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Case Class:	Civil
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Milton Stephen Asike Makhandia, Patrick Omwenga Kiage
Citation:	Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR
Advocates:	-
Case Summary:	**Courts do not have jurisdiction to handle a multifaceted claim where another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter exists.** **Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR** **Civil Appeal No. 153 of 2019** **Court of Appeal at Kisumu** **MSA Makhandia, PO Kiage and PO Odek, JJA** **January 31, 2020** **Reported by Chelimo Eunice** ***Jurisdiction*** *- jurisdiction of the Environment and Land Court (ELC) – jurisdiction of National Environment Tribunal (NET) and National Environmental Complaints Committee (NECC) - jurisdiction of the ELC vis-a-vis jurisdiction of NET*

and NECC - whether where a claim was multifaceted, a court could have jurisdiction despite existence of another forum, institution or agency that had been legislatively conferred with jurisdiction to determine the matter - whether the ELC had jurisdiction simply because some of the prayers in a petition were outside the jurisdiction of NET or NECC - whether disputes on validity of and conditions imposed on an Environmental Impact Assessment (EIA) licence were within the competence of ELC or NET and NECC – whether ELC had jurisdiction to hear and determine a matter concerning environmental pollution and procurement of EIA licences - whether ELC had jurisdiction to cancel EIA licence which had not been cancelled by NEMA.

Jurisdiction *– original jurisdiction – appellate jurisdiction - original vis-a-vis appellate jurisdiction – whether the jurisdiction of the Environment and Land Court (ELC) under was original or appellate – whether a claim of alleged violation of a constitutional right ousted the jurisdiction of any and all Tribunals thereby conferring jurisdiction at first instance to the ELC or High Court - whether original jurisdiction could operate to oust the jurisdiction of competent organs that had legislatively been mandated to hear and determine a dispute – Environmental Management and Coordination Act, sections 129 and 130; Physical Planning Act, sections 15, 19 and 38.*

Environmental Law *- environmental project report (EPR) - environmental impact assessment (EIA) study report – distinction between EPR and EIA Study Report - which report was required in order to get the EIA licence – requirement for publication of an EPR - whether non-publication of an EPR in the gazette divested jurisdiction from the National Environment Tribunal - Environmental Management and Coordination Act, 1999, section 58(1); Environmental Management and Coordination Act, section 2; Environmental (Impact Assessment and Audit) Regulations, 2003, section 2.*

Interpretation of statutes *– retrospective or retroactive legislation- principles for determining whether a legislation was retrospective or retroactive – constitutionality of retrospective law –*

how to determine whether a retrospective law was unconstitutional - which environmental law was applicable in 2004 between EMCA,1990, which required submission of an EIA project report in order to obtain an EIA licence and EMCA, 2015 which required submission of an EIA study report instead – whether a party could invoke the provisions of the Constitution in a claim arising from facts which had occurred before the commencement of the Constitution - whether constitutional concept and value of public participation as embodied in the 2010 Constitution was a criterion to be used in the determination of procedural validity of the EIA licence issued on October 19, 2005- Constitution of Kenya, 2010, article 69 (1) (d); Environmental Management and Coordination Act, 1999, section 58(2); Environmental Management and Coordination Act, 2015, section 58(2); Environmental (Impact Assessment and Audit) Regulations, 2003, regulation 10 (2) and (3).

Environmental Law *- environmental impact assessment licence – transfer of – effect of transfer – variation of EIA licence – where EIA licences and variations were cancelled because no EIA studies had been conducted and no EIA Reports had been submitted – when was fresh EIA study report had to be carried out after an EIA licence had been issued - conditions precedent to the requirement of a fresh EIA Report after issuance of a licence – whether the conditions precedent as stipulated in section 64(1)(c) of EMCA, 1999 were applicable to the instant matter where the EIA licence was issued in 2005 – who had the discretion to make a decision whether an EIA licence that had been issued was to be cancelled - Environmental Management and Coordination Act, 1999, section 64 (1) (a).*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to fair hearing – oral hearing - whether the right to a fair hearing and trial would be violated by failure to adduce viva voce evidence before a trial court - whether procedural fairness required an oral hearing in all circumstances – where it was claimed that oral hearing was necessary to ensure fair hearing – circumstances where oral hearing was necessary -*

whether viva voce evidence was a mandatory requirement in petitions for enforcement of fundamental rights and freedoms – whether the urgency of a petition or an alleged violation of a constitutional right was per se by itself a sufficient ground for a court to dispense with viva voce evidence and rely on affidavit evidence - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rule 20.

Civil Practice and Procedure *- pleadings – drafting of pleadings - petitions – requirement for petitions to be pleaded with reasonable precision - where it was claimed that the petition filed in the trial court did not meet the threshold of a constitutional petition to disclose or describe the nature of the complaints of violation of their constitutional rights or threats to such violations with specificity – whether the respondents' petition filed in the trial court was pleaded with reasonable precision - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rules 4 and 10.*

Environmental Law *- Environmental Impact Assessment (EIA) – EIA study – importance of EIA study – environmental pollution – what was required to proof existence of environmental pollution - whether in the absence of an EIA Study, the law presumed proof of threat or harm to the environment without need for any actual evidence of resultant pollution – whether the trial court erred in deducing and arriving at conclusions of fact on river pollution without any scientific, empirical and sampling evidence to prove point pollution and the causal link to the appellants.*

Civil Practice and Procedure *– judgments - retroactivity of court decisions – nature and import of retroactivity of court decisions – whether the decision in National Environment Tribunal v Overlook Management Limited, Silver Sand Camping Site Limited, NEMA & 4 others, that granted persons other than project proponents locus standi to access the NET, was retroactive.*

Constitutional Law *– public interest litigation – what consisted public interest litigation – where*

only personal reliefs were claimed in a petition purporting to represent the public - whether a matter would be considered public interest litigation where the relief sought was of a personal nature.

Civil Practice and Procedure *- presumption of regularity – presumption of regularity in regards to public officials - who bore the burden of proof to rebut the presumption of regularity.*

Brief facts

On October 25, 2018, the 1st, 2nd and 3rd respondents filed a constitutional petition against the appellants before the Environment and Land Court (the trial court) seeking several declaratory orders *inter alia* that their right to a clean and healthy environment had been violated; a declaration that the 1st to 3rd appellants (the appellants) illegally acquired environmental impact assessment (EIA) licences for Kibos Sugar and Allied Factory and a permanent injunction to restrain the appellants from continuing with operations of their factories and or milling sugar cane. They claimed, among others, that the appellants were polluting the environment by discharging raw effluent into Rivers Nyamasaria, Kibos and Lie Lango

The appellants denied all the allegations, and among others, contested the jurisdiction of the trial court to hear and determine the dispute at hand averring that it had no jurisdiction over the matters in dispute. Upon hearing the parties to the petition, the trial court, in a judgment dated July 31, 2019 allowed the petition. Aggrieved by the judgment, various parties filed a total of six separate appeals against the judgment. The grounds of appeal included that the trial court erred in holding that it had jurisdiction to hear and determine the petition and in issuing a permanent injunction against the appellants thereby stopping their operations without calling for *viva voce* evidence.

Issues

i. What principles guided first appeals to the Court of Appeal?
ii. Whether where a claim in a petition or suit

was multifaceted, a court could have jurisdiction despite existence of another forum, institution or agency that had been legislatively conferred with jurisdiction to determine the matter.

iii. Whether disputes on procurement of and validity of and conditions imposed on an Environmental Impact Assessment (EIA) licence were within the competence of the Environment and Land Court (ELC) or National Environment Tribunal (NET) or National Environmental Complaints Committee (NECC).

iv. Whether the Environment and Land Court (ELC) had jurisdiction to cancel environmental impact assessment (EIA) licence which had not been cancelled by the National Environment and Management Authority (NEMA).

v. Whether original jurisdiction could operate to oust the jurisdiction of competent organs that had legislatively been mandated to hear and determine a dispute.

vi. Whether *viva voce* evidence was a mandatory requirement in petitions for enforcement of fundamental rights and freedoms.

vii. Whether the right to a fair hearing and trial would be violated by failure to adduce *viva voce* evidence before a trial court.

viii. Whether in the absence of an environmental impact assessment study, the law presumed proof of threat or harm to the environment without need for any actual evidence of resultant pollution.

ix. What were conditions precedent to the requirement of a fresh EIA Report after issuance of an EIA licence?

x. Which environmental law was applicable in 2004 between Environmental Management and Coordination Act (EMCA),1990, which required submission of an EIA project report in order to obtain an EIA licence and EMCA, 2015 which required submission of an EIA study report instead?

xi. Whether public participation was a criterion to be used in the determination of procedural validity of an EIA licence issued before the promulgation of the 2010 Constitution.

xii. Whether closure of factories was the only legal and effective way to enforce constitutional articles and statutory provisions guaranteeing the right to a clean and healthy environment.
xiii. Whether a matter would be considered public interest litigation where the relief sought was of a personal nature.

Relevant provisions of the law

Environmental Management and Coordination Act, 1999

Section 58 (2);

"The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs."

Environmental Management and Coordination Act, 2015

Section 58 (2);

"The proponent of any project specified in the second schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority. Provided the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases."

Section 129 (1):

(1) Any person who is aggrieved by:

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder:

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder:

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder:

may within sixty days after the occurrence of the event against which he is dissatisfied appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

Environmental (Impact Assessment and Audit) Regulation, 2003,

Regulation 7;

7. (1) A proponent shall prepare a project report stating -

(a) the nature of the project;

(b) the location of the project including the physical area that may be affected by the project's activities;

(c) the activities that shall be undertaken during the project construction, operation and decommissioning phases;

(d) the design of the project;

(e) the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal;

(f) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project;

(g) an action plan for the prevention and management of possible accidents during the project cycle;

(h) a plan to ensure the health and safety of the workers and neighbouring communities;

(i) the economic and socio-cultural impacts to the local community and the nation in general;

(j) the project budget; and

(k) any other information the Authority may require.

Regulation 10:

(1) On determination of the project report, the decision of the Authority, together with the reasons thereof, shall be communicated to the proponent within forty-five days of the submission of the project report.

(2) Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule to these Regulations.

(3) If the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with these Regulations.

(4) A proponent who is dissatisfied with the Authority's decision that an environmental impact assessment study is required may within fourteen days of the Authority's decision appeal against the decision to the Tribunal in accordance with regulation 46.

Regulation 17

1. *During the process of conducting an environmental impact assessment study under these Regulations, the proponent*

shall in consultation with the Authority, seek the views of persons who may be affected by the project.

2. *In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall;*

(a) Publicize the project and its anticipated effects and benefits by-

i. posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

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

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

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

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

(d) ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority"

Held:

1. Being a first appeal, the court had to analyze and re-assess the evidence on record and reach its own conclusions. An appeal to the court from a trial by the High Court was by way of retrial and it was guided by various principles. The court had

to consider evidence, evaluate it itself and draw its own conclusions though it had to bear in mind that it had neither seen nor heard the witnesses and had to make due allowance in that respect. In particular, the court was not bound necessarily to follow the trial court's findings of fact if it appeared either that it had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness was inconsistent with the evidence in the case generally.

2. Regarding the relevance and weight of the additional evidence, the Hansard record of the proceedings of the County Assembly of Kisumu for October 30, 2019 did not contain a specific resolution that the documents filed in court by the appellants were authentic and genuine. The issue of alleged forgery of the County Assembly Report of Water, Environment and Natural Resources Committee documents was not an issue for determination by the court. Noting that the authenticity of the two documents/report allegedly from the County Assembly of Kisumu was raised on October 30, 2019 before the County Assembly, and in the absence of a specific resolution by the Assembly on the authenticity and genuineness of the documents, the County Assembly of Kisumu documents that were produced in court as additional evidence pursuant to the ruling delivered on October 9, 2019 had no probative value. In addition, the said documents were not technical reports prepared by experts on environmental pollution. The County Assembly was not a competent organ under the Environmental Management and Coordination Act, (EMCA) that could make a finding that environmental degradation had taken place.
3. As regards the National Environmental and Management Authority (NEMA) report forwarded to the Clerk of the National Assembly vide letter dated April 18, 2019, all parties agreed that the report was

authentic and was prepared by NEMA. The report was thus relevant and had probative value.

4. A court's jurisdiction flew from either the Constitution or legislation or both. A court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law. Where the Constitution exhaustively provided for the jurisdiction of a court of law, the court had to operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation.
5. Not each and every violation of the law had to be raised before the High Court as a constitutional issue. Where there existed an alternative remedy through statutory law, then it was desirable that such a statutory remedy had to be pursued first.
6. The exposition that a court could have jurisdiction to handle a multifaceted claim in a petition or suit despite existence of another forum, institution or agency that had been legislatively conferred with jurisdiction to determine the matter, was incorrect. Such an exposition implied that jurisdiction could be conferred through the art and craft of drafting of pleadings, that all that a litigant needed to do was to draft pleadings such that claims were raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. That promoted forum shopping.
7. Jurisdiction could not be conferred by way of judicial craft and innovation. Jurisdiction could not be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute. Thus, the trial court erred in law in finding that the Environment and Land Court (ELC) had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the National Environment Tribunal (NET) or National Environmental Complaints Committee (NECC). A party or litigant could not be allowed to confer jurisdiction

on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings.

8. Even if a court had original jurisdiction, the concept of original jurisdiction did not operate to oust the jurisdiction of other competent organs that had legislatively been mandated to hear and determine a dispute. Original jurisdiction was not an ouster clause that ousted the jurisdiction of other competent organs. Neither was original jurisdiction an inclusive clause that conferred jurisdiction on a court or body to hear and determine all and sundry disputes.
9. Original jurisdiction meant the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To that end, where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure had to be strictly followed.
10. The jurisdiction of the ELC was appellate under section 130 of EMCA. The ELC also had appellate jurisdiction under sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction was not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others could not by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. Original jurisdiction was not the same thing as unlimited jurisdiction.
11. A court could not arrogate itself an original jurisdiction simply because claims and prayers in a petition were multifaceted. The concept of multifaceted claim was not a legally recognized mode for conferment of jurisdiction to any court or statutory body. In addition, section 129 (3) of EMCA conferred power upon the NET to *inter alia* exercise any power which could have been exercised by NEMA or make such other order as it deemed fit. The provisions of section 129 (3) of EMCA was an all-encompassing provision that conferred at first instance jurisdiction upon the Tribunal to consider the prayer that dealt with

constitutional rights and freedoms in the petition. It was never the intention of the Constitution makers or legislature that simply because a party had alleged violation of a constitutional right, the jurisdiction of any and all Tribunals had to be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.

12. The competent organ with original jurisdiction to hear and determine the petition before the trial court, which petition was about whether the appellants were polluting the environment and whether the appellants' EIA licences were lawfully procured, was NET or the NECC. To that extent, the trial court erred in usurping the jurisdiction of the NET and or the NECC. Further, the trial court in usurping the jurisdiction of the NET negated and rendered otiose the legal effect of section 130(5) of EMCA which made the decisions of the ELC on appeal to be final. Having erred in exercising original jurisdiction in the matter, the trial court erred in rendering superfluous and ineffectual the provisions of section 130(5) of EMCA.
13. In civil cases, judicial decisions ordinarily were retroactive in application. Such retroactivity was a consequence of the nature and function of the judicial decision-making process. Retroactivity was founded on the notion that a judicial decision enunciated the law as it had always existed. To that end, the decision in *National Environment Tribunal v Overlook Management Limited, Silver Sand Camping Site Limited, NEMA & 4 others,* that granted persons other than project proponents *locus standi* to access the NET, was retroactive and the respondents misapprehended that they had no right to access the NET.
14. Jurisdiction on a court or tribunal was not conferred or divested by knowledge or lack of knowledge on the part of a litigant. Jurisdiction was a question of law and not an issue to be inferred or determined by knowledge on the part of a litigant. Thus, the non-publication of the EIA Project report in the gazette did not divest

jurisdiction from the tribunal.

15. Disputes on validity of and conditions imposed on an EIA licence were within the competence of NET and NECC. The alleged violation of the 1st, 2nd and 3rd respondents' constitutional rights was ancillary to and riding on their central complaint.
16. As a general rule, there was no automatic right to an oral hearing. Procedural fairness did not require an oral hearing in all circumstances. In determining the form of a hearing, the critical question was whether meaningful participation was allowed by the process chosen by the decision-maker. It also could not be said that an oral hearing was always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognized that meaningful participation could occur in different ways in different situations.
17. Although oral hearing was not always required, where a serious issue of credibility was involved, fundamental justice required that credibility be determined on the basis of an oral hearing.
18. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, *(Mutunga Rules)* required one to approach the court by way of a petition. The 1st, 2nd and 3rd respondents' petition before the trial court was founded on enforcement of the right to a clean and heathy environment as guaranteed in articles 42 and 43 of the Constitution. It followed that the respondents correctly instituted the suit by way of petition. Rule 20 of the *Mutunga Rules* spelt out the manner in which a petition could be heard and determined.
19. The record showed that the trial court gave directions that the petition was to be heard by way of affidavit evidence and written submissions. No application was made by any party that the petition or part thereof be heard by oral evidence. No objection was raised by the appellants or any party on the propriety of the directions given by the trial court. In the absence of any

challenge to the directions given by the trial court, the directions given was in conformity and consonance with rule 20(1) of the Mutunga Rules.

20. It could be wiser for the parties to give *viva voce* evidence since the same had a way of bringing out the facts more clearly, particularly in a contested matter. There were cases where the leading of evidence would not be necessary, particularly where the facts giving rise to the request were common cause. In such a case, it would serve no meaningful purpose for the parties to be required to give *viva voce* evidence. Where, however, the facts were not common cause, the parties had to, as a general rule, be required to give evidence.
21. Where there was no real, substantial and material dispute of fact which made it impossible to dispose of a matter without resort to *viva voce* evidence, the factual differences could be decided on the papers by affidavit evidence.
22. The appellants had not indicated the nature and type of witnesses and evidence that they would have called for the trial court to consider if *viva voce* evidence was necessary. They had not demonstrated what prejudice they had suffered as a result of the trial court not taking *viva voce* evidence. Further, no application was made to adduce oral evidence and no objection was raised against the directions given by the trial court. For those reasons, failure by the trial court to conduct the hearing by way of *viva voce evidence* did not vitiate the trial and proceedings that led to the judgment of the court.
23. A right to a hearing was not exclusively and primarily a right to be heard by way of oral evidence. Oral or personal hearing was not an integral part of fair hearing unless circumstances were so exceptional that without oral hearing, a person could not put up an effective defence or advance his/her/its case.
24. When facts in issue in a case were strongly contested, that would be a good basis for a court to allow *viva voce*

evidence to enable cross-examination to separate the wheat from the chaff. There were two ardently contested issues on the procedure through which the appellants acquired their EIA licences and whether the rivers were being polluted by the appellants. The two issues ought to have been determined by *viva voce* evidence. Nonetheless, the trial court gave directions that the case proceeded by way of affidavits and written submissions and no objection was made by either party to the directions. The trial court had a discretion in the matter and it had not been demonstrated that the discretion was perversely exercised in proceeding by way of affidavit and not by oral evidence especially when the latter was not sought. That would not be interfered although there was probably something to be gained through adoption of *viva voce* evidence.

25. The appellants had not demonstrated any exceptional circumstance that would vitiate the directions given by the trial court to proceed by way of affidavit evidence and written submissions. The trial court gave directions on how the petition was to be heard. It exercised discretion. At no time during the proceedings did the appellants apply for *viva voce evidence* to be adduced. In addition, the appellants had not pointed to court's satisfaction that issues of credibility of the deponents of the various affidavits filed in court was raised to justify receiving oral evidence to test the veracity of their depositions. Thus, the appellants' right to a fair hearing or right to be heard by way of *viva voce* evidence was not violated.
26. Neither the urgency of a petition nor an alleged violation of a constitutional right was *per se* by itself a sufficient ground for a court to dispense with *viva voce evidence* and rely on affidavit evidence. If a party applied to court for *viva voce* evidence to be taken, the court ought to carefully consider the application and if persuaded to conduct the hearing by way of *viva voce* evidence unless for reasons to be recorded the court direct otherwise.

27. In the petition dated October 25, 2018 filed in the trial court, the respondents specifically averred, *inter alia,* that their right to a clean and healthy environment as guaranteed by articles 42 and 43 of the Constitution had been violated. They also explicitly identified that section 58 (1) of the EMCA, 1999 and regulations 7, 8, 17, 19, 20, 22, 24 and 25 of the Environmental (Impact Assessment and Audit) Regulations 2003 (the Regulations) were violated. They pleaded with reasonable precision and specificity the constitutional articles and the statutory provisions they alleged were violated by the appellants, hence there was no merit in the contestation that the petition was not precise.
28. Whether there was threat, harm or degradation of the environment was a question of fact. A presumption of fact meant presumption established from another fact or group of facts. In the instant matter, even if it were proved that there was no EIA study, the absence of such a study could not support a presumption or finding of fact that there was threat, harm or degradation of the environment. There was no presumption of threat or harm to the environment simply because no environmental impact assessment study had been done. There was no legal principle, a binding judicial authority or a statutory provision that established such a presumption.
29. Even though the trial court held that the respondents had proved that the appellants were polluting and degrading the environment, a re-examination of the record revealed that there was no scientific evidence on record to prove that there was air pollution and that aquatic life in the water bodies in the neighborhood was affected through the activities of the appellants. There was no chemical analysis conducted by the respondents, more particularly NEMA, to prove that the waters of the rivers had been polluted. Other than the observations made by NEMA’s inspectors, no scientific causal

link between the activities of the appellants and the alleged pollution of the rivers was proven. The sources of river or water pollution could be considered to be non-point and point. Point indicated the existence of pollutants coming from one source. River pollution came from a variety of different sources, including agricultural operations, industrial discharge, wastewater treatment plants and storm water runoff, that carried pollutants into waterways. All those were non-point sources of pollution.

30. There was no scientific empirical evidence on record to prove point pollution and its causal link to the activities of the appellants. No sampling technique to prove river pollution was tendered in evidence. Above all, the alleged deleterious effect of the vinasse to the environment was not scientifically proven and no expert report on the effect of vinasse to the environment was produced in evidence.
31. Further, it was an incorrect deduction and conclusion of fact to make a finding that the fact that the respondents had raised their complaints over raw effluent discharge into the environment by the appellants' years before filing the petition was proof of environmental degradation. Proof that a complaint had been raised years before was not proof of environmental degradation. Pollution was primarily proved by empirical, technical and scientific evidence and not by lay man opinion testimony or depositions. The trial court erred in deducing and arriving at conclusions of fact that the appellants were responsible for river pollution without any scientific, empirical and sampling evidence to prove point pollution and the causal link to the appellants.
32. NECC was a competent organ authorized by statute to conduct investigation on any alleged environmental degradation. NECC on its own motion investigated complaints of environmental degradation due to discharge of effluent into river Nyamasaria by the 3rd appellant. The finding as per a

report dated October 5, 2017 were that there was a black effluent being discharged from a pipe near the distillery factory into River Nyamasaria through the southern storm drain. There was no scientific evidence to prove what the black effluent was and if the same was deleterious to the environment. The source of the black effluent was not unequivocally identified and stated. Thus, point pollution was not proved.

33. The trial court did not have the benefit of the additional evidence in form of the NECC compliance report forwarded to the clerk of the National Assembly. Further, recalling the need for continuous monitoring of compliance, the court ordered that NEMA and or NECC had to continuously conduct inspection at the appellants' factories to monitor compliance with environmental standards.
34. The definition, meaning and content of an Environment Project Report (EPR) and EIA study report was contained in the EMCA as well as in the the Regulations. Section 2 of EMCA as well as section 2 of the Regulations defined a project report to mean a summary statement of the likely environmental effects of a proposed development. On the other hand, an EIA was defined to mean a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment. Regulation 2 of the Regulations defined an EIA study report to mean the report produced at the end of the environmental impact assessment study process. On the other hand, an environmental audit was defined in section 2 of EMCA to mean a systematic, documented, periodic and objective evaluation of how well environmental organization, management and equipment were performing in conserving or preserving the environment.
35. An EPR was distinct from an EIA study report. The documents were very different with different functions addressing different requirements of the statute. A reading of

section 58 (1) of EMCA, 1999 indicated that as at 2004, all that the 3rd appellant was required to submit to NEMA was a project report. A project report was a summary that was generated after an EIA study. Under EMCA, 2015 amendments, all proponents of a project were required to submit a full EIA study report. The EMCA, 2015 amendments did away with the requirement to submit a project report instead a full EIA study report was the one to be submitted. Thus, in 2004, the 3rd appellant was required to submit to the 4th appellant a project report and not an EIA study report.

36. In law, there was a presumption of regularity. Under that presumption, a court presumed that official duties had been properly discharged and all procedures duly followed until the challenger presented clear evidence to the contrary. There was a presumption that all acts done by a public official had been done lawfully and that all procedures had been duly followed. The presumption of regularity was a presumption that executive officials had properly discharged their official duties. The presumption was captured in the ancient latin maxim “omnia praesumuntur rite esse acta,” which roughly translated meant all things were presumed to have been done rightly.
37. Applying the presumption of regularity, the starting point was that NEMA acted lawfully and procedurally in issuing the various EIA Licences to the appellants. The burden of proof to rebut the presumption of regularity was upon the respondents. The evidence required to rebut the presumption of regularity had to be cogent, clear and uncontroverted. The presumption of regularity could not be rebutted through conflicting interpretation of a statutory or regulatory provision. Liability for any action could not be founded on conflicting interpretation of statute.
38. The respondents did not lead cogent, undisputed factual evidence to dislodge the presumption of regularity. In arriving at

its decision, the ltrial court erred in failing to take into account and consider the role and place of presumption of regularity in execution of official duty by NEMA when the EIA Licences were issued. The trial court erred and failed to give sufficient weight to the provisions of regulation 10 (2) and (3) of the Regulations. In so doing, it erred and failed to bear in mind that the discretion in regulation 10 (2) and (3) of the Regulations was vested upon NEMA and not the trial court. A court could not usurp the discretionary powers vested upon NEMA and substitute its own decision for that of NEMA.

39. The issue of validity of the EIA licence No. 0000259 (the licence) issued to the 3rd appellant by NEMA on October 19, 2005 was partially to be determined by the concept of retroactivity of legislation. A retroactive or retrospective law was one that took away or impaired vested rights acquired under existing laws, created new obligations, imposed new duties, or attached a new and different legal effect to transactions or considerations already past. Settled principles of legislative construction presumed that legislation was not intended as retroactive unless its language expressly made it retroactive.
40. Whether or not legislation operated retrospectively depended on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, courts were guided by certain rules of construction. One of these rules was that if the legislation affected substantive rights it could not be construed to have retrospective operation unless a clear intention to that effect was manifested, whereas if it affected procedure only*, prima facie* it operated retrospectively unless there was a good reason to the contrary. But in the last resort, it was the intention behind the legislation which had to be ascertained and a rule of construction was only one of the factors to which regard had to be had in order to ascertain that intention.

41. As regards the licence, the procedural and constitutional validity of the Licence was to be determined by the law as it was on October 19, 2005 when it was issued. As at October 19, 2005, the environmental legislation that was in force was the EMCA, 1999 and not the EMCA, 2015 amendments. The Constitution that was in force was the repealed Constitution and not the 2010 Constitution.
42. For non-criminal legislation, the general rule was that all statutes other than those which were merely declaratory or which related only to matters of procedure or evidence were *prima facie* prospective, and retrospectivity was not to be given to them unless, by express words or necessary implication, it appeared that that was the intention of the legislature. A retroactive law was not unconstitutional unless it:

    i. was in the nature of a bill of attainder;
    ii. impaired the obligation under contracts;
    iii. divested vested rights; or
    iv. was constitutionally forbidden.

43. In evaluating the evidence on record and arriving at its decision, the trial court stated that it relied on the second schedule to the EMCA. However, it did not specify whether it was relying on section 58 (2) of EMCA, 1999 or section 58 (2) of EMCA as amended in 2015. The trial court misapprehended fact that the 3rd appellant obtained the licence based on a project report submitted to NEMA, thereby applying section 58 (2) of EMCA, 2015 amendments to determine the validity of the licence. The trial court ought to have applied section 58 (2) of EMCA, 1999 which required the 3rd appellant to submit a project report and not an EIA study report.
44. The trial court erred in retroactively applying the EMCA, 2015 amendments in determining the procedural validity of the licence. No EIA study was required in relation to the project report submitted to NEMA in 2004 upon which the licence was issued on October 19, 2005.

45. The promulgation of the 2010 Constitution did not render invalid and unconstitutional the EIA Licences that had been issued by NEMA under EMCA, 1999 prior to the 2010 Constitution. A party could not invoke the provisions of the Constitution in a claim arising from facts which had occurred before the commencement of the Constitution unless it was expressly stated that the constitutional provision in question was retroactive.
46. The trial court erred and failed to appreciate that as at October 19, 2005 when the licence was issued, the relevant Constitution was the repealed Constitution and not the 2010 Constitution. The constitutional concept and value of public participation as embodied in article 69 (1) (d) of the 2010 Constitution was not a criterion to be used in the determination of procedural validity of the licence.
47. The concept of public participation was incorporated into the Regulations, by Legal Notice No. 101 of June 13, 2003. Pursuant to regulation 17 of the Regulations, public participation was envisaged and required in the process of conducting an EIA. As of 2004, when the 3rd appellant applied for the licence, NEMA did not require it to prepare an EIA study. There was no evidence on record indicating that the 3rd appellant was required by NEMA to conduct an EIA study after the project report had been submitted. The trial court, thus, erroneously held that public participation was required for the 2004 Project report submitted by the 3rd appellant to NEMA when NEMA did not require an EIA to be conducted. The trial court also erred in finding that the 3rd appellant ought to have submitted an EIA study in 2004.
48. Regulation 10 (2) and (3) of the Regulations had to be given meaning. When NEMA issued the licence pursuant to its power under regulation 10 (2) of the Regulations, it did not require the 3rd appellant to conduct an EIA study. Thus, NEMA was satisfied that the project report submitted by the 3rd appellant in 2004

indicated that the project would not have a significant impact on the environment and that the said project report disclosed sufficient mitigation measures.

49. In addition, a reading of the licence indicated that the 3rd appellant's project report dated January 30, 2004 was reviewed by NEMA and the licence was lawfully and procedurally issued. Thus, the trial court's conclusion that the licence was issued unprocedurally, unlawfully and unconstitutionally was not supported by the evidence on record and the law applicable as at October 19, 2005.
50. The trial court cancelled the licences nos. 0000151. 000042 and 000043 variation because no EIA studies had been conducted and no EIA reports had been submitted. Section 64(1)(a)(b)(c) of EMCA, gave scenarios when fresh EIA study report had to be carried out after a licence had been issued. Section 64(1)(a) of EMCA, 1999 required a fresh EIA Report when; there was a substantial change or modification in the project or in the manner in which the project was being operated; the project possessed environmental threat which could not be reasonably foreseen at the time of the study, evaluation or review; if it was established that the information or data given by the proponent in support of his application for an EIA licence under section 58 of EMCA was false, inaccurate or intended to mislead.
51. Section 64 (1) of EMCA imposed conditions precedent to the requirement of a fresh EIA Report after issuance of a licence. On whether the conditions had been met, the only evidence on record was the increased capacity of sugar production and power generation. Founded on the evidence that there was increased and expanded capacity for sugar production and power generation, the trial court arrived at the conclusion that a fresh EIA Report was mandatory and required under section 64(1) of EMCA. The record did not show that any information or data that had been provided by the 3rd appellant in 2004 was false, inaccurate or intended to

mislead. Therefore, the conditions precedent as stipulated in section 64 (1) (c) of EMCA, 1999 were inapplicable to the instant matter.

52. In arriving at its decision, the trial court ignored the provisions of section 64 (3) of EMCA, 1999 which stipulated that where NEMA had directed that a fresh environmental impact assessment be carried out, any licence previously issued would be cancelled, revoked or suspended by NEMA. The discretion to make a decision whether a licence that had been issued was to be cancelled was with NEMA. NEMA neither cancelled nor revoked the EIA licences but instead approved the variations. A discretion once exercised by a competent organ under the EMCA, could only be appealed against to the NET. The trial court erred in substituting his own exercise of discretion and setting aside a discretion already exercised by NEMA in not cancelling the appellants EIA licences. The trial court did not have jurisdiction to cancel the licence as the decision of NEMA could only be challenged pursuant to section 129 (1) (a) (b) or (c) of the EMCA by way of appeal to NET.
53. Further, the 3rd appellant had completed and submitted a detailed compliance plan of its activities in regard to pollution, prevention and sustainability of the ecological systems within the area. That *per se* fulfilled the condition in section 64(1)(b) of EMCA, 1999. From the interpretation of sections 129, 58(2) and 64 of the EMCA, 1999, had NEMA's compliance status report of April 2019 been placed before the trial court, it would have found that there was compliance with the requirement for an environmental management plan and that mitigation measures had been undertaken satisfactorily.
54. There was no evidence on record demonstrating that the conditions precedent for calling of a fresh EIA report under sections 64(1)(a)(b) and (c) of EMCA were fulfilled. The trial court erred in

applying section 64 of EMCA without satisfying himself with cogent reasons that the section was applicable and that the conditions precedent to the application of the section had been fulfilled. The trial court erred in ursurping and exercising a discretion vested upon NEMA and further erred in exercising original jurisdiction when the court only had appellate jurisdiction.

55. The appellants had already complied with the restoration order issued by NEMA. That was evident from the additional evidence contained in NEMA compliance and status report submitted to the clerk of the National Assembly vide the letter dated April 18, 2019. Thus, the restorative and demolition orders issued by the trial court in so far as pollution and environmental degradation was concerned had been overtaken by events.
56. There was no evidence on record to prove that *per se* the structures on the appellants' premises were responsible for environmental degradation. In principle, a structure on a property could be used for a purpose that did not threaten or endanger the environment. That being so, it was injudicious to order demolition of the appellants' structures without proof that the structures *per se* were the cause of pollution.
57. There were other innovative methods of ensuring that court orders on environmental protection were implemented. One such innovative relief was a continuing mandamus. Another example included monitoring committees constituted to implement court orders. It was, thus, not the case that closure and demolition orders were the only effective ways to protect and conserve the environment.
58. The licence was issued to the 3rd appellant way back on October 19, 2005. The petition before the trial court was filed in 2018, thirteen years after the licence was issued. The appellants had been operating and undertaking the project for all those years with approval and licences issued by

NEMA. A pertinent consideration was whether NEMA and the trial court could reopen and cancel a licence issued over thirteen years ago when section 129(1) of the EMCA expressly imposed a sixty-day limitation period. The appellants derived rights and incurred obligations and a legitimate expectation from the said EAI licence. It would well be that the doctrines of estoppel and legitimate expectation would apply against NEMA in respect of the EIA licences that were issued to the appellants.

59. There was evidence on record that; the appellants had complied with the restorative orders issued by NEMA; the NECC being the competent organ charged with investigating pollution complaints recommended continuous monitoring of the appellants' operations; NECC recommended the uplifting of the order closing the appellants' factories. The court, thus, affirmed and confirmed recommendations by NECC as the technical competent organ. The demolition and closure orders issued by the trial court were disproportionate and inappropriate in the circumstances of the case. The restorative, injunctive and demolition orders issued by the trial court for the reason that the restorative order as related to pollution and mitigation of environmental damage had been complied with as per NEMA's Report of April 18, 2019.
60. The trial court's declaratory order that NEMA and 4th appellant had failed in their statutory duties and had violated the provisions of section 108 of EMCA was not supported by the evidence on record. On the contrary, there was evidence that upon complaints and allegations of river pollution being raised by the 1st, 2nd and 3rd respondents, NEMA, the NECC and the 4th appellant independently visited the locus in quo to investigate the complaints. The evidence revealed that NEMA went further and issued restoration and closure orders. The 4th appellant's Committee also visited the locus in quo and prepared its reports which were on record.

61. There was no cross-appeal, thus, the trial court did not err in failing to award compensatory damages to the respondents.
62. The project report submitted by the 3rd appellant to NEMA in 2004 had no significant impact on the environment or alternatively, the EPR disclosed sufficient mitigation measures. There was no sufficient basis to fault the action of NEMA to issue the 3rd appellant with EIA licence No. 0000259 upon the EPR without an EIA study report.
63. The respondents did not lead an iota of evidence that individually they had suffered any injury. There was nothing like a presumption of damage or injury because there was no EIA study report. The respondents were claiming compensatory damages for Ksh. 100,000,000/- (One Hundred Million). That *per se* meant that the respondents were pursuing personal compensation and were neither pursuing nor advancing public interest litigation.
64. NEMA was a statutory body charged with the responsibility of issuing EIA licences. In the instant matter, NEMA issued EIA licences to the appellants. However, in this appeal, NEMA had prevaricated and disowned the lcences. A public body could not issue a licence and then turn around and disown the same. Such a conduct had to be condemned by way of costs.

Appeal allowed, the judgment, declaratory orders and the decree of the trial court were set aside

Orders

i. Order that the National Environment and Management Authority (NEMA) and NECC were to continuously conduct inspection at the 1st, 2nd and 3rd appellants' factories to monitor compliance with environmental standards.
ii. Order compelling the 1st, 2nd and 3rd appellants to annually or as directed by NEMA or other competent organ, conduct an environmental audit of its project and activities and submit a Report to NEMA or

	any other competent organ as directed by NEMA or NECC or applicable law. iii. The 1st, 2nd 3rd and 4th respondents were to jointly and severally bear the costs of the appeal and the costs before the trial court. *The instant judgment was delivered pursuant to rule 32(3) of the Court of Appeal rules as Odek, J.A. sadly passed on before the delivery of the Judgment.*
Court Division:	Civil
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	Petition No. 8 Of 2018
Case Outcome:	Appeal allowed
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJA)

CIVIL APPEAL NO. 153 of 2019

BETWEEN

KIBOS DISTILLERS LIMITED.....1ST APPELLANT

KIBOS POWER LIMITED.....2ND APPELLANT

KIBOS SUGAR & ALLIED INDUSTRIES LIMITED.....3RD APPELLANT

COUNTY GOVERNMENT OF KISUMU.....4TH APPELLANT

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS.....5TH APPELLANT

AND

BENSON AMBUTI ADEGA.....1ST RESPONDENT

ERICK OTIENO OPIYO.....2ND RESPONDENT

BETHER ATIENO OPIYO.....3RD RESPONDENT

NATIONAL ENVIRONMENTAL & MANAGEMENT AUTHORITY (NEMA).....4TH RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Kisumu (S.M. Kibunja, J.) dated 31st July 2019 in PETITION NO. 8 OF 2018)

JUDGMENT OF ASIKE-MAKHANDIA, JA

I affirm the right to a clean and healthy environment as guaranteed in **Article 42 of the Constitution**. I will not shy **away to direct polluters of the environment to follow constitutional, statutory and regulatory norms** for the protection, preservation and conservation of the environment. Consequently, I am not averse to ordering National and County implementing agencies to discharge their constitutional and statutory obligations to protect the environment in appropriate cases.

On 25th October 2018, the 1st, 2nd and 3rd respondents filed a constitutional petition against the appellants before the Environment and Land Court (ELC) seeking several declaratory orders *inter alia* that their right to a clean and healthy environment as guaranteed by **Articles 42** and **43** of the **Constitution** had been violated; a declaration that the 1st to 3rd appellants illegally acquired Environmental Impact Assessment (EIA) Licences for Kibos Sugar & Allied Factory; a permanent injunction to restrain the 1st to 3rd appellants from continuing with operations of their factories and or milling sugar cane; an order of environmental restoration requiring the 1st to 3rd appellants to demolish any structures erected on LR No. 654/23 and LR No. 11273 in Kibos area; and a

declaration that the failure by the 4th respondent and the 4th appellant to stop the degradation of the environment by the 1st to 3rd appellants was unconstitutional, illegal and contravened the provisions of **Section 108** of the **Environmental Management and Coordination Act, 1999** and **Articles 3, 10** and **47** of the **Constitution**.

In the Petition, the 1st, 2nd and 3rd respondents further sought compensatory damages for violation of their right to a clean and healthy environment guaranteed under **Articles 43, 46** and **47** of the **Constitution**.

The 1st, 2nd and 3rd respondents claim was that the 1st to 3rd appellants were polluting the environment by discharging raw effluent into Rivers Nyamasaria, Kibos and Lie Lango as evidenced by the National Environmental Complaints Committee (NECC) report dated 5th October 2017. That the 1st to 3rd appellants were discharging, vinessa, a raw effluent from its distillery into the environment. That the Environmental Project Report(s) submitted by the three appellants to the 4th respondent was inadequate as it did not explain the activities of the three appellants as the project proponent and the effect of the activities on the environment.

In a replying affidavit deposed to by Ms Joyce Opondo, the 1st to 3rd appellants denied all the allegations contained in the Petition. Specifically, they denied that the EIA Licences issued to them by the 4th respondent were unprocedurally and unlawfully issued contrary to **Section 58 (2)** of the **Environmental Management and Coordination Act, 1999** (EMCA). That it was not true that the Environmental Project Report submitted by them was inadequate. That it was not true that they were polluting the environment by discharging raw effluent (vinessa) into Rivers Nyamasaria, Kibos or Lie Lango.

In their replying affidavit, the 1st to 3rd appellants conceded that they had put in place dust control measures and had decommissioned the vinasse holding area and were in full compliance with NEMA environmental restoration requirements. The three appellants averred that they had not infringed on any of the constitutional or statutory environmental principles and at no time did they discharge or channel pipes discharging raw effluent directly into Rivers Kibos, Nyamasaria or Lie Lango.

The 1st to 3rd appellants specifically contested the jurisdiction of the Environment and Land Court (ELC) to hear and determine the dispute at hand averring that the ELC had no jurisdiction over the matters in dispute. It was averred that the issues raised by the 1st, 2nd and 3rd respondents could only be channeled through a judicial review application and or the National Environment Tribunal (NET) or the National Environmental Complaints Committee (NECC).

The three appellants further contended that the issues raised by the 1st, 2nd and 3rd respondents did not evince any human rights violation. That the three appellants have not in any way violated any of the fundamental or human rights of the respondents as guaranteed in the Constitution.

Responding to the alleged inadequacy of the Environmental Project Report and the validity of the EIA Licences issued by the 4th respondent, the three appellants deposed that it was not true there was no EIA study undertaken; that an EIA Report was submitted to the 4th respondent with regard to the 1st and 2nd appellants' projects. That EIA reports for both factories were commissioned and approved by the 4th respondent before the EIA licences were procedurally issued. That the report from Water Resources Management Authority dated September 2018 confirms that the three appellants have not polluted any river. That the 1st, 2nd and 3rd respondents have neither demonstrated personal injury caused to them by the three appellants nor have they annexed any report (medical or otherwise) showing that the three appellants' activities affected them in any manner.

The 4th respondent (NEMA) in a replying affidavit deposed to by Mr. Ali Mwanzei stated that indeed, NEMA issued an EIA Licence N0. 000259 to the 3rd appellant on 19th October 2005 for production of high quality sugar with portable spirits and packaging paper. That the National Environment Complaints Committee (NECC) visited the appellants' factories on 20th February 2017 and made recommendations in its report dated 5th October 2017. In the Report, the NECC recommended that there was need for continued monitoring and surveillance of the activities of the 1st to 3rd appellants. A major finding of the NECC was evidence of a blackish liquid identified as "vinasse" which was a by-product of Kibos Distillery operated by the 1st appellant. That the harmful effects of the vinasse, if at all, could not immediately be established. That upon inspection by NECC, it was found that the three appellants were using the vinasse to control dust from the earth roads. The NECC issued an order requiring the three appellants to stop using vinasse on the road.

The 5th appellant in a replying affidavit dated 30th January 2019 deposed by Mr. Francis Wagara averred that in the event the 1st to 3rd appellants were found to have violated the right to a healthy and clean environment, they should be given time to comply with the requisite environmental standards. That the members of the 5th appellant Union stand to lose jobs and their only source of livelihood if the factories operated by the three appellants are closed.

Upon hearing the parties to the petition, the learned judge in a judgment dated 31st July 2019 held that the 1st, 2nd and 3rd respondents had established their claim against the appellants. From this finding, the judge granted *inter alia* the following orders:

(a) A declaration be and is hereby issued that the respondents right to a clean and healthy environment as guaranteed by **Articles 42** and **43** of the **Constitution** had been violated by the actions and omissions of the appellants.

(b) A declaration be and is hereby issued that the issuance of EIA Licence No. 000259 to the Kibos Sugar Limited by NEMA based on the Environmental Project Report only for milling of 500 tonnes of sugar cane without the Kibos Sugar Carrying out an EIA Study and going on to construct a 1650 TCD was unconstitutional, illegal and in contravention of **Sections 58, 59, 60, 61, 62** and **63** of **EMCA** and **Regulations 17, 18, 22, 23** and **24** of the **Environmental (Impact Assessment and Audit) Regulations, 2003**.

(c) A declaration be and is hereby issued that the variation of the 1st respondent's EIA Licence No. 000259 by NEMA and subsequent issuance of certificate of variation of EIA Licence No.0000151 without an EAI study and report being submitted for approval was unconstitutional, illegal and in contravention of **Sections 58, 59, 60, 61, 62** and **63** of **EMCA** and **Regulation 25** of the **Environmental (Impact Assessment and Audit) Regulations, 2003**.

(d) A declaration be and is hereby issued that the EIA Licences issued to the three appellants by NEMA have been illegally and un-procedurally acquired.

(e) An order of a permanent injunction be and is hereby issued restraining the three appellants from in any way continuing with operations of their factories and or milling sugar cane at Kibos area without first carrying out EIA studies and submitting the reports to NEMA for approval and fresh EIA Licences issued in accordance with the law.

(f) An order of environmental restoration be and is hereby issued requiring the three appellants to demolish any structures erected on Land Parcels LR No. 654/23 and 11273 in Kibos without an approved EIA Study Report with a view to restoring the environment to its original status should they fail to obtain a fresh EIA Licence within one hundred and twenty (120) days; the petitioner in conjunction with NEMA and County Government of Kisumu be and are hereby authorized to appoint an auctioneer to carry out the said restoration ordered and to recover the costs from the three appellants.

(g) A declaration be and is hereby issued that the failure, neglect and refusal by NEMA and County Government of Kisumu to stop the activities of the three appellants is illegal and contravenes **Section 108** of **EMCA**.

Aggrieved by the judgment and decree issued by the learned judge, various parties filed a total of six separate appeals against the judgment. The appeals were Kisumu Civil Appeal No. 153 of 2019; Kisumu Civil Appeal No. 162 of 2019; Kisumu Civil Appeal No. 187 of 2019; Kisumu Civil Appeal No. 188 of 2019; Kisumu Civil Appeal No. 189 of 2019 and Kisumu Civil Appeal No. 367 of 2019.

The appellant in Civil Appeal No. 153 of 2019 is Kibos Distillers Limited. The appellant in Civil Appeal No. 162 of 2019 is Kenya Union of Sugar Plantations & Allied Workers. The appellants in Civil Appeal No. 187 of 2019 are Kibos Sugar & Allied Industries Limited and Kibos Power Limited. The appellants in Civil Appeal No. 188 of 2019 are Kibos Sugar & Allied Limited and Kibos Power Limited. The appellants in Civil Appeal No. 189 of 2019 are Kibos Sugar & Allied Limited and Kibos Power Limited. The appellant in Civil Appeal No. 367 of 2019 is The County Government of Kisumu.

GROUNDS OF APPEAL

The 1st to 3rd appellants in their respective appeals raised the following repetitive grounds of appeal which can be compressed that the learned Judge erred in:

i) Holding that the Environment and Land Court (ELC) had jurisdiction to hear and determine the petition.

ii) Correctly finding that the National Environmental Tribunal (NET) had jurisdiction to determine some of the issues in the petition and then erred in usurping the jurisdiction of the Tribunal by hearing and determining the issues.

iii) Issuing a permanent injunction against the three appellants thereby stopping their operations without calling for *viva voce* evidence.

iv) Holding that the three appellants were degrading the environment by pouring vinasse without any or at all conclusive evidence to that fact.

v) Finding that the EIA Licences issued to the three appellants were contrary to **Sections 58, 59, 60, 61, 62** and **63** of the **Environment Management Coordination Authority Act** and **Regulations 17, 18, 22, 23, 24** and **25** of the **Environmental (Impact Assessment and Audit) Regulations 2003**. The judge further erred in holding that the appellants EIA Licences were *void ab initio* and that the Licences were issued illegally and unprocedurally.

vi) Declaring that the variation and transfer of the three appellants EIA Licences was done unprocedurally, illegally and irregularly.

vii) Issuing a permanent injunction against the three appellants thereby stopping their operations without sufficient reason and in total disregard of the natural consequences flowing from the said decision.

viii) Ignoring and failing to appreciate the evidence supplied by the three appellants to demonstrate that they had indeed carried out a comprehensive EIA study and submitted the same to NEMA.

ix) Issuing a restoration order which was merely meant to permanently close the operations of the three appellants leading to miscarriage of justice.

x) Ordering the demolition of the three appellants' structures on LR No. 654/23 and 11273 in Kibos area without any evidence as to the specific contribution to degradation of the environment by the structures.

xi) Holding that the three appellants were responsible for degrading the environment without any supportive evidence.

xii) Failing to advance the purposive interpretation of the **Constitution**.

xiii) Finding that the 1st, 2nd and 3rd respondents' right to a clean and healthy environment under **Articles 42** and **43** of the **Constitution** had been violated.

xiv) Failing to accord the three appellants their constitutional right to a fair hearing as contemplated under **Article 50** of the **Constitution**.

xv) Finding that the 4th appellant had violated **Section 108 of EMCA.**

xvi) Issuing a closure and demolition order that was disproportionate in the circumstances of the case.

xvii) Awarding costs to the 1st to 3rd respondents.

CONSOLIDATION OF APPEALS

By consent of the parties recorded on 2nd October 2019, all the six appeals were consolidated with the holding file being Kisumu Civil Appeal No. 153 of 2019. This judgment applies *mutatis mutandis* to all the six appeals as consolidated.

Prior to the hearing of the main appeal, this Court vide a Ruling delivered on 10th October 2019, admitted additional evidence in the appeal. Further, by consent of the parties that was adopted as an order of this Court on 31st October 2019, additional evidence by the 1st, 2nd and 3rd respondents were admitted in the appeal.

The additional evidence admitted by the ruling of this Court delivered on 10th October 2019 were:

a) A copy of The County Assembly of Kisumu's Motion for the Second Assembly.

b) A copy of The County Assembly of Kisumu's Motion for the Third Assembly together with a Report of Water, Environment and Natural Resources Committee on the Pollution of Rivers Kibos, Auji and Lie Lango.

c) A copy of The National Environment and Management Authority (NEMA) Inspection Report for Kibos Sugar and Allied Industries forwarded to the Clerk of the National Assembly by letter dated 18th April 2019.

The additional evidence admitted in this appeal by consent of the parties recorded on 31st October 2019 were:

(a) A copy of a letter dated 25th October 2019 from the County Assembly of Kisumu to the effect that the County Assembly of Kisumu Report of Water, Environment and Natural Resources Committee on Pollution of Rivers Kibos, Auji and Lie Lango produced in court as additional evidence by Kibos Sugar & Allied Industries Limited had never been discussed in the House and was not found in any deliberations in the Hansard Record of the Kisumu County Assembly.

(b) An affidavit sworn on 28th October 2019 by Erick Otieno Agola, the Vice Chairman of the County Assembly of Kisumu Committee of Water, Environment and Natural Resources confirming that the Report was a forgery.

(c) An affidavit dated 31st October 2019 deposed by learned counsel Mr. Jared Sala Advocate attaching a forwarding letter dated 31st October 2019 from the Office of the Clerk of the County Assembly of Kisumu annexing the Hansard Record of Proceedings of 30th October 2019 of the County Assembly of Kisumu.

At the hearing of this appeal, the parties were represented by learned counsel as follows: Messrs. F.E. Wasuna and W. Gichaba appeared for the 1st appellant Kibos Sugar Limited. Senior Counsel Prof. T. O. Ojienda and Ms S. Omire for the 2nd and 3rd appellants (Kibos Power Limited and Kibos Distillers). Senior Counsel Hon. J. Orengo and Ms J. Sala for the 4th appellants (Kisumu County Government). Mr. P. D. Onyango for the 5th appellants (Kenya Union of Sugar Plantation & Allied Workers). Mr. J. Ragot for the 1st, 2nd and 3rd respondent and Ms. Cynthia Sakami for the 4th respondent (NEMA).

All parties filed written submissions and lists of authorities in the appeal.

For clarity, the 1st appellant Kibos Sugar Limited filed written submissions in support of the appeal dated 4th September 2019 through the firm of Gichaba & Co. Advocates. The 2nd and 3rd appellants filed joint written submissions in support of the appeal dated 7th September 2019 through the firm of Ojienda & Associates. Further written submissions on the additional evidence were filed dated 15th October 2019. The 4th appellant (County Government of Kisumu) filed its written submissions dated 5th September 2019 in support of the appeal through the firm of Sala & Mudany Advocates. The 5th appellant (Kenya Union of Sugar Plantation & Allied Workers) filed its written submissions in support of the appeal dated 5th September 2019 through the law firm of P. D. Onyango & Co. Advocates.

The 1st, 2nd and 3rd respondents filed their joint written submissions opposing the appeal dated 28th October 2019 through the law firm of Owiti Otieno & Ragot Advocates.

The 4th respondent, NEMA, filed its written submissions opposing the appeal dated 18th October 2019 and further written submissions dated 28th October 2019 through Erastus K. Gitonga Advocate.

1st APPELLANT'S SUBMISSIONS

Learned counsel Messrs. F. E. Wasuna for the 1st appellant, associated himself with and adopted in entirety the submissions made by the 2nd and 3rd appellants in support of the appeal. Counsel rehashed the grounds of appeal highlighting that the learned judge had no jurisdiction to hear and determine the dispute between the parties; that the judge erred in cancelling the EIA Licences issued by the 4th respondent to the 1st appellant; that the judge further erred in issuing restorative and demolition orders against the 1st appellant's structures without any iota of evidence proving pollution; that the restorative order issued by the court was not specific as to what or which portion of the environment was to be restored to its previous condition. Founded on these grounds, the 1st appellant urged us to allow the appeal with costs.

2nd and 3rd APPELLANTS SUBMISSIONS

Senior Counsel Prof. Ojienda made submissions on behalf of the 2nd and 3rd appellants. On the jurisdictional issue, he submitted that the trial court erred in assuming jurisdiction to hear and determine the dispute between the parties whereas the correct and appropriate forum was the National Environment Tribunal or the National Environmental Complaints Committee.

Counsel submitted that **Sections 20** to **23 of EMCA (Amendment) Act No. 5** of **2015** establishes a National Environment Complaints Committee (NECC). That the functions of the Committee are well spelt out in **Section 32** of the **EMCA**. That one of the functions of the Committee is to investigate any allegations or complaints in relation to the condition of the environment and on its own motion the Committee may investigate any suspected case of environmental degradation. It was submitted that the complaints by the 1st, 2nd and 3rd respondents on the alleged pollution of Rivers Nyamasaria, Kibos and Lie Lango made before the ELC were within the jurisdiction of the NECC. Relying on the provisions of **Section 32** of the **EMCA,** it was urged that the trial court usurped the functions of the NECC by hearing and determining the complaints and allegations on river pollution.

That pursuant to **Section 129 (1)** of **EMCA**, the complaints by the 1st, 2nd and 3rd respondents on issuance of EIA licences to the three appellants fell within the jurisdiction of the National Environment Tribunal (NET). That **Section 129** of **EMCA** clearly spells out the appellate functions of the Tribunal. Of specific relevance is the power to grant a licence or permit or refuse to grant a licence or the transfer of a licence or permit, and the imposition of any condition or limitation or restriction on a licence granted under the regulations. Citing **Section 129** of the **EMCA,** counsel submitted that the learned judge erred in usurping the appellate function of the National Environment Tribunal.

Counsel reiterated and emphasized that all the complaints that were raised by the 1st to 3rd respondents before the trial court fell within the special jurisdiction of the NECC or the NET. That in deciding to hear and determine the dispute before it, the trial court erred as it had no jurisdiction and further erred by denying the appellants the right to be heard in the first instance by the NECC or NET and then on appeal to the ELC pursuant to **Section 130** of the **EMCA**.

In substantiation, it was urged that the judge erred by failing to adhere to the principle of exhaustion which provides for the need to explore all the available mechanisms of dispute resolution before proceeding to the courts. Counsel cited dicta from the case of **Speaker of National Assembly – v- Njenga Karume** as cited in **Republic – v- Kenya Revenue Authority Ex Parte Keycorp Real Advisory Limited (2019) eKLR** where it was stated that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed. Counsel also cited the cases **Republic – v- Karisa Chengo & 2 others [2017] eKLR**; **Geoffrey Muthijja Kabiru & 2 others – v- Samuel Munga Henry & 1756 others** as cited in **Krystalline Salt Limited – v- Kenya Revenue Authority [2019] eKLR** and **Rich Productions Limited – v- Kenya Pipeline Company & another [2014] eKLR** in support of this proposition.

Citing dicta from the case of **Mutanga Tea & Coffee Company Limited –v- Shikara Limited & another [2015] eKLR,** it was posited that the real question is whether an aggrieved party can ignore the elaborate provisions in the EMCA and resort to the ELC not in an appellate capacity as provided for in **Section 130** of the **EMCA,** but in the first instance in exercise of original jurisdiction by the ELC.

Counsel concluded submissions on the jurisdictional issue by urging us to be persuaded by dicta from the case of **Republic – v- National Environmental Management Authority [2011] eKLR** where it was held that challenges to EIA study reports and or EIA Licences should be made to the Tribunal and not to the regular courts; that the NET should be accorded the first opportunity to consider the matter. In addition, counsel cited comparative jurisprudence from Trinidad & Tobago in the case of **Damian Delfonte – v- The Attorney General of Trinidad and Tobago CA 84 of 2004** where it was held that if a specialized body has been formed, the said body should hear and determine the matter in the first instance.

In auxiliary argument, it was submitted that the learned judge erred in issuing declaratory orders in violation of the three appellants' non-derogable right to a fair hearing and trial under **Articles 50 (1)** and **25 (c)** of the **Constitution.** It was urged that the impugned judgement was delivered without *viva voce* evidence. That no oral evidence was presented in court to warrant the declaration that the issuance to the appellants of EIA Licences by the 4th respondent as well as the variation and transfer of the EIA Licences were irregular, unprocedural and illegal. That without *viva voce evidence*, the trial judge had no basis to arrive at the determination that the EIA Licences were irregularly issued. That the judge could not determine the validity of the Licences and the transfers without affording the appellants a chance to interrogate the authenticity of the respondents' claims.

In support of that submission, counsel cited **Rule 20** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** and dicta from the case of **Mohammed Ali Baadi & others – v- Attorney General & 11 Others [2018] eKLR**, where during the hearing of a constitutional petition, the trial court departed from the practice in the conduct of petitions and made a site visit and received *viva voce* evidence from expert witnesses. Likewise, counsel cited the case of **Republic – v- Nairobi City Council & another Ex parte Premier Food Industries Limited [2016] eKLR** where it was stated that where facts alleged by both parties remain unresolved, such disputed facts cannot be resolved on cold-print affidavits but may require *viva voce* evidence to be taken, and if necessary even a visit to the *locus in quo.*

In the instant matter, it was submitted that whereas the trial judge gave directions that the petition be disposed of by written submissions, the direction by the court completely locked out the appellants from adducing *viva voce* evidence that was crucial for determination of the dispute. That the locking out of the three appellants was a violation of their right to a fair hearing. That parties were not even allowed to highlight the submissions that they had been asked to file.

The three appellants further faulted the trial judge for ignoring their expert evidence adduced by way of replying affidavit deposed to by Ms Joyce Opondo. That the judge erred and did not consider the exhibits attached to the replying affidavit which showed that the three appellants were compliant with the law and up to date with the environmental restoration orders issued by the 4th respondent.

It was further urged that the 1st, 2nd and 3rd respondents did not bring any witness to confirm their allegations that it was the three appellants who were discharging raw effluent into the rivers. That there was no evidence tendered to demonstrate that the discharged raw effluent, if any, was harmful to the environment. There was no evidence to prove that any of the 1st, 2nd or 3rd respondents were riparian owners or users of the waters of the river and or any medical report tendered to prove injury to these respondents and that as a consequence they suffered damage, injury or harm.

In vehemence, counsel faulted the trial judge for cancelling the EIA Licences issued to the three appellants. It was submitted that the appellants carried out EIA based on **EMCA 1999** and not the **EMCA 2015** (Amendment Act). That the three appellants complied with **Sections 58** and **63** of the **EMCA 1999 Act and Regulation 7** of the **Environmental (Impact Assessment and Audit) Regulations 2003**. That the 3rd appellant submitted an EIA Project Report to NEMA which then issued it with Licence No. 0000259 as per **Regulation 10 (2)** of the **2003 Regulations**.

The three appellants urged that before the **EMCA 2015** (Amendment Act), there was no categorization or classification of projects to carry out EIA project report or EIA study. It was submitted that under the **EMCA 1999**, projects were classified into those that have to submit Project Reports and those that are to carry out an EIA Study. That as per **EMCA 1999** and the **Regulation 10 (3)** of the **Environmental (Impact Assessment and Audit) Regulations 2003**, NEMA had the discretion after a project report had been submitted to decide if an EIA study report was required or not depending on whether the potential impacts had been identified and mitigated.

The thrust of the three appellants' submissions was that the validity of their EIA Licences were not to be determined under the **EMCA 2015** amendments since the appellant's projects and manufacturing activities were carried out under EMCA 1999 and the EIA Audit Regulations of 2003. That as per the EMCA 1999, the three appellants were not required to comply with **Sections 59, 60, 61,** and **62** of the **1999 Act**.

On cancellation of the EIA Licence No. 0000259, the three appellants reiterated that they conducted EIA based on the **EMCA 1999 Act** and not the **EMCA 2015 Act** as amended. That pursuant to **Section 58 (2)** of **EMCA 1999**, NEMA reviewed the Project Report submitted by the 3rd appellant and found the Report to have identified potential impacts associated with the project and also that the 3rd appellant had consulted the Project Affected Persons (PAP) who had no objection to the project. That the three appellants cannot be subjected to **Section 58 (2)** of the **EMCA 2015** amendment when the project was carried out in 2004 under the then **Section 58 (2)** of **EMCA 1999**.

Counsel submitted that the three appellants carried out EIA Project Report and were issued with a valid EIA Licence. That they then applied for variation of the Licence which was issued under **Section 65 (1)** of **EMCA 1999** as read with **Regulation 25 (1)** and **25 (2)** of the **EIA and Audit Regulations of 2003**. It was submitted that the learned judge erred in applying **Section 64** of **EMCA** to the transfer of Licence issued by NEMA as there was no substantial change or modification of the appellants projects as approved vide the EIA Licence issued to the 3rd appellant on 19th October 2005. It was urged that a variation of a project whose impact had been identified and adequate mitigations provided for cannot be subjected to a fresh EIA study unless the activities of the project are

different from the ones licensed. It was urged that the activities, impact and mitigation measures under Licence No. 0000259 had not changed and therefore a fresh EIA study report was not required.

On the issue of transfer of EIA Licence No. 0000151 and issuance of EIA Licence Nos. 0000042 and 0000043 in favour of the three appellants by NEMA, it was submitted that the transfer of the licences was guided by **Section 65** of **EMCA 1999 and Regulation 26 (1), 26 (2), 26 (3)** and **26 (5)** and not the sections cited in the judgment. That a transfer of a licence from one entity to another does not require a fresh EIA study.

THE THREE APPELLANTS SUBMISSIONS ON ADDITIONAL EVIDENCE

The three appellants filed further submissions in support of the additional evidence admitted by this Court vide its ruling dated on 9th October 2019.

Counsel submitted that pursuant to **Section 68** of **EMCA,** NEMA is responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment. That following the 1st to 3rd respondents' allegation of pollution, a team of NEMA Inspectors, Police, Water Resources Authority and Lake Victoria South Water Services Board conducted an inspection of the entire stretch of the rivers bordering the appellants' factories. That NEMA prepared a Report that was forwarded to the Clerk of the National Assembly by letter dated 18th April 2019.

It was submitted that according to the NEMA Report sent to the Clerk of the National Assembly, the investigations established that the appellants were in compliance with the NEMA environmental restoration conditions. That in the Report, a finding was made that there was no vinasse waste being discharged to the environment as had been alleged and upheld by the trial court. That the Report further established that the effluent emission points that had earlier been identified had been sealed off. That the bagasse waste in the river had been removed and the river was generally clear of bagasse. That the Report established that the three appellants were in compliance and the pollution measures put in place were determined by the Inspectors to be satisfactory. It was submitted that the NEMA Report to the National Assembly was the most recent Report and NEMA is estopped from disowning and denying the contents of its own findings.

The three appellants made further submissions on the Report by the County Assembly of Kisumu Water, Environment and Natural Resources Committee that set out to investigate, inquire into and verify the public outcry on the pollution of Rivers Auji, Kibos and Lie Lango. That the Committee also visited the three appellants' factories. That the County Assembly Committee in its Report indicated that the three appellants had complied with the environmental regulations including EIA reports for Kibos Sugar & Allied Industries. That the County Assembly Committee further found that the three appellants had complied with the NEMA improvement order to decommission the vinasse lagoon that spilled over into the river; that the three appellants had complied and constructed another vinasse lagoon as per the NEMA standards. Counsel submitted that the Report by the County Assembly of Kisumu supports the submission that the three appellants were in compliance with the environmental requirements.

Founded on the additional evidence from the NEMA and County Assembly of Kisumu Reports, the three appellants submitted that there was no basis for the restoration orders issued by the trial court when both Reports show that the three appellants had complied with the environmental requirements. That a court order should not be issued in vain. That the restoration orders were issued in vain as the three appellants had already complied with the environmental requirements.

4th APPELLANT'S SUBMISSIONS

For the 4th appellant, Hon. James Orengo SC also adopted and associated himself with the submissions made by Senior Counsel Prof. Ojienda SC in support of the appeal.

Hon. Orengo submitted that the trial judge did not have jurisdiction to hear and determine the dispute between the parties. That the 1st, 2nd and 3rd respondents individually and collectively did not bring themselves within the human rights jurisdiction of the trial court and consequently, there was no justiciable or triable issue between the three appellants and the respondents. That the judge erred in considering issues raised by NEMA which were not before the trial court either by way of pleading or affidavit. That the trial judge's decision was not supported by proven evidence on record. That the judge erred and denied the three appellants their constitutional and statutory right to fair hearing and due process in contravention of **Articles 50** and **169 (1) (d)** and **(2**) of the **Constitution.**

It was urged that the County Government of Kisumu was sued on account of matters to do with Physical Planning under the Physical Planning Act. That complaints to do with Physical Planning cannot be addressed and dealt with under the ambit of the National Environmental Tribunal. That the procedure for dealing with planning complaints is provided for under **Sections 13 (1), 15 (1), 15 (4), 38 (5) and (6) of the Physical Planning Act**. That the EMCA and NET have no jurisdiction and mandate to deal with complaints relating to physical planning. Likewise, that the ELC pursuant to **Sections, 15, 19 and 38 of the Physical Planning Act** has appellate and not original jurisdiction on planning matters. The 4th appellant cited dicta from the case of **Samson Chembe Vuko – v- Nelson Kilumo & 2 others [2016] eKLR,** where it was stated as follows:

In effect, the appellant ought to have addressed his objection to the Director of Physical Planning and not the respondents. If a party is not satisfied with the decision of the Director of Physical Planning, he then appeals to the Liaison Committee under Section 13 of the Act and if a party is still unhappy with the decision, he can appeal further to the National Liaison Committee under Section 15 of the Act. In the event that the party is still dissatisfied, then by virtue of Section 19 of the Act, he has a right of appeal to the High Court and in this case, the Environment and Land Court…. As it can readily be seen, the Environment and Land Court's jurisdiction in matters pertaining to the Act is purely appellate….

On the jurisdictional issue, it was submitted that the remedies sought by the 1st to 3rd respondents before the trial court were available and provided for in the EMCA Act and there was no good reason to bypass the NECC and NET and the adjudicatory mechanisms provided for in the EMCA.

The 4th appellant further urged that the petition filed by the 1st to 3rd respondents cited alleged violation of omnibus provisions of the Constitution including **Articles 2 (1), 3 (10), 10 (1), 2 (a) (b), 20 (1), (2) (3) (a)** and **(b), 4 (a)** and **(b), 21 (1)** and **(2), 23 (1)** and **(3) (a) (b) (c) (d)** and **(e), 27, 28, 32, 40, 42, 43, 47, 70** and **73**.

That the citation of omnibus provisions of the Constitution is contrary to the decision in **Anarita Karimi Njeru v- Republic [1979] eKLR** and **Mumo Matemu – v- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where this Court held that in a case founded on alleged violation of a constitutional provision, the petition must set out with reasonable precision the acts or omissions as well as the provisions alleged to have been violated.

It was further submitted that the case before the trial court should have involved the taking of *viva voce* evidence with witnesses being cross-examined.

Counsel for the 4th appellant extensively submitted on the need for equitable and proportionate justice. That the judge erred in failing to consider all the competing legitimate interests in the petition consequently making orders that were not only unwarranted but equally unjust and unfair. That evidence was adduced by the 4th appellant on the contribution of the three appellants to the County economy and that it was demonstrated that the three appellants were the largest tax payers in Kisumu County. That workers and farmers alike have been and are beneficiaries of the enterprises undertaken by the three appellants. In light of this, the learned judge misapprehended and wrongly applied the cost benefit analysis principle. That the said principle must be balanced with the principle of sustainable development to ensure sustainable exploitation and utilization of natural resources for the benefit of the people of Kenya. In support, counsel cited the case of **Kenya Association of Manufacturers & 2 others – v- Cabinet Secretary – Ministry of Environment and Natural Resources and 3 Others [2017] eKLR** where it was stated that a court seized of an environmental dispute is to bear in mind that through its judgment, the court plays a crucial role in promoting environmental governance, and in ensuring a fair balance between competing environmental, social, developmental and commercial interests.

Citing comparative jurisprudence, it was submitted that environmental problems are often dealt with through constant monitoring and appropriate intervention that include improvement and restoration orders. (See **African Center for Rights and Governance (ACRAG) & 3 others – v- Municipal Council of Naivasha** citing the USA Supreme Court dicta in the case of **New Jersey – v- New York 283 U.S. 473; see also Tapesh Bhardwaj Sharma – v- UP State Pollution Control Board, Mathura Cantonment Board District Magistrate Mathura and Central Pollution Control Board Original Application No. 596 of 2016)**.

In conclusion, the 4th appellant submitted that the trial judge erred in failing to consider the obtaining laws at the material time when the three appellants were issued with the EIA Licence No. 0000259 under **Section 58** of the **EMCA Act 1999** as read with the Amendments made in **EMCA 2015**. That the judge erred in applying the 2015 EMCA amendments to the dispute between the parties.

5th APPELLANT'S SUBMISSIONS

Learned counsel for the 5th appellant, Mr. P.D. Onyango, associated himself with and adopted submissions made by Senior Counsel Prof. Ojienda for the 2nd and 3rd appellants.

It was repeated that the trial judge did not have jurisdiction to hear and determine the dispute between the parties. That the judge erred in failing to take into consideration that the issues before him were specific issues that were to be dealt with independently. That the mere fact that the petition had other prayers that are constitutional in nature did not confer on the ELC jurisdiction to deal with matters over which neither the Constitution nor Statute give it jurisdiction. That the learned judge at paragraph 15 (c) of the impugned judgment confirmed that some of the prayers in the petition were within the jurisdiction of the NET and not the ELC. That the judge erred in holding that because there were other constitutional prayers sought, this conferred jurisdiction upon the ELC. Counsel cited dicta from the case of **Republic - v – NEMA Ex parte Sound Equipment Limited CACA 84 2010 [2011] eKLR** where it was held that challenges to EIA Reports should be made to the NEMA Tribunal in the first instance.

The 5th appellant faulted the trial judge for failing to take into account its submissions and further erred in not considering comparative jurisprudence in the Indian case of **M.C. Mehta & another – v- Union of India and others, Civil Writ Petition No. 12739 of 1985 and Shiram Foods and Fertilizers Industries & another Civil Writ Petition No. 26 of 1986.**

It was further submitted that the learned judge erred in issuing orders without considering the plight of the 5th appellant's members. That the declaratory orders issued amount to closing the 1st to 3rd appellants' factories leading to unemployment and crippling of the appellants' businesses. Grounded on the foregoing submissions, I was urged to allow the instant appeal.

1st, 2nd and 3rd RESPONDENTS SUBMISSIONS

The 1st, 2nd and 3rd respondents filed joint written submissions dated 28th October 2019. On the issue of jurisdiction of the trial court, it was urged that the appellants' objection to the jurisdiction of the ELC arises from a misapprehension of the issues raised in the petition. That the claims by the respondents were anchored on the Constitution with a view to enforcement of fundamental rights and freedoms. That the petition specifically identified the Articles of the Constitution that were violated as **Articles 2 (1)**, **10**, **19**, **20**, **20 (3)**, **(4)**, **21 (1)**, **(2)**, **23**, **(1)**, **(3)**, **24**, **27**, **28**, **40**, **42**, **43**, **47**, **69** and **70**.

That the claims of violation of constitutional rights could only be determined by the ELC which is the only court designated by **Article 70 (1)** as read with **Article 162 (2)** of the **Constitution** and **Sections 2**, **4 (1)** and **13 (3)** of the **Environment and Land Court Act**, **2011.** That the NET has no such jurisdiction as per **Section 129** of the **EMCA**.

It was submitted that the petition having also raised complaints and reliefs anchored on the provisions of **Sections 58-63, 75** and **108 of EMCA 1999**, the NET could prima facie be deemed to have jurisdiction. However, it was countered that several coordinate judicial decisions have held that in multifaceted claims for enforcement of fundamental rights, it would be imprudent and a cause for injustice to separate the claims to be heard differently before the court and other portions to be heard before a Tribunal. Examples of judicial decisions cited included the cases of **Ken Kasinga – v- Daniel Kiplagat Kirui & 5 others [2015] eKLR** as per Emukhule J.; **Ken Kasinga – v- Daniel Kiplagat Kirui & 5 others [2015] eKLR** as per Sila Munyao J.; **Moffat Kamau & 9 others – v- Aelous Kenya Limited and others [2016] eKLR** as per Sila Munyao J.; **and West Kenya Sugar Co. Limited – v- Busia Sugar Industries Limited & 2 others [2017] eKLR.** Persuaded by the merits of the foregoing judicial decisions, the respondents submitted that the trial judge did not err in adopting and following the persuasive coordinate decisions on the issue of jurisdiction of the court.

The respondents further urged that the NET had no jurisdiction to hear and determine any of the issues raised in the petition. That the first issue presented in the petition for determination was cancellation of the EIA Licences granted to the three appellants. That the EIA Licences granted to the three appellants were not procedural. That in the absence of an EIA audit study, and in the absence of publication to the general public, the respondents would not have been expected to have filed their appeal against the issuance, variation and lack of EIA study and report within the limitation period of six months provided in **Section 129** of the **EMCA Act**. That the absence of publication and knowledge on the part of the respondents *per se* divested NET of jurisdiction to hear and determine issues raised in the petition.

The respondents submitted that an additional fact that divested the NET of jurisdiction was that under **Section 129** of **EMCA**, it is only an aggrieved party that can access the Tribunal by way of appeal from the decisions of the Director General of NEMA. Counsel urged that at the time when the petition was filed at the ELC on 25th October 2018, the Environment and Land Court judgments pointed to unanimity that the NET would have no jurisdiction to hear claims when a party was not a complainant before

NEMA. That this remained so until this Court in its decision delivered on 8th February 2019 in **National Environment Tribunal – v- Overlook Management Limited, Silver Sand Camping Site Limited, NEMA & 4 others**, held that **Section 129** of **EMCA** should not be interpreted to deny any person the right to access the Tribunal. In arriving at its decision, this Court expressed:

…. Where a party considers itself aggrieved by the events stipulated in Section 129 (1) (a) – (e) of the Act, such a party may as of right appeal to the appellant. Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd respondent (NEMA), its Director General or its Committees, then such a party may lodge an appeal pursuant to sub-section 2 of that provision. We take the view that such a party does not have to demonstrate that he has a right or interest in the property, environment or land alleged to have been likely to be harmed.…

It was submitted that where NET has no jurisdiction, the EMCA Act gives an automatic right of access to the ELC under **Section 3 (3)** of the **Act** on any matter involving threat or actual violation of fundamental rights to a clean and healthy environment.

On the issue that the trial judge erred in giving directions on the hearing of the petition on affidavits, it was submitted the judge did not err. That the judge directed the petition be heard by way of affidavit and written submissions. That all parties complied with the directions as given by the judge. That the appellants did not challenge the directions.

In responding to the contestation that the petition did not meet the threshold for a constitutional petition as enunciated in the cases of **Anarita Karimi Njeru - v- Republic [1979] eKLR** and **Mumo Matemu – v- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR,** the respondents submitted that the petition filed before the ELC identified with specificity the Articles in the Constitution that were violated. That the respondents' case was for protection and enforcement of their right to a clean and healthy environment founded on **Articles 42, 69** and **70** of the **Constitution**. That the pleading in the petition was specific enough with facts set out in the petition.

It was further submitted that there was sufficient evidence on record to justify the learned judge's decision to cancel the EIA Licences issued to the three appellants by the 4th respondent. That on 19th October 2005, the 3rd appellant obtained an EIA Licence from NEMA based on its Environmental Project Report submitted on 30th January 2004. That the Licence granted as No. 0000259 permitted the 3rd appellant to engage in the activity of producing high quality sugar, production of portable spirits and packaging paper. That it was a condition in the Licence that the 3rd appellant was required to submit an Environmental Audit Report in the first year of operation.

That the 3rd appellant continued its operations for the next seven years until 22nd October 2010 when it wrote a letter to NEMA seeking variation of the Licence to expand the power generation component and increase capacity to 25 MW. In the aforestated letter, the 3rd appellant requested for a new Licence to be given to a new company called Kibos Power Limited. That NEMA granted the request by its letter dated 9th November 2010. A condition in the acceptance letter was that the 2nd appellant was to submit an EIA Report. That to date, no EIA study report has been submitted to NEMA.

On the contestation that the judge erred in not receiving *viva voce evidence,* the respondents submitted that the facts that led to issuance of the various EIA Licences to the three appellants were not disputed. Consequently, there was no need for the petition to be determined on *viva voce* evidence. That the need to urgently resolve the dispute in this matter as it relates to violation of the right to a clean and healthy environment militated against the quest for *viva voce* evidence.

The 1st, 2nd and 3rd respondents submitted that the key issue before the trial judge was whether the EIA Licences issued by NEMA to the three appellants namely Licence Nos. 0000259, 00000151, 0000042 and 0000043 were issued procedurally and legally. A question posited is whether it was mandatory for an EIA Study and Report be undertaken before each and every of the EIA Licences were issued"

On this question, these respondents submitted it was mandatory for the three appellants to undertake an EIA study before variation and transfer of the Licences. The respondents submitted as follows:

The only point of departure from the position taken by the parties herein is what really constituted such an Environmental Impact Assessment study and report and its process, with the petitioners alleging defiantly on one hand, that the three factories did not undertake the same, while the three factories maintained their defiance too, that they had undertaken the environmental impact assessment report for all the EIA licences complained of and even presenting what they considered to be such Environmental

Impact Assessment Reports which they had undertaken.

These respondents further submitted that a Project Report is a mandatory requirement under **Section 58 (1)** of **EMCA** and its format is prescribed. That under **Regulation 7**, when a Project Report is received by NEMA, it would be sent to lead agencies for their approval or rejection.

Counsel for the respondents submitted that **Sections 58 (1)** and **(2)** of **EMCA** is couched in mandatory terms and whoever intends to undertake a project should submit an EIA Report. It was submitted that the activities of the three appellant factories come within the meaning of projects that mandatorily require an EIA under **Section 58** of **EMCA**. That the proper and mandatory process which NEMA ought to have followed for issuance of Kibos Sugar & Allied Industries Licence No. 0000259 should have been **Regulation 10 (3)** requiring it to have undertaken an EIA study. That under **Regulation 17,** public participation is envisaged and NEMA should have published the three appellants' Report for a second level of public participation pursuant to **Section 59** and **Regulations 21** and **22**.

It was submitted that the EIA Licence No. 0000259 issued to the 3rd appellant on 19th October 2005 was granted in fatal breach of the mandatory provisions of **Section 58 (2), 59, 60** and **64** of the **EMCA.** For this reason, counsel urged that the three proposed projects contained in the EIA Report submitted by the 3rd appellant on 30th January 2004 were inadequate for purposes of obtaining the EIA Licence No. 0000259. That the Licence as issued was null and void. Counsel cited **Section 66 (2)** of the **EMCA Act** which provides that the fact of issuance of a licence is not a defence where the legality of the licence is challenged. The Section provides that:

66 (2) The issuance of an environmental impact assessment licence in respect of a project shall afford no defence to any civil action or to a prosecution that may be brought or preferred against a proponent in respect of the manner in which the project is executed, managed or operated.

These respondent further submitted that the additional licences granted to the three appellants being EIA Licence Nos. 0000151, 0000042 and 000043 were all invalid given that the parent EIA Licence No. 0000259 was invalid. That in any event, the three additional licences were issued without the mandatory EIA study and report contrary to **Section 58 (2)** of EMCA.

It was further urged that the three appellants have confused and mixed up the requirement for EIA Project Report contemplated under **Section 58 (1)** of the **EMCA Act** and the EIA Study Report contemplated under **Section 58 (2)** of the **EMCA Act.** That a Study Report and a Project Report are separate and independent documents. That the EIA Project Reports put in evidence by the three appellants are Project Reports and not EIA Study Reports.

That the variation of the licences given to the three appellants was substantial involving the variation of production of 500 tons of sugar per day as per Licence No. 0000259 to 1650 tons per day and to 3000 tons per day. That such variations cannot be done without a fresh environmental impact assessment study report as required by **Section 64** of **EMCA.** Counsel cited dicta from the case of **Moffat Kamau & 9 Others vs Actors Kenya Ltd & 9 Others [2016] eKLR** where it was stated:

"I do not think that it can be said that NEMA has exercised its discretion judiciously, in a situation where it issues a variation without requiring a fresh EIA, where the project has substantially been changed or been modified. Where there is such a scenario, NEMA must require a fresh EIA before issuing a variation of the licence……"

On the issue of pollution, the respondents urged that it was not necessary to delve into the issue of pollution of the three rivers once it was shown that there was no Environmental Impact Assessment Study undertaken by the three appellants, the law presumes that such a project must be stopped, as it presumes proof of threat to harm the environment without need for any actual evidence of such resultant pollution.

On whether the trial judge erred in issuing restorative and demolition orders, the respondents submitted that the net effect of the impugned judgment was to secure compliance and enforcement of the provisions of **Articles 10, 42, 43, 69** and **70** of the **Constitution.** That the impugned judgment seeks to enforce compliance with the mandatory provisions of **Sections 58 (2), 59, 60, 61, 62, 63, 66,** and **67** of the **EMCA Act** and the regulations thereunder. That there is no other known and reasonable legal manner of enforcement of such mandatory provisions on undertaking EIA study other than what the learned judge did by giving the three appellants One hundred and Twenty (120) days to comply. That a proponent of a project cannot undertake any activity falling

under the second schedule to the EMCA without undertaking an EIA study. Based on the foregoing reasons, these respondents urged that the instant appeal be dismissed with costs.

1st, 2nd and 3rd RESPONDENTS SUBMISSIONS ON ADDITIONAL EVIDENCE

These respondents did not file written submissions in response to the additional evidence adduced in this matter pursuant to the ruling of this Court delivered on 9th October 2019. Instead, the respondents filed a Notice of Motion dated 28th October 2019 seeking an order to admit their own additional evidence by way of affidavit.

On 31st October 2019, by consent of the parties, the additional evidence sought to be adduced by these respondents was admitted by way of affidavit. The additional evidence so admitted was that new and additional evidence had emerged showing that the public documents from the County Assembly of Kisumu Water, Environment and Natural Resources Committee admitted by this Court vide its ruling of 9th October 2019 were not genuine. In support of the allegation that the documents were not genuine, these respondents relied on an affidavit deposed to by Ben Amuti Adega, the 1st respondent, who deposed that the documents produced by the three appellants allegedly from the County Assembly of Kisumu could be forgeries. That the authenticity of the documents from the County Assembly of Kisumu was in doubt and a Report had been made to the Kisumu Central Police Station for investigation.

These respondents further relied on an affidavit deposed to by Mr. Erick Otieno Agola who stated that he was the Vice Chairman of the County Assembly of Kisumu Water, Environment and Natural Resources Committee. That the Committee had never undertaken any fact finding mission to investigate and or make inquiry into the cause of the uncontrolled and continuous pollution of local rivers by raw effluents from the 3rd appellant as alleged in the Report. That the County Assembly of Kisumu had never sat in any meeting to set the terms of reference as alleged in the Report. He further deposed that he had listened to the audio Hansard Recordings of the County Assembly of Kisumu and he confirmed that there were no recordings of any deliberations of the Report allegedly from and by the Committee. He averred that the Report as presented in court was a forged document.

To counter the affidavit deposed by Mr. Erick Otieno Agola, the appellants filed a Replying Affidavit deposed by learned counsel Mr. Jared Sala who attached a letter dated 31st October 2019 from the Clerk of the County Assembly of Kisumu. The letter from the Clerk attaches the record of Hansard Proceedings of the County Assembly of Kisumu for 30th October 2019. From the Hansard, Hon. Kanga made a statement to the effect that he had in his possession a copy of the Report from the Water and Environment Committee duly stamped by the Office of the Clerk of the Assembly. That the same office of the Clerk of the Assembly gave a contradictory statement that the Hansard does not contain deliberations and Report of the Water, Environment and Natural Resources Committee.

4th RESPONDENT (NEMA) SUBMISSIONS

In its written submissions, the 4th respondent in opposing the instant appeal focused on two issues namely the jurisdiction of the ELC vis-a-vis the NET and the balance between economic and environmental concerns in closing of an industrial undertaking.

It was submitted that the learned judge did not err in holding that the ELC had jurisdiction to hear and determine the dispute. The case of **Taib Investments Limited – v- Fahim Salim Said & 5 others [2016] eKLR** was cited where it was stated that where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous Tribunals or bodies, and where those issues cannot be dealt with separately, it is only the ELC that can deal with all those issues.

On the jurisdiction of the NET, it was submitted that the Tribunal had no jurisdiction to hear constitutional prayers. That the petition before the trial judge was founded on alleged violation of constitutional rights and this divested NET the jurisdiction to hear and determine the dispute between the parties.

It was submitted that the emerging jurisprudence shows that a petition cannot be split into segments so that some reliefs are heard by one judicial body and others by another. That where reliefs sought are not severable, the ELC has original jurisdiction.

On balancing between economic development and environmental concerns, the 4th respondent cited comparative jurisprudence from India in the case of **MC Mehta – v- Union of India AIR 1988 SC 1037** where in ordering closure of a tannery, the learned judges opined that;

"we are conscious that closure of tanneries may bring about unemployment, loss of revenue, but life, health and ecology have greater importance to the people."

On the EIA Licences issued by the 4th respondent, it was submitted that the original licence granted to the 3rd appellant on 19th October 2005 was for cane crushing capacity of 500 tons per day (TPD). That the three appellants have now constructed a factory with a higher crushing capacity of 3500 tons per day. That such a factory is a high impact project and requires a fresh EIA study under the 2nd schedule to the **EMCA Act**.

It was submitted that the EIA Project Report prepared by Ms Joyce Opondo on behalf of the three appellants was dated 17th November 2010. That the report was never received by NEMA; there was no acknowledgment stamp or date when it was received. That despite the three appellants having been given a variation certificate on 1st December 2010, this was in direct contravention of **Section 59 (1)** of the **EMCA Act** which required public participation and advertisement in a newspaper. That the three appellants have not provided evidence that indeed the said EIA Report was presented to the 4th respondent. That the list of persons who allegedly participated in public participation as given by the three appellants does not meet the set standards of the Regulations that the EIA study should list the members of the public who participated indicating their names, identification numbers and phone numbers for purposes of verification. That the list given by the three appellants does not contain the specified details.

Regarding the paper factory run by the three appellants, the 4th respondent submitted that to date, no EIA study report had been submitted.

Concluding its submissions on the EIA Licences, the 4th respondent submitted that the three appellants have never undertaken an EIA study for the construction of their sugar, paper and distillery factories. That no variation of the EIA Licence could properly be issued over the invalid Licence No. 0000259 issued on 19th October 2005. That the only licence capable of variation is one issued on the basis of an EIA study. That since the three appellants never conducted an EIA study prior to variation, the variation licence is illegal and a nullity *ab initio*.

The 4th respondent repeated that to date, no EIA study had been undertaken by the three appellants. That omission of an EIA study has effectually denied the 1st, 2nd and 3rd respondents the opportunity to interrogate the sustainability of the three appellant's projects in terms of their social, economic, environmental and administrative impact.

On the alleged pollution of the rivers, it was submitted that on 30th August 2018, 4th respondent directed that the three appellants should undertake a chemical analysis of vinasse and that they should do an EIA study on the disposal of vinasse. That a follow up inspection was to be done upon corrective measures being undertaken. That in February 2019, the 4th respondent sent its inspectors who found out that the three appellants were still polluting the environment. That other public agencies such as the National Environment Complaints Committee, the County Government of Kisumu Department of Water, Irrigation and Natural Resources visited the three appellants' factories and all have returned a finding that the three appellants are polluting the environment.

The 4th respondent submitted that the three appellants' factories should remain closed until a proper EIA study is done and mitigation measures put in place to safeguard against constant pollution by the three appellants.

Despite opposing the instant appeal, the 4th appellant faulted the learned judge for ordering that auctioneers take up enforcement action for demolition of the three appellant's structures. It was submitted that any demolition should be done by the County Government of Kisumu Department in charge of public works and the costs defrayed by the three appellants.

ISSUES FOR DETERMINATION

In this appeal, I have distilled the following as the issues for determination:

(a) Did the learned judge err in holding that he had jurisdiction vis – a- vis the National Environment Tribunal and the National Environmental Complaints Committee to hear and determine the dispute between the parties.

(b) What is the probative value of the additional evidence adduced before this Court"

(c) Did the judge err in failing to admit *viva voce* evidence"

(d) Was the claim for constitutional violation in the petition pleaded with specificity"

(e) Did the judge err in finding that the three appellants were responsible for polluting and degrading the environment contrary to **Articles 42** and **43** of the **Constitution**"

(f) Did the judge err in finding that the 1st, 2nd and 3rd respondents' human rights had been violated"

(g) Did the judge err in finding that the three appellants EIA Licences and variation thereof were illegally, unprocedurally and unconstitutionally acquired"

(h) Did the judge err in issuing the restorative and demolition orders against the three appellants"

(i) Did the judge err in failing to award compensation to the 1st, 2nd and 3rd respondents"

(j) Did the court err in ordering the three appellants to pay the costs of the petition"

ANALYSIS and DETERMINATION

I have consolidated, abridged and considered the grounds of appeal stated in all the six appeals that were filed against the impugned judgment. I have also considered the written and oral submissions by counsel and the authorities cited. I have considered the supplementary record of appeal containing the additional evidence adduced before this Court and the response by the 1st, 2nd and 3rd respondents on the same.

Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** it was expressed:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

RELEVANCE and WEIGHT OF THE ADDITIONAL EVIDENCE

Before I delve into the merits of the issues of law and fact urged in this appeal, I find it opportune to make a determination on the probative value to be attached to the additional evidence adduced before this Court. Broadly, three public documents were admitted as additional evidence *vide* the ruling of this Court dated 9th October 2019. The admitted documents were:

(a) A copy of The County Assembly of Kisumu's Motion for the Second Assembly.

(b) A copy of The County Assembly of Kisumu's Motion for the Third Assembly together with a Report of Water, Environment and Natural Resources Committee on the Pollution of Rivers Kibos, Auji and Lie Lango.

(c) A copy of The National Environment and Management Authority (NEMA) Inspection Report for Kibos Sugar and Allied Industries dated 18th April 2019.

The 1st, 2nd and 3rd respondents have taken issue with the authenticity and genuineness of the two documents from the County Assembly of Kisumu. In a supporting affidavit to the Notice of Motion dated 28th October 2019, these respondents contend that the two documents from the County Assembly of Kisumu are forgeries and the Reports do not exist in the Hansard of the County Assembly. On their part, the three appellants filed a replying affidavit deposed by learned counsel Mr. Jared Sala which attached the Hansard Proceedings of the County Assembly of Kisumu for 30th October 2019.

I have considered the Notice of Motion and its supporting affidavit as well as the replying affidavit thereto.

The issue of authenticity and the alleged forgery of the two documents from the Kisumu County Assembly has now been brought to fore. I have analyzed the Hansard record of the proceedings of the County Assembly of Kisumu for 30th October 2019. The Hansard does not contain a specific resolution that the documents filed in Court by the three appellants are authentic and genuine. The issue of alleged forgery of the County Assembly Report of Water, Environment and Natural Resources Committee documents is not an issue for determination by this Court in this matter.

Noting that the authenticity of the two documents/report allegedly from the County Assembly of Kisumu was raised on 30th October 2019 before the County Assembly; and in the absence of a specific resolution by the Assembly on the authenticity and genuineness of the documents; I find that the County Assembly of Kisumu documents that were produced before this Court as additional evidence pursuant to the ruling delivered on 9th October 2019 have no probative value. In addition, the documents from the Kisumu County Assembly are not technical reports prepared by experts on environmental pollution. The County Assembly is not a competent organ under EMCA that can make a finding that environmental degradation had taken place. On a balance of probability, I find and assign no probative value to the copy of The County Assembly of Kisumu's Motion for the Second Assembly. I also assign no probative value to The County Assembly of Kisumu's Motion for the Third Assembly together with a Report of Water, Environment and Natural Resources Committee on the Pollution of Rivers Kibos, Auji and Lie Lango.

As regards the 4th respondents Report forwarded to the Clerk of the National Assembly vide letter dated 18th April 2019, all parties agreed that the Report is authentic and was prepared by the 4th respondent. The Report is thus relevant and has probative value. In re-evaluating the evidence on record in this matter, I shall consider The National Environment and Management Authority (NEMA) Inspection Report for Kibos Sugar and Allied Industries forwarded to the Clerk of the National Assembly by letter dated 18th April 2019.

JURISDICTION OF THE ELC COURT

A preliminary ground urged in this appeal is that the judge erred in finding that the ELC had jurisdiction to hear and determine the dispute between the parties. The three appellants contend that the ELC had no jurisdiction over the matter and the proper forum should have been the National Environment Tribunal (NET) or the National Environment Complaints Committee (NECC).

In determining the jurisdictional question, the trial judge made reference to the prayers in the petition filed by the respondents.

In their submissions, the respondents urged that the prayers in the petition were multifaceted and thus the only forum with jurisdiction to hear the matter was the ELC. It was urged that where a petition involves multifaceted claims of enforcement of fundamental rights and rights under any other statute, the courts have held that it would be imprudent to separate the claims to be heard differently before the court and other portions to be heard before a Tribunal.

I have considered the prayers sought by the 1st, 2nd and 3rd respondents in their petition. The prayers for ease of reference are paraphrased as follows:

1. "A declaration that the Petitioners' right to a clean and healthy environment as guaranteed by Article 42 and 43 of the Constitution of Kenya has been violated by the actions of the appellants.

2. A declaration that the issuance of an EIA licence No. 0000259 to the appellants by the 4th Respondent based on the environmental project report only and without the appellants conducting an EIA study for the construction of the 1650 TCD factory is unconstitutional, illegal and contravenes the provisions of Section 58, 59, 60, 61, 62, and 63 of the Environmental Management and Co-ordination Act, 1999 and provisions of Regulations 17, 18, 22, 23 and 24 of the Environmental (Impact Assessment and Audit) Regulations, 2003

3. A declaration that the variation of the appellants EIA licence 0000259 by the 4th Respondent and subsequent issuance of certificate of variation No. 0000151 without the appellant carrying out an EIA study was unconstitutional, illegal and contravenes the provisions of Sections 58, 59, 60, 61, 62 and 63 of the Environmental Management and Coordination Act, 1999 and provisions of Regulation 25 of Environment (Impact Assessment and Audit) Regulations 2003.

4. A declaration that the transfer of the appellants EIA licence No. 0000151 without an EIA study is unconstitutional, illegal and contravenes Sections 58, 59, 60, 61, 62 and 63 of the Environmental Management and Coordination Act, 1999 and Regulations 17, 18, 22, 23, 24 and 25 of Environmental management and Coordination Act, 1999 (Environmental (Impact Assessment and Audit) Regulations 2003.

5. A declaration be issued to declare that the appellants have illegally acquired Environmental Impact Assessment Licences for the Kibos Sugar Factory.

6. That an order of certiorari be issued to bring into this Court and quash and or cancel the Environmental Impact Assessment Licence No. 0000151 issued to the appellants, the Environmental Impact Assessment Licence No. 0000042 issued to the appellants and the Environmental Impact Assessment Licence No. 0000043 issued to the appellants by the 4th Respondent for the construction of a sugar and paper mill, power plant and a distillery factory in Kibos Area, Miwani Central Location, Muhoroni Sub-County, Kisumu County.

7. That an order of permanent injunction be issued to restrain and or stop the appellants through themselves, their directors, their agents, employees and or representatives from in any way continuing with operations of their factory and or milling of sugar cane at its factory site in Kibos Area, Miwani Central Location, Muhoroni Sub-County, Kisumu County.

8. An order of an environmental restoration order requiring the appellants though themselves, their agents, employees and or representatives to demolish any structures erected on the land parcel number LR NO 654/23 and LR NO 11273 in Kibos Area, Miwani Central Location, Muhoroni Sub-County, Kisumu County with a view of restoring the environment to its original status within 14 and in default the Petitioner be at liberty to appoint an auctioneer to demolish the structures and restore the environment and recover the cost from the appellants.

9. A declaration that the failure, neglect and or refusal by the 4th appellant and 4th Respondent to stop the operations of the 1st – 3rd appellants after they had been found to repeatedly and continuously to be degrading the environment is unconstitutional, illegal and contravenes the provisions of Section 108 of Environmental management and Coordination Act, 1999 and Articles 3, 10, and 47 of the Constitution.

10. Compensatory damages for violation of the Petitioners' rights under Articles 43, 46 and 47 of the Constitution.

11. Interest.

12. Costs of an incidental to this Petition; and

13. Any other order that this court deems fit and just to grant in the circumstances."

In finding that the court had jurisdiction, the trial judge expressed as follows:

"[15] ……. The 3rd Respondent's and the Interested Party's Preliminary Objections dated the 7th February 2019 and 8th March 2019 respectively are essentially challenging this court's jurisdiction on the basis that the complaints raised by the Petitioners, and prayers 2 to 6 of the petition are matters that should have been lodged with the National Environment Complaint Committee (NECC) and or the National Environment Tribunal (Tribunal) in the first instance. That this court's jurisdiction in respect of matters to do with Environment Impact Assessment Licence can only be on appeal on the decision of the Tribunal, but not in its original jurisdiction… That having considered the submissions touching on the preliminary objections, the decided decisions of the Superior Courts referred to, the cited provisions of the Statutes, Regulation and Constitution, the court finds as follows;

a……

b. That it is important to note that the two preliminary objections, and the submissions in support have left out other prayers in the petition, that is prayers 1, 7, 8, 9 and 10 which are obviously outside the mandate of the Tribunal and other agencies under EMCA. That it therefore follows that the Petitioners' options were either to come to this court which has original jurisdiction under Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act No. 19 of 2011 to deal with all the issues, or separate them into two for this court and the Tribunal.

c. That had all the issues and prayers in the petition been matters that the Tribunal had jurisdiction to hear and determine, the court would have upheld the preliminary objections raised by the 3rd respondent and Interested Party and dropped its tools without proceeding any further as has been held by the various Superior Courts including the decisions cited by the learned Counsel some of them being Samwel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Ohters [2012] eKLR, and Motor vessel M. V. "Lillian S" vs Caltex Oil (Kenya) Ltd 1989 KLR 1653. That however, this petition has prayers that the Tribunal and other agencies under the National Environmental Management and Coordination Act have no jurisdiction to handle.

e. That the other objection raised is that the claims herein are statute barred as the complaints were not raised within 60 (sixty) days of the events, as required by Section 129 (1) of Environmental Management and Coordination Act. That having considered the submission on this aspect and Articles 23, 42, 47, 69 and 70 of the Constitution 2010, the court finds that as some of the complaints and prayers in the petition relates to infringement of the Petitioners' right to clean and healthy environment, the limitation period set in the statute does not apply. That in any case to matter is not before the Tribunal but in court." (Emphasis supplied)

The *ratio decidendi* for the learned judge holding that the ELC had jurisdiction is that Prayer Nos. 1, 7, 8, 9 and 10 in the petition are outside the mandate of the NET and other agencies under **EMCA**. That had all the issues and prayers in the petition been matters that the Tribunal had jurisdiction to hear and determine, the court would have upheld the preliminary objections and dropped its tools without proceeding any further. The judge further held that as some of the complaints and prayers in the petition related to infringement of the constitutional right to a clean and healthy environment, the Tribunal had no jurisdiction to determine the constitutional issue and the sixty-day limitation period in **Section 129 (1)** of **EMCA** is inapplicable to claims involving violation of constitutional rights before the ELC.

It's in my duty to determine whether the *ratio decidendi* of the learned judge is a correct exposition of law. The Supreme Court in **Samuel Kamau Macharia and another – v- Kenya Commercial Bank and 2 Others**, **Application No. 2 of 2011**, pronounced itself on jurisdiction thus:

"[68] A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. …. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation…." (Emphasis provided).

In the case of **Benard Murage - v - Fine serve Africa Limited & 3 others [2015] eKLR** the Supreme Court again stated that;

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

On the contested jurisdiction between NET and the ELC, in the case of **Ken Kasinga – v- Daniel Kiplagat Kirui & 5 others [2015] eKLR,** Emukule J. of the High Court stated as follows:

"…. In my view, so long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction. This jurisdiction is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or rejection of an EIA licence. True, a person aggrieved by the decision has avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading flied in the ELC as a court of first instance……" (Emphasis supplied)

The respondents also cited dicta from the case of **West Kenya Sugar Co. Limited – v- Busia Sugar Industries Limited & 2 others, [2017] eKLR**, where the learned judge stated:

"This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the constitution. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of the ELC…." (Emphasis supplied)

In the instant matter, the learned judge citing the case of **Ken Kasinga – v- Daniel Kiplagat Kirui & 5 others, [2015] eKLR,** and other decisions from courts of coordinate jurisdiction held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings - that all that a litigant need to do is to draft pleadings such that claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping.

As aptly stated by the Supreme Court in ***Samuel Kamau Macharia and another - v - Kenya Commercial Bank Ltd and 2 Others*** **(supra)**, jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute.

To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

Further, I observe that the jurisdiction of the ELC is appellate under **Section 130** of **EMCA**. The ELC also has appellate jurisdiction under **Sections 15, 19 and 38** of the **Physical Planning Act.** An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

In addition, **Section 129 (3)** of **EMCA** confers power upon the NET to *inter alia* exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of **Section 129 (3)** of **EMCA** is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8, 9 and 10 in the petition. It was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court.

In this matter, the key dispute in the petition before the trial court was whether the three appellants were polluting the environment and whether the three appellants EIA Licences were lawfully procured. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal or the NECC. To this extent, I find that the learned judge erred in usurping the jurisdiction of the Tribunal and or the NECC. I further find that the trial judge in usurping the jurisdiction of the Tribunal negated and rendered otiose the legal effect of **Section 130 (5)** of **EMCA** which makes the decisions of the ELC on appeal to be final. Having erred in exercising original jurisdiction in this matter, the learned judge erred in rendering superfluous and ineffectual the provisions of **Section 130 (5)** of **EMCA**.

The 1st, 2nd and 3rd respondents contend that prior to the decision of this Court in **National Environment Tribunal – v- Overlook Management Limited, Silver Sand Camping Site Limited, NEMA & 4 others**, they would not have had *locus standi* to have access to the National Environment Tribunal. However, it was submitted that at the time the petition was filed, the jurisprudence from the ELC was to the effect that **Section 129 (1)** of **EMCA** barred a person who was not aggrieved from accessing the Tribunal by way of appeal.

Section 129 (1) of **EMCA** provides as follows:

(1) Any person who is aggrieved by:

(a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder:

(b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder:

(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;

(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder:

may within sixty days after the occurrence of the event against which he is dissatisfied appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

The respondent submitted that judicial decisions from the ELC was unanimous to the effect that **Section 129 (1**) of the **EMCA** is only applicable to project proponents. That it was not until the decision of this Court in **National Environment Tribunal – v- Overlook Management Limited, Silver Sand Camping Site Limited, NEMA & 4 others**, that persons other than project proponents could access the NET.

In the instant matter, it is the 1st, 2nd and 3rd respondents' submissions that when they filed their petition before the ELC, the judicial view was that under Section 129 (1) of the EMCA, the respondents did not have *locus standi* to appeal to NET. The respondent's submission is aptly answered through the concept of retroactivity of court decisions. In civil cases, judicial decisions ordinarily are retroactive in application. Such retroactivity is a consequence of the nature and function of the judicial decision-making process. Retroactivity is founded on the notion that a judicial decision enunciates the law as it has always existed. To this end, the decision of this Court in **National Environment Tribunal – v- Overlook Management Limited, Silver Sand Camping Site Limited, NEMA & 4 others**, is retroactive and I find that the respondents misapprehended that they had no right to access the Environmental Tribunal. (See Canadian Supreme Court case of **Attorney General of Canada – v - George Hislop and 4 others [2007] SCC 10**; see also the decision of this Court in **Paul Posh Aborwa - v - Independent Election & Boundaries Commission & 2 others [2014] eKLR)**.

A further jurisdictional contestation urged by the 1st, 2nd and 3rd respondents is that the EIA Licences granted to the appellants was done without publication in the Kenya Gazette and in the absence of an EIA audit study. That in the absence of publication to the general public in the Gazette these respondents would not have been expected to have filed their appeal against the issuance, variation and lack of EIA assessment study and report within the six months' window expressed in **Section 129** of the **EMCA Act**. That the absence of publication and knowledge on the part of the respondents *per se* divested the Tribunal the jurisdiction to hear and determine issues raised in the petition.

I have considered these respondents' contestation that absence of publication in the Gazette led them to have neither notice nor knowledge of the issuance of the EIA Licences to the three appellants. That the non-publication of the EIA Project Report in the Gazette divested jurisdiction from the Tribunal. The submission by the respondents appear logical but has no basis in law. Jurisdiction on a court or Tribunal is not conferred or divested by knowledge or lack of knowledge on the part of a litigant. Jurisdiction is a question of law and not an issue to be inferred or determined by knowledge on the part of a litigant.

I now consider other grounds of appeal urged in this matter.

VIVA VOCE EVIDENCE and THE RIGHT TO FAIR HEARING

The central complaint and dispute between the parties is the validity of the EIA Licences and the issues of alleged pollution of Rivers Nyamasaria, Kibos and Lie Lango. Disputes on validity of and conditions imposed on an EIA Licence are within the competence of NET and NECC. The alleged violation of the 1st, 2nd and 3rd respondents' constitutional rights is ancillary to and riding on their central complaint.

In this appeal, the three appellants contend that the trial judge erred in failing to determine the petition through *viva voce* evidence. As a general rule, there is no automatic right to an oral hearing. Procedural fairness does not require an oral hearing in all circumstances. In determining the form of a hearing, the critical question is whether meaningful participation was allowed by the process chosen by the decision-maker. In Baker - v - Canada (Minister of Citizenship and Immigration)**, [1999] 2 SCR 817**, the Supreme Court stated (at para. 33):

"…it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. …"

In Singh - v- Canada (Minister of Employment and Immigration)**, [1985] 1 SCR 177**, the Supreme Court of Canada agreed that an oral hearing was not always required, but stated that where a serious issue of credibility is involved, "fundamental justice" requires that credibility be determined on the basis of an oral hearing. Justice Wilson (at para. 59) expressed;

"I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions."

In the instant matter, the three appellants contend that the learned judge erred in issuing declaratory and injunctive orders without calling for *viva voce* evidence. That no oral evidence was presented in court to warrant the declaration that the three appellants EIA Licences were irregularly and unprocedurally issued and varied. That without *viva voce* evidence, the trial judge had no basis to arrive at the determination that the EIA Licences were irregularly and unlawfully issued.

In further support, the appellant cited **Rule 20** of the **Constitution** of **Kenya (Protection of Rights and Fundamental Freedoms) Practice** and **Procedure Rules 2013** and dicta from the case of **Mohammed Ali Baadi & others – v- Attorney General & 11 Others, [2018] eKLR**, where at the hearing of a constitutional petition, the trial court departed from the practice in the conduct of constitutional petitions, made a site visit and received *viva voce evidence* from expert witnesses. Likewise, counsel cited the case of **Republic – v- Nairobi City Council & another Ex parte Premier Food Industries Limited [2016] eKLR** where it was stated that where facts alleged by both parties remain unresolved, such disputed facts cannot be resolved on cold-print affidavits but may require *viva voce* evidence to be taken and if necessary, even a visit to the *locus in quo*.

The 1st to 3rd respondents on their part submitted that the trial judge did not err in hearing and determining the petition on affidavit evidence. That there was no need for the petition to be determined on *viva voce* evidence as all the facts in issue relating to licensing of the appellants' factories were not disputed. That in addition, the urgency of the matter as it relates to violation of the right to a clean and healthy environment militated against the taking of *viva voce* evidence.

The three appellants submitted that whereas the trial judge gave directions that the matter be disposed of by written submissions, the directions completely locked them out from adducing evidence that was crucial for determination of the dispute. That the locking out of the appellants was a violation of their right to a fair hearing and fair trial. That parties were not even allowed to highlight the submissions that they had been asked to file.

In this context, four issues arise for my consideration and determination. The first is whether *viva voce* evidence is a mandatory requirement in petitions for enforcement of fundamental rights and freedoms. Secondly whether the learned judge erred in giving directions on proceeding with the hearing based on affidavit evidence and written submissions. Third, whether urgency is a ground to determine a petition on affidavit evidence and not through oral hearing. Fourth, whether the three appellants right to a fair hearing was violated because *viva voce* evidence was not taken by the trial court.

The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013,** *'Mutunga Rules'* require one to approach the court by way of a petition. The 1st, 2nd and 3rd respondents' petition before the ELC is founded on enforcement of the right to a clean and heathy environment as guaranteed in **Articles 42** and **43** of the **Constitution**. It follows that the respondents correctly instituted the suit by way of petition. Rule 20 of the *Mutunga Rules* spells out the manner in which a petition shall be heard and determined.

Rule 20 provides as follows:

20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of— (a) affidavits; (b) written submissions; or (c) oral evidence.

(2) The Court may limit the time for oral submissions by the parties.

(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence

In the instant matter, the record shows that the trial court gave directions that the petition was to be heard by way of affidavit evidence and written submissions. No application was made by any party that the petition or part thereof be heard by oral evidence. No objection was raised by the three appellants or any party on the propriety of the directions given by the judge. In the absence of any challenge to the directions given by the judge, it is my finding that the directions given was in conformity and consonance with **Rule 20 (1)** of the **Mutunga Rules.**

I am cognizant that in the persuasive case of in **Re Estate of Joseph Mapesa Nakuku (Deceased) [2019] eKLR** it was stated that it would have been wiser for the parties to give *viva voce* evidence since the same has a way of bringing out the facts more clearly, particularly in a contested matter.

Comparatively, in the South African case of **S - v- J. Sibanda (Judgment No. CCZ 4/17, Const. Application No. CCZ 14/15) [2017] ZWCC 4 (17 March 2017),** it was expressed that *"there are cases where the leading of evidence would not be necessary, particularly where the facts giving rise to the request are common cause. In such a case, it would serve no meaningful purpose for the parties to be required to give viva voce evidence. Where, however, the facts are not common cause, the parties must, as a general rule, be required to give evidence."*

In the Lesotho case of **Zwelakhe Mda v Minister of Home Affairs and Others (Constitutional Case No.4 of 2014) [2014] LSHC 30 (24 September 2014);** it was expressed that where there is no real, substantial and material dispute of fact which makes it impossible to dispose of a matter without resort to *viva voce* evidence, the factual differences can be decided on the papers by affidavit evidence.

In the instant matter, I am persuaded by the merits of the principles enunciated in the foregoing comparative jurisprudence. I approve and adopt the same. I have considered whether in the instant matter there are real contested matters of fact that could not be resolved by way of affidavit evidence and that would require *viva voce* evidence.

The 1st, 2nd and 3rd respondents submitted that the facts that led to the issuance of the appellants EIA Licences were undisputed. That the undisputed facts relate to pollution and procedural validity of the EIA Licences granted to the three appellants. On the alleged pollution of the rivers, these respondents submitted that what was required to prove or disapprove pollution is not oral evidence but expert evidence. In addition, that the relevant fact finding reports were all attached to the affidavits filed in support of or in opposing to the petition. That all the relevant facts having been placed on record, the trial judge did not err in giving directions that the petition be heard and determined by affidavit evidence and written submissions.

In rebuttal, the three appellants submitted that oral evidence was imperative to assist the trial court in determining the dispute between the parties. That the three appellants vehemently denied polluting any of the rivers. That oral expert evidence was required to prove pollution or environmental degradation. That cross-examination of the experts would prove or disapprove pollution and environmental degradation.

I have considered the rival submissions on *viva voce* evidence. The three appellants have not indicated the nature and type of witnesses and evidence that they would have called for the trial court to consider if *viva voce* evidence was necessary. The three appellants have not demonstrated what prejudice they have suffered as a result of the trial court not taking *viva voce* evidence. Further, no application was made to adduce oral evidence and no objection was raised against the directions given by the trial judge. For these reasons, I find that failure by the trial court to conduct the hearing by way of *viva voce evidence* did not vitiate the trial and proceedings that led to the judgment of the court.

In duplication, the three appellants further contend that their right to a fair hearing and trial were violated because no *viva voce* evidence was adduced before the trial court. It is a settled principle of law that a right to a hearing is not exclusively and primarily a right to be heard by way of oral evidence. The courts are unanimous on the point that oral or personal hearing is not an integral part

of fair hearing unless circumstances are so exceptional that without oral hearing, a person cannot put up an effective defence or advance his/her/its case.

When facts in issue in a case are strongly contested, that would be a good basis for the Court to allow *viva voce* evidence to enable cross-examination to separate the wheat from the chaff. In this matter, in orbiter, I note that there were two ardently contested issues on the procedure through which the three appellants acquired their EIA Licences and whether the rivers were being polluted by the three appellants. These two issues ought to have been determined by *viva voce* evidence. Nonetheless, as already stated, the trial court gave directions that the case proceeds by way of affidavits and written submissions and no objection was made by either party to the directions. At any rate, I think the learned judge had a discretion in the matter and it has not been demonstrated that the discretion was perversely exercised in proceeding by way of affidavit and not by oral evidence especially when the latter was not sought. I would therefore not interfere although it may be said that there was probably something to be gained through adoption of *viva voce* evidence.

In summation, in the instant matter, the three appellants have not demonstrated to us any exceptional circumstance that would vitiate the directions given by the trial court to proceed by way of affidavit evidence and written submissions. The trial court gave directions on how the petition was to be heard. It exercised discretion. At no time during the proceedings did the three appellants apply for *viva voce evidence* to be adduced. In addition, the three appellants have not pointed to our satisfaction that issues of credibility of the deponents of the various affidavits filed in court was raised to justify receiving oral evidence to test the veracity of their depositions. I thus find that the three appellants' right to a fair hearing or right to be heard by way of *viva voce* evidence was not violated.

I conclude the foregoing analysis by stating that neither the urgency of a petition nor an alleged violation of a constitutional right is per se by itself a sufficient ground for a court to dispense with *viva voce evidence* and rely on affidavit evidence. If a party applies to court for *viva voce* evidence to be taken, the court ought to carefully consider the application and if persuaded to conduct the hearing by way of *viva voce* evidence unless for reasons to be recorded the court direct otherwise.

PETITION WAS NOT SPECIFIC AS TO THE CONSTITUTIONAL RIGHTS VIOLATED

The High Court in **Silas Make Otuke - v - Attorney General & 3 others [2014] eKLR** persuasively expressed that the requirement for precise pleading is the essence of **Rule 4** & **10** of the ***Mutunga** Rules*. In this matter, the appellants contend that there was no precise pleading as the petition filed before the trial court did not meet the threshold of a constitutional petition to disclose or describe the nature of the complaints of violation of their constitutional rights or threats to such violations with specificity. It was urged that no particulars were provided on the alleged breach of the respondents right to a clean and healthy environment and as such, the petition did not meet the test established in ***Anarita Karimi Njeru - v – The Republic** (1976 – 1980) KLR* and **Mumo Matemu – v- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.**

The 4th appellant urged that the petition filed by these respondents cited alleged violation of omnibus provisions of the Constitution including **Articles 2 (1)**, **3 (10**, **10 (1)**, **2 (a) (b)**, **20 (1)**, **(2) (3) (a)** and **(b)**, **4 (a)** and **(b)**, **21 (1)** and **(2)**, **23 (1)** and **(3) (a) (b) (c) (d)** and **(e)**, **27**, **28**, **32**, **40**, **42**, **43**, **47**, **70** and **73**. That the citation of omnibus provisions of the Constitution is contrary to the decision in **Anarita Karimi Njeru v- Republic** (supra) and **Mumo Matemu – v- Trusted Society of Human Rights Alliance & 5 others** (supra) where this Court held that in a case founded on alleged violation of a constitutional provision, the petition must set out with reasonable precision the acts or omissions as well as the provisions alleged to have been violated.

The 1st, 2nd and 3rd respondents in rebutting the alleged non-specificity of the constitutional provisions violated, submitted that the petition specified all the relevant Articles of the Constitution and the relevant statutory provisions in the EMCA and the specific regulations that were violated. It was urged that these respondents' case was grounded on protection of their right to a clean and healthy environment under **Articles 42, 69** and **70** of the **Constitution**.

I have perused the petition dated 25th October 2018 filed before the trial court to ascertain if there was a reasonable degree of precision of the respondents' rights claimed to have been violated. In the petition, the respondents specifically averred at paragraph 55 thereof that *inter alia* their right to a clean and healthy environment as guaranteed by **Articles 42** and **43** of the **Constitution** had been violated. Paragraph 55 of the petition also explicitly identifies that **Section 58 (1)** of the **Environmental Management and Coordination Act of 1999** and **Regulations 7, 8, 17, 19, 20, 22, 24 and 25** were violated.

From my perusal and analysis of the petition dated 25th October 3028, I find that the respondents pleaded with reasonable precision

and specificity the Constitutional Articles and the statutory provisions they alleged were violated by the three appellants. I find no merit in the contestation that the petition that was filed did not meet the criteria set out in the case of **Anarita Karimi Njeru** (supra).

POLLUTION OF RIVERS, DEGRADATION OF THE ENVIRONMENT and RIGHT TO CLEAN and HEALTHY ENVIRONMENT

It is contended the learned judge erred in holding that the three appellants were degrading the environment by pouring vinasse without any or at all conclusive evidence. That the judge erred in holding that the three appellants were responsible for degrading the environment without any supportive scientific evidence. That the judge erred in finding that the three appellants were polluting Rivers Nyamasaria, Kibos and Lie Lango. That in the absence of evidence, the judge erred in finding that the 1st, 2nd and 3rd respondents rights to a clean and healthy environment under **Article 42** and **43** of the **Constitution** were violated.

These respondents at paragraph 29 of the Petition averred that the three appellants have been polluting the environment by discharging raw effluent into River Nyamasaria as was established by the National Environmental Complaints Committee *vide* their Report dated 5th October 2017. That the three appellants have been polluting the environment by discharging raw effluent into River Kibos as was established by the County Government of Kisumu, Department of Water, Environment, Irrigation and Natural Resources vide their Report issued in March 2018. That the three appellants have been polluting the environment by discharging raw effluent into River Lie Lango as was established by the County Government of Kisumu, Department of Water, Environment, Irrigation and Natural Resources vide their report issued in March 2018. That the three appellants are discharging raw effluent from the distillery and specifically vinasse into the environment. That the 4th respondent visited and inspected the appellants' factories and discovered that the factories were using vinessa in dust control and road maintenance. That the use of vinasse in road maintenance had not been subjected to the EIA process. That the use of bagasse in the pulp and paper industry releases some fugitive dust and ash into the environment.

Paragraph 29 of the petition contains the allegations on pollution of Rivers Nyamasaria, Kibos and Lie Lango. The same paragraph contains allegations of degradation of the environment and alleged violation of the respondents' right to a clean and healthy environment.

The legal and factual issue is what scientific or factual evidence is on record to support the pollution allegations" In their submissions before this Court, the 1st, 2nd and 3rd respondents urged that once it was shown that there was no Environmental Impact Assessment Study undertaken by the three appellants, the law presumes proof of threat or harm to the environment without need for any actual evidence of such resultant pollution.

I have considered the foregoing submission by the respondents. Whether there is threat, harm or degradation of the environment is a question of fact. A presumption of fact means **presumption established from another fact or group of facts**. In the instant matter, even if it were proved that there was no EIA study, the absence of such a study cannot support a presumption or finding of fact that there is threat, harm or degradation of the environment. There is no presumption of threat or harm to the environment simply because no environmental impact assessment study has been done. I have looked far and wide and failed to find any legal principle, a binding judicial authority or a statutory provision that establishes the presumption as alleged by the respondents.

In determining the pollution issue, the trial judge held that the respondents had proved that the three appellants were polluting and degrading the environment. In so holding, the judge expressed himself as follows:

"24. That the Petitioners have detailed the nature of the raw effluent being discharged by the 1st to 3rd Respondents into the environment including the three surrounding rivers. That though the said Respondents have disputed the claim, the 4th Respondent has in their submissions left no doubt that indeed the 1st to 3rd Respondents activities are negatively affecting the environment, and further disclosed that they have already closed down the distillery and paper packaging plants of the 1st to 3rd Respondents so as to allow improvements on the industrial processes to be made. That they submitted that "We thus not only support the closure orders sought in the petition but have gone ahead to exercise our statutory mandate in closing down 2 of the plants which were found to have exceeded parameters of their effluent discharge……" That had the 1st to 3rd Respondents complied with the 4th Respondent's restoration and improvement orders as they appear to claim in their replying affidavits and submissions, the closure order referred to by the 4th Respondent affecting two (2) of their factories would not have been issued. That the court therefore finds that the petitioners have established that the 1st to 3rd Respondents are releasing raw effluent beyond the accepted quantities and without putting in place sufficient mitigating measures thereby affecting the environment negatively. That said pollution affects not only the air, water but also the aquatic life in the water bodies in the neighborhood. That it amounts to an infringement of the Petitioners'

Constitutional right to clean and healthy environment under Article 42 of the constitution. That the Petitioners are therefore in order to move this court as they did for the enforcement of their environment rights as provided for under Article 70 of the Constitution.

25. That it is apparent that the Petitioners had raised their complaints similar to those in the petition with the 4th and 5th Respondents. The 4th Respondent conceded it had acted on the complaints while the 5th Respondent denounced the correspondence availed by the Petitioners in support of their claim that they had sought assistance and action from it. That the fact that the petitioners had raised their complaints over raw effluent discharge into the environment by the 1st to 3rd Respondents years before filing this petition, without effective action being taken under Section 108 of EMCA points to the extent the environment in that area has been put through degrading activities. That all that time, and until after the filing of the petition when 4th Respondent reportedly issued the closure orders on the two factories, the state regulatory agencies including, the 4th and 5th Respondents, did practically nothing as the few restoration and improvement orders issued were generally not complied with and no prosecution has been initiated as of 12th March 2019, when the 4th Respondent filed their submissions in which they stated in the last sentence that "The 4th Respondent reserves its right to upscale enforcement to prosecutorial action should the events warrants."…...

I have examined the record of appeal and it is now my duty to determine if the learned judge correctly evaluated the evidence and properly arrived at the determination that the three appellants were polluting and degrading the environment. In relevant excerpt, the judge made findings of fact that the;

"said pollution affects not only the air, water but also the aquatic life in the water bodies in the neighborhood. That it amounts to an infringement of the Petitioners' Constitutional right to clean and healthy environment under Article 42 of the constitution.……. That the fact that the petitioners had raised their complaints over raw effluent discharge into the environment by the 1st to 3rd Respondents years before filing this petition, without effective action being taken under Section 108 of EMCA points to the extent the environment in that area has been put through degrading activities."

My re-examination of the record reveals that there is no scientific evidence on record to prove that there was air pollution and that aquatic life in the water bodies in the neighborhood was affected through the activities of the three appellants. There is no chemical analysis conducted by the respondents (more particularly the 4th respondent) to prove that the waters of the rivers had been polluted. Other than the observations made by the 4th respondents Inspectors, no scientific causal link between the activities of the three appellants and the alleged pollution of the rivers was proven. The **sources of river or water pollution can be considered to be Non-Point and Point. Point indicates the existence of pollutants coming from one source.** River pollution comes from a variety of different sources, including agricultural operations, industrial discharge, wastewater treatment plants and storm water runoff, that carry pollutants into waterways. All these are non-point sources of pollution.

In the instant matter, there is no scientific empirical evidence on record to prove point pollution and its causal link to the activities of the three appellants. No sampling technique to prove river pollution was tendered in evidence. Above all, the alleged deleterious effect of the vinasse to the environment was not scientifically proven and no expert report on the effect of vinasse to the environment was produced in evidence.

Further, it is an incorrect deduction and conclusion of fact to make a finding that the fact that the respondents had raised their complaints over raw effluent discharge into the environment by the three appellants' years before filing the petition was proof of environmental degradation. Proof that a complaint had been raised years before is not proof of environmental degradation. Pollution is primarily proved by empirical, technical and scientific evidence and not by lay man opinion testimony or depositions. In the context of the statements by the learned judge as stated above, I find that the judge erred in deducing and arriving at conclusions of fact that the three appellants were responsible for river pollution without any scientific, empirical and sampling evidence to prove point pollution and the causal link to the three appellants.

On record, (at pages 124 to 130 in Civil Appeal No. 153 of 2019), there is a report by the NECC dated 5th October 2017. I note that the NECC is a competent organ authorized by statute to conduct investigation on any alleged environmental degradation. The Committee on its own motion investigated complaints of environmental degradation due to discharge of effluent into River Nyamasaria by 3rd appellant. The finding as per the Report were that "there was a black effluent being discharged from a pipe near the distillery factory into River Nyamasaria through the southern storm drain." There was no scientific evidence to prove what the "black effluent was" and if the same was deleterious to the environment. The source of the "black effluent" was not unequivocally identified and stated. Thus, point pollution was not proved.

On record (at pages 135 to 137 in Civil Appeal No. 153 of 2019), there is a report by the County Government of Kisumu Department of Water, Environment, Irrigation and Natural Resources of the 4th appellant dated March 2018 on complaints of pollution of River Kibos by the 3rd appellant. The findings as per the Report were that the water was black and smelly; fish among the aquatic plants were being picked floating helplessly on water which was an indication of oxygen depletion; that the water was not being used for domestic purposes and livestock were not consuming it. The content of vinasse in the river was confirmed to have come from 3rd appellant.

A further report from NEMA dated 30th October 2018 (see pages 148 to 203 of the record) made recommendations on the nature of restorative action that the three appellants needed to undertake to restore the rivers that had allegedly been polluted. For example, it was recommended that to ensure proper handling of vinessa to curb spillage into the environment, the three appellants were to fence the temporary lagoons holding the vinasse; that all lands contaminated with the vinessa should have a band around them to avoid spill over into the environment; that the three appellants were to complete the lagoon under construction to specifications with underlining that will prevent seepage of vinessa into the ground water; that the appellants were to decommission the current holding lagoon and carry out operations to ensure ground water seepage is curtailed; that the three appellants were to install a lining for use in case it was needed for further use.

Subsequent to the October 2018 Report, the NECC conducted a further site inspection visit to the three appellants' factories to determine if the recommendations made in October 2018 had been implemented. A Compliance Status Report was forwarded to the Clerk of the National Assembly vide letter dated 18th April 2019. The Compliance Report was admitted as additional evidence by this Court in the ruling delivered on 9th October 2019.

The findings and recommendations in the Compliance Report are that:

1. Operations in the Kibos Paper and Packaging Limited may be allowed to start operations with NEMA monitoring the following issues:

(a) Removal of bagasse from the open area next to staff quarters by end of April 2019 (on-going).

(b) Diversion of effluent waste from storm drains immediately (already done).

(c) Complete separation of the effluent and storm drains by end of March 2019 (already completed).

(d) Complete drain layout plan by 23rd March 2019 (already completed and submitted).

2. Current Vinasse waste management and preparation activities in place;

(a) During the trial run the vinasse waste is filled into the bio digester which has a capacity of 300m3.

(b) On daily basis the distillery generates 80m3 of vinasse waste.

(c) This implies that the bio digester will fill up by 25th April 2019 (the alternative storage lagoon has been completed).

(d) The construction of the storage lagoon currently on-going is likely to be completed on 12th April 2019 (already completed).

Based on the above compliance efforts by the management of Kibos Sugar and Allied Industries, the closure order issued to the distillery and paper factories may be lifted. NEMA inspectors should conduct quarterly inspections to deter recurrence of similar occurrences.

The proposal of Kibos management to establish a fertilizer plant to convert vinasse waste into fertilizer should be speeded up to permanently solve the vinasse challenge. (Emphasis supplied)

I note that the 4th respondent's Compliance Report has a Matrix on Compliance with the Environmental Restoration Orders issued on 27th February 2019. The Matrix was prepared as a result of an inspection conducted between 12th and 14th March 2019. In the

Matrix, a finding was made that there was 100% satisfactory compliance with pollution prevention measures that were put in place; that 100% of all the fugitive waste water discharge points were sealed off and the drains cleared the debris; that 100% layout plan were completed and submitted and finally that 100% correctional measures were undertaken. (Emphasis supplied)

The Compliance Status Report also shows that the Kibos Sugar Plant had an effective effluent treatment plant and 95% of the corrective measures had been undertaken. As for the 1st appellant, the Report shows that at the time of inspection, the plant was compliant as no vinasse waste was discharging into the environment. (Emphasis supplied)

I have considered the additional evidence produced before this Court vide the NEMA Compliance Report forwarded to the Clerk of the Assembly by the letter dated 18th April 2019. During the hearing of the application to adduce the additional evidence, counsel for 4th respondent conceded that the Compliance Report was authentic and duly signed by the 4th respondent.

The issue for my consideration and determination is what probative value should be accorded to the 4th respondent Compliance Report. The Compliance Report shows that diversion of effluent waste from storm drain had already been completed; that there was a complete separation of effluent and storm drain; that construction of an alternative storage lagoon had already been completed. The final recommendation in the Compliance Report is that the closure order issued to the Kibos Distillery and Paper Factory may be lifted and that NEMA inspectors should conduct quarterly inspections to deter similar occurrences.

The Compliance Report for Kibos Paper & Packaging Limited indicates that the discharge points observed in the earlier inspection had been sealed off. That the leakages from the pump glands had been stopped by replacing the glands and pollution preventive maintenance had been completed. The Report shows a 95% compliance.

The 4th respondent Compliance Report is authentic and credible being a report from a public body charged with the mandate to undertake environmental inspection. I note that during site inspection, the Kibos Distillery Factory was allowed to open to conduct a trial run for inspectors to observe compliance. The Report shows that at the time of inspection, there was no risk of vinasse spilling to the river as it was contained in a bio-digester.

From my re-evaluation of the evidence on record and taking into account the additional evidence of the 4th respondent Compliance Report, I find that at the time of delivery of the impugned judgment, the learned judge did not have the benefit of having before him the NEMA Compliance Status Report forwarded to the Clerk of the Assembly by letter dated 18th April 2019. The Compliance Report shows that restorative measures and compliance had already been undertaken. That the compliance rate was between 95% and 100%. The judge did not have the benefit of the final recommendation of the Compliance Report that recommends lifting of the closure order. For this reason, I am satisfied that had the learned judge had the benefit of the NEMA Compliance Status Report, he would have arrived at a different conclusion and not issued the restorative and demolition orders that were made in paragraphs 31 (g) of the impugned judgment.

Having found that the learned judge did not have the benefit of the additional evidence in form of the NECC Compliance Report forwarded to the Clerk of the National Assembly, and further recalling the need for continuous monitoring of compliance, I order that NEMA and or NECC should continuously conduct inspection at the three appellants' factories to monitor compliance with environmental standards.

The next ground of appeal for my consideration relates to the trial court's order cancelling the EIA Licences that were issued to the three appellants. Before I delve into the merits of cancellation, it is imperative for us to clarify and draw a distinction between an Environmental Project Report and Environmental Impact Assessment Study.

PROJECT REPORT and ENVIRONMENTAL IMPACT ASSESSMENT STUDY

The definition, meaning and content of an EIA Project Report and EIA Study Report is contained in the EMCA as well as in the **Environmental (Impact Assessment and Audit) Regulations 2003** (hereinafter referred to as "the Regulations").

Section 2 of **EMCA** as well as **Section 2** of the **Regulations** define a Project Report to mean "*a summary statement of the likely environmental effects of a proposed development…"* On the other hand, an Environmental Impact Assessment is defined to mean "*a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment."*

Regulation 2 defines an Environmental Impact Assessment Study Report to mean "the report produced at the end of the environmental impact assessment study process……"

On the other hand, an "Environmental Audit" is defined in Section 2 of EMCA to mean "a systematic, documented, periodic and objective evaluation of how well environmental organization, management and equipment are performing in conserving or preserving the environment."

The legal issue for my consideration and determination is whether there is legal and material difference between a Project Report and an Environmental Impact Assessment Study Report. The second issue is which report was the 3rd appellant required to submit in order to get the EIA Licence No. 0000259 or any other EIA Licence that was issued.

On the first issue, it is not disputed that a Project Report is distinct from an EIA Study Report. The respondents in their written submissions correctly stated that the documents are very different with different functions addressing different requirements of the statute.

A reading of **Section 58 (1)** of **EMCA 1999** indicates that as at 2004, all that the 3rd appellant was required to submit to the 4th respondent was a Project Report. A Project Report is a summary that is generated after an environmental impact assessment study. Under **EMCA 2015** amendments, all proponents of a project are required to submit a full EIA Study Report. The **EMCA 2015** amendments did away with the requirement to submit a Project Report instead a full EIA Study Report is the one to be submitted.

I therefore make a finding that in 2004, the 3rd appellant was required to submit to the 4th appellant a project report and not an EIA study report.

PRESUMPTION OF REGULARITY IN ISSUANCE OF EIA LICENCES

The 1st, 2nd and 3rd respondents urged that the procedure for issuance of an EIA Licence after submission of a project report is vide **Regulations 7, 8, 9** and **10.** The gist of these respondents' case is that **Regulations 7, 8, 9** and **10** were not followed in the issuance of EIA Licence No. 0000259. It is these respondents case that the 4th respondent did not follow the procedure in **Regulations 7, 8, 9** and **10 (2)** and thus **NEMA** acted unprocedurally and unlawfully in invoking the provisions of **Regulation 10 (3)** and issuing the EIA Licence No. 0000259.

On the other hand, the three appellants contend that upon submitting the project report in 2004, the 4th respondent was satisfied and issued the EIA Licence No. 00259 pursuant to **Regulation 10 (2)**.

In law, there is a presumption of regularity. Under this presumption, a court presumes that official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary. (See Archbold Criminal Pleading, Evidence and Practice**, 1999, p. 1130,** see heading "B" to paras. 10-4 and 10-5; see also **Patrick Ayisi Ingoi - v- Republic [2018] eKLR)**

In **Chief Land Registrar & 4 others - v - Nathan Tirop Koech & 4 others [2018] eKLR** it was stated that there is a presumption that all acts done by a public official have lawfully been done and that all procedures have been duly followed. The presumption of regularity is a presumption that executive officials have properly discharged their official duties. The presumption is aptly captured in the ancient latin maxim "**Omnia praesumuntur rite esse acta,"** which roughly translated means "All things are presumed to have been done rightly."

In the instant case, applying the presumption of regularity, the starting point is that the 4th respondent acted lawfully and procedurally in issuing the various EIA Licences to the three appellants. The burden of proof to rebut the presumption of regularity is upon the respondents. The evidence required to rebut the presumption of regularity must be cogent, clear and uncontroverted. In the instant case, the respondents seek to rebut the presumption of irregularity through interpretation of **Section 58 (2)** of **EMCA** and **Regulation 10 (2) and (3)**. Both the appellants and respondents have submitted their versions of conflicting interpretation and application of **Section 58 (2)** of **EMCA** and **Regulation 10 (2) and (3)** aforestated. I make a finding that the presumption of regularity cannot be rebutted through conflicting interpretation of a statutory or regulatory provision. Liability for any action cannot be founded on conflicting interpretation of statute. In this matter, I find that the respondents have not led cogent, undisputed factual evidence to dislodge the presumption of regularity. In arriving at his decision, the learned judge erred in failing to take into account

and consider the role and place of presumption of regularity in execution of official duty by the 4th respondent when the EIA Licences were issued. The judge erred and failed to give sufficient weight to the provisions of **Regulation 10 (2) and (3)**; in so doing, the judge erred and failed to bear in mind that the discretion in **Regulation 10 (2)** and **(3)** is vested upon the 4th respondent and not the trial court. A court cannot usurp the discretionary powers vested upon the 4th respondent and substitute its own decision for that of the 4th respondent.

CANCELLATION OF LICENCES

The three appellants submitted that the learned judge erred in declaring that the issuance of EIA Licence No. 0000259 by the 4th respondent was unconstitutional, illegal and in contravention of **Sections 58, 59, 60, 61, 62,** and **63** of **EMCA** and also contrary to **Regulations 17, 18, 22, 23** and **24**.

The pivotal point in this appeal is the wordings and interpretation of **Section 58 (2)** of **EMCA** and application of **Regulation 10 (2) and (3)** of the **Regulations.** There are two section 58's in contestation. The first being **Section 58 (2)** of **EMCA 1999** and the second being **Section 58 (2)** of **EMCA** as amended in 2015.

Section 58 (2) of the 1999 EMCA Act provided as follows:

"the proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs. (Emphasis supplied)

Regulation 10 (2) of the EIA Regulations 2003 provides that:

Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project discloses no sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule. (Emphasis supplied)

Section 58 (2) of EMCA as amended in 2015 provides as follows:

"The proponent of any project specified in the second schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority. (Emphasis supplied)

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

The three appellants fault the trial judge for relying on **Section 58 (2)** of **EMCA 2015** instead of **Section 58 (2)** of **EMCA 1999**. It was submitted that the 3rd appellant conducted the EIA based on **Sections 58 (1), 58 (2)** and **63** of **EMCA 1999** and **Regulations 7 (1), 7 (2)** and **7 (3)** of the **EIA Regulations** and not **EMCA 2015.** That upon submitting a Project Report under **Regulation 9 (1),** the 4th respondent then communicated to the 3rd appellant as per **Regulation 10 (1**) and finally issued a Licence No. 000259 as per **Regulation 10 (2)**.

At this juncture, it is important to reproduce the provisions of **Regulations 7 and 10 of the Regulations**.

Regulation 7 provides as follows:

7. (1) A proponent shall prepare a project report stating -

(a) the nature of the project;

(b) the location of the project including the physical area that may be affected by the project's activities;

(c) the activities that shall be undertaken during the project construction, operation and decommissioning phases;

(d) the design of the project;

(e) the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal;

(f) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project;

(g) an action plan for the prevention and management of possible accidents during the project cycle;

(h) a plan to ensure the health and safety of the workers and neighbouring communities;

(i) the economic and socio-cultural impacts to the local community and the nation in general;

(j) the project budget; and

(k) any other information the Authority may require. (Emphasis supplied)

Regulation 10 provides as follows:

(1) On determination of the project report, the decision of the Authority, together with the reasons thereof, shall be communicated to the proponent within forty-five days of the submission of the project report.

(2) Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule to these Regulations. (Emphasis supplied)

(3) If the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with these Regulations. (Emphasis supplied)

(4) A proponent who is dissatisfied with the Authority's decision that an environmental impact assessment study is required may within fourteen days of the Authority's decision appeal against the decision to the Tribunal in accordance with regulation 46.

The three appellants submitted that under **Regulation** 7, all a project proponent was required to do was to submit a Project Report and not an Environmental Impact Assessment Study. That an Environmental Impact Assessment Study was only required pursuant to **Regulation 7 (3)**, if the 4th respondent made a finding that the project will have a significant impact on the environment, and the project report disclosed no sufficient mitigation measures. In this matter, it was submitted that on 19th October 2005 when the 4th respondent issued the EIA Licence No. 0000259, the 4th respondent was satisfied that the Project Report submitted by the 3rd appellant did not have significant impact on the environment and the Report disclosed sufficient mitigation measures. That the 4th respondent having reviewed the 3rd appellant's project report and being satisfied on its sufficiency and adequacy issued EIA Licence No. 0000259 to the 3rd appellant as per the procedure that existed at that time.

It was submitted that before the amendment to **EMCA Act** in **2015**, there was no categorization or classification of projects to carry out EIA project report or EIA study report. That the second schedule of **EMCA 1999** has no classification while the second schedule of **EMCA 2015** has classification into Project Report and EIA Study Report.

The three appellants submitted that when **EMCA** was amended in 2015, projects were classified into those that have to carry out project report and those that are to carry out study report. That the three appellants having been issued with EIA Licences prior to the 2015 amendments, the three appellants cannot be subjected to **Section 58 (2)** of the **EMCA 2015** amendments.

Founded on the submission that the three appellants were not to be subjected to the **2015 EMCA** amendments, it was submitted that the learned judge erred in declaring as illegal the variation of the 3rd appellant's EIA Licence No. 0000259 issued by the 4th respondent. The judge in cancelling the variations stated that the three appellants were required to conduct an EIA Study pursuant to **Section 58 (2)** of **EMCA.** The judge did not specify which **Section 58 (2)** he was referring to but the requirement of an EIA is contained in **EMCA 2015**. It follows that the trial judge erred in applying the provisions of **EMCA 2015** to the appellants.

I shall now re-evaluate the evidence on record and determine the procedural validity of each of the EIA Licences issued to the three appellants by the 4th respondent.

PROCEDURAL VALIDITY OF LICENCE No. 0000259

The issue of validity of the EIA Licence No. 0000259 issued to the 3rd appellant by the 4th respondent on 19th October 2005 is partially to be determined by the concept of retroactivity of legislation. A retroactive or retrospective law is one that takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes new duties, or attaches a new and different legal effect to transactions or considerations already past. Settled principles of legislative construction presume that legislation is not intended as retroactive unless its language expressly makes it retroactive.

In the case of ***Municipality of Mombasa – v - Nyali Limited*** **[1963] E.A. 371** Newbold, JA stated that:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention." The principle reiterated in ***Orengo - v - Moi & 12 Others (No. 3) (2008) 1 KLR EP 715.***

In the instant appeal, as regards EIA Licence No. 0000259, the procedural and constitutional validity of the Licence is to be determined by the law as it was on 19th October 2005 when it was issued. As at 19th October 2005, the environmental legislation that was in force was the **EMCA 1999** and not the **EMCA 2015** amendments. The Constitution that was in force was the repealed Constitution and not the 2010 Constitution.

In ***Samuel Kamau Macharia and another - v - Kenya Commercial Bank Ltd and 2 Others*** **(supra)** the Supreme Court observed that:

"[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospectivity is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden"

At the outset, I point out that in this matter, the learned judge in evaluating the evidence on record and arriving at his decision as stated in paragraph 16 of the impugned judgment relied on the second schedule to the **EMCA Act**. However, the judge did not specify whether he was relying on **Section 58 (2)** of **EMCA 1999** or **Section 58 (2)** of **EMCA** as amended in 2015. At paragraph 16, the judge stated that the three appellants had not availed a copy of EIA Study Report upon which they allege the EIA Licence No. 0000259 was based so as to rebut the respondents claim. This statement by the judge is erroneous. It is not in dispute that the 3rd appellant obtained Licence No. 0000259 based on a Project Report submitted to the 4th respondent. The learned judge misapprehended this critical fact thereby applying **Section 58 (2)** of **EMCA Act 2015** amendments to determine the validity of the EIA Licence No. 0000259. The learned judge ought to have applied **Section 58 (2) of EMCA 1999** which required the 3rd appellant to submit a project report and not an EIA study report.

The error by the judge in failing to find that an EIA Study was not required by the 3rd appellant as regards Licence No. 0000259 is demonstrated by another statement at paragraph 16 of the judgment where the judge stated that **"the respondents herein had not not proved that NEMA had required an EIA study to be carried out by the appellants after submission of the Project**

Report." This statement by the judge is a finding that no EIA Study Report was required when Licence No. 0000259 was issued. This finding is reinforced by the learned judge's statement in relation to Licence No. 0000259 that **"the court will take it that NEMA was satisfied that the project had no significant impact on the environment or alternatively, the EPR disclosed sufficient mitigation measures before issuing the licence."**

From my re-evaluation of the evidence, I find that the judge erred in retroactively applying the **EMCA 2015** amendments in determining the procedural validity of the EIA Licence No. 0000259. I further find that the learned judge correctly held at paragraph 16 of the judgment that no EIA Study was required in relation to the Project Report submitted to the 4th respondent in 2004 upon which Licence No. 0000259 was issued on 19th October 2005. I however observe that the trial judge later in the final orders erred and abandoned the finding and arrived at a contradictory conclusion.

In addition, my reading of paragraph 17 of the judgment reveals that the judge applied the concept of public participation in determining the procedural lawfulness of the EIA Licence that was issued to the three appellants. The learned judge expressed:

"[17] …… That it is important to note that public participation is now an accepted phenomenon post 2010 Constitution. That this is evinced by, for example Article 69 (i) (d) of the Constitution which obligates the state to "encourage public participation in the management protection and conservation of the environment," and sub-Article (2) provides that "Every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources." That the Petitioners and other residents affected by the activities carried out by the 1st to 3rd Respondents were denied the opportunity to have their say in respect of the said Respondents' applications for variations of the EIA licence No. 0000159, when the 4th Respondent approved it and issued the certificate of variation of EIA licence No. 0000151 despite them knowing the fact that the variation projects would not comply with the requirements of the original licence in terms of size and capacity of sugarcane processed, and the parcel of land the projects would be situated……."

The EIA Licence No. 0000259 was issued by the 4th respondent to the 3rd appellant on 19th October 2005. Bearing in mind the learned judge's reference to the 2010 Constitution, I am reminded of the dicta in the judgment of the Supreme Court in **Communications Commission of Kenya & 5 others – v - Royal Media Services Limited & 5 others [2014] eKLR** where it was stated:

"[205] In such context, can it be concluded that the promulgation of the Constitution, on the 27th of August, 2010 immediately rendered CCK and all its actions thereafter unconstitutional" Such is the conclusion the Appellate Court arrived at, and which occasioned the nullification of the licence that had already been issued to the 5thappellant herein. It is clear to us that this conclusion was based on the assumption that Article 34(3) and (5) had somehow envisaged the reconstitution of CCK. However, this assumption, although not devoid of logic, is not supported by the tentative cast of the two sub-Articles. The three-year time-frame within which legislation was required to be enacted, pursuant to the Fifth Schedule as read with Section 7(1) of the Sixth Schedule, should be understood to mean that the Constitution did not contemplate a vacuum in the licensing of airwaves……..

[209] Hence *it is our conclusion that, CCK was not only legally mandated to regulate airwaves and licensing under the 1998 and 2009 Acts, but also, the promulgation of the Constitution of 2010 did not render its actions immediately unconstitutional"*

By parity of reasoning and guided by the Supreme Court dicta in the CCK case, I am of the considered view that the promulgation of the 2010 Constitution did not render invalid and unconstitutional the EIA Licences that had been issued by the 4th respondent under **EMCA 1999** prior to the 2010 Constitution.

In the comparative and persuasive South African case of ***Du Plessis & Others versus De Klerk and Another*** **(1997) 1 LRC637, it was held that** a party cannot invoke the provisions of the Constitution in a claim arising from facts which had occurred before the commencement of the Constitution unless it is expressly stated that the constitutional provision in question is retroactive.

In the instant matter, with due respect, the learned judge erred and failed to appreciate that as at 19th October 2005 when the EIA Licence No. 0000259 was issued, the relevant Constitution was the repealed Constitution and not the 2010 Constitution. I find that the constitutional concept and value of public participation as embodied in Article **69 (1) (d)** of the 2010 **Constitution** was not a criterion to be used in the determination of procedural validity of the EIA Licence issued on 19th October 2005. (See **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** (supra) at paragraph 62.

The concept of public participation was incorporated into the **Regulations,** by **Legal Notice No. 101 of 13th June 2003**. Pursuant to Regulation 17, public participation was envisaged and required in the process of conducting an environmental impact assessment. As of 2004 when the 3rd appellant applied for EIA Licence No. 0000259, the 4th respondent did not require it to prepare an Environmental Impact Assessment Study. As the learned judge correctly held in paragraph 17 of the impugned judgment, there is no evidence on record indicating that the 3rd appellant was required by the 4th respondent to conduct an EIA study after the Project Report had been submitted. The trial judge thus erroneously held that public participation was required for the 2004 Project Report submitted by the 3rd appellant to the 4th respondent when NEMA did not require an EIA to be conducted. The judge also erred in finding that the 3rd appellant ought to have submitted an EIA study in 2004.

In my considered view, **Regulation 10 (2) and (3)** must be given meaning. When the 4th respondent issued the EIA Licence No. 0000259 pursuant to its power under **Regulation 10 (2),** it did not require the 3rd appellant to conduct an EIA study. I thus find that the 4th respondent was satisfied that the Project Report submitted by the 3rd appellant in 2004 indicated that the project would not have a significant impact on the environment and that the said Project Report disclosed sufficient mitigation measures.

In addition, EIA Licence No. 0000259 contains the following paragraph:

This is to certify that the Project Report/Environmental Impact Assessment Study Report received from Kibos Sugar & Allied Industries Limited……has been reviewed and a licence is hereby issued for implementation of the project subject to attached conditions. (Emphasis supplied)

A reading of the above paragraph in Licence No. 0000259 aptly indicates that the 3rd appellant's Project Report dated 30th January 2004 was reviewed by the 4th respondent and EIA Licence No. 0000259 was lawfully and procedurally issued.

For the foregoing reasons, the conclusion by the learned judge that EIA Licence No. 0000259 was issued unprocedurally, unlawfully and unconstitutionally is not supported by the evidence on record and the law applicable as at 19th October 2005.

PROCEDURAL VALIDITY OF VARIATION and TRANSFER OF LICENCE Nos. 0000151, 000042 and 000043

In this matter, the parent or original EIA Licence issued to the 3rd appellant was Licence No. 0000259. The Licence covered three main project activities namely:

(a) Production of high quality sugar from sugar cane.

(b) Production of portable spirit and

(c) Packaging paper.

Licence No. 0000259 was varied and a new Licence issued as EIA No. 0000151 dated 1st December 2010.

By letter dated 22nd October 2010, the 3rd appellant applied for a variation of Licence 0000259 for power co-generation under a new company name (the 2nd appellant) for increased capacity to 25MW.

By letter dated 26th November 2010, 3rd appellant applied for variation of Licence No. 000259 to increase its sugar cane crushing capacity from 1650TCD to 3000TCD; increase in power production from 1.9 MW to 19MW of electricity; production of portable spirit *to wit* 40KLPD and production of 100 tons' pulp, 100TPD of kraft packaging paper and 10TPD of soda ash.

By letter dated 9th November 2010, the 4th respondent replied to the 3rd appellant's letter dated 22nd October 2010. The response was that due to the expansion of the power generation component and proposed increase of current capacity from 3MW to 25MW, an Environmental Impact Assessment was to be conducted and a Project Report was to be submitted. At this juncture, I note and emphasize that the reply letter expressly stated that what was to be submitted by the appellant was a Project Report.

By letter dated 1st December 2010, the 4th respondent approved the variation of EIA Licence No. 0000259 with regard to increased capacity of sugar cane milling from 1650 TCD to 3000TCD; increase in power generation from 1.9MW to 19MW and production of

portable spirit viz 40KLPD. However, the approvals given were subject to additional conditions. I note that none of the conditions required a fresh EIA Study. Instead the condition required an annual Environmental Audit Report. The meaning and content of an Environmental Audit Report is stated in the Regulations. Further, in the letter dated 1st December 2010, a separate EIA Report was required ONLY for the variation to include production of 100 tons' pulp, 100TPD of kraft packaging paper and 10TPD of soda ash.

After variation of Licence No. 0000259 and issuance of the varied Licence No. 0000151, the 3rd appellant made an application to the 4th respondent by letter dated 6th January 2011 to separate the three project manufacturing activities and to transfer the EIA Licence No. 0000151 to three separate entities namely: the 2nd appellant got EIA Licence No. 0000042 for generation of electric power; the 1st appellant got EIA Licence No. 000043 for production of portable spirit and the 3rd appellant remained only with sugar production under Licence No. 0000151.

In the impugned judgment, the trial judge issued a declaration that the issuance, variation and transfer of the three appellants Licence Nos. 0000151, 000042 and 000043 were all null and void. On variation and issuance of EIA Licence No. 0000151, the judge expressed himself as follows:

[30] ……..... That the certificate of variation of the EIA Licence No. 0000151 for 1st Respondent, and the certificate of Transfer of EIA licence Nos. 0000042 and 0000043 for 2nd & 3rd Respondents, having been applied for, processed and issued without undertaking EIA studies and submitting the Reports thereof for approval to 4th Respondent, were issued in contravention of the law. That they are therefore void ***ab initio.*** *(Emphasis supplied)*

My reading of the impugned judgment shows that the trial judge cancelled the licences and variation because no EIA studies had been conducted and no EIA Reports had been submitted. The legal question is whether the variation and transfers required EIA studies. Which Sections and Regulations of **EMCA** regulate variation and transfer of an EIA Licence" Which **EMCA** is applicable, the **1999** or the **2015** amendments"

The approval and mandatory variation conditions given by the 4th respondent to the 3rd appellant vide its letter dated 1st December 2010 expressly required the appellants to submit an Environmental Audit Report on the first year of operation to confirm the efficacy and adequacy of the environmental management plan. As relates to the expansion of power co-generation under the name of the 2nd appellant, by letter dated 9th November 2010, the 4th respondent expressly stated that due to the expansion of power generation component and the proposed increase in capacity from 3MW to 25 MW, the 2nd appellant was required to carry out an EIA. (See page 1069 of the Record in Civil Appeal No. 153 of 2019).

By Licence dated 4th April 2011, the 4th respondent issued an EIA Licence certifying that a Project Report/Environmental Impact Assessment Study Report had been received from Kibos Pulp and Paper Mills Limited. The Licence expressly stated that the project to increase sugar milling capacity, develop a power, paper, pulp and ethanol plants had been reviewed and the licence issued. (Emphasis supplied - See page 510 of the Record in Civil Appeal No. 153 of 2019).

The three appellants in their submission contend that no environmental impact assessment study was required for variation and transfer of the EIA Licences. It was submitted that Licence No. 0000259 was varied and transferred according to the following procedure:

(a) All the potential impacts associated with the activities under Licence No. 0000259 had been identified and mitigation measures provided for. That the variation was approved by the 4th respondent because the mitigation measures that were already in place could effectively handle the increased production for the varied activities.

(b) That when Licence No. 0000259 was varied, it was the conditions for the power and distillery which were lifted from the original licence leaving the original licence with the milling conditions.

Founded on the foregoing submissions, the three appellants urged that **EMCA 1999, Section 64 (1) (a) (b) (c)** thereof give scenarios when fresh EIA study report should be carried out after a licence has been issued.

Section 64 (1) (a) of EMCA 1999 requires a fresh EIA Report when:

(a) there is a substantial change or modification in the project or in the manner in which the project is being operated;

(b) the project possesses environmental threat which could not be reasonably foreseen at the time of the study, evaluation or review;

(c) if it is established that the information or data given by the proponent in support of his application for an environmental impact assessment licence under Section 58 was false, inaccurate or intended to mislead.

Section 64 (1) of **EMCA** imposes conditions precedent to the requirement of a fresh EIA Report after issuance of a licence. Is there evidence on record to show that the conditions precedent as stipulated in **Section 64** of **EMCA** were fulfilled" Who decides that the conditions precedent have been fulfilled"

The only evidence on record is the increased capacity of sugar production and power generation. Founded on the evidence that there was increased and expanded capacity for sugar production and power generation, the trial judge arrived at the conclusion that a fresh EIA Report was mandatory and required under **Section 64 (1)** of **EMCA**. The record does not show that any information or data that had been provided by the 3rd appellant in 2004 was false, inaccurate or intended to mislead. I therefore find that the conditions precedent as stipulated in **Section 64 (1) (c)** of **EMCA 1999** are inapplicable to the instant matter.

In arriving at his decision, the trial judge ignored the provisions of **Section 64 (3)** of **EMCA 1999** which stipulates that where the 4th respondent has directed that a fresh environmental impact assessment be carried out, any licence previously issued may be cancelled, revoked or suspended by the 4th respondent. The discretion to make a decision whether a licence that has been issued is to be cancelled is with the 4th respondent. In this matter, the 4th respondent vide its letters to the three appellants dated 9th November 2010, and 1st December 2010 neither cancelled nor revoked the EIA licences but instead approved the variations. I am of the considered view that a discretion once exercised by a competent organ under the **EMCA** can only be appealed against to the National Environmental Tribunal. I find that the trial judge erred in substituting his own exercise of discretion and setting aside a discretion already exercised by the 4th respondent in not cancelling the three appellants EIA licences. I once again reiterate that the trial judge did not have jurisdiction to cancel the licence as the decision of the 4th respondent could only be challenged pursuant to **Section 129 (1) (a) (b)** or **(c)** of the **EMCA** by way of appeal to the Tribunal.

Further, I note that in the 4th respondent's Compliance and Status Report forwarded to the Clerk of the National Assembly vide letter dated 18th April 2019, it is indicated that the 3rd appellant had completed and submitted a detailed compliance plan of its activities in regard to pollution, prevention and sustainability of the ecological systems within the area. This *per se* fulfills the condition in **Section 64 (1) (b)** of **EMCA 1999**.

From my interpretation of **Sections 129, 58 (2)** and **64** of the **EMCA 1999** I find that had the 4th respondent's Compliance Status Report of April 2019 been placed before the trial judge, he would have found that there was compliance with the requirement for an environmental management plan and that mitigation measures had been undertaken satisfactorily. I am further satisfied that there is no evidence on record demonstrating that the conditions precedent for calling of a fresh EIA Report under **Sections 64 (1) (a) (b)** and **(c)** of **EMCA** were fulfilled. The learned judge erred in applying **Section 64** of **EMCA** without satisfying himself with cogent reasons that the Section was applicable and that the conditions precedent to the application of the Section had been fulfilled. As stated, the judge erred in ursurping and exercising a discretion vested upon the 4th respondent and further erred in exercising original jurisdiction when the court only had appellate jurisdiction.

PROPORTIONALITY and APPROPRIATENESS OF THE DECLARATORY ORDERS ISSUED

The next issue for my consideration is the proportionality and appropriateness of the declaratory orders issued by the learned judge.

The three appellants submitted that the declaratory and restorative orders issued by the trial judge were disproportionate and inappropriate to the circumstances of the case. That the judge erred in not drawing a balance between economic and environmental concerns in closing an industrial undertaking. That the restoration orders issued by the judge were not specific as to what or which part or portion of the environment should be restored to its previous position. That the judge did not say what aspect of restoration the three appellants should undertake; that the restoration order of demolition of structures was issued without an iota of evidence of pollution by the structures per se and thus the order to demolish the three appellants' structures was a misdirection on the part of the judge.

On its part, the 5th appellant submitted that the injunctive and declaratory orders issued by the trial court were not in touch with reality. That the orders did not take into consideration the plight of sugar cane plantation workers who would lose their jobs and

livelihood. That the orders went beyond environmental issues and were aimed at crippling the three appellants' business. The 5th appellant faulted the trial judge for failing to follow persuasive decisions of coordinate courts where the courts declined to issue closure orders. (See **Martin Osano Rabera & another –v- Municipal Council of Nakuru & 2 others [2018] eKLR and African Centre for Rights and Governance & 3 others - v – Municipal Council of Naivasha [2017] eKLR)**.

In supporting the orders issued by the trial court, the respondents urged that the declaratory, restorative, demolition and closure orders issued by the trial judge were the appropriate reliefs and remedies for enforcement of the constitutional right to a clean and healthy environment. Citing comparative jurisprudence from the case of **M.C. Mehta – v- Union of India** (supra), it was submitted that the three appellants' factories should be closed and should not be allowed to continue operations and discharging untreated effluent into the environment. Counsel urged us to apply the persuasive dicta from the case of **M.C. Mehta – v- Union of India (supra)** where it was stated; **"we are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people."**

In its submissions, the 4th respondent supported the closure of the three appellants' factories. However, it was submitted that the judge erred in making an order that an auctioneer be appointed to demolish the structures on the three appellants' premises. That if at all any demolition ought to be done, the same should be undertaken not by a private auctioneer but by the relevant department of the County Government of Kisumu.

In further support of the injunctive and demolition orders issued by the trial court, the respondents urged that a reading of **Section 67** of **the EMCA** shows that once an environmental impact assessment licence has been revoked or cancelled, the proponent cannot continue to undertake any of the projects under that licence. It was urged that the net effect of the impugned judgment was to compel compliance with the provisions of **Articles 10, 42, 69** and **70** of the **Constitution** as well as **Sections 58 (2), 59, 60** to **67** of **EMCA**. The respondents urged that there was no other known and reasonable legal manner for enforcement of the mandatory provisions of the **EMCA** other than through cancellation of the EIA licences. That given the mandatory provisions of the **EMCA**, a proponent cannot lawfully undertake any activity falling under the Second Schedule to the Act without an EIA study.

I have considered the rival submissions by the parties as to whether the declaratory orders and reliefs granted by the trial court were proportionate and appropriate to the circumstances of the case.

First, I have found that the appellants have already complied with the restoration order issued by the 4th respondent. This is evident from the additional evidence contained in the 4th respondent Compliance and Status Report submitted to the Clerk of the National Assembly vide the letter dated 18th April 2019. I thus find that the restorative and demolition orders issued by the trial court in so far as pollution and environmental degradation is concerned had been overtaken by events.

Second, I note that the trial judge made an order for demolition of the three appellants' premises. There is no evidence on record to prove that per se the structures on the three appellants' premises were responsible for environmental degradation. In principle, a structure on a property can be used for a purpose that does not threaten or endanger the environment. This being so, I find that it was injudicious to order demolition of the three appellants' structures without proof that the structures per se were the cause of pollution.

Third, I have considered the respondents' submissions that closure of factories is the only legal and effective way to enforce the constitutional Articles and statutory provisions guaranteeing the right to a clean and healthy environment. Comparatively, courts have come up with innovative methods to see that orders on environmental protection are implemented. One such innovative relief is a continuing mandamus. (See **Vineet Narrain v. Union of India and Others, Supreme Court of India, Judgment of 18 December 1997, 1997 (7) SCALE 656).** Another example include monitoring committees constituted to implement court orders. (For more details, see **Sahu, G (2008), Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence, Journal of Law, Environment and Development (LEAD), International Environmental Legal Research Centre, London, Number 4/1**). It is thus not the case that closure and demolition orders are the only effective ways to protect and conserve the environment.

Fourth, I have taken into account that the EIA Licence No. 0000259 was issued to the 3rd appellant way back on 19th October 2005. The petition before the trial court was filed in 2018 – thirteen years after the Licence was issued. The three appellants have been operating and undertaking the project for all these years with approval and licences issued by the 4th respondent. A pertinent consideration is whether the 4th respondent and the trial judge can reopen and cancel a licence issued over thirteen years ago when **Section 129 (1) of the EMCA** expressly imposes a sixty-day limitation period. The three appellants derived rights and incurred

obligations and a legitimate expectation from the EAI Licence issued by the 4th respondent on 19th October 2005. It may well be that the doctrines of estoppel and legitimate expectation would apply against the 4th respondent in respect of the EIA Licences that were issued to the three appellants. In this context, I are reminded of the Supreme Court dicta in the case of **Samuel Kamau Macharia & another - v- Kenya Commercial Bank Limited & 2 others** (supra) where it was stated:

(63) In the matter before us, the question is not whether the appellants seek to rely on a law that has retrospective effect. The sole issue to consider is whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest Court in the land) before the commencement of the Constitution of 2010. Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that Court. If this Court were to allow appeals from cases that had been finalized by the Court of Appeal before the Commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens. (Emphasis supplied)

There is evidence on record that the three appellants have complied with the restorative orders issued by the 4th respondent. There is evidence on record that the NECC being the competent organ charged with investigating pollution complaints recommended continuous monitoring of the appellants' operations. There is evidence on record that NECC recommended the uplifting of the order closing the three appellants' factories. I am obliged to affirm and confirm the recommendations by NECC as the technical competent organ. I find the demolition and closure orders issued by the learned Judge were disproportionate and inappropriate in the circumstances of this case. The result is that I set aside the restorative, injunctive and demolition orders issued by the trial court for the reason that the restorative order as relates to pollution and mitigation of environmental damage has been complied with as per the 4th respondent's Report of 18th April 2019.

In the impugned judgment, the trial court held that the 4th respondent and the 4th appellant had violated the provisions of **Section 108 of EMCA**. The evidence on record shows that upon complaints and allegations of river pollution being raised by the 1st, 2nd and 3rd respondents (and when the allegations were covered in the media) both the 4th respondent, the NECC and the 4th appellant independently visited the locus in quo to investigate the complaints. The evidence reveals that the 4th respondent went further and issued restoration and closure orders. The 4th appellant's Committee also visited the locus in quo and prepared its reports which are no record. I thus find that declaratory order issued by the judge that 4th respondent and 4th appellant had failed in their statutory duties is not supported by the evidence on record.

COMPENSATORY DAMAGES

I now consider whether the trial court erred in failing to award compensatory damages to these respondents. On the issue of compensatory damages, there was no cross-appeal. Accordingly, I hereby affirm and uphold the decision of the trial court.

FINAL DETERMINATION

Upon my re-evaluation of the evidence on record, I hereby affirm the finding by the learned judge in paragraph 17 of the impugned judgment that the Project Report submitted by the 3rd appellant to the 4th respondent in 2004 had no significant impact on the environment or alternatively, that the EPR disclosed sufficient mitigation measures. I further affirm the finding and holding by the learned judge in paragraph 18 of the impugned judgment that *"…....the court does not find sufficient basis to fault the action of the 4th Respondent to issue the 1st Respondent with EIA licence No. 0000259 upon the EPR without an EIA study Report."*

On the other grounds of appeal urged in this matter, I have made a finding that the trial court had no jurisdiction to hear and determine the dispute between the parties; that the learned judge erred in cancelling the initial Licence No. 0000259 issued to the appellants; that the judge erred in retroactively applying the provisions of **Section 58 (2)** of **EMCA 2015** amendment to the dispute between the parties; that the judge erred in retroactively applying the 2010 Constitution to events prior to its promulgation.

In addition, I have held that the demolition and restorative orders issued by the trial court were disproportionate and have been overtaken by events. To ensure future compliance with environmental regulations, I hereby order that the 4th respondent and NECC should continuously conduct inspection at the three appellants' factories to monitor compliance with environmental standards. On its part, the three appellants should annually (or as directed by the 4th respondent or other competent organ) conduct an environmental audit of its project and activities and submit a Report to the 4th respondent or any other competent organ as directed by the 4th respondent or NECC or applicable law.

In the final analysis, the upshot of the foregoing is that this appeal has merit and is hereby allowed.

COSTS

On costs, I have agonized whether this was a public interest litigation or a personal litigation by the 1st, 2nd and 3rd respondents. In the petition, these respondents prayed for compensatory damages for alleged violation of their constitutional rights. These respondents did not lead an iota of evidence that individually they had suffered any injury. There is nothing like a presumption of damage or injury because there is no EIA study report. In addition, the learned judge at paragraph 28 of the judgment observes that these respondents were claiming compensatory damages for Ksh. 100,000,000/- (One Hundred Million). This perse means that these respondents were pursuing personal compensation and were neither pursuing nor advancing public interest litigation. For this reason, I am obliged to follow the long established dicta that costs follow the event. Accordingly, the 1st, 2nd and 3rd respondents shall jointly and severally bear the costs of this appeal and the costs before the ELC.

As regards the 4th respondent, I note that the 4th respondent is a statutory body charged with the responsibility of issuing EIA Licences. In the instant matter, the 4th respondent issued EIA Licences to the three appellants. However, in this appeal, the 4th respondent has prevaricated and disowned the Licences. A public body cannot issue a licence and then turn around and disown the same. Such a conduct must be condemned by way of costs. Accordingly, the 4th respondent shall also jointly with the 1st, 2nd and 3rd respondents bear the costs the suit before the ELC and in this appeal.

Save as otherwise affirmed in this judgment, I hereby set aside in entirety the judgment, declaratory orders and the decree of the Environment and Land Court delivered on 31st July 2019 in Kisumu ELC Petition No. 8 of 2018.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules as Odek, J.A. sadly passed on before the delivery of the Judgment. As Kiage J.A concurs, it is so ordered.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.

JUDGMENT OF KIAGE, J.A

I have had the good fortune of reading in draft the Judgment of my brother Makhandia JA.

Given his comprehensive and exhaustive treatment of all the issues involved herein, and being in concord with his analysis of the factual and legal questions engaged, and the conclusions he arrives at, it would be a superfluity for me to say anything further.

I agree with the final determination allowing the consolidated appeal, as well as the orders on costs that he proposes.

Dated and delivered at Kisumu this 31st day of January, 2020.

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR