the issues raised in his report. Further,

that all outstanding compensation will be resolved and that a precautionary approach will be adopted with respect to water conservation and the protection of wildlife. Mr. Wairagu also testified that the SEA Report observed that there was "generally poor disclosure of LAPSSET Project information at all stakeholder levels."[59]

155. In cross-examination, Mr. Wairagu confirmed that berths 4 to 32 of the proposed Lamu Port would require a standalone ESIA study and that would also apply to the oil refinery, the proposed Lamu Metropolis and resort city. Mr. Wairagu confirmed that he was aware that an ESIA for the highway was in progress. He however admitted that a SEA should precede an ESIA process, but that this did not happen because at the time the first three berths of the proposed Lamu Port were being developed the SEA was not a requirement under EMCA, and the 8th Respondent had also not developed any regulations for SEA. The witness also added that SEA can be developed *ex post* and could be used to remedy an ESIA.

156. He concluded that there was nothing illegal in the manner the SEA for the LAPSSET Project was conducted. He also confirmed that after finalization of the SEA process, if the SEA was found not to be in harmony with the ESIA, the EIA Licence would be reviewed and varied.

157. On the issue of social costs, Mr. Wairagu insisted that social costs apply to the community and not individuals and thus the individual fishermen would not be compensated for social costs. Besides, emotional trauma could not be quantified and thus could not be included under social costs.

158. Again, we listened to, questioned and observed Mr. Wairagu as he testified. Though he freely answered questions, we found Mr. Wairagu rather guarded in some of his answers, especially during cross-examination on the SEA which was prepared under his watch. His free concessions during cross-examination, like when he admitted that during the SEA preparation process they discovered that there had been poor disclosure about the LAPSSET Project to the public, however, led us to conclude that he was a witness whose evidence we could also rely on.

[59] Volume 1 of the 1st -6th Respondents' Documents at para. 10.8.

159. Mr. Motari for the 1st to 6th Respondents and the 3rd Interested Party advanced a three-fold argument on the issue of the SEA's and ESIA's adequacy. First, he submitted that the evidence by the expert witness of the 7th Respondent and that by Mr. Wairagu had demonstrated that the ESIA and the SEA processes respectively were not procedurally defective.

160. Mr. Motari reiterated that the ESIA study for the first three berths is adequate and stated that the ESIA study was carried out in compliance with the requisite terms and conditions set out in the EMCA, in that there was a reasonable level of public participation, and that what matters is reasonable opportunity to be offered to members of the public.[60]

161. Secondly, Mr Motari maintained that the critiques by the Petitioners' witnesses of the ESIA and SEA processes were misguided. In this respect, Mr Motari insisted that both Mr. Niemi and Dr. Chernaik had admitted that they had no knowledge on the regulations governing SEA and ESIA processes in Kenya, and that therefore their critiques of the ESIA and SEA should be disregarded.

162. Regarding Mr. Niemi's evidence, Mr. Motari argued that the witness had failed to interlink the ESIA done on the first three berths of the proposed Lamu Port to the doctrine of external costs which he propagated. Mr. Motari further argued that this doctrine of external cost was not founded on any known legal doctrine or governance policy which had been applied anywhere in the world by a court of law.

163. Turning to the evidence of Dr. Chernaik, Mr. Motari had the following arguments. First, that the critique of SEA by Dr. Chernaik was premature since the SEA process was still on-going. Hence, Mr. Motari argued, the exercise was open to public participation and not Court challenge. Second, Mr. Motari doubted the robustness of Dr. Chernaik's methodology. In particular, Mr. Motari pointed out that the witness had not carried out any air quality assessment to contradict the proposals by Mr. Wairagu in the draft SEA

[60] Counsel cited *Diani Business Welfare Association & Others vs County Government of Kwale* {2015}eKLR and *Nairobi Metropolitan PSV Saccos Union & 25 Others vs County Government of Nairobi & 3 Others* {2013} eKLR.

Report. Consequently, Mr. Motari submitted that Dr. Chernaik's evidence was purely hypothetical and not based on any scientific findings.

164. Mr. Motari had a similar critique of Dr. Obura. In particular, counsel pointed out that Dr. Obura claimed to have observed differential levels of water turbidity with his naked eyes.

165. Mr. Motari's third argument on the adequacy of ESIA and SEA was that there was no requirement for conducting SEA before 2015. According to counsel, it was the 2015 amendments to EMCA that made SEA a legal requirement and that this explained why the ESIA study for the first three berths of the proposed Lamu Port preceded the SEA. Consequently, Mr. Motari submitted that there was no violation of any law or statute in the conceptualization or implementation of the LAPSSET Project. Mr. Motari sought to demonstrate that for each of the environmental cultural and economic impacts identified in the ESIA and SEA processes, there were adequate mitigation measures also provided. In this respect, counsel referred the Court to the ESIA Report and licence, SEA Report and the experts' evidence presented by the Respondents.

166. Mr. Miller for the 7th Respondent submitted that an ESIA study was undertaken for the first three berths of the proposed Lamu Port and a report published in February 2013 by Heztech Engineering Consulting Services leading to the issuance of the EIA Licence on 27th March 2014. Counsel's argument was that since the EIA Licence was limited to the first three berths of the proposed Lamu Port, the petition should be limited to the three berths and not the entire LAPSSET Project. Mr. Miller's argument was that the requisite ESIA studies on the other berths and the other components of the LAPSSET Project would be undertaken prior to the commencement of the respective components. Counsel was therefore of the opinion that challenging the entire LAPSSET Project at this stage was premature.

167. The 7th Respondent similarly called its expert to testify about the adequacy of the ESIA. The 7th Respondent filed a Report and an affidavit by their expert, Mr. Hezekiah Omondi Adala. Mr. Adala holds a Bachelors Degree in Mechanical Engineering from University of Nairobi, and a Post-graduate Diploma on Environmental Management from the Institute of Environmental Management. He is an environmental expert

specializing in infrastructure development and he is a lead NEMA expert. He testified that he prepared the ESIA Report for the first three berths of the proposed Lamu Port, which was approved by NEMA and a license for the Project was issued. His view was that the assessment of potential external costs of a project are not a requirement for approval of ESIA Reports.

168. Mr. Miller's submissions were in the same vein regarding external costs. Additionally, Mr. Miller submitted that their expert evidence had demonstrated that the impact of dredging on the sea water is minimal. He further submitted that the impact on fishing will only be felt after the port becomes operational. He further submitted that the process of compensating the affected fishermen is ongoing. He wrapped up his submissions by stating that in any event all infrastructure development come with a price.

169. Mr. Gitonga for the 8th Respondent relied on his written submissions filed on 20th June 2017. He questioned the Petitioners' failure to distinguish that the ESIA is only for the first three berths of the proposed Lamu Port, and associated infrastructure and not the entire LAPSSET Project. Mr. Gitonga further argued that all the concerns listed in the Petition for the first three berths of the proposed Lamu Port were addressed both in the ESIA and the ongoing SEA and that mitigation measures are in place. These mitigation measures include equipping the fishermen with fishing gear and skills to enable them to engage in deep sea fishing.

170. Mr. Gitonga highlighted plans to replant mangroves. He also stated that concerns not addressed by the ESIA for the first three berths of the proposed Lamu Port would be accommodated in the SEA review or subsequent ESIAs for the other components of the LAPSSET Project, and that in any event no orders are sought against the SEA in the Petition. Mr. Gitonga added that even if the SEA in place was conducted *ex post*, there is nothing irregular about that since that is provided for in the guidelines.

171. Mr. Gitonga also submitted that prior to 2015, SEA was not a legal requirement, and that the ESIA study for the first three berths of the proposed Lamu Port included proper public participation. He further submitted that there are elaborate EIA monitoring plans and an annual environmental audit.

172. Ms. Njuguna for the 1st Interested Party submitted that SEA was not a legal requirement as at the time the project was conceptualized.

173. The term "environmental impact assessment" (EIA) is defined in EMCA to mean "a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment."[61] On the other hand, EMCA defines SEA as "a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives."[62] The International Association for Impact Assessment (IAIA) defines an environmental impact assessment as "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."[63]

174. The purpose of the assessment is to ensure that decision makers consider the environmental impacts when deciding whether or not to proceed with a project.[64] EIAs are unique in that they do not require adherence to a predetermined environmental outcome, but rather they require decision makers to account for environmental values in their decisions, and to justify those decisions in light of detailed environmental studies and public comments on the potential environmental impacts.[65] Hence, EIA is designed to ensure that planning decisions involving significant effects on the environment are taken by bodies with full information as to the relevant factors.

175. The innovation behind the ESIA and SEA process is the systematic use of the best objective sources of information and emphasizes on the use of best techniques to gather information.[66] The ideal ESIA and SEA process would involve a totally bias free collation of information about environmental impact, produced in a coherent, sound and complete form, considering impact in an integrated manner. It should then allow the decision maker and members of the public to scrutinize the proposal, assess the weight

[61] See section 2 EMCA.
[62] See section 2 EMCA.
[63] International Association for Impact Assessment, *Principle of Environmental Impact Assessment Best Practice*, 1999.
[64] Stuart Bell & Donald McGillivray, *Environmental Law*, Seventh Edition, p. 431.
[65] Holder, J., *Environmental Assessment: The Regulation of Decision Making*, Oxford University Press, New York, 2004. For a comparative discussion of the elements of various domestic EIA systems, see Christopher Wood, *Environmental Impact Assessment: A Comparative Review*, 2 ed., Prentice Hall, Harlow, 2002.
[66] Ibid.

of predicted effects and suggest modifications or mitigation where appropriate.[67] Thus, environmental assessment is both a technique, and a (physical and social) scientific process.

176. The environmental impact assessment must identify the direct and indirect effects of a project on the following factors: human beings, the fauna, the flora, the soil, water, air, the climate, the landscape, the material assets and cultural heritage, as well as the interaction between these various elements. The developer (the person who applied for development consent or the public authority which initiated the project), must provide the authority responsible for approving the project with the following information as a minimum:- a description of the project (location, design and size); possible measures to reduce significant adverse effects; data required to assess the main effects of the project on the environment; the main alternatives considered by the developer; the main reasons for the alternative chosen; and, a non-technical summary of this information.

177. On the other hand, NEMA Guidelines define Strategic Environmental Assessment (SEA) as "a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programs (PPP) and evaluate the inter-linkages with economic and social considerations." SEA is a family of approaches that uses a variety of tools, rather than a single, fixed, prescriptive approach. The SEA process extends the aims and principles of Environmental Impact Assessment (EIA) upstream in the decision-making process, beyond the project level, when major alternatives are still possible. As NEMA states in its guidelines, "SEA is a proactive approach to integrate environmental considerations into the higher levels of decision-making."[68]

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

179. ***Stuart Bell & Donald McGillivray*** authoritatively state that EIA and SEA should be an *iterative* process, in which information that comes to light is fed back into the decision

[67] Ibid.
[68] National Environmental Management Authority, NEMA SEA Guidelines, 2013.

making process.[69] First, a truly iterative process would ensure that the very design of the project, plan, or programme would be amended in the light of the information gathered and secondly, and also ideally, it would also involve some kind of monitoring of environmental impact after consent or approval has been given.[70]

180. The argument by the Respondents and the 1st and 3rd Interested Parties is that SEA was not legally required at the commencement of the LAPSSET Project, and that it only became necessary after the amendment to the law by Act No. 5 of 2015 which inserted the new section 57A to provide for SEA, and to give effect to the guidelines on SEA that NEMA had passed in 2012. Their argument was that while the NEMA Guidelines of 2012 provided for SEA, they were not yet effective because they did not have statutory backing until 2015.

181. As a consequence, the Respondents and the 1st and 3rd Interested Parties argue, that there was nothing improper in the 5th Respondent embarking on the SEA process after the commencement of the LAPSSET Project. In the same vein, the 7th Respondent argued that the nature of SEA is such that it can be conducted both *ex ante* and *ex post* – and neither modes of conducting it are privileged. Neither mode of conducting SEA, the 7th Respondent insisted, is more prudent or preferred than the other. Hence, the Petitioners should allow the SEA process to be completed.

182. On our part, we are not persuaded that SEA was not a required legal step prior to the EMCA amendments of 2015 as the Respondents and the 1st and 3rd Interested Parties argued. It is true that a new section 57A of EMCA was added in 2015 which specifically provided for SEA. However, as early as 2003, NEMA's own regulations - the Environmental (Impact Assessment and Audit) Regulations, 2003 - at Regulation 42 provided as follows:

42 (1) Lead agencies shall in consultation with the Authority subject all proposals for public policy, plans and programmes for the implementation to a strategic environmental assessment to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others.

(2) The assessment carried out under this regulation shall consider the effect of implementation of alternative policy actions taking into consideration -

[69] Supra note 64 at p. 433.
[70] Ibid.

(a) the use of natural resources;

(b) the protection and conservation of biodiversity;

(c) Human settlement and cultural issues;

(d) Socio-economic factors; and

(e) the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of built environment of historic or cultural significance.

(3) The Government, and all the lead agencies shall in the development of sector or national policy, incorporate principles of strategic environmental assessment.

183. It seems clear to us that NEMA envisaged that SEA will be required for some Projects with significant environmental and cumulative impacts where Policies, Plans and Programmes are implicated. There was no need to have specific backing in the text of the statute for this aspect of the regulations to be effective. Indeed, NEMA (the 8th Respondent) does not contest that it had the requisite authority to pass the Regulations in 2003 – and that they were not *ultra vires*. If so, it follows that the Regulations were in effect, and needed to be adhered to even prior to the passage of the amendment to EMCA of 2015.

184. Indeed, in his affidavit deposed on 02/11/2012, Zephaniah Ouma, the 8th Respondent's Deputy Director in charge of environmental compliance and enforcement, explicitly stated as follows regarding the requirement of SEA for the LAPSSET Project:-
That the larger LAPSSET Program (excluding the 3 berths and associated infrastructure) will have to be taken through a Strategic Environment Assessment (SEA) which report the 5th Respondent is yet to submit though duly notified.

185. This is as explicit an admission as one can get from the 8th Respondent that they were aware that SEA was required before the 2015 amendments to EMCA. It is noteworthy that Mr. Ouma's affidavit was deposed on 02/11/2012 – three years before the EMCA amendments which the Respondents claim made SEA compulsory.

186. Given the analysis above, it is our finding and conclusion that the proponent of the LAPSSET Project was duty bound to conduct SEA before the commencement of any of the individual Project's components. Our conclusion is based not only on the text and content of the law but on the nature and magnitude of the LAPSSET Project. This is a necessary reading of the environmental governance principles contained in our

Constitution including Articles 10, 69 and 70. These Articles among other things require a proactive approach to integrate environmental considerations into the higher levels of decision making for projects with the potential to have significant inter-linkages between economic and social considerations.

187. The Petitioners also complained that the Respondents – and in particular the 5th and 7th Respondents - did not adhere to the EIA Licence conditions imposed by NEMA, and that this was enough to attract the jurisdiction of the Court to make certain orders or declarations to protect the Petitioners and other Lamu County residents. In particular, the Petitioners made three claims on this point:

    a. First, the Petitioners complained that the EIA Licence conditions were categorical that there had to be compensation to the fishermen in financial terms. Further, the EIA Licence conditions stipulated that the local fishermen be assisted to acquire modern fishing boats which can sail further into the ocean for deep fishing due to the expected drastic reduction in quantities of fish in the Mkanda Bay after construction of the new berths at Lamu Port began. The Petitioners presented oral testimony, and the Respondents did not deny that neither of these conditions has been adhered to yet.

    b. Second, the Petitioners argued that the EIA Licence required the 5th and 7th Respondents to prepare a detailed Environmental Management and Monitoring Plan (EMMP). The EMMP would contain management programmes to be put in place during project construction and operation outlining key project impacts, magnitude of occurrence, mitigation measures, monitoring locations and parameters and frequency of monitoring. The EIA Licence condition provides that "the Proponent shall submit an Environmental audit report in the first year of occupation/operations/commissioning to confirm the efficacy and adequacy of the Environmental Management Plan."(See Condition 1.7). Similarly, Condition 2.23 provides that the proponent shall ensure strict adherence to the Environmental Management Plan developed throughout the Project cycle."

    The Petitioners complained that the 5th and 7th Respondents never compiled the EMMP as required by the EIA Licence. In addition, the Petitioners argued that, in part as a result of this failure, there has been no structured monitoring and reporting of the environmental impacts of the Project including turbidity of the water, water quality, and other effects of dredging. The Petitioners' expert, Dr. Obura, was

particularly scathing about the level of scientific ascertainment of environmental monitoring being done by the 5th and 7th Respondents.

c. Third, the Petitioners pointed out that even where the 5th and 7th Respondents purported to follow the EIA Licence conditions, they did so in a manner that did not strictly adhere to the conditions imposed. In particular, the Petitioners complained that it was a mistake for the 5th and 7th Respondents to compensate the Kenya Forest Services for the destruction of mangroves rather than find a more sustainable way to ensure that the mangrove population was increased. They were sceptical that the Kenya Forestry Services would, in fact, spent the money given to it to plant new mangrove forests.

188. The complaints presented in this part of the Petition are, definitionally, fact-intensive. The Petitioner is required to demonstrate to us, to the required standard of proof that the EIA Licence Conditions have, in fact, been violated and that some relief was needed from this Court.

189. We carefully looked at all the evidence presented before us, took keen interest during the site visit, and listened to the arguments and submissions by all the parties on this question. We make the following findings.

a. First, there is no doubt that it was an unambiguous EIA Licence condition that the local fishermen who number about 4,700 in both the ESIA and the subsequent SEA, should be financially compensated. Further, the EIA Licence condition imposed the responsibility to acquire bigger and modern fishing vessels to the local fishermen on the 5th and 7th Respondents. The 5th and 7th Respondents are yet to do either of these. To their credit, both were candid about this – only making the claim that a request has been made to Treasury and that they are confident that provision will be made for these payments by the National Treasury. This kind of pledge is not good enough. EIA Licence Conditions impose obligations over the proponents of the project – be they government organs or private individuals – not choices upon which the proponents can choose if and when to comply. The failure to adhere to this EIA Licence condition is a definite violation of the EIA Licence Condition. In the Remedies section, we will say more about the appropriate measures to address this violation.

b. The Petitioners' second claim on the level of compliance by the 5th and 7th Respondents on EIA Licence dealt with the EMMP and the robustness of scientific monitoring of environmental impacts. Mr. Adala, the expert for the 7th Respondent, conceded that the 7th Respondent did not develop the detailed EMMP alluded to in Chapter 12 of ESIA Report. He, however, said that there was an outline of one in the Chapter at pages 192-202 of the ESIA Report. Both Mr. Adala and Engineer Oremo, another expert witness for the 7th Respondent, pointed out to the Court that the 7th Respondent had, in fact, been conducting detailed environmental monitoring and producing monthly reports on them. They produced copies of these monthly reports to demonstrate their *bona fides* in this regard. The Petitioners did not impugn the authenticity of these monthly reports - but persisted in questioning the efficacy of a monitoring process which is not based on a detailed Monitoring Plan providing for a baseline for the monitoring.

We begin by noting that the EIA Licence clearly required the 5th and 7th Respondents to develop an EMMP as they had promised to do in the ESIA Report they provided. The position of the 8th Respondent (NEMA) which issued the EIA Licence is instructive in this regard. Ms. Githinji, counsel for NEMA during final submissions, argued that the understanding of both NEMA and the 5th and 7th Respondents was that Condition 2.23 of the EIA Licence adopted and incorporated into the EIA Licence the outline of the EMMP in Chapter 12 of the ESIA Report and that while other supplementary EMMPs were explicitly envisaged and expected, the outline of EMMP contained in Chapter 12 of the ESIA Report filed by the 5th and 7th Respondents was sufficient to begin the process of monitoring.

It is important to make a specific finding that no EMMP was placed before the Court and that the expert witnesses by the 5th and 7th Respondents admitted that no detailed EMMP had been prepared other than the outline provided in Chapter 12 of ESIA Report. It logically follows that it is not operationally and pragmatically useful to monitor environmental conditions when no detailed EMMP or inception Environmental Plan has been prepared, which contains the baseline data and specific monitoring indicators which can be used to compare the data being collected during the structured monitoring at determined frequency levels. There is, therefore, no question that failure to prepare a detailed EMMP and/or a detailed Inception Environmental Plan was a significant violation of the EIA Licence.

Even if we accepted the monthly environmental reports being produced by the 5th and 7th Respondent are robust and authentically show the varying environmental conditions including turbidity and water and water quality levels at the frequency required by a Project of this magnitude, the truth of the matter is that such monthly reports are not operationally useful if they are prepared without an EMMP and/or an Inception Environmental Plan with the correct database to begin analysis.

c. Lastly, we are also not persuaded to fault the 5th and 7th Respondents as a matter of law for electing to pay out monies for the replanting of mangrove trees to the Kenya Forestry Services (KFS). Perhaps there would have been a more institutionally effective way to ensure the replanting was done, but it would be improper for this Court to second guess the 5th and 7th Respondents on the exact manner they chose to adhere to the EIA Licence conditions where it can be shown indubitably that the means chosen was rationally related to the observance of the licence condition.

190. We will now turn to the last argument by the Petitioners about what they argue are fatal ESIA and SEA procedural missteps.

191. The Petitioners launched a particularly robust argument based on the scientific inadequacy of the ESIA and SEA to identify, mitigate and properly compensate for external costs of the LAPSSET Project and its individual components. Mr. Niemi's attack was frontal and categorical: smart practices the world over now demand that ESIA and SEA processes include a form of external cost estimation and take them into consideration in decision-making. Indeed, Mr. Niemi was of the opinion that external cost estimation might, in extreme cases, inform decision-makers to drop a project or change track and design of policies, plans or programs (PPPs) of major infrastructural projects which might contain several project components. Mr. Niemi was concerned that the ESIA and SEA did not make any mention of pollution from vessels that affect the hinterland, toxic material emissions, and explosions in its "Social-Economic Impacts" section. He was also of the view that some of the external costs missing include port-related air-pollution costs; coal-combustion air pollution costs; occupational injuries and diseases; impairment of ecosystems as well as climate change from oil exports were all missing from the ESIA and SEA Reports.

192. On the other hand, the 5th and 7th Respondents were categorical that our law – and in particular, EMCA and the subsidiary regulations established there-under – do not require that external cost estimation be carried out before EIA Licence is issued or as part of SEA. Indeed, both Mr. Adala – the EIA Lead Consultant – and Mr. Wairagu – the SEA Lead Consultant – appeared doubtful that such external cost estimation is possible to any level of precision or certainty to form a useful basis for decision makers in deciding whether or how to move forward with a project or policies, plans or programs associated with a mega infrastructural project.

193. We have had occasion to consider the text, structure and import of EMCA, the Regulations enacted there-under, the Guidelines published by NEMA on environmental audits, assessments and SEA processes. More importantly, we have also pondered the effect of Articles 10, 69 and 70 of the Constitution, as well as section 3 of the Environmental and Land Court Act, on the appropriate methodology for conducting ESIA and SEA in the post-2010 constitutional period.

194. We begin by pointing out, as we elaborate in detail below, that our Constitution contains a number of robust procedural (due process) as well as substantive environmental governance principles as part of its structural foundation (in Article 10 of the Constitution which spells out the values of the Constitution), as well as the Bill of Rights (in Articles 69 and 70 of the Constitution). As our decisional law has now made clear, all these articles are justiciable, and any citizen is at liberty to approach this Court for their enforcement where those rights are either violated or even threatened with violation (see Article 258 of the Constitution).

195. Looking at the broad and progressive definitions and processes of ESIA and SEA included in EMCA, its Regulations and Guidelines, it seems obvious to us that the drafters were alive to these environmental governance principles. In our view, the most telling evidence that this is so is given in the definition of SEA contained in the NEMA Guidelines which we reproduced in paragraph 173 of this judgment. That definition makes it clear that in designing and carrying out SEA, the project proponent will go far beyond what is considered "traditional" environmental impacts of a project. Rather, there is an expectation that the project proponent will assess, consider and report on the "true" costs of a project, policy, plan or program. These "true" costs include a

reflection of the extent of impacts on health, welfare loss (including both monetary losses associated with lost opportunities for community members directly and indirectly associated with the project, policy, plan or program as well as losses which cannot be monetarily measured); reduction of life expectancy associated with increased diseases resulting from air and water pollution; a decrease in the quality of life associated with these same toxins, and so forth.

196. These NEMA-generated Regulations and Guidelines are in line with the constitutional principles which constitutionalize the rights to life (Article 26); human dignity (Article 28); culture (Article 44); clean and healthy environment (Article 69), and the right to sustainable development and livelihood (Article 70). Read together, all these articles create an inescapable obligation on NEMA and other decision-makers to consider external costs of projects, policies, plans and programmes which are bound to have significant environmental, social, cultural as well as other external costs on the environment and the local population. Differently put, NEMA and other decision-makers are duty-bound to require proponents of projects, policies, plans and programs of such magnitude to credibly assess and report on the external costs of the projects as part of their ESIA and SEA in order to provide the decision makers with sufficient materials to make decisions that are in line with the constitutional rights of those who will be affected by those decisions.

197. In the present case, by their own admission, the 5th Respondent who is the LAPSSET Project proponent (and who is conducting the SEA), as well as the 7th Respondent, who is the agency conducting the project on the first three berths of the proposed Lamu Port (and who conducted the ESIA), frankly conceded that neither studies contained an assessment and consideration of external costs of the projects, policies, plans and programmes associated with the LAPSSET Project and its associated infrastructure. It is our finding and conclusion that such an assessment and consideration was and is required by the correct reading of the principles of environmental governance enunciated in our Constitution as outlined above. To the extent that such an estimation of external costs was not considered, assessed or reported, this amounts to a significant procedural inadequacy in the ESIA and the SEA Reports.

198. To be clear, when we speak of the estimation of external costs we have in mind consideration of concrete factors not mere, uncertain "pies in the scientific sky". 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. The failure to consider all these factors rendered both the ESIA and the SEA procedurally infirm.

c. Whether the County Government of Lamu was Involved in the Conceptualization and Implementation of the Project and if not the Consequences of such Non-involvement

199. **Miss Swalleh**, for the 2nd Interested Party, supported the Petition. She filed written submissions dated 25th May 2017 citing *inter alia* the responsibility of County Governments under the Fourth Schedule to the Constitution, which includes county planning and development. Such responsibility also includes implementation of specific National Government policies on natural resources and environmental conservation and ensuring coordination and participation of communities in governance at the local level.

200. Counsel submitted that the 2nd Interested Party, therefore, had a crucial role to play; yet it was sidelined and kept in the dark in the implementation of the LAPSSET Project to the extent that public land was allocated to the Project without its consent, a violation of Article 6(2) of the Constitution. Counsel also asserted that development must conform to the principles of sustainable development. Counsel further submitted that the project was commenced before NEMA conditions were complied with. Such conditions included compensating the affected fishermen. Also, she argued that there was poor public participation.

201. Counsel proposed proper analysis of the project and effective mitigating measures to be put in place to prevent environmental degradation. Counsel was clear that the 2nd Interested Party is not opposed to the implementation of the LAPSSET Project; it only seeks proper procedures to be followed, and mitigating measures to be put in place.

202. Mr. Motari for the 1st to 6th Respondents and the 3rd Interested Party argued that there was ample public consultation and that the LAPSSET Project was conceived before county governments came into existence. Further, there is a mechanism for resolution of disputes between national and county governments which ought to be followed and that adequate public participation was undertaken. Further, no evidence of violation of Constitutional rights was tendered.

203. The County government of Lamu asserts that under Article 6 of the Constitution and the Fourth Schedule, its functions include county planning and development yet it was sidelined and kept in the dark in the implementation of the project to the extent that public land was allocated to the project without its consent, a violation of Article 6(2) of the Constitution.

204. As will become clearer in this judgment we cannot over emphasize the need for participation of all stakeholders in decisions affecting them. It is not sufficient for the Respondents to state that county governments did not exist at the time the Project commenced. The Lamu County Government, ought to have been involved and provided with all relevant information relating to the LAPSSET Project.

205. We also hasten to add that even though the LAPSSET Project is an initiative of the National Government, the Constitution requires consultation, cooperation and co-ordination between the two levels of government in the performance of their functions. (See Article 189 of the Constitution). This Constitutional commandment is not merely pedantic. Rather, this is the subsidiarity principle: a recognition that the County Government more closely reflects the concerns, preferences and choices of the local population. Further, it puts in action the constitutional requirement 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." (See ***In the Matter of the Mui Coal Basin Local Community***[71])

206. The LAPSSET Project is being implemented in stages. We cannot fault the proponents for not having involved the 2nd Interested Party in the conceptualization of the Project

[71] [2015] eKLR.

as we are aware that the 2nd Interested Party came into being in 2013. We must however state that and we are led to the holding that there is need for involvement of County Governments through basic consultation and coordination by and with the National Government, where such mega infrastructural developments are being undertaken which transcend counties, so as to assist the county in its planning.

207. Therefore, going forward, the proponent of the LAPSSET Project must of necessity implement the Project in consultation, cooperation and co-ordination with the 2nd Interested Party and other affected Counties and government agencies.

e. Whether there was Sufficient Public Participation as Required under Article 10 of the Constitution

208. In resolving this issue, it is important for the Court to bear in mind the ambit of the Courts' duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as intended in our transformative Constitution to ensure that the normative value system created by the Constitution permeates the Common Law.

209. It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand, the Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.[72]

210. This Court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. Every act of the State and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. In cases of violation of fundamental rights, the Court has to examine as to what factors the Court should weigh while determining the Constitutionality of the

[72] See Mudholkar J. in *Sakal Papers v Union of India* AIR 1962 SC 305 at p. 311.

actions complained of. The Court should examine the case in light of the provisions of the Constitution. When the constitutionality of an act of State agents is challenged on grounds that it infringes a fundamental right, what the Court has to consider is the direct and inevitable effect of such actions.

211. Public participation is generally the real involvement of all social actors in social and political decision-making processes that potentially affect the communities in which they live and work.[73]

212. Article 10 of the Constitution imposes an obligation on the State, that is to say every State organ, State officer or public officer to facilitate a consultative process with the public in the State organs or State officers' processes, application of any law, public policy or decision making. Separately and with regard to matters environment, Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003[74] also imposes parallel obligations on the proponents of any project in consultation with the 8th Respondent to seek views of persons who may be affected by the project.

213. Regulation 17(l) of the said Regulations requires the proponent of a project to *inter alia* (a) publicize the project and its anticipated effects and benefits by - (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project; (ii) publishing a notice of the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; (iii) a qualified co-coordinator being appointed to receive and record oral and written comments and where necessary translate such comments received during the public meetings; and (iv) making an announcement of the notice in both official and local languages in a radio with a nation-wide coverage at least once a week.

214. Additionally, under Regulations 21 and 22, prior to the making of any decision on the ESIA Report received by the 8th Respondent, the 8th Respondent is again enjoined to involve the public. The Regulations specifically enjoin the 8th Respondent to invite the

[73] Picolotti R. & Taillant J. D. (eds), *Linking Human Rights and the Environment,* University of Arizona Press, 2003, p. 50.
[74] Legal Notice No. 101

public through the print media and in a prescribed format to make oral and written comments on the ESIA Report. The 8th Respondent is also to hold public hearings where the proponents are given the opportunity to make presentations and also respond to any representations made at the public hearing.

215. It may be tempting to ask why the law and indeed the Constitution generally imposes this duty of public participation yet the State is generally a government for and by the people. The people elect their representative and also participate in the appointment of most, if not all public officers nowadays. The answer is, however, not very far. Our democracy contains both representative as well as participatory elements which are not mutually exclusive but supportive of one another. The support is obtained even from that singular individual.

216. We also have no doubt that our local jurisprudence deals at length with why the Constitution and statute law have imposed the obligation of public participation in most spheres of governance and generally we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation.

217. In the instant case, a key concept which this Court cannot ignore is environmental democracy, a term that reflects increasing recognition that environmental issues must be addressed by all, or at-least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors.[75] It captures the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.[76] It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.[77] Access to environmental information and justice for all

[75] Albert Mumma, *Environmental Law in Kenya*, a paper presented at the ICJ (K) members conference on "New Frontiers in the Law", held at Nyali Beach Hotel, March 11th to 14th, 1999 p. 6.
[76] Dr. Susan Hazen, *Environmental Democracy,* 1998 Available at <http.www.ourplanet.com> accessed on 25/1/2007 (Susan Hazen is a Director of the Environmental Assistance Divisions, Environmental Protection Agency, Washington DC.).
[77] Ibid.

those who choose to participate in such decision-making is integral to the concept of environmental democracy.[78]

218. Thus, a key component of the environment and sustainability agenda concerns the opportunity for the public to be involved in government decision-making for development proposals that affect the lives or interests of citizens. In the *Rio Declaration on Environment and Development*,[79] principle 10 provides that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level" and that "each individual shall have…the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available…"

219. Additionally, Principle 22 provides for the "effective participation" of "indigenous people and their communities and other local communities" in the "achievement of sustainable development." In legal terms, the effective and equitable participation of the public in decision-making processes is related to the provision of natural justice or procedural fairness. Public participation has many connotations. It can be seen as genuine consultation or merely information dissemination. It may also involve community education or be viewed as a means of promoting social responsibility and citizenship.[80]

220. Public participation is therefore regarded both as a proper and fair conduct of democratic government in public decision-making activities,[81] and as a fundamental component of the ESIA process.[82] Citizens have a right to be involved in the decision making about the planned interventions that will affect their lives, and "the opinions and views of experts should not be the sole consideration in decisions about planned interventions."[83]

[78] Ibid.
[79] Signed off at the United Nations Earth Summit in 1992.
[80] Petts, J., "Public Participation and Environmental Impact Assessment" in *Handbook of Environmental Impact Assessment Volume 1: Environmental Impact Assessment Process, Methods and Potential*, 1999, ed. J Petts, pp. 145–177. Oxford: Blackwell Science Ltd.
[81] Shepherd, A and C Bowler, "Beyond the Requirements: Improving Public Participation in EIA", 40(6) *Journal of Environmental Planning and Management*, pp. 725–738,1997.
[82] Hartley, N and C Wood, "Public Participation in Environmental Impact Assessment: Implementing the Aarhus Convention", 25 *Environmental Impact Assessment Review*, pp. 319–340, 2005.
[83] Vanclay, F., "International Principles for Social Impact Assessment", 21(1) *Impact Assessment and Project Appraisal*, pp. 5–11, 2003.

221. Indeed, looking at international law and comparative law and how this right of public participation has been contextualized, it is proper to conclude that public participation in environmental law issues and governance has risen to the level of a generally accepted rule of customary international law.[84] Thus, in Kenya, in addition to the explicit constitutionalization of this right in Articles 10, 69 and 70 of our Constitution, the right to public participation in environmental governance is further entrenched under Article 2 (5) of the Constitution.

222. ***Stuart Bell and Donald McGillivary***[85] authoritatively state that public participation in environmental issues[86] consists of access to environmental information, public participation in decision making and access to justice. The public "should have timely access to information about proposals … in a form suitable to enable informed involvement in the ESIA process"[87] and that a key principle for government is to "ensure assessment reports are available to the public before or at the time of decision-making."[88] Similarly, an ESIA process should ensure that there is easy access to "all information reports and decision documents."[89]

223. In South Africa, in the case of ***Earthlife Africa (Cape Town) vs Director-General: Department of Environmental Affairs & Tourism and Eskom Holdings Limited***,[90] the Court arrived at two important conclusions:

Firstly, the public comments received should be placed before the decision-maker in an accurate summary and the decision-maker must consider them.

Secondly, if a new matter is raised in a final EIA after a draft document has been circulated for public comment, then interested parties should be allowed to comment on the final document. In the words of the Court:[91]

"The question for decision can therefore be narrowed down to an enquiry whether it was procedurally fair to take administrative action based on 'substantially different' new matter on which interested parties have not had an opportunity to comment … fairness requires that an

---

[84] See for example principle 10 of the *Rio Declaration on Environment and Development*, 1992.

[85] Supra note 64, at p. 294.

[86] Arhus Convention, UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice, Aarhus, 1998

[87] Australian and New Zealand Environment and Conservation Council (ANZECC), *A National Approach to Environmental Impact Assessment In Australia*, Canberra, 1991.

[88] Ibid.

[89] Kinhill Engineers Pty Ltd, *Public Participation in the Environmental Impact Assessment Process*: *Input to the Public Review of the Commonwealth Environmental Impact Assessment Process*, prepared for Commonwealth Environment Protection Agency. Turner ACT, 1994.

[90] *2005* [HCSA 7653/03].

[91] Ibid at pp. 59–60.

interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made."

224. As we noted earlier in this judgment (paragraphs 109 and 110), the "access rights" namely, **(a)** access to information, **(b)** participation in decision-making, and **(c)** access to justice[92] are necessary for members of the public to meaningfully participate in developmental initiatives. These "access rights" give individuals and communities basic facts about the quality of their environment. This way, individuals and communities can become active participants in identifying and resolving environmental issues at local, national, regional and even global levels; hence, potentially making citizens active participants in environmental governance. The resulting public participation increases vigilance and identification of anomalies that call for engagement of the mainstream justice system in resolution.

225. Kenya has also embraced the principles of sustainable development. These are not only captured in the Constitution but also in section 3(5) of the EMCA. They include: (a) the principle of public participation in the development of policies, plans and processes for the management of the environment; (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment and natural resources; (c) the principle of international co-operation in the management of the environmental resources shared by two or more states; (d) the principles of intergenerational and intra-generational equity; (e) the polluter pays principle; and (f) the precautionary principle.[93]

226. It is our view that the Respondents ought to take on board the views and values on environmental management held by communities likely to be affected by decisions affecting environmental resources that are close to them or in which they live (such as decisions on land, the sea, water and forest issues, their livelihood, culture and heritage.)

[92] Csaba Kiss and Michael Ewing (eds), *Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries,* European Regional Report published by The Access Initiative Europe. Available at <http://www.accessinitiative.org> accessed on 25/-7/2008.

[93] EMCA section (3)5 (a)-(f).

227. The involvement of the public in environmental decision and policy making must be regarded as important for various reasons. First, the utilization of the views gathered from the public in governmental decision-making on environmental issues results in better implementation of the goals of environmental protection and sustainable development. This is because the resultant decisions raise an expanded knowledge base on the nature of environmental problems that are to be met by the decision. The decisions help to enrich and cross-fertilize environmental rights.

228. Secondly, developing environmental laws and policies is a very resource-intensive area. Hence, the public input comes in handy, especially in developing countries, in supplementing scarce government resources for developing laws and policies. In addition, at the implementation stage, public vigilance is critical for monitoring, inspection and enforcement of environmental laws and policies by identifying and raising with appropriate authorities, environmental threats and violations.

229. Thirdly, public participation can help identify and address environmental problems at an early stage. This helps to save reaction-time, energy and the scarce financial resources, at least in the long run. In addition, it improves the reactive and, often, adversarial nature of government action which operates by promising solutions to environmental problems mostly *post-facto*, and only following an actual complaint by a citizen.

230. Lastly, public involvement in natural resource management also helps improve the credibility, effectiveness and accountability of governmental decision-making processes. This is a result of broad-based consensus for environmental programs that flows from involvement of the public at the infancy stages of the decision making processes.

231. The Stockholm Declaration[94] and the Rio Declaration[95] recognise the need to involve the populace in environmental decision-making. Public participation in environmental governance is recognized as a vital element that ensures decisions made in the

[94] *Stockholm Declaration on the Human Environment,* Stockholm, June 1972.
[95] *Rio Declaration on Environment and Development,* Rio De Janeiro, June 1992, see principle 10.

environmental sphere are arrived at after broad-based consultation and are acceptable to the people they are likely to affect.[96]

232. A further purpose of public participation in environmental governance regulatory scheme is to ensure public scrutiny of major schemes and democratic participation in decisions about such schemes.[97] However misguided and wrongheaded some may view the public's views to be, the public must be given an opportunity to express their opinions on the environmental issues arising from a project.[98]

233. Any decision to exclude fundamental participatory rights must be proportionate in order to be lawful.[99] A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake.

234. We are bound to review the evidence and determine whether there was adequate notification, education and information, review and reaction and, finally, consultation, dialogue and interaction. The standard of ascertaining whether there is adequate public participation in environmental matters, in our view, is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. This means, for example, if you do not comply with the set statutory provisions, then *per se* there is no adequate public participation. And, the question is not one of substantial compliance with statutory provisions but one of compliance.

235. Petitioners' Counsel submitted that while the Constitution and statute law require public participation in formulation of laws, policies, budgets and development plans, the Respondents, and in particular the 5th Respondent violated the provisions of EMCA and the Environment (Impact Assessment and Audit) Regulations, 2003 which provide for the procedures to be followed before granting of an EIA Licence.

---

[96] Ibid.

[97] Richard Harwood, Justine Thornton and Richard Wald, *Environmental Impact Assessment*, Available at http://www.39essex.com/docs/articles/EIA_Seminar_Paper_190706.pdf.

[98] *Advocate-General Elmer in Commission of the EC v Federal Republic of Germany* (Case C-431/92) [1995] ECR I- 2819 2208 – 2209 para 35.

[99] See e.g. *Daly v SSHD* [2001] UKHL 57 §§24-32 and ACCC/C/2008/33.

236. According to the 1st to the 7th Respondents and the 3rd Interested Party there was adequate public participation. However, we can say here and now that there was not adequate evidence tendered to demonstrate that there was adequate public participation in the lines prescribed by the regulations. This was despite the Court overruling the Petitioners' objections and affording the 7th Respondent on 29th June 2017 the opportunity to avail the evidence. The Lead Consultant, Mr. Adala, who testified on behalf of the 7th Respondent simply stated how the Respondents called a public meeting on 2nd August 2012. The meeting lasted some three odd hours and was chaired by the then District Commissioner. No details were given as to whether there was any education, information, review, reaction, consultation, dialogue and interaction at the meeting. Mr. Adala also testified that 16 public gatherings prior to the meeting of 2nd August 2012 had also been organized, but gave scanty details on any education, information, review, reaction, consultation, dialogue and interaction at these meetings.

237. Mr. Adala further testified that there was another meeting on 31st January 2013 to present the ESIA Report. Once again, all the specifics and particulars were lacking. The evidence did not however convince us that the Respondent had complied with the provisions of Regulations 17, 22 and 23 of the Environmental (Impact Assessment and Audit) Regulations, 2003. The evidence tendered, in our view, instead clearly shows that there was inadequate stakeholder dialogue and engagement, a position also vindicated by Mr. Wairagu's evidence.

238. In conclusion, there is nothing in the evidence before us to demonstrate that the omission to include the Petitioners in public participation was justifiable to fall within the exceptions provided under Article 24 of the Constitution. No evidence was tendered to demonstrate that the steps prescribed under Regulations 17, 22 and 23 of the Environmental (Impact Assessment and Audit) Regulations, 2003 were adhered to.

239. In the circumstances of this case which involves a mega infrastructural project, we are led to the holding that the Respondents and the 3rd Interested Party had no alternative but to strictly adhere to, and comply with, the provisions of both the Constitution and the EMCA. Accordingly, we find that the public were not adequately involved as required.

240. This now leads us to the issue of access to information.

e. Whether the Petitioners Right to Access Information was Violated

241. The Petitioners alleged that despite the Project being a multibillion dollar development, it is shrouded in mystery, and the project proponents failed to provide public documentation or carry out consultative meetings with the affected communities. They contended that the Respondents omitted and failed to inform and consult with the local people and residents of Lamu or involve them in various phases of the Project. Furthermore, that despite their demands for proper information on the Project and the commissioning of the ESIA, no response had been forthcoming from the Respondents. The only source of information on the Project identified by the Petitioners were newspaper reports, advertisements on the studies and progress in the construction of the Lamu Port, and verbal presentations on the Project made at a sensitization meeting at Lamu Town in January 2009.

242. The evidence of Somo Mohammed Somo Bwana was that the Lamu community was not informed of the Project at the conceptualization stage, and that they learnt about the implementation of the Project from newspaper reports, specifically the *Daily Nation* newspaper of 23rd February 2015 wherein it was reported that the construction of the Lamu Port would commence in March 2015. He however admitted that the consultants who prepared the ESIA Report consulted his organization after they filed this Petition.

243. Mr. Waikwa, the counsel for the Petitioners, submitted that public participation and access to information are dependent upon each other, and that Article 35 of the Constitution creates a positive obligation on the State to disclose information that is of a public interest. In addition, that there is a presumption that all information held by public bodies should be subject to disclosure, and such disclosure can only be withheld in limited circumstances.[100] Furthermore, that the right to information is key in achieving the values of transparency, accountability, public participation, the rule of law and good governance.

[100] Justice Odunga J. in *Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission & Another* {2016} eKLR.

244. In the Petitioner's counsel's submissions, State actions should be governed by the principles of disclosure and transparency so that the public can question, investigate and consider whether public functions are being performed adequately and failure to provide the information especially at the conceptualization stage limited the Petitioners' right to question the viability of the project.

245. The counsel concluded that the lack of information from the Respondents limited the ability of the Petitioners and the public to question the viability of the Project, and that later consultations were undertaken to placate the community and not intended to be objective and genuine engagement. It was his opinion, therefore, that there was a violation of the Petitioners' access to information rights under Articles 33(1) (a) and 35(1)(a) of the Constitution.

246. The 1st to 6th Respondents on their part stated that the information on the Project has been in the public domain as evidenced by the contents of the pleadings filed by the Petitioner and denied that any information had been kept secret. Further, that the Government had been keen to sensitize and dialogue with the residents of Lamu on key areas of the Project, which fact had been admitted by the Petitioners. Mr. Motari, counsel for the 1st to 6th Respondents, submitted that despite the provisions of Article 35 of the Constitution, no evidence exists of a request for information or a Petition having been filed to enforce such a request, which confirms that the Petitioners have always had information with respect to the LAPSSET Project, and that the Petition herein is made in bad faith.

247. The 7th Respondent and 3rd Interested Party also denied that they had omitted or failed to inform or consult with the local people and residents of Lamu and stated that they had fulfilled their constitutional duty to publish and publicize any important information on the Project by publicizing the ESIA, setting up a website on the LAPSSET Project, and holding public participation forums with the residents of Lamu.

248. Mr. Peter Oremo, in his evidence and testimony, stated that the 7th Respondent, upon advice from the 1st Interested Party, did undertake a consultative meeting with the stakeholders in Lamu on 2nd August 2012, and attached minutes of the said meeting to his affidavit. Mr. Hezekiah Adala also stated that NEMA held a public hearing on the

ESIA at the Project site on 12th June 2013 where the Petitioners were represented, and at least 3 stakeholder meetings were conducted during the ESIA study. Further, that upon submission of the ESIA Report, they published a summary of the key findings of the report in the *Daily Nation*, and posted copies of the report at the NEMA and County Commissioner's offices in Lamu.

249. Likewise, Mr. Michael Mwangi Wairagu observed that the SEA was opened to public review on 13th March 2017 by way of newspaper advertisement and gazette notice, and validation workshops held to get feedback in which the Petitioners were represented. He, however, admitted that during the scoping stage of SEA, they found out that the demand for information on the Project was high and that is why they mounted the stakeholders' engagements at every affected County. He stated that the engagement for Lamu County was held on 21st June 2016, and two other engagements were also held at the grassroots level.

250. The 8th Respondent, in its response to the Petitioners' expert reports, stated that it issued a statutory public notice to the 3rd Interested Party, requiring it to publish the ESIA study report in the Kenya Gazette and 2 local newspapers as required by law, which was done. In particular, the proponent published the report in the Kenya Gazette on the 3rd May 2013, the *Standard* newspaper on 28th March 2013, the *Daily Nation* on 19th March 2013, and *People's Daily* on 26th March 2013. Further, that the 8th Respondent advertised for and held a public hearing on the 12th June 2013.

251. It is not disputed that the rights of citizens in relation to environmental matters to information, public participation, and access to justice are indispensable to foster sustainable development.[101] The *International Covenant on Civil and Political Rights(ICCPR)* promulgated in 1966 sought to guarantee the right of access and dissemination of information. In particular, the ICPR secured the freedom of citizens of the member countries "to seek, receive and impart information and ideas of all kinds [information on environmental issues included]."[102]

[101] Principle 10 of Rio Declaration of Environment and Development.
[102] Article 19(2).

252. Closer home, the *African Charter on Human and Peoples' Rights* in 1981 guaranteed that citizens have the rights of access to information,[103] participation[104] and justice.[105] These rights, were granted in addition to the right of the citizens "to a generally satisfactory environment favorable to their development."[106]

253. Kofi Annan, the former UN Secretary-General stated of the Rio Declaration[107]:*"Principle 10 of the Rio Declaration ... stresses the need for citizens' participation in environmental issues and access to information on the environment held by public authorities."*[108] Principle 10 obligates governments to establish a process for citizens and civil society to obtain environmental information, participate in environmental decision-making and access justice in environmental matters. Agenda 21 which was adopted in 1992 to implement the principles in the *Rio Declaration* reflected the rights of access to information, public participation and justice. Under Principle 10 of the *Rio Declaration*, the member states are obligated to facilitate the rights of access to information, public participation in decision making and access to justice in environmental matters.

254. The importance of being informed of basic facts about the quality of their environment is, therefore, well established in different international conventions. Increasing access to environmental information also allows for competing interests to be balanced. Access to information permits all relevant factors to be taken into account as part of decision making process. Environmental information is a self standing regulatory instrument and serves to inform the public of environments risks.[109] Citizens must not only have access to information but must also be entitled to participate in decision-making and have access to justice in environmental matters.[110] Only this way will they be able to assert their right to live in a safe environment, and fulfil their duty to protect, and improve the environment for the benefit of future generations.[111] In addition to enhancing the quality and implementation of decisions, improved access to information and public

[103] Article 9(1), African Charter on Human and Peoples' Rights.
[104] Article 13 ibid.
[105] Article 3 and 7 ibid.
[106] Article 24 ibid.
[107] Kofi Annan, *Introducing the Aarhus Convention,* Available at http://www.unece.org/env/pp/.
[108] Ibid.
[109] Supra note 59 at p. 297.
[110] Department of the Environment, Transport and the Regions, *Public Participation in Making Local Environmental Decisions: The Aarhus Convention Newcastle Workshop Good Practice Handbook*, 2000 Available at www.unece.org>env>ecases>handbook.
[111] Stec, S, S Casey-Lefkowitz and J Jendroska, *The Aarhus Convention: An Implementation Guide*, United Nations Economic Commission for Europe,2000. Available at www.unece.org>DAM>env>acig

participation contributes to public awareness of environmental issues and provides more opportunities for the public to express their concerns to relevant authorities.

255. Access to information enables the public to find out about development proposals and air their concerns, while proponents learn from local knowledge.[112] This has the potential to reduce conflicts by 'transformative learning' on the part of all stakeholders and by enabling developers to address contentious issues early in the proposal development phase.[113] Moreover, public participation increases public confidence in the ESIA process and promotes democratic principles.[114]

256. In addition, if rights are to be effective, the public must have a way of seeking justice when those rights are accidentally, or deliberately, denied.[115] For purposes of enforcement of environmental rights, Article 70 of the Constitution provides a framework to meet this need. It highlights rights of a citizen to move to Court citing violation of rights to clean and healthy environment. For a citizen to exercise these rights, access to environmental information is a necessity.

257. The state is obliged to play a proactive and prominent role in ensuring that the public who are likely to be affected by a proposed project, plan or development are provided with all the relevant information relating to the project including the environmental impact assessment report, which must contain all information that is necessary for the competent authority to consider the application, and to reach a decision.

258. Access to information is, thus, a key pillar in environmental matters because effective public participation in decision-making depends on full, accurate, up-to-date information. The public may seek access to information for a number of purposes, not just to participate. The access to information pillar is split in two. The first part concerns the right of the public to seek information from public authorities and the obligation of public authorities to provide information in response to a request. This type of access to

[112] Kakonge, JO, "Dispute Resolution and Negotiations. EIA and Good Governance: Issues and Lessons from Africa", 18 *Environmental Impact Assessment Review*, pp. 289–305.
[113] Kakonge, JO., "Environmental impact assessment in Africa," In *Handbook of Environmental Impact Assessment*, 1989, Vol. 2, ed. Petts J. Oxford: Blackwell; Doelle, M and J Sinclair, "Time for a New Approach to Public Participation in EA: Promoting Cooperation and Consensus for Sustainability", 26 *Environmental Impact Assessment Review*, pp. 185– 205.
[114] Hunsberger, C A, R Gibson and S K Wismer, "Citizen Involvement in Sustainability-Centered Environmental Assessment follow-up", *Environmental Impact Assessment Review*, 609– 627.
[115] Supra note 105.

information is called "passive." The second part of the information pillar concerns the 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. This is called "active" access to information.[116]

259. It is common cause that LAPSSET Project is a mega-infrastructural Project transcending many counties. For this reason, the Respondents had an obligation to disseminate the information without waiting for the Petitioners' to request. Hence, the submission by Mr. Motari that the Petitioners did not request for the information cannot stand in the circumstances. This was a legal obligation which the Respondents cannot avoid.

260. Although we are satisfied that the Respondents met the statutory requirements as to disclosure of the ESIA Report, we note that Mr. Wairagu admitted that there was scanty information on the Project while they were undertaking the SEA. We also find that no evidence was tendered to demonstrate that the relevant information leading to the conception of the 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. It is, thus, our conclusion that to this extent the Petitioners' rights to access information on the Project were violated.

f. Whether the Petitioners' Right to a Clean and Healthy Environment has been Violated

261. The sixth issue we are required to resolve is on the right to a clean and healthy environment.

262. The Petitioners, on this aspect, called Dr. David Obura. He described the Marine ecosystem in Lamu as a complex comprising of the largest mangroves forests in Kenya, sea grass beds and coral reefs. Further, that the mangroves, sea grass beds and coral reefs provide fish breeding grounds and protect the coastline from erosion. Additionally, Dr. Obura testified that the foregoing are critical for sea life, and thus functionally interconnected in the ecosystem.

[116]Paul Stookes, *Environmental Judicial Review*, available at http://www.publiclawproject.org.uk.

263. Dr. Obura added that the shore in the area where the proposed Lamu Port is being constructed is about two metres above sea level and during high tide is about four metres high. Hence, the shore is vulnerable to destruction by sea waves and the protection offered by mangroves and coral reefs is critical. According to Dr. Obura, no assessment has been done on the effect of losing the mangroves. Further, that the water is murky due to dredging and this will affect the marine economy and tourism.

264. Dr. Obura gave an elaborate presentation on the impacts on the marine ecology and a critique on the Project's mitigation proposals in the ESIA Report. He stated that proposals to transfer the corals to another site are not effective, because replanting will not restore them to the original quality. Further, that the condition in the EIA License on the studies to be undertaken before mangrove clearing is silent on the other marine habitats that will be affected by the dredging and port construction.

265. Counsel for the Petitioners then submitted that the violation of the Petitioners' rights to a clean and healthy environment does not require proof of harm. This, Counsel submitted, is clearly provided for under Article 70(3) of the Constitution, and hence credible evidence that there is threat of environmental degradation suffices and the Court ought to intervene.

266. Counsel also cited violation of various regional[117] and international conventions[118] protecting the environment to which Kenya is a party, and which form part of the laws of Kenya,[119] and submitted further that the environment is a fundamental right as was held by the African Commission on Human and Peoples' Rights (ACHPR) in ***Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR), Nigeria.***[120]

267. To buttress his argument, counsel cited the South African decisions in ***Fuel Retailers of South Africa vs Director General, Environmental Management Department of***

[117] Article 24 of the African Charter on Human and Peoples Rights.
[118] Articles 4, 9 & 10 of the Convention for the Protection, Management and Development of Marine and Coastal Environment.
[119] By dint of Article 2 (6) of the Constitution.
[120] Case No. 155 of 1996.

Agriculture, Conservation and Environment-Mpumalanga & Others[121] in which the Court balanced the competing principles of sustainable development and environmental protection, and also the case of ***BP Southern Africa vs MEC for Agriculture, Conservation, Environment and Land Affairs***[122] in which it was held that pure economic principles alone ought not to determine in an unbridled fashion whether development is acceptable. Mr. Waikwa also relied on ***Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others***[123] in which the Court held that environmental impact assessment must include climate change impact assessments.

268. It is important to note that the 2nd Interested Party largely adopted the Petitioners' case with regard to the violation of the right to a clean and healthy environment.

269. On his part, Mr. Motari for the 1st to 6th Respondents and the 3rd Interested Party, submitted that there was no evidence tendered by the Petitioners to show that the right to a clean and healthy environment had been violated. Counsel added that there was not a single Petitioner whose health had been proven to have been adversely affected as a result of the Project. His submissions were in support of the 1st to 6th Respondents' stand that the Petitioners had not demonstrated any damage to or possibility of damage to the environment, and that the mere probability of damage must be weighed against the positive infrastructural effects of the Project.

270. The 7th and 8th Respondents, on their part, contended that the mitigation measures provided for in the ESIA Report would adequately address any adverse effects on the environment and safeguard the mangroves and the coral reefs. Counsel submitted that the construction of the three berths did not pose any significant threat, harm and damage to the environment, and the minimal threats would be mitigated as already provided for in the ESIA Report.

271. In particular, the 7th Respondent noted that the ESIA Report recommended restoration of the mangrove forests by replanting mangroves in an area equivalent to two times the area to be altered or damaged by the Project. Additionally, the mitigation measures

[121] Cct 67/06 [2007].
[122] 2004 (5) SA 124 (W).
[123] Case no 65662/16.

were proposed to minimize the loss of coral reef habitat, and to translocate corals from areas that would be dredged to appropriate safe habitats. By way of example and to demonstrate compliance with the mitigation measures, Engineer Oremo testified that the 7th Respondent made a payment of Kshs. 8,000,000/= to the Kenya Forest Service for the replanting of mangroves cleared to pave way for the construction of the first three berths of the Lamu Port.

272. The promulgation of the Constitution in 2010 marked an important chapter in Kenya's environmental policy development. The Constitution embodies elaborate provisions with considerable implications for sustainable development. These range from environmental principles to the right to a clean and healthy environment as enshrined in the Bill of Rights. Chapter V of the Constitution is entirely dedicated to land and environment. The Constitution also embodies a host of social and economic rights which are of environmental character such as the right to water, food and shelter, among others.

273. The Constitution begins by acknowledging the need for cautionary dealing with the environment by a provision in its preamble which, as is relevant, provides that *"We, the People of Kenya ... Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations..."* These words of the Constitution in its preamble clearly suggest reverence to sustainable development.

274. It is undisputed that the Constitution contains an explicit environmental right in Article 42 which provides that every person has the right to a clean and healthy environment. This right includes the right (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.

275. EMCA[124] is Kenya's primary environmental regulatory law. The statute provides generic provisions (including environmental management principles) regulating all

[124] Act No. 8 of 1999

environmental sectors and all public and private actions which may affect the environment. The Act defines the "environment" as follows:

"environment" includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment.

276. This definition transcends mere ecological interests. It explicitly includes dimensions of the environment beyond the bio-physical aspects such as the inter-relationship between people, the natural environment the socio-economic and cultural aspects undergirding that inter-relationship.

277. Article 70 of the Constitution confers standing upon a person who alleges violation of rights to a clean and healthy environment. This means that "the environmental right is sufficiently comprehensive and all-encompassing to provide 'everyone' with the possibility of seeking judicial recourse in the event that any of several potential aspects related to the right or guarantee derived there from is infringed." From the foregoing, it is clear that protection of the environment has now become an urgent responsibility to which our legal system responds to inadequately. It is undisputed that environmental protection in Kenya has constitutional protection.

278. Article 69 of the Constitution imposes obligations on the State in respect of the environment. Among other obligations imposed on the State include the duty to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. The State is also obligated to ensure equitable sharing of the accruing benefits. It is also required to encourage public participation in the management, protection and conservation of the environment. Finally, the State is required to eliminate processes and activities that are likely to endanger the environment.

279. The Supreme Court of India, has inferred the existence of a constitutional right to a healthy environment from its reading of the enforceable constitutional right to life in

the ***Dehradun Quarrying Case.*** [125] Article 21 of the Indian Constitution which protects the right to life reads as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."[126] The Indian Supreme Court implied that the right to a healthy environment was fundamental and cognizable under this Article.

280. Subsequent to the ***Dehradun Quarrying Case***, the High Court of Andhrad reiterated this interpretation of Article 21 in ***T. Damodar Rao v. The Special Officer, Municipal Corporation of Hyderabad***[127] in the following words:

"[I]t would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without [which] life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art.21 of the Constitution. The slow poisoning [of] the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to [a] violation of Art.21 of the Constitution."[128]

281. Also, in ***Subhash Kuimar vs. State of Uttar Pradesh***, the Indian Supreme Court expressly determined that Article 21 of the Indian Constitution includes a right to a clean environment:- "any action that would cause environmental, ecological, air, water pollution, etc., should be regarded as amounting to a violation of Article 21."[129] In so deciding, the Court reasoned that, "life in its proper dimension could not be enjoyed unless the ecological balance and the purity of air and water were preserved."[130]

282. This extension of the fundamental rights doctrine makes sense in the context of our transformative Constitution's jurisprudence. The right to life "includes the right to live with human dignity and all that goes along with it." Fundamental rights "weave together a pattern of human rights guarantees" that are not mutually exclusive and distinct."[131] It is clear, our legal system provides an express, justiciable constitutional right to a clean and healthy environment. Kenyans secured this powerful right to the

[125] *Rural Litigation and Entitlement, Dehradun v. State of Uttar Pradesh*, AIR 1985 SC 652.
[126] India Const, pt. III, Art. 21.
[127] AIR 1987 AP 171, 181.
[128] Ibid.
[129] *Subhash Kuimar v. State of Uttar Pradesh*, JT 1991 (1) SC 538).
[130] Ibid.
[131] *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621, 620–21).

environment through the promulgation of the Constitution and Courts have a solemn duty to enforce this right in the context of environmental harms.

283. The adverse effects of the Project on the marine environment and eco-system in Lamu has been acknowledged and appreciated by the Respondents as well as the 3rd Interested Party. This is clear from the assembly of the Respondents' and 3rd Interested Party's pleadings, documents, evidence and submissions, and may especially be gathered by an examination of the ESIA Report for the first three berths of the proposed Lamu Port. Some of the major identified present or potential adverse environmental effects and the suggested mitigation measures, according to the Respondents' and 3rd Interested Party's own documents include the following:

    a. Loss of mangroves of up to 2.4 hectares to pave way for the construction of the first three berths of the proposed Lamu Port. See p. 178 of ESIA Report. The mitigation measures suggested include the replanting of mangroves to cover at least two times the area to be altered or damaged, and education and conservation efforts with local communities. See p. 179 of ESIA Report. We have addressed part of this issue in paragraph 189(c) of this judgment.

    b. Sedimentation as a result of dredging and dumping during construction of the berths of the proposed Lamu Port, the dispersal of re-suspended dredged material, as well as secondary impacts on sedimentation on adjacent mangroves. There is also apprehension that altered sedimentation pattern may favour deposition in the port area resulting into smothering of bottom biota and physical habitat. See p. 178, p. 181 and p. 186 of ESIA. The suggested mitigation measures include the use of turbidity barriers to prevent sedimentation of corals; the use of silt curtains during dredging; the disposal of reduced amounts of material to reduce agitation; use of dredgers; and reduction of dumping frequency. See p. 190 of ESIA Report.

    c. Loss of corals and reduction in species diversity and abundance due to substrate removal during dredging. See p. 185-186 of the ESIA Report. The proposed mitigation measures include minimizing coral reef habitat loss by applying careful control on boundaries during dredging as well as translocating dredged corals to appropriate safe habitats. See p. 186 of ESIA Report.

d. Potential oil spill impacts from construction works and in the future during operations. See p. 178 of ESIA. The recommended mitigation measures include upscaling the use of Oil Spill Mutual Aid Group (OSMAG) and related oil spill contingency plans currently in use in the Mombasa Port to cover Lamu in addition to providing a contingency fund as per NEMA's polluter pay principle. See p. 179 of the ESIA Report. Other measures recommended include enforcement of response and clean up protocols as well as training. See p. 191 of ESIA Report.
e. Loss of benthic habitats and benthic fauna. See p. 178 of ESIA Report. The Report hypothesizes that the loss will be temporary, localized and insignificant but that more data will be needed to deploy a precautionary principle.
f. New species invasions by ships through ballast water from the ships during operations. See p. 178 of ESIA Report. The recommended mitigation measure is to enforce shipping regulations related to the control of ballast water and conducting ballast water surveys.
g. Impacts on ambient noise levels from the construction noise, vibrations, additional traffic and operations of the proposed Lamu Port. See p. 179 of ESIA Report. A number of mitigation measures are suggested including procurement of appropriate machinery and construction materials which will keep the noise levels down; use of noise barriers; monitoring noise levels; control of times of vibration generating activities; and enforcing existing regulations. See p. 183 of ESIA Report.
h. Potential adverse impacts on water quality during construction due to contamination from suspended solids in site runoff and accidental discharge of pollutants and foul waste from the site. There is also potential risk of long-term changes to drainage and flow which could affect receiving water bodies in terms of their use and attributes. See p. 183 of ESIA Report. The ESIA Report suggests a raft of mitigation measures most of which are predicated on monitoring of spillages and discharges of waste. See pp. 183-184; and
i. Potential negative impacts on air quality from the fugitive emissions of airborne dust from construction activities; gas emissions from increased traffic, construction machines, cargo handling equipment; and ships. See p. 182 of the ESIA Report. A slew of mitigation measures is suggested based mainly on monitoring, use of specialized equipment which produce less

emissions as well as enforcement of existing regulations on air pollution. The following mitigation measures were also recommended: use of dust screens; covering of stockpiles; spill control of bulk cargo; and water sprinkling during construction. See p. 191 of ESIA Report.

284. The position taken by the Respondents and the 3rd Interested Party throughout the litigation has been a consistent one: that, the Proponent of the Project has put in place adequate mitigation measures consistent with the principle of sustainable development and precautionary principle as required by the Constitution and statutory law.

285. The Petitioners' position is radically different. The Petitioners assert that the mitigation measures to address the adverse effects which are identified are either non-existent or inadequate.

286. Who is right?

287. Given the extent of the LAPSSET Project pitted against the material placed before us, we are unable to adjudicate on the adequacy of the full spectrum of the mitigation measures identified and designed to extenuate the potential adverse effects of the LAPSSET Project or even the first three berths of the proposed Lamu Port – which is a singular component of the larger Project. We do not even think we are called to do so in this litigation, in any event. However, we are able to make some findings and conclusions based on the material put before us by the parties, testimonies of the experts, and our own observations made during the site visit.

288. One thing we can say for sure is that during the site visit we viewed the following evident impacts of the Project:
    a. Excavated coral rocks;
    b. Silty and turbid waters around the construction site;
    c. Areas where the mangrove forest had been cleared; and
    d. Installed silt curtains: these are floating barriers used in marine construction, dredging, and remediation projects to control the silt and sediment in a body of water.

289. From our observation of the site visit, our analysis of the expert witnesses' testimonies and reports, the other documents filed in this case, in particular the ESIA report and the draft SEA report, we can safely conclude that the mitigation measures are not fully effective. In particular, we noted the following:

a. Despite the use of silt curtains, and the weather and water being relatively calm, the waters were still evidently silty and turbid in the area around Mkanda channel and the port construction site. This was also confirmed by Dr. Obura's evidence that he observed the turbidity at two different spots when he went snorkeling. We had no reason to doubt his evidence.

b. There was no evidence of replanted Mangrove forests to replace the ones that had been cleared to pave way for the construction of the first three berths of the proposed Lamu Port.

c. Oral testimony by Somo Mohamed Somo Bwana which we found to be credible and was corroborated by the findings of the lead expert of the ESIA Report and the draft SEA report which showed that there was a marked reduction of fish population as discussed below.

290. We are led to the conclusion and we agree with the Petitioners that the right to a clean and healthy environment of the Petitioners and the Lamu residents is potentially at risk of being violated.

g. Whether the Petitioners' Traditional Fishing Rights have been Violated

291. Most of the Petitioners, like more than 4,700 other adult residents of Lamu County are traditional and artisanal fishermen who derive their livelihoods directly from fishing. Through affidavit evidence, the unquestioned testimony of Somo Mohamed Somo Bwana as well as the Respondents' own documents and testimonies by the Respondents' expert witnesses filed as part of ESIA and draft SEA Reports, the fact that these residents of Lamu Island are traditional and artisanal fishermen who have, from time immemorial fished using relatively small vessels and deploying small amounts of capital and energy in the areas immediately adjacent the Lamu archipelago is neither denied nor contested.

292. Indeed, it can be freely stated that these artisanal fishermen in the Lamu archipelago have concretized and enjoyed traditional fishing rights in the areas immediately along the Lamu archipelago. These traditional fishing rights are directly related to their social and economic rights (now protected under Article 43 of the Constitution); right to life (guaranteed under Article 26); right to human dignity (protected under Article 28), as well as the right to property (guaranteed under Article 40 of the Constitution).

293. The evidence tendered in this case is that more than 4,700 fishermen will be affected by the LAPSSET Project. Murky waters due to effects of dredging that is already happening as part of the construction of the first three berths of the proposed Lamu Port, and the destruction of the coral reefs and mangrove forests have already affected the population and location of the fish. Both the ESIA and draft SEA Reports also acknowledged that the local fishermen lack modern equipment necessary to engage in deep sea fishing. Indeed, the EIA License conditions include the requirement to compensate the fishermen monetarily and then assist them to acquire modern fishing boats suitable for deep sea fishing.

294. The construction of the first three berths has commenced, yet as we made a finding above, the compensation stipulated in the conditions has not been paid to the affected fishermen whose access to their traditional fishing areas near the coast line has been adversely affected.

295. It is important to point out that the candid acknowledgment by the 5th and 7th Respondents that the traditional fishing rights of the local fishermen will be affected and the EIA Licence condition that the fishermen should be compensated monetarily and through provision of modern and bigger fishing vessels is not an act of charity in favour of the traditional fishermen. Rather, it is a recognition that their rights and legitimate expectations of the local fishermen were adversely affected.

296. Traditional fishermen who have, over time, enjoyed the right to fish in certain sea routes and zones in an area immediately next to an archipelago or archipelagic state and within the national waters and Exclusive Economic Zone (EEZ) or the National Waters of the Kenyan state acquire, by virtue of Articles 26, 28, 40 and 43 of the Constitution cited above, certain penumbral property rights to traditionally fish in those routes and

zones as well as a legitimate expectation that the State will observe, respect, protect, promote and fulfil those rights under Article 21 of the Constitution. The conclusion, then, is that the more than 4,700 traditional and artisanal fishermen in the Lamu Archipelago who can demonstrate that they have enjoyed and exercised fishing rights in the traditional fishing routes and zones immediately around the Archipelago have certain property rights over those traditional fishing rights and routes or zones.

297. The obvious implication of this pronouncement is that the State is, then, obliged not only to observe, respect, protect, promote and fulfil the traditional fishing rights of the more than 4,700 traditional and artisanal fishermen in the Lamu archipelago who have traditionally exercised fishing rights in the Archipelago within the national waters of Kenya but that where the State limits, restricts or acquires these traditional rights, the State must not only satisfy the conditions placed under Article 24 of the Constitution on the limitation of rights as well as meet the conditions for compulsory acquisition of property by the State for public purpose or in the public interest under Article 40 (3)(b) of the Constitution.

298. Our Constitution obligates this Court to develop the Bill of Rights to the extent that it fully aggrandizes the full panoply of rights and freedoms envisaged by the framers, and to adopt an interpretation of the Bill of Rights which most favours the enforcement of a right or fundamental freedom. In this vein, today we declare that established traditional and artisanal fishing rights and routes exist in areas immediately within the Kenyan archipelagic areas and which are within Kenya's Exclusive Economic Zone (EEZ) and National Waters. We must clarify that this property right to particular fishing zones and routes by traditional and artisanal fishermen are, however, subject to any applicable international treaties. This established property right can only be limited by the Kenyan State pursuant to Articles 24 and 40 of the Constitution.

299. The right which we declare is not completely unknown in international law. Indeed, to a large extent, our necessary reading of the existence of this penumbral right under our Constitution is merely a reflection and extension of existing international law. For example, Article 51 of the United Nations Convention of the Law of the Sea (UNCLOS) explicitly refers to traditional fishing rights and stipulates thus:

Without prejudice to Article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

300. Beyond making these general pronouncements of law which are a necessary reading of our Constitution, we do not need to belabour this point – in part because the Respondents – and in particular the 5th and 7th Respondents – have explicitly made a number of concessions in this regard:

a. One, regarding the ESIA Report, the 5th and 7th Respondents identify the impacts on fishing in the following two paragraphs (at p. 11 of ESIA Report; Table 11a):

The proposed port will encroach on fishing grounds thereby displacing the artisanal fishermen from some of their traditional fishing grounds and landing sites……

Sea routes used by fishers, especially Mkanda (main channel) will be affected by dredging. Mkanda is used by fishers from Faza, Kizingitini, Matondoni, Kiunga, Mkokoni, Kiwayu, Chandani and Dodori to access their fishing grounds….

Fishers using small vessels will have difficulty travelling between their fishing grounds and landing sites through the alternate sea route via Manda-Bruno-Museum-Shala-Lamu which is rough and long. The longer travel time will result into post-harvest losses…

b. Two, the EIA Licence gave the following explicit condition (Condition 2.3): "*The Proponent shall in consultation with the Fisheries Department provide improved fishing gear and modern fishing landing sites with adequate infrastructure such as power, access roads and cold rooms*."

c. Three, the draft SEA Report by Mr. Wairagu made the following pertinent analysis and conclusions on this issue:

Fishing is the economic mainstay for Lamu County supporting incomes for 80% of the population. Artisanal fishing in marine areas is the dominant fishing activity accounting for 80% of the 2200 metric tonnes of annual catch valued at Kshs. 180 Million….Marine fishing at Lamu is, therefore, restricted to the sheltered areas

inside the fringing coral reef on account of reliance on old traditional fishing technology which restricts fishers from venturing into the deep sea…(Section 5.2.1 p. 90)

And later on:

A situation whereby income for 80% of the population are pegged to fishing renders Lamu County quite vulnerable as any small interference with fishing is enough to render them destitute. The situation in Lamu is complicated by the isolated nature of the community on an island that has limited economic activities where the cost of doing business is also high on account of lack of functional road connection to the supply line in Mkowe. (Section 5.2.1 p. 90)

And finally:

The initial construction phase of the port will cause the destruction of 2 hectares of mangrove at the Manda Bay area and from Mkanda channel to Dodori Creek. This phase will destroy a critical habitat for a variety of fish species, invertebrates and bird life; it will also destroy a line of defence against shoreline erosion and an important carbon sink increasing green-house gas emissions that cause global warming. The cumulative effects of the above activities will lead to disruption of the fisherfolk livelihoods and create tension and conflicts because of the reduced fish in the breeding areas. (Appendix 6.1, p.10).

d. Four, the oral evidence of Mr. Adala, the EIA Lead Consultant and Mr. Wairagu, the SEA Lead Consultant forthrightly acknowledged the effects on traditional fishing rights of the local fishermen.

e. Five, Engineer Oremo, the Project Manager on behalf of the 7th Respondent who testified as an expert witness acknowledged that "*the process leading to final compensation of fishermen affected by the LAPSSET Project is ongoing. The County Government of Lamu, Department of Fisheries, Livestock and Cooperative Development submitted a report dated 10th January, 2017 with regard to the fishermen affected by the Project and the proposed compensation*." (Paragraph 6, Further Affidavit of Peter Usenge Oremo deposed on 19/05/2017).

301. The document which Engineer Oremo referred to in paragraph 300(e) above is a document entitled "*Fisheries Resource Valuation and Compensation: A Report for Consideration by Lamu Port and Coal Plant Power Generation Company in Lamu*." Engineer Oremo conceded in testimony that the 7th Respondent has accepted the

document as sound and has requested the amounts identified under various line items from National Treasury. According to both Engineer Oremo and Mr. Miller, counsel for the 7th Respondent, the 7th Respondent is only waiting for the National Treasury to release the amounts identified for compensation. They were unsure when the National Treasury was likely to release the amounts.

302. It is important to point out that the Valuation document in question begins with a situational analysis of the impact of the Project on fishing and announces that "*all fishers (sic) in Lamu County will suffer the adverse effects of [the] port and coal plant construction. What will differ is the magnitude and time the impact will be felt at different BMUs depending the location of the BMU from the port and coal plant area*." The Valuation document ends with a summary of the total cost for proposed compensation strategies as follows:

No.	**Compensation Strategy**	**Total Cost (KShs.)**
1	Medium sized boat	305,250,000
2	Outboard engine	206,050,000
3	Trainings	75,744,000
4	Landing sites development	520,000,000
5	Ice boxes, market stalls and refrigerated trucks	56,980,000
6	Commercial fishing ship	123,000,000
7	Transition cash support	236,700,000
8	Loan Scheme (fishermen loan scheme)	236,700,000
	Total Cost (KShs.)	**1,760,424,000**

303. Hence, the 5th and 7th Respondents concede in no uncertain terms not only that the traditional fishing rights of the fishermen will be adversely affected but also that it is feasible to determine strategies for compensating the fishermen as well as scientifically approximate how much the compensation they should be paid. As shown in the Table reproduced above, the 5th and 7th Respondents have accepted the figure of Kshs. 1,760,424,000/- as the amount needed to compensate all the fishermen in Lamu County.

304. Having made these findings of facts and pronouncement of law above, we summarise our holdings and conclusions on this issue thus:

a. ***First,*** the more than 4,700 fishermen from Lamu have traditional fishing rights to the routes and zones immediately next to the archipelagic waters of Lamu Island within the National Waters of Kenya. 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, 43 and 70 of the Constitution as well as a necessary reading of general principles of International Customary Law. The latter is, for example, exemplified by Article 49 of UNCLOS.

b. ***Second***, since we have comprehended the traditional fishing rights of the local fishermen as rights under our Constitution, the government may only regulate or interfere with such rights only 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.

c. ***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.

d. ***Fourth,*** given the dynamic and indeterminate way in which the government can, even in the exercise of all due diligence and good faith compensate local fishermen for loss of traditional fishing rights, even after initial compensation through, for example provisional loans and training, the local fishermen must be given priority to fish for food and commercial purposes over other user groups.[132] This Court holds the view that when dealing with rights of indigenous communities, their rights are to be taken seriously, sensitively and in such a manner as to maintain their constitutional rights to a livelihood where their livelihood depends on the environment as in the present case.

e. ***Fifth,*** 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

[132] See *R. v. Sparrow*, [1990] 1 S.C.R. 1075

method of approximating their loss in monetary terms. Further, this compensation was required as a pre-requisite to embarking on the Project in the EIA Licence issued on 27/03/2014.

f. ***Sixth,*** it is a further constitutional violation verging on discrimination under Article 27 of the Constitution for the 5th and 7th Respondents to have proceeded to promptly compensate land owners whose property was compulsorily acquired for the LAPSSET Project after identifying the correct land owners, yet to delay and/or fail to pay the equally agreed compensation for the local fishermen who have suffered loss in the same way more than two years later.

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

h. Are the Petitioners' Cultural Rights threatened by the Project?

305. It is common among all the parties that Lamu Island is designated as a United Nations Educational Scientific and Cultural Organization (UNESCO) World Heritage site. This designation happened in 2001. The Kenyan government itself had designated the Island as a national monument in 1986. In its designation, UNESCO describes Lamu Island in the following terms which put in context the Petitioners' first claim that their right to culture is under serious threat:

Lamu is the oldest and the best-preserved living settlement among the Swahili towns on the East African coast. Its buildings and the applied architecture are the best preserved and carries a long history that represents the development of Swahili technology. The Old Town is thus a unique and rare historical living heritage with more than 700 years of continuous settlement. It was once the most important trade centre in East Africa before other towns such as Zanzibar took over. Since the 19th Century, Lamu has been regarded as an important religious centre in East and Central Africa due to the tarika activities introduced by Habib Swaleh, a Sharif descendant of Prophet Mohamed. There are many descendants of the Prophet in Lamu. Their presence has kept up that tradition, which continues to the present day Lamu in form of annual festivals known as "Maulidi". These festivals are endemic to Lamu and draw the Muslim community from all over East and Central Africa as well as the Gulf. Lamu is an Islamic and Swahili education centre in East Africa. Researchers and scholars of Islamic religion and

Swahili language come to Lamu to study this cultural heritage, which is relatively unchanged. The island town has adopted very little modern technology due to its isolation.

The Old stone town of Lamu has survived into the twenty-first century due to several fortunate circumstances: the remoteness of the area and the absence of roads and vehicles on the island have prevented many irreversible changes associated with modernization…Lamu has been spared the disruption of its society, which is the norm of the impact of Western influences when in contact with the African culture….The inhabitants of Lamu have managed to maintain the age-old tradition of the sense of belonging and social unity.

306. The 5th and 7th Respondents readily acknowledge this description of Lamu as a unique cultural site; and the Lamu Island as the bearer of uniquely recognisable culture. Indeed, in their ESIA Report, the 5th and 7th Respondents refer to Lamu Island as a "virgin" marine ecosystem and presents a diverse floral and faunal make up" which could be negatively impacted, if not properly mitigated, by the Project – including adverse impacts on archaeological, historical and cultural sites.

307. The Petitioners biggest concern regarding culture is that the implementers of the LAPSSET Project did not consult with the local community to hear its concerns on the effects of the construction of the mega-port and mega-city to its culture and demography. They further complain that the implementers of the Project failed to commission a comprehensive assessment of the impacts of the Project on the region's cultural heritage as provided for in Condition 2.1 of the EIA Licence. The Petitioners argue that these two failures constitute distinct violations of the right to culture enshrined in Article 44 as read together with Article 11 of the Constitution of Kenya, and as concretized by various International Treaties to which Kenya is a party and which have become part of the Laws of Kenya by virtue of Article 2(6) of the Constitution. In particular, the Petitioners cite Articles 17(2) of the Banjul Charter; Article 27 of the International Convention Civil Cultural and Political Rights; and various Articles of the UNESCO World Heritage Convention of 1991. Kenya has acceded to all these treaties.

308. In response to these arguments, Mr. Motari for the 1st - 6th Respondents and the 3rd Interested Party argued that the UNESCO heritage sites are not affected, and that there are clear mechanisms in place to protect the heritage sites and culture.

309. In similar vein, Mr. Miller for the 7th Respondent submitted that only 16 acres of the Lamu old Town is inscribed as a UNESCO World Heritage site, yet the Project is located 20km away. Mr. Miller argued that the cultural impact is adequately addressed and appropriate mitigation measures proposed, and that the construction of the first three berths of the proposed Lamu Port does not pose any significant threat, harm or damage to the environment.

310. Thus, the Respondents' and 1st and 3rd Interested Parties' case is that the LAPSSET Project is located 20 kilometres away from the old Lamu town and away from the cultural and historical sites, hence there is no danger at all that it will negatively impact on the culture of the Lamu Island. They further argue that the physical isolation of the Island from the site of the Project is advantageous from the perspective of protecting the unique culture of Lamu Island.

311. Since the parties do not appear to have any significant differences in the meanings and applications they ascribe to the various constitutional and human rights principles related to the right to culture, but only disagree on their application to and implications for the LAPSSET Project, only a short review of these provisions is needed here.

312. The preamble to the Constitution recognizes Kenya's ethnic, cultural and religious diversity. The Constitution of Kenya gives prominence to national values and principles of governance. These include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.

313. Article 11 (1) of the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Respect for indigenous culture is found in several international instruments as well. For example, Principle 20 of the Vienna Declaration, adopted by the 1993 United Nations World Conference on Human Rights, "*recognizes the inherent dignity and the unique contribution of indigenous peoples…and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being.*" It follows that State

actions that erode the cultural uniqueness of indigenous peoples would be contrary to the Constitution and international conventions. Article 27 of the ICCPR guarantees indigenous peoples the right to enjoy their cultures. The United Nations Human Rights Committee has interpreted Article 27 of the ICCPR to include the protection of cultural integrity.[133]

314. Article 44 of the Constitution, on the other hand, guarantees every person's right to use the language, and to participate in the cultural life, of the person's choice, the right to a cultural or linguistic community, to enjoy the person's culture and use the person's language. The Article also guarantees each Kenyan the right to form, join and maintain cultural and linguistic associations and other organs of civil society. In our view, a proper construction of the foregoing provisions would mean according cultural rights the highest respect and protection possible. It is an established part of our Constitutional jurisprudence that the term liberty extends beyond freedom from physical restraint but also extends to interests traditionally protected by our society.

315. It seems clear to us that the Petitioners are aware that the path of economic development and the dynamic nature of culture cannot be denied. Indeed, neither Articles 11 and 44 of the Kenyan Constitution nor the International Conventions cited to us by the Petitioners take the view that culture is static and ossified. Indeed, Article 11 of the Kenyan Constitution speaks of culture specifically in terms of cumulative civilization of the Kenyan people envisages that the culture is dynamic, learned and will continue to grow: culture is not a static condition; it responds dynamically to new factors.

316. Culture, then, is fluid and changes from time to time. It is susceptible to be influenced by many factors such as religion, education, influence from other communities, inter-marriage and urbanization. But there are certain aspects of culture that identify a particular group, their history, ancestry and way of life and this diversity is recognized and protected by the Constitution. We find it useful to cite with approval the words of the Supreme Court of India in ***Keshavananda Bharati vs. State of Kerala***[134] in which it stated:-

Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions,

[133] *U.N. Human Rights Committee, General Comment No. 23 (50) (Art. 27)*, HRI/GEN/1/Rev.1 at 38, adopted Apr. 6, 1994.
[134] [1973] 4 SCC 225.

abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the Constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied ....

317. If the Petitioners understand that the human right to protect and preserve culture is not a commandment to ossify particular artifacts, symbols and behaviours of given group of people at a given time, what is their exact complaint about the violation of or risk of violation of their right to culture that is engendered in the LAPSSET Project?

318. As we understand it, the Petitioners' main concern is that a major project which will include the construction of a major city intended to attract upwards of 1.25 Million people will be built in Lamu. The Petitioners are concerned that these people from diverse cultures will apply pressure upon the cultural and traditional values of the region changing it irreversibly due to the drastic and overwhelming numbers. Such influx of migrant workers from diverse communities, the Petitioners fear, could send the region into a severe culture shock. Additionally, the Petitioners are apprehensive that the dilution of the culture which is the basis for designation of Lamu Island as a world heritage site will threaten the tourist appeal of the area hence further affecting the livelihoods of the local residents.

319. The specific concerns of the Petitioners with regard to culture, therefore, are threefold:
    a. *First*, the Petitioners complain that the implementers of the Project have not engaged in any consultations whatsoever with the local residents of Lamu Island about how to guard against the erosion of their culture during the lifetime of the Project and thereafter and how to preserve the culture of the region despite the projected economic development. Counsel for the Petitioners relied on the Inter-American Court of Human Rights decision in ***Kalina and Lokono Peoples v Suriname***[135] and insisted that "environmental impact assessments must respect the traditions and culture of the indigenous peoples."[136] Counsel reiterated that one of the purposes for such assessments is to ensure the right of the indigenous people to be informed of all proposed projects in their territory.

[135] Inter-Am. Ct. H.R. (Ser. C) No. 309 (Nov. 25, 2015).
[136] Ibid.

b. *Second*, the Petitioners complain that the Government has not taken any positive measures to preserve and promote Lamu Island as a UNESCO World Heritage Site even in the face of the LAPSSET Project with its projected impact on the culture of the region. In particular, the Petitioners are concerned that the Government has failed to draw up a management plan to preserve what is left of the rich legacy of Lamu Island despite repeated declarations by UNESCO that it does so.

c. *Third*, that the implementers of the Project have taken no discernible measures to prepare Lamu Island for this growth in population and to preserve its culture. In particular, the Petitioners are worried that most of the health, educational as well as governmental facilities are still located in the Island meaning that the influx of people into the Island in search of these services will expose the Island to cultural, environmental and infrastructural degradation.

320. Given our specific findings on the quality of public participation done for the first three berths of the proposed Lamu Port and the entire LAPSSET Project in the context of ESIA and SEA, it is no surprise to us that the Petitioners feel that their right to consultation as a specific instantiation of their right to culture and as a form of ensuring that their cultural identity is guaranteed in the context of the Project was violated. The need to consult indigenous communities when planning and implementing development projects which could potentially have an impact on their culture and cultural identity is obligatory. It is heightened, in cases such as this one where the intended infrastructural project is of such magnitude and the culture sought to be preserved so unique and fragile. See, for example, ***Kichwa Indigenous People of Sarayaku v Ecuador***.[137]

321. From our review of the material placed before us and the testimonies of the parties, we make a specific finding, like we did with respect to the general obligation of public participation, that the implementers of the LAPSSET Project did not utilize the quantum of due diligence required to consult the indigenous residents of Lamu Island on the impacts of the Project on their culture. This lack of consultation led to an inadequate cultural impact assessment, and equally insufficient cultural impact mitigation measures.

[137] ICHR, Judgment of June 12, 2012

322. Fortunately, for the Project implementers, Courts and Tribunals internationally have comprehended this obligation to consult indigenous communities about the potential threats to their culture in the context of economic development projects as a dynamic and continuous obligation rather than a static, one-time event. Hence, in the ***Kalina and Lokono Peoples Case***, the concurring opinion of Judges Humberto Antonio Sierra Porto and Eduardo Ferrer Mac-Gregor Poisot, the judges helpfully noted:

Thus, the State obligation in relation to development projects in indigenous or tribal territory arises from the moment at which the State accepts the obligations contained in the provisions of the American Convention, regardless of the moment at which the concession is granted, because as mentioned previously, it includes independent stages. Denying this and understanding prior consultation in a different way, confining it explicitly only to the initial stages of the concession of the project, would lead to the absurd situation of permitting new exploitations that have an immediate impact on indigenous territory and culture, affecting them for the rest of the time that the concession is valid. Evidently, since consultation is a constant process of dialogue, it should not be restricted merely to the initial stages of a project; rather, the obligation arises whenever there is a possible impact on the traditional indigenous or tribal life concerned.[138]

323. In the present case, according to the testimonies by John Francis Dyer and Somo Mohamed Somo Bwana and by the Project implementers own admissions, not much consultation was done with the residents of Lamu Island respecting the need to preserve and protect their culture. This, the Project implementers felt, was because the LAPSSET Project site would be more than twenty kilometres away and the physical isolation of the Island offered sufficient protection for the culture. It is also true, and the Respondents put sufficient materials and evidence before us to persuade us that there will be no infrastructural projects in the Lamu Island itself.

324. The argument that the project site is 20 kilometres away from Lamu Island is not, in our view, adequate proof that the cultural sites are not under threat. During the site visit by the Court, it took us approximately 15 minutes by boat-ride at moderate speed to travel from Lamu Island to the proposed Lamu Port project site and a similar duration to travel back from Mukowe Jetty at the mainland to Lamu Island. Such a duration clearly shows the development is within the precincts of Lamu Island, and as modes of

[138] Joint Concurring Opinion of Judges Humberto Antonio Sierra Porto and Eduardo Ferrer Mac-Gregor Poisot. In Supra Note 130.

communication improve with time, access from either side will certainly take lesser time.

325. The Respondents were under a duty to satisfy the Court that adequate measures have been put in place to safeguard Lamu's rich culture and historical sites. No evidence was tendered to this effect. "Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission - particularly through formal and non-formal education - as well as the revitalization of the various aspects of such heritage.[139]

326. In this regard, after review of the evidence, we agree with the Petitioners that the cultural effects of the planned Lamu mega-city with a projected influx of 1.25 Million migrant workers merely twenty kilometres away, *could* have an impact on the culture of the indigenous community in Lamu Island. As described at the beginning of this section, this indigenous community and its culture is not only of vintage ancestry and fecund history and traditions, it is highly endangered. We are therefore of the view that it was incumbent upon the Project implementers to take specific measures to consult with the indigenous community about the cultural impacts of the Project and co-design specific mitigation measures to address any adverse impacts. To the extent this did not happen, this amounted to a violation of the Petitioners' rights to be consulted, and a consequent infringement of their rights under Articles 11(1) and 44 of the Constitution.

327. Additionally, we make a finding that the Government has failed to draw up a management plan to preserve the rich legacy of Lamu Island so that it can retain its status as a UNESCO World Heritage Site, despite repeated declarations by UNESCO that it does so. This, in our view, amounts to a violation of the right to culture of the indigenous community of Lamu Island, especially when seen in the context of the planned mega-infrastructural project at hand.

328. Finally, and related to the first concern, the Project implementers did not place before the Court sufficient material to persuade us that they are doing enough to prepare the

[139] Ibid

Lamu region for the "cultural shock" which will be inevitable from the drastic influx of the 1.25 Million people in the region. Even if we accept that these people would be separated by a mass of water twenty kilometres apart, some specific, measurable and actionable plan needs to be designed in consultation with the Lamu residents on how to protect the cultural identity of the region during and after the construction of the mega-city.

329. Our conclusion, then, is that the LAPSSET Project if implemented in the manner projected now runs the risk of irreversibly violating the various components of the right to culture of the Petitioners and other indigenous residents of Lamu. In particular, we find and hold as follows:
    a. ***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.
    b. ***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.
    c. ***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.
    d. ***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 mega-city is a violation of the right to culture of the Petitioners and the residents of the region and needs to be remedied.

i. Whether the Petitioners are Entitled to the Reliefs sought in the Petition

330. Given the findings of facts and determinations of law we have reached above, in this section we will consider the appropriate remedies to grant.

331. In the amended Petition, the Petitioners sought the following reliefs:

i. *A declaration that the Petitioner's rights, individually or in association with others, to a clean and healthy environment guaranteed by Article 42 of the Constitution have been and will be contravened if the intended development of a port in Lamu is effected in its present form and that if the Respondents proceed in such form and manner as they have to date they will violate the fundamental rights of the Petitioners as envisaged under Article 42 of the Constitution.*

ii. *A declaration that Petitioners' rights, individually or in association with others, to access to information held by the government and information held by other persons and required for the exercise or protection of any right or fundamental freedom guaranteed by Article 35 of the Constitution have been contravened.*

iii. *A declaration that the Petitioners' rights individually or in association with others, to participate in the cultural life, of the person's choice guaranteed by Article 44 of the Constitution have been and will be contravened if the intended development of a Port in Lamu is effected and which intended development is unlawfully and illegal.*

iv. *A declaration that the Respondents have contravened Article 10 of the Constitution in that the national values and principles of governance set out have not been observed and that decisions regarding and the implementation of the proposed project require the participation and general approval of the people and residents of Lamu.*

v. *A declaration that the 9th Respondent, NEMA has been in breach of the Petitioners' fundamental rights and freedoms under Article 42 of the Constitution failed to discharge its statutory obligation and responsibilities under the Environmental Management and Co-ordination Act, Number 8 of 1999 to safeguard Lamu and its environs against the inevitable large-scale pollution and degradation that will be wrought by the proposed project.*

vi. *An order compelling the 9th Respondent, NEMA, to ensure that all conditions necessary to safeguard the environment including marine ecosystems for present and future generations, are complied with before commencement and during the life of the project.*

vii. *An order of prohibition or injunctions against the Respondents restraining them from undertaking or implementing the proposed project until safeguards and remedies in respect of the subject matter of the declarations above are put in place to the satisfaction of this honourable court.*

viii. *Order of mandamus compelling the Government to discharge their lawful statutory and constitutional obligations by extensively consulting the people of Lamu and its environs, engage credible and reputable local and international independent experts in the appropriate fields, and with their assistance and in consultation with the people of Lamu and its environs who are likely to be or may be affected by the proposed project, prepare and implement protective and remedial measures to avoid and ameliorate the matters complained of in this petition and which are the subject matter if the declarations above.*

ix. *Orders of mandamus compelling the Respondents and the Government of Kenya as a whole pursuant to Article 35 of the Constitution of Kenya to publish disseminate and make available to the people of Lamu and of Kenya, all relevant information about the proposed projects including the contracts involved, the proposed tendering process, the parties owning the land to be acquired for the proposed projects, the purchase of land, services, goods and equipment for the proposed project and the costs involved, and generally to observe principles of good governance, transparency and accountability in the implementation of the proposed project.*

x. *This honourable court to issue such further orders and give directions as it may deem fit to meet the ends of justice and the protection of the Constitutional rights of the Petitioners and the people of Lamu and its environs in the context of the declarations made.*

xi. *The costs of the petition be awarded to the Petitioners as against the Government of the Republic of Kenya and other Respondents.*

332. In their submissions, counsel for the Petitioners urged the Court to grant certain orders beyond the remedies they have specifically stated in the Petition namely:

i. *Quashing the SEA and EIA [Licence] and requiring the project proponents to undertake proper assessments which are objectively undertaken and done in accordance with the law, including by genuinely involving the County Government of Lamu (including in decision-making), Lamu Community and other critical sectors of the public.*

ii. *Suspending the EIA License and requiring that a new EIA license be issued when the new and proper SEA and EIA are completed and strictly in accordance with the findings of those assessments and the law.*

iii. In the alternative to (ii) suspending the license until minimum requirements to be specified by the Court are met and all the existing license conditions are fully complied with.

iv. That the Court retains jurisdiction to supervise its own orders in this case and specify clear timelines when the various conditions it sets out in its orders are to be undertaken.

333. The Petitioners counsel further submitted that given that these proceedings have been occasioned by the failure by the Respondents and 3rd Interested Party's to comply with the law, by the 8th Respondent's dereliction of its constitutional, statutory and fiduciary duty, and failure by the Respondents to mitigate any of the violations during the pendency of this litigation, this court orders that the 1st to 8th Respondents and the 3rd Interested Party pay the Petitioners the costs of this litigation.

334. On the other hand, the Respondents as well as the 1st and 3rd Interested Party urged the court to dismiss the Petition with costs.

335. From our findings, the Petitioners have substantially succeeded. However, we note that they were not materially opposed to the Project, but only to the manner of its implementation which concerns have been affirmed by the court. Additionally, the Court has also taken into account the considerable investment made in the implementation of the Project and the public interest in the continued implementation of the Project. In this connection, we have delicately fashioned the reliefs we have granted below to appropriately respond and remedy the specific violations of the law affecting the Petitioners as well as ensure the proper, lawful implementation of the Project going forward.

336. Indeed, this Court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in ***Minister of Health & Others vs Treatment Action Campaign & Others***[140] thus:

[140] (2002) 5 LRC 216 at p. 249.

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

337. We fully adopt this definition of "appropriate reliefs" and shall deploy it in our disposition of this Petition.

338. Arising from the findings of evidence, conclusions of facts and law, constitutional and statutory interpretations and various pronouncements of law, we have reached above, we make the following orders:

Summary of Findings and Disposition

A. <u>On the Question of Jurisdiction</u>

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.

B. <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**