REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENTAL TRIBUNAL

AT NAIROBI

TRIBUNAL APPEAL NO. NET 196 OF 2016

SAVE LAMU.....1ST APPELLANT

SOMO M. SOMO.....2ND APPELLANT

RAYA FAMAU AHMED.....3RD APPELLANT

MOHAMMED MBWANA.....4TH APPELLANT

JAMAL AHMED ALI.....5TH APPELLANT

ABUBAKAR MOHAMMED TWALIB.....6TH APPELLANT

-VERSUS-

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA)....1ST RESPONDENT

AMU POWER COMPANY LIMITED.....2ND RESPONDENT

JUDGMENT

1. As part of a vision of the country's economic blueprint for development and industrialization of the country the Government of Kenya, through the Kenya Vision 2030 initiative, formulated a power generation program intended to increase the generation of total effective capacity to about 5000 MW. This program included the setting up of the intended 1050 MW coal fired power plant in Lamu to be built, owned and operated by the 2nd Respondent , who were the successful bidders following an expression of interest by the Government. It was proposed to have the coal power plant on the sea shore of Kwasasi area, Hindi Division, in Lamu County.

2. The 2nd Respondent engaged Kurrent Technologies Limited, to undertake an Environmental & Social Impact Assessment (ESIA) Study for its coal power plant in Lamu, and, upon completion, presented the same to the 1st Respondent Authority for licensing purposes. The 1st Respondent , NEMA, proceeded to issue an Environmental Impact Assessment Licence No. NEMA/ESIA /PSL/3798 to the 2nd Respondent on 7th September, 2016.

3. The 1st Appellant , a community based organisation representing the interests and welfare of Lamu and whose membership comprised of individuals and several community groups within Lamu together with the 2nd to 6th Appellant s were aggrieved by the issuance of the said EIA License dated 7th September 2016. They filed the present appeal on 7th November, 2016 challenging the issuance of the EIA Licence as well as the process in obtaining the same. They prayed, inter alia, for the following relief(s):-

a. The setting aside of the decision by the 1st Respondent to grant the 2nd Respondent an EIA Licence;

b. That a fresh EIA study be conducted based on specific and current information involving all stakeholders; and

c. That each party bears its own cost.

4. The grounds of the appeal included the following:-

a. There was a poor analysis of alternatives and economic justification and failure to take into account economic issues and to identify and analyse alternatives to the proposed project;

b. Insufficient scoping process that lacked proper Public Participation;

c. Adverse effects on the Marine Environment through the discharge of thermal effluent into the marine environment by using poor and outdated cooling system;

d. Approval of the project on land falling within an ecologically sensitive area;

e. A flawed EIA Report plagued with misrepresentations inconsistencies and omissions;

f. The Negative Impact on Kenya's Air Quality with adverse effects on human health and biodiversity

g. Contribution to climate change and making the Project inconsistent with Kenya's low carbon development commitments;

h. The Failure to put conditions in the EIA licence to put in place mitigation measures to address coal pollution caused by coal handling and storage;

i. Lack of sound mitigation measures

j. Compounded unviability of the project

5. The 1st Respondent filed its Reply to Appeal dated 16th January 2017 before this Tribunal along with its witness statements and documents on 16th March 2017; the 2nd Respondent responded to the Appeal and Grounds through the 2nd Respondent's Reply to Appeal dated 3rd November 2016 and filed in the Tribunal on 2nd December, 2016.

The Hearing

6. Following a site visit by the Tribunal members of the proposed project at Kwasasi on 11th May 2017, the Tribunal commenced hearing of the appeal in Lamu on 12th May 2017.

7. The Tribunal took the evidence of the first three witnesses of the Appellant s, AW1. Raya Famau Ahmed, AW2 Mohamed Athman and AW 3 Dr. David Obura in Lamu before adjourning the proceedings to Nairobi.

8. In Nairobi, the Appellant called nine (9) other witnesses to the stand: These were AW4 Ernie Niemi, AW5 Dr. Mark Chernaik, *AW6* Lauri Myllvtra, AW7 Hindpal Jabbal, AW8 Mohammed Mbwana, AW9 Somo M Somo, AW10 Jackson Kiplagat, AW11 Francis Dyer and AW12 Mike Olendo.

9. The 1st Respondent on commencement of his case called one witness *RW1* Gideon Kipchirchir Rotich *(the NEMA Compliance and Enforcement officer EIA section)*

10. The 2nd Respondent on their part called 3 witnesses*: RW2* Abdulrahman Aboud (*who discussed the issue of public participation and mangrove regeneration plan*), RW3 Mr. Sanjay Gandhi (*the lead EIA expert tasked with coordinating and conducting the EIA study report*) and *RW4* Andreas Szechowycz (*an Engineer working for the international firm of Sargent and Lundy LLC and responsible for the design of the coal plant*)

Agreed Issues submitted by the parties

11. On 9th February, 2018 the following six agreed issues were presented to the Tribunal for determination:

a. Whether the grant of the ESIA Licence by the 1st Respondent is in violation of the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya.

b. Whether the process leading to the preparation of the ESIA Study Report by the 2nd Respondent involved proper and effective public participation.

c. Whether the Respondents conducted a proper analysis of alternatives of the project.

d. Whether the Respondents conducted a proper analysis of the economic viability of the project.

e. Whether the ESIA Study Report prepared by the 2nd Respondent contains adequate mitigation measures.

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

accordance to the law.

DELIBERATION BY THE TRIBUNAL

12. From the outset it is important to clarify that the jurisdiction of the Tribunal under Section 129(1) of the Environmental Management and Coordination Act 2009 ("EMCA") is not unlimited. The Tribunal is an appellate court from the decision of the 1st Respondent in matters relating to EIA licenses. In Miscellaneous Application Number 391 of 2006 -

> **Republic –vs- National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited** while considering the jurisdiction of the Tribunal to entertain an appeal against an EIA approval, **Emukule J**, considered the legislative intent of the provisions of ***EMCA*** and held as follows:

> **"….*I have shown in the discussions on the two previous issues that the powers of the Respondent Tribunal are not unrestricted.* The Tribunal 's powers to entertain appeals are limited to decisions made under powers given to NEMA (Authority) or to NEMA's Director General or Committee of NEMA… This is about where the jurisdiction of the Respondent Tribunal ends...On the other hand, the High Court has both original and appellate jurisdiction commencing from the provisions of Section 3(3) of the Act …"**

13. In Nairobi HCCC Petition NO 22 OF 2012**: MOHAMED ALI BAADI AND OTHERS vs THE HON. ATTORNEY GENERAL and 7 others** the Constitutional court in a matter dealing with the LAPSETT project and associated with the present Lamu Coal Plant made the following observations on the jurisdiction of the Tribunal :-

> "*93.* In our view, the mandate of the Tribunal is limited to the matters provided for in section 129 of EMCA. *Of all the functions of the Tribunal under Section 129 of EMCA, the only applicable one would* ***be Section 129(1)(a) to the extent that the Petitioners challenge the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued by NEMA*** *to the LAPSSET Project's proponent.* However, the scope and range of issues, rights and controversies involved in the present dispute surpasses the narrow question of the conditions which can be imposed as part of the EIA License …..
>
> 94. ……..
>
> *95.* ….…..…….…..*[*
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> 96. **In our considered opinion, the Tribunal is not a suitable forum for the purpose of settling environmental conflicts at community level as disclosed in this Petition. In addition, the design of the Tribunal is such that it does not envisage the participation of all interested parties, such as developers, government, the community, non-governmental organizations, and environmental groups in a joint effort aimed at restoring the environment and agreeing on their sustainable use. *Differently put, the multiplicity of parties and the polycentricity of issues in a case such as this one makes it unsuitable for the Tribunal* ."

14. The purpose of this observation on the Tribunals jurisdiction and scope of mandate is to ensure that the Tribunal does not stray outside the scope and mandate set out in section 129 (1)(a) of Environmental Management and Coordination Act, 1999 when dealing with the present dispute to matters outside the licensing regime or in issues where there are **"multiplicity of parties and polycentricity of issues".** The jurisdiction of the Tribunal is narrow. It is to examine "**the completeness and scientific sufficiency of the ESIA Report *that resulted in the license issued by NEMA".***

15. The Tribunal has considered the evidence tendered by the respective witnesses and submissions of the parties. The evidence of the expert witness for both the Appellant s and the Respondents was extremely helpful to the Tribunal and their expertise was not called into question by any of the parties.

16. The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.

17. Accordingly, contrary to popular belief the purpose of environmental audits are not meant to hinder development but to ensure economic progress in a country takes into account environmental impacts of such proposed economic activity. With this in mind, we must also make it absolutely clear that the common perception that a coal power plant project will always be rejected in Kenya as part of its development agenda is not correct. As long as coal power plant projects meet the required standards of the law and abide by conditions imposed to mitigate potential impacts then they remain a viable and an acceptable mode of power generation. We say this being alive to the recent changes in the Energy law as enacted by the Energy Act 2019 that contains an entire provision on coal plants. Part V of the Energy Act 2019, (sections 94 to 116) capture the licensing requirements for operation of Downstream Coal activities and includes environmental conditions as one of the things to be met before licensing. Section 94 of the Energy Act provides as follows:

> "*94.* (1) A licence or permit as the case may be, is required by a person who wishes to carry out the production of energy from coal.
>
> 2. A person who wishes to undertake— (a) electricity generation using coal must have a valid licence issued by the Authority; (b) transportation of coal for energy production using a vehicle must have a valid permit in respect of that vehicle issued by the Authority."

18. Importantly, for the construction of a coal power plant section 107 provides as follows:-

> *"107*. (1) A person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. *Construction permits.*
>
> 2. An application under subsection (1) shall—
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> a. specify the name and address of the proposed owner;
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> b. be accompanied by the registration documents of the proposed beneficial owner;
>
> c. be accompanied by a copy of detailed layout plans and specifications prepared by a professional engineer;
>
> d. be accompanied by a Strategic Environment Assessment and Social Impact Assessment licenses; and
>
> e. contain such other details as may be necessary.*"*

19. Accordingly, Parliament in its wisdom has identified coal energy as one source of possible energy sources for this country. The only relevant considerations are compliance with the provisions of the Energy Act 2019 and the Environmental Management and Coordination Act, 1999 when setting up such plants. As such, we repeat that, subject to meeting the conditions set out in the Act and in so far as it relates to this Tribunal , if the requisite conditions are met with respect to environmental matters including the due and proper preparation of an EIA study report in compliance with EMCA, coal fired power plants remain, for the time being, a lawful option in the power generation mix of this country.

20. In the present case, turning now to the issues agreed upon by the parties and upon reading the submissions of all parties, based on the evidence on record, we address each issue as follows:-

> **A. Whether the grant of the ESIA Licence by the 1st Respondent is in violation of the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya;**
>
> -and-
>
> **B. Whether the process leading to the preparation of the ESIA Study Report by the 2nd Respondent involved proper and effective Public Participation**.

21. To these issues, we observe that the legal regime for the issuance of EIA Licenses is anchored in the Constitution of Kenya where Article 69 (f) requires the State to establish systems of environmental impact assessment, environmental audit and monitoring of the environment.

22. These systems are set out in EMCA and in particular Part VI of the EMCA as read with the relevant provisions of the Environmental (Impact Assessment and Audit) Regulations 2003 ("the Regulations") made thereunder have set out the framework of environmental impact assessment, environmental audit and monitoring of the environment and the procedures and processes involved in securing the same. These requirements in the EMCA and the Regulations ought to be complied with in the preparation of an EIA report. As part of the Tribunal s mandate, it is important that there be strict compliance and adherence to the letter of the law. The Tribunal s jurisdiction does not allow it to waive provisions of statute or regulations made thereunder. In this case, the legal requirements imposed on the 1st and 2nd Respondents when undertaking an EIA study have to be strictly complied with considering the nature of the Lamu coal power plant project and its unique position as the first coal power plant proposed to be developed and operated in Kenya.

23. The Appellants have complained about the lack of proper and effective public participation as a ground of appeal and as one of the agreed issues. The Respondents disagree that there was a lack of consultation and point to the vast amount of attachments to the exhibits showing that there was public participation with the community and other lead agencies. It is trite law that a key element in the system of environmental impact assessment is that of public participation by individuals and communities in this process. The foundation of public participation can be found in Principle 10 of the ***Rio Declaration on Environment and Development***, 1992 which states as follows:-

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

24. It will be seen that access to information for the persons affected is important for meaningful participation by citizens and motivates them to participate in decision and policymaking processes in an informed manner as it seeks to take into account the community's and different stakeholders concerns.

25. In Constitutional Petition No. 305 of 2012: ***Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*** a three judge bench of the Kenya Constitutional Court set out the minimum basis for adequate public participation as follows:-

> ***"97.*** From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles**:**
>
> > ***a.*** **First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. *Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.***
> >
> > ***b.*** **Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. *The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.***
> >
> > *Sachs J*. of the South African Constitutional Court stated this principle quite concisely thus: **"**The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. *What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)***)"**
> >
> > ***c.*** **Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information.**
>
> *See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App*. No. *374 of 2012)*. In relevant portion, the Court stated: "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them***."**

In the instant case, environmental information sharing depends on availability of information. *Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below***.**

> ***d.*** **Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. *To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity.* Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. *In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.***
>
> ***e.*** **Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.**
>
> ***f.*** **Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*"***

26. We accept the principles and guidelines set out in the *Mui Coal basin case* as a proper path in examining the level of process of public participation undertaken by the proponents and the true test of participation being the effectiveness of the process.

27. The 2nd Respondents relied on ***National Association for the Financial Inclusion of the Informal Sector v Minister for Finance & Another*** [2012] eKLR (per *Majanja* J), for the holding that the Constitution does not prescribe how public participation is to be effected and in every case where a violation is alleged, it is a matter of fact whether there is such a breach or not. While this may be true for the Constitutional provisions and/ or other sectors, in the matter of Environmental Impact Assessment Studies the EMCA and its regulations provide a structure of how the public participation exercise will be conducted.

28. The relevant provisions of law require that an Environmental Impact Study be conducted for projects of the nature contemplated by the 2nd Respondent herein as a matter falling within the Second Schedule to the Act and Regulations. It envisages three general stages leading up to the issuance of the EIA Licence by the 1st Respondent. These stages are firstly, the formulation of the terms of reference (TOR) as per Regulation 11, secondly, the carrying out of the EIA study in terms of Regulations 16-17 leading to the preparation and presentation of the EIA Study report and finally, the post-study report where certain actions had to be undertaken as per Regulations 18-22 culminating in the issuance of an EIA licence to a project proponent. Depending on the stage of the process, there are different roles to be played by either the 1st or 2nd Respondent and different levels and requirements for participation.

29. In the instant appeal, the evidence showed that the 2nd Respondent , through Kurrent Technologies Limited, prepared an Environmental Project Report for the Proposed 1050 MW Coal Power Plant in September, 2015 and submitted the same to the National Environmental

Management Authority (NEMA), 1st Respondent who in turn submitted copies of the project report to each of the relevant lead agencies and the relevant District Environment Committee by its letters of 26th October, 2015 and 16th October, 2015 respectively. The Appellants tendered their comments to the Project Report through their letter of 12th November 2015**.** Up till this stage the parties appeared to proceed on the basis of a project report.

30. At this stage it is important to clarify that with effect from 17th June 2015, Act No 5 of 2015 amended Section 58 of the EMCA so that all projects falling within the Second Schedule to the Act now required an EIA Study as opposed to a mere project report which was the case prior to the amendment. The current project fell within the Second Schedule.

31. In any event, through a letter dated 26th October 2015 the 1st Respondent , in line with the now substituted provisions, required the 2nd Respondent to undertake an environmental impact assessment study as the project would have a significant impact on the environment and demanded wider public consultation and in-depth coverage of the foreseen impacts and mitigation measures thereof. The 2nd Respondent was thereby required to liaise with its EIA Experts to develop a Terms of Reference for its approval before it carried out the EIA Study. The letter of 26th October 2015 is of paramount significance to this case and concluded as follows:

> **"You will be expected to (among other things) include the following details in your study:**
>
> **1. Project rationale and justification (especially with regard to the site)**
>
> **2. Detailed Engineering and related drawings**
>
> **3. A comprehensive analysis of project alternatives (site, technology, materials etc)**
>
> **4. Detailed and comprehensive stakeholder consultation."**

32. Turning now to each phase that the study process had to undergo, the Tribunal considers the following:-

Phase I: the Terms of Reference

33. In commencing the EIA Study, the 2nd Respondent complied with the directive of the 1st Respondent and regulation 11 of the Regulations by preparing the Terms of Reference dated 27th January 2016 and submitted the same to the 1st Respondent Authority on 29th January 2016.

34. After the development of the Terms of Reference for the EIA Study in January 2016, the Regulation required fulfilment of the two further stages mentioned earlier before approval could be given and licence issued: the EIA Study phase leading to publication of an EIA Study report on the one hand and the post EIA study report phase on the other, each with its own process and requirements for public consultation and participation.

Phase II: The EIA Study phase

35. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003, required the proponent of a project to seek views of the persons to be affected ***after*** approval of the project report and during the process of the study. In particular, Regulation 17 (2) required the proponent to publicize the project and its anticipated effects and benefits by

a. posting posters with information on the proposed project in strategic public places in the vicinity of the site, and

b. publish a notice on the proposed project for two successive weeks in a newspaper with nation – wide circulation ; and

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

d. Thereafter, the proponent was required to 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.

e. For these meetings, a notice of the time and venue was to be communicated at least one week before the meeting. The meetings were expected to be at a time and venue convenient to the affected communities and other concerned parties

f. A coordinator to record the comments was to be availed as well as a translator made available during the meeting. The views collected from this meeting would then be incorporated in the preparation of the EIA Study report.

36. The 1st to 6th Appellants case revolves around the adequacy of the consultation process leading to the preparation of the ESIA study. The 1st and 2nd Respondents submissions is that Save Lamu, through its officers and members, including the Appellants, continued to appear and represent their views at different fora on the project as seen from the annexure presented in evidence. In their testimony, Raya Famau Ahmed **AW1**, Somo M Somo **AW9** and Mohamed Athman **AW2** confirmed their individual membership of the 1st Appellant , Save Lamu. The Lamu Tourism Association represented by **AW11** – John Francis Dyer, a beach hotel owner in Manda also confirmed its membership

including a letter dated 13 March 2016 addressed to the Director Compliance and Enforcement of the 1st Appellant giving their views on the proposed project. The input of the 1st Appellant and the various members who attended the meetings organized by the Respondents were documented as part of the evidence of the ***RW3*** Sanjay Gandhi at Page 269 of the Appellants' Bundle of documents as proof of the 2nd Respondents position that the Appellants had actually participated in the process**.**

37. From the Appellants' Annexure at Pages 189-197 and at Pages 207-265 of the Appellants Bundle of Documents (Volume 1) there is evidence that the Appellants gave their views and comments and took part in ventilating their views leading to the preparation of the Project Report and scoping stage and even after the Project report but before the EIA study had commenced.

38. To support their contention of adequate participation, the 2nd Respondents point to the Appellant s letter dated 15th January, 2015 annexed to the Appellant s' Bundle of Documents (1) as SL 4 where they are specifically invited by the 2nd Respondent's Lead ESIA Expert, Sanjay Gandhi, to attend a public hearing to give their views. Later on in 2016, they directly communicated to the 2nd Respondent's Managing Director, Francis Njogu, vide their unsolicited letter dated 13th March, 2016 giving their comments on the Proposed Project. In the 2nd Respondents view, this was proof that there was engagement of the Appellants in the process

39. The 2nd Respondents witness **RW3** Sanjay Gandhi, who was also the Lead EIA Expert for the project, pointed out that a total of 31 meetings were undertaken at various locations between 9th January 2015 and 25th June 2015 with a variety of stakeholders in Lamu County, Nairobi and Malindi. A complete record of each meeting including completed registration sheets, photographic evidence and Issues and Response (I&R) Reports were presented as evidence. The ESIA report also contains a very clear Stakeholder Engagement Plan at Pages 1407-1481 (of volume II) intended to cover the Scoping Phase, the ESIA Study Phase, the Construction Phase, the Operational Phase and the Decommissioning Phase dated 10th July 2016. Table 3.1 at page 1429-1434 (of volume II) presented a summary of the stakeholder engagement activities commencing with the meeting at Subira Hotel, Hindi on 9th January 2015 to the Focus Group Discussion at Chiefs Camp Pate Island on 25th June 2015 as per the table below:-

DATE AND PLACE	**STAKEHOLDER GROUP AND MEETING PURPOSE**
9TH January 2015 Subira Hotel,Hindi, Lamu Island	Ward admin, Hindi/ Senior Chief, Village headmen, community leaders & mangrove cutters representatives.
9th January 2013 Lamu Museum, Lamu Island	National Museum of Kenya Representatives
9th January 2015 Lamu Island	Assistant County Commissioner, Lamu County
24th January 2015 Mwana Arafa Restaurant, Lamu Island	Save Lamu Representatives workshop
24th January 2015 Mwana Arafa Restaurant, Lamu Island	Lamu Youth Alliance Representatives Workshop
25th January 2015 Mwana Arafa Restaurant, Lamu Island	Male Opinion Leaders Representatives Workshop
25th January 2015 Mwana Arafa Restaurant, Lamu Island	Female Opinion leaders Representatives

26th January 2015	Bargoni and Ngini Residents				
Bargoni Primary School	Dissemination meeting	and	consultation	public	
26th January 2015	Mokowe residents				
Mokowe Primary School	Dissemination meeting	and	consultation	public	
27th January 2015	Lamu County Land Management Board				
Ardhi House, Mokowe, Lamu	Project Briefing Meeting				
27th January 2015	Kwasasi Residents				
Kwasasi (proposed project site)	Dissemination meeting	and	consultation	public	
27th January 2015	Hindi Residents				
Hindi Digital Sport Center and News	Dissemination meeting	and	consultation	public	
28th January 2015	Mtangawanda residents				
Change Chini, Mtangawanda, Pate Island	Dissemination meeting	and	consultation	public	
28th January 2015	Pate residents				
Pate social hall, Pate Island	Dissemination meeting	and	consultation	public	
2nd February -3rd February 2015	Lamu County Government Workshop				
Sarova Panafric hotel, Nairobi					
10th February 2015	Media Editors kick-off briefing				
Serena Hotel Nairobi					
11th February 2015	Standard Media group editors kick-off				
Standard Media Group offices, Nairobi	briefing				

12th February – 13th February 2015	Lamu members of County Assembly
Tamani Jua Resort, Malindi	workshop
24th February 2015	Media Houses press briefing
Crowne Plaza Hotel, Nairobi	
1st April 2015	Lamu County Administration Kick-off
Mwana Arafa Restaurant Gardens,	workshop
22nd June 2015	Ministry of Gender, Youth and social
Lamu Island	services, Lamu County Government
23rd June 2015	Ministry of Education
Ardhi House, Mokowe	Lamu County Government
23rd June 2015	Ministry of Health and Environment
Public Health Office Lamu Island	Lamu County Government
24th June 2015	Ministry of Agriculture
Ministry of Agriculture Office Lamu Island	Lamu County Government
23rd June 2015	Focus Group Discussion pastoralist
Chief's Camp, Hindi	communities
24th June 2015	Focus Group Discussion / women with
Chief's Camp, Hindi	Vulnerable stakeholders groups
24th June 2015	Focus Group Discussion/ Elders from
Chief's Camp, Hindi	indigenous minority communities
25th June 2015	Focus Group Discussion Farmers
Chief's Camp, Pate Island	

41. A public/ stakeholder meeting for civil society organizations based in Lamu was organized by the Ministry of Energy and Petroleum on 14th October 2015 to discuss the proposed project and its potential impacts. The 2nd Respondent also engaged the services of a company by the name Africa Practice to conduct physical door to door campaigns in homes situated in various locations within Lamu Islands of Pate namely Kizingitini, Mbwajumwali, Faza, Myabogi, Tchundwa, Siyu and Shanga between 5th April and 2nd May 2015, to sensitize the residents about the project. ***RW2*** Abdulrahman Aboud**,** testified how posters were placed at strategic places all over Lamu for purposes of notifying the public of the project and calling on their comments and views during the public hearings that were conducted all over Lamu. He also testified about the use of other mechanisms to reach the public in remote parts of Lamu such as the use of the so-called criers who relayed messages about meetings.

42. The 2nd respondents witness ***RW2*** Abdulrahman Aboud confirmed that Mr Gandhi explained and engaged with some of the participants at the various meetings in Kiswahili language which he was fluent in taking into account the language most widely spoken in the region.

43. Looking at the evidence produced we accept that wide public participation had been undertaken during the scoping phase for the project report.

44. However, this were all done before the study had been commenced or conducted or the study report prepared. The meetings that took

place from 9th January 2015 to 25th June 2015, well before the EIA Study was itself conducted, were in the Tribunal s view not the meetings contemplated by Regulation 17 of the regulations which provides at Regulation 17 (2) that the seeking of views of the public could only happen after the approval of the project report by the 1st Respondent.

45. From the table of the summary of the meetings, it will be seen that these were introductory in nature but not structured to share information on the possible effects and impacts of the project on the population and the proposed mitigation measures that the 2nd Respondent would undertake. ***AW1*** Raya Famau who attended the first consultative meeting held on 24th January 2015 testified that participants were given very limited time to ask questions and answers appeared inadequate and Sanjay Gandhi for the 2nd Respondents informed them that specialist studies were still being conducted to determine the precise impacts of the coal plant project. To date, answers to these queries had not been provided. ***AW8*** Mbwana, also complained of the same thing. By the time these meetings were taking place the Study process had not commenced and the attendees were informed that subsequent meetings were planned for to provide more details on the concerns they raised. These meetings to explain the project properly and allay the concerns of the residents never took place. Essentially, the proponent had put the cart before the horse by relying on information obtained prior to the EIA Study as the basis for justifying the EIA Study. It also contradicted the directive by the 1st Respondent of 26th October 2015 when the 2nd Respondent was asked to undertake wider public consultation and in-depth coverage of the foreseen impacts and mitigation measures thereof. The directive was intended to cover greater additional consultation and inclusion of these impacts.

46. From the evidence of both the 1st and 2nd Respondents no attempt was made to show that public consultation meetings had taken place in line with regulations 17(1) and 17 (2) for the period from the formulation of the Terms of reference in January 2016 to July 2016 when the EIA study report was concluded. No notice of meetings were issued or meetings held under the requirements of regulation 17. Instead the Respondents sought to circumvent these requirements by repeatedly referring to the meetings at the scoping and project stage of the process in the year 2015, well before the EIA Study had commenced. At that stage of the project report in 2015, and as pointed out by the 1st Respondents letter, there was lack of access to information that was a prerequisite to a meaningful exercise of public consultation and participation.

47. The danger of relying on the year 2015 meetings is evident from the inaccuracy of certain information presented then. For instance, to the question asked on whether it was possible that the Kenya Power Limited Company would not take up the power produced, Mr Gandhi replied that it was highly unlikely as Kenya would require 5000 MW within 40 months of the year 2013. To date, even in the year 2019, from the evidence of the Appellants witness, Mr Jabbal, Kenya's requirement remains at an average of 2000 MW only. On the land position and size, in January 2015 Mr Gandhi confirmed that no firm decision had been made on the exact location or the size that would be required. To the question of climate change and the requirements of the Climate Change Act, 2016, Mr Gandhi in his testimony conceded that he had not given greater attention to these aspects and he would give the same more emphasis should the process be repeated. These examples are but a few and illustrate the inaccuracy and uncertainty of information at that stage in the year 2015. Further meetings ought to have been held to give the correct information during the conduct of a proper study and when data on most of the areas identified by the terms of reference had been collected and verified. Lack of accurate information cannot be the basis of proper and effective public participation.

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

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

50. Human beings are justifiably concerned about the environmental impacts of projects to their location and especially where those projects are novel in nature. These environmental impacts are not restricted to the ecological effects alone but extend to other wider areas that affect their lives like the health impacts to them and their families, to their livelihood and economic opportunities, socio-cultural heritage and traditions. Being concerned about all these environmental effects of a project the people most affected by a project must therefore have a say on each and every aspect of the project and its impact. In carrying out a consultative process, it is not a must that every person must support the project nor can a proponent address every unreasonable demand and suggestion, but it is vital that even the most feeble of voices be heard and views considered. It is presumptuous for a proponent, like the 2nd Respondent did in this case, to proceed with the EIA study, identify the impacts and then unilaterally provide for mitigation measures in complete disregard of the people of Lamu and their views. We therefore find that public participation in phase II of the EIA Study process was non-existent and in violation of the law.

<u>On Phase III: the post- study report</u>

51. The 2nd Respondents ESIA Study report was completed and forwarded to the 1st Respondent on 14th July 2016. From this moment on till the issuance of the EIA Licence, the responsibility to undertake certain specified acts in accordance with the law now shifted to the 1st Respondent. Regulation 20 of the Environmental (Impact Assessment and Audit) Regulations, required the 1st Respondent to forward the ESIA Study report, within 14 days of its receipt, to the relevant Lead Agencies for their comments. This was done by a letter dated 18th July, 2016.

52. Under section 59 of EMCA and Regulation 21 (2) (a) of the Environmental (Impact Assessment and Audit) Regulations, the 1st Respondent was required, within 14 days of receipt of the said ESIA Study Report from the 2nd Respondent , to invite members of the public to make oral or written comments on the report and proceed to publish the same in the Kenya Gazette and in a newspaper circulating in the area or proposed area of the project a notice of the Project. The notice published provided for a time limit of 30 days for comments.

53. Newspaper advertisements were published in *Taifa Leo* of Monday, 18th July, 2016 followed by the publication in the *Daily Nation* of Tuesday, 19th July, 2016 inviting the public to submit their views and comments on the proposed project within thirty (30) days from the date of Publication as well as the *Daily Nation* of Monday, 25th July, 2016 and *Taifa Leo* of Monday, 25th July, 2016 all setting similar time lines from the date of publication. The 1st and 2nd Respondents point to the documents annexed at Pages 24-31 of the 1st Respondent 's Bundle of Documents as proof of compliance. The Kenya Gazette notice of 29th July 2016 also gave 30 days for presentation of views. From the various time-lines given in the newspaper advertisement and the Kenya gazette, the 1st Respondent attempted to comply with the law by providing for a 30 day notice period but having set different start dates for the 30 days it became prejudicial and unfair to parties who wished to respond to these notices as they could not be sure of the last day for presentation of comments as invited. Essentially, following the last advertisement in the Kenya Gazette, the only logical deadline became the 29th August 2016. Any attempt to deny people their submission of comments before then, including those received on 29th August 2016, was procedurally unfair and made the process defective. Various lead agencies and stakeholder groups submitted their comments in what they believed to be in compliance of Regulation 21 (3) of the Environmental (Impact Assessment and Audit) Regulations, albeit on different dates up to 30th August 2016 and beyond. The said comments are contained at Pages 34-168 of the 1st Respondent 's Bundle of Documents

54. On the radio announcements, the evidence tendered showed that an announcement was made in both official and local languages and also broadcast at least once a week for two consecutive weeks on *Radio Salaam* and *Radio Sifa* although no evidence was adduced to show that these were radio stations with national coverage as provided for under Regulation 21 (2) (b) of the Environmental (Impact Assessment and Audit) Regulations. The emphasis on nation-wide publication/ announcement was because the impact of such projects, in many instances, were of national interest. Whereas the EIA Studies had to consider the subsidiarity principle in asking for participation of the most affected members it was still imperative that such study also consider the wider views beyond the project area, where the nature of the project meant that its impact could potentially extend beyond the geographical location, as also alleged by the Appellant s in their submission. This is the main reason for the requirement for nation-wide as opposed to localized participation.

55. Following the submission of the ESIA Study to NEMA for consideration, the 2nd Respondent rolled out a program of 5 public stakeholder consultation meetings. These meetings were held at various locations in Lamu County between August 8 and 11, 2016. The purpose of these meetings was to share the contents of the ESIA Study and Specialist Studies and to receive comments and views from the stakeholders. The stakeholder group and location of the 5 meetings were as follows: (i) Members of the Lamu County Assembly at the County Assembly of Lamu, (ii) Technical Community Committee at the KPA boardroom in Lamu, (iii) County Administration at Mwana Arafa Hall in Lamu, (iv) Imams and Preachers at Mwana Arafa Hall in Lamu, (v) Women's groups at Subira Guesthouse, Lamu and (vi) Public and Farmers at Kwasasi, the project area. The evidence thereof is annexed at pages 73-118 of Sanjay Gandhi's Witness Statement**.** It is important to note that after the submission of the ESIA study report to NEMA, the regulations oblige the 1st Respondent (at the cost of the 2nd Respondent) to carry out the public consultation exercise. There is no requirement for the 2nd Respondent at this stage to call for any further meetings or consultations- this was the 1st Respondents role. In allowing the 2nd Respondent to act like it was still in charge of the process at this stage, the 1st Respondent appeared to have taken a back seat and abdicated its role to the 2nd Respondent**.** The 2nd Respondent in rolling out its stakeholder consultation of August 2016 was engaged in something over and above what was legally required of them. The stakeholder engagement, after the report had been presented to the 1st Respondent , was not a requirement of the regulations, at this stage of the process

56. Notwithstanding, these activities by the 2nd Respondent , the 1st Respondent attempted to also engage the Lead Agencies through a meeting held on 25th August 2016 for some select groups. The minutes of this meeting were post-dated to 1st September 2016 but painted a very grim view of the project by these lead experts. It was clear from the minutes of 1st September 2016, that all the lead agents at that meeting had raised concerns on the location of the Kwasasi public meeting of 26th August 2016, the day of the meeting being a Friday, the time lines for submitting of comments and all were unanimous in their view that the time was too short and pointed to the failure to have a proper civic education process for members of the public.

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

58. Ignoring these defects, a public hearing took place at Kwasasi, the project site, on 26th August, 2016. The Appellants contend that this meeting was premature. The Respondents submitted that it was conducted after the expiry of the 30 days contained in the notices referred to herein. On the conclusion of the hearing, the presiding officer compiled a report of the views presented at the public hearing and submitted the report to the Director-General within fourteen days from the date of the public hearing as can be seen from the record of attendance.

59. The Tribunal has already observed that the different deadlines set in the newspapers and the Kenya Gazette notifications served to confuse the last day for presentation of comments. Accordingly, it made no sense for the meeting of 26th August 2016 to be held prior to the last possible day for the close of presentation of views and before all parties had been given an opportunity to present comments as advertised. It is our considered finding that the notice of 19th August 2016 was inappropriate and the meeting of 26th August 2016 thus premature as the time under the Kenya gazette had not expired by this time. The earliest the meeting could take place was after the 29th August 2016. In the Tribunal s view this confused approach and state of affairs made the process procedurally unfair as it subjected members of the public to conflicting dates and deadlines. The process appeared to be deliberately hurried to either meet the proponents expectations or to lock out members of the public from the process.

60. The 2nd Respondents point out the fact that the Appellant s presented further views to the 1st Respondent 's Director General vide their undated letter enclosing their 50-Page comments annexed as SL 14 at pages 207-265 of the Appellant s Bundle of Documents (volume 1).

The said letter was signed by the Appellants Shalom M Ndiku, their lawyer and the Chairman.

61. They also point to the fact that both the Appellant s and the chairman attended the Public hearing at Kwasasi on 26th August, 2016 and gave the Appellant s' comments which are captured at Page 268-269 of the Appellant s of Annexure SL 15 to the Appellant s Bundle of Documents (Volume 1). AW2 – Mohamed Athman attended the public hearing at Kwasasi on 26th August, 2016, including a written Memorandum presented by Somo M Somo.

62. From the evidence of Somo M Somo, the Tribunal formed the impression that the conduct of the meeting of 26th August 2016 at Kwasasi fell short of that contemplated by the regulations. The Kwasasi meeting was not a consultative meeting to explain the nature of the project and its impact as required by the Regulations. It fast degenerated into a popularity contest, engulfed by an atmosphere of tension, where the participants were split into two groups and a poll of some sort was conducted to establish the numbers who supported as opposed to those against the project. There was a lack of true and genuine engagement on the merits and demerits of the project. Mike Olendo, an expert working with WWF, complained about the manner in which participation was conducted as he felt it was more of a routine check-off approach. Regulation 22 (5) provides that a proponent would be entitled to make a presentation and thereafter respond to presentations made at the meeting. This did not include converting the meeting to a popularity contest.

63. The 1st Respondents compliance and enforcement officer in the EIA section, ***RW1*** *Gideon Kipchirchir Rotich*, laid no evidence to show that there was any attempt to even comply with the prescribed clear regulations and procedures on public participation despite NEMA being solely responsible for the arrangement and conduct of the public participation after July 2016. Other than confirming advertisement of the meeting on 19th August 2016 for the meeting of 26th August 2016, Mr Rotich laid no evidence to show what efforts had been made by the 1st Respondent to have a proper and meaningful exercise in compliance with the EMCA and the Regulations before then and or to clarify the conflicting deadlines.

64. The Tribunal therefore finds that for Phase III, the steps taken after the publication of the EIA Study report in July 2016 to September 2016, including the notices issues, time for receipt of comments and the time and venue of meetings were all done in a manner contrary to the regulations and did not meet the threshold of regulation 21 of the Regulations for public participation.

65. The Tribunal thus finds that the 1st Respondent in issuing the EIA Licence on 7th September 2016 failed to properly consider its own directive of 26th October 2015, the compliance with the same and of the regulations in so far as the process of consultation was concerned at the second and third phases of the EIA study and further erred by approving the project without considering the views presented after 26th August 2016. It also disregarded the views and advise of the meeting of the lead experts of 25th August 2016. We have no hesitation in holding that there was a lack of proper and effective public participation as required by law. The issuance of the licence was unreasonable in ignoring the prescribed procedure and its own directive, arbitrary and disregarded the views given without providing reasons for refusal to consider the same.

66. In the case of ***National Association for the Financial Inclusion of the Informal Sector v Minister for Finance & Another*** **[2012] eKLR,** Majanja J, held as follows at Page 195 as regards public participation:

> ***"24.*** I agree that public participation as a national value is rooted in the fact that Kenya is a democratic state and that public participation fulfills and complements the other values of good governance, transparency and accountability. ***The Constitution does not prescribe how public participation is to be effected and in every case where a violation is alleged, it is a matter of fact whether there is such a breach or not***.
>
> [Emphasis Added]"

> 25. In the case of **Consumer Federation of Kenya (COFEK) vs Attorney General & Others – *Nairobi Petition No. 11 of 2012 (Unreported)***, *the Court noted at para. 52, that:*
>
> "The values outlined in Article 10 of the Constitution are not defined nor are they cast in stone. *I would agree with Mr. Gatonye that they are applied in a particular context and the court in examining whether particular values are fulfilled must look at the legislative architecture of the statute and the facts and circumstances of the case bearing in mind that every statute, rule, regulation or policy must be read in a manner that is intended to fulfill these values."*
>
> *26. The Court further quoted with approval the sentiments of the Constitutional Court of South Africa in* ***Minister of Health and Another vs New Click (Pty) Limited and Others CCT 59/2004, [2005] ZACC 14*** *that:*
>
> "The forms of facilitating an appropriate degree of participation in law-making process are indeed capable of infinite variation. *What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and have an adequate say."*

67. The 2nd Respondent has also correctly pointed out that part of the Appellant s grievances on public participation arose from a common misunderstanding of public participation where participants expect all their views to be accepted as seen from paragraph 33 of the Appeal (Page 13 of the Notice of Appeal) where the Appellant s state:

> "*33*. THAT upon inspection of the EIA Licence's accompanying conditions, we noticed that a great portion of our comments, concerns and queries on the Report were not included in the conditions, indicating a failure to properly consider these comments

prior [to] issuing the EIA Licence to APCL.*"*

68. In ***Musimba v The National Land Commission & Others*** **[2016] 2 EA 260,** a 5 Judge-Bench comprising Lenaola J. (as he then was), Mumbi, Achode., Odunga and Onguto, JJ held as follows at Page 283:

> **"…**the fact that the views given by the attendees at a public forum are all not taken into consideration does not vitiate the fact that there has been compliance with the requirement for public participation.
>
> *In the instant case, there was facilitation*. The public and other relevant stakeholders were involved as the third Respondent undertook its statutory mandate. *There is undisputed evidence that Kenya Wildlife service, the Ministry of State for Planning, the Kenya Forest Service and National Museums were all involved. These were all stakeholders with different interests.*
>
> *There is also adequate evidence that pursuant to section 21 of the Environmental (Impact Assessment and Audit) Regulations, LN Number 101 of 2003, the second and third Respondents caused to be published in the newspapers of 6 November 2012 and 13 November 2012 notice to the public inviting comments within 60 days from the public on the project. The said notice were also published in the Kenya Gazette also disclosed the anticipated impacts and proposed mitigation measures*. The notices were all published before the Environmental Impact Assessment Licence being issued and some comments were indeed received, taken into account and acted upon by the third Respondent.*"*

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

70. In the Privy Council decision from the Supreme *Court of Belize in Claim No. 223 of 2014****:***

> ***Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment and Belize Electric Company Limited***, stated as follows:-
>
> **"**……*As Linden JA said with reference to the Canadian legislation in* **Bow Valley Naturalists Society v Minister of Canadian Heritage** *[2001] 2 FC 461, 494 (in a passage quoted by the Chief Justice in this case)*:-
>
> "The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. *It is not for the judges to decide what projects are to be authorised but, as long as they follow the statutory process, it is for the responsible authorities*."

71.From the above authority, it is incumbent for the Tribunal to be satisfied that the process and procedures under the Act were complied with and to ensure that the Regulators decision is not touched except where it is unreasonable or goes contrary to the law. The judicial function of the Tribunal is to examine whether there was compliance with statute. In the present appeal, the procedure was not followed and the process was seriously flawed. The 1st respondent owed a duty to properly supervise and ensure there had been compliance. They did not. Public participation conducted in a manner envisaged by a proponent is not one necessarily in conformity with the law. The Tribunal is interested more in the latter than the former.

72. At this juncture it is important to point out that is imperative that those in administration be keen when faced with objections to projects, where objectors hold the view that the project may compromise the environment. This Tribunal cannot permit authorities to deal so nonchalantly with such objections. Such objections need to be taken seriously and need to be considered. Public participation especially when it comes to EIAs are extremely critical and cannot be treated as a formality or inconvenience. It is at the very core of any EIA exercise. The EIA public participation process cannot be a mechanical exercise but a vibrant and dynamic activity where affected persons are engaged in a fair and reasonable manner.

73. In our view, public participation in an EIA Study process is the oxygen by which the EIA study and the report are given life. In the absence of public participation, the EIA study process is a still-born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the EIA study report is. In this case, the report was extremely bulky and purported to capture a lot of information. By all accounts, it was an impressive piece of literal work but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value.

74. In the case of **Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others, Nakuru ELC Constitutional Petition No. 50 of 2013**, the court in dicta stated as follows

> "w*here a procedure for the protection of the environment is provided by law and is not* followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment."

75. Following the authorities cited, we have no hesitation in finding and hereby do that the process leading to the preparation of the ESIA Study Report by the 2nd Respondent was not properly conducted, had side-stepped the procedure laid out under the regulations and having done so, there was a failure of effective public participation and the procedure for the issuance of the ESIA Licence by the 1 st Respondent was in violation of the elaborate procedure set out in the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya.

76. Having found that the process was flawed, the Tribunal then has to ask whether such failure in the consultation process was fatal to the ESIA study. On this point, we draw judicial support from the decision of the ***Supreme Court of Belize in Claim No. 223 of 2014 –***

Belize Tourism Industry Association v National Environmental Appraisal Committee & 2 Others where the Court quoted the decision of Sykes, J in ***Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency*** where the Learned Judge found that the consultation process was flawed because an important part of the ESIA was not placed in the public domain and where the Court explained thus:

> "It does not follow…that flaws in the consultation process will necessarily mean that the decision should be quashed. *It would seem that it depends on the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision -maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision*. These concerns should be taken into account conscientiously when making his decision…the Courts will examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy…"

77. While we respectfully accept the observations made in the Belize case that not every non-compliance will vitiate the entire process where such flaws were not substantive, as a Tribunal we are unfortunately bound by the governing statute establishing and spelling out the functions of the Tribunal . As a Tribunal we lack inherent powers to excuse non-compliance of the rules and regulations on public participation. Even if we are wrong on this issue of lack of powers to consider the effect of non-compliance and follow the Belize court decision, we would still find that the flaws mentioned were sufficiently serious to vitiate the process as in this case there was an outright disregard of the need to conduct effective public consultation to the detriment of the public and residents of Kwasasi area and the larger Lamu region surrounding the project site.

C. Whether the Respondents conducted a proper analysis of alternatives of the project.

78.Regulations 16 (b) of the Environmental (Impact Assessment and Audit) Regulations requires that an EIA study identifies and analyses alternatives to the proposed project

79. Regulations 18(i) and (j) of the Environmental (Impact Assessment and Audit) Regulations also mandates a proponent to consider alternative technologies and processes available and reasons for preferring the chosen technology and processes in the environmental content of an EIA Study report.

80. The proponent of the project conducted an analysis and took into consideration the Project Alternatives in the ESIA Study report it presented to the 1st Respondent as can be seen from Page 254 of the ESIA Study contained in Volume II of the Appellants' Bundle of Documents. These alternatives included the location/ site analysis, scheduling of the development and time constraints, the energy supply options for the same amount of power as the intended coal plant project, the different technological systems (such as the sub-critical, supercritical and ultra-super critical) and finally the analysis of not proceeding with the project (also known as the "Do-Nothing option")

81. For the **Location Alternative**, a proponent is ideally required not only to analyse the location selection for the project and its alternatives but also to examine the placement of the plant on the project location site and the impact of its various components on the environment, if any, by placing in one sector as opposed to another.

82. The coal power plant with a capacity of 1,050MW and located at Lamu appears to have already been identified by the government as a necessary source of power and expression of interest had already been sent out for interested parties to apply. The 2 nd Respondents witness, Sanjay Gandhi, testified that the Kwasasi site was a pre-selected site as part of the wider LAPSSET project and the proponents settled on the inverted "L" shape upon considering three other available alternatives. In other words, the 2 nd Respondent's testimony was that it had no say in the selection of the location. In the final holding of Nairobi HCCC Petition NO 22 OF 2012**: MOHAMED ALI BAADI AND OTHERS vs THE HON. ATTORNEY GENERAL and 7 others** the Constitutional court found that a Strategic Environmental Assessment (SEA) study should have been undertaken with respect to the LAPSETT project and the impact of its various components, of which the Lamu Coal power plant is one of the components. To date, no evidence has been tendered that a SEA has been done or completed and thereby supporting the choice of location. We do not see how a meaningful EIA study could be undertaken in the instant case when the basis for the choice of location and other components of the LAPPSETT project had already been called into question by a superior court. It appears to us that both the desired project, that is, a coal plant and the desired site of Kwasasi had already been pre-determined even before the SEA for the whole LAPSSET project were completed. This was outside the 2nd Respondent's control.

83. As regards the site placement on the location itself, the 2 nd Respondent did not submit a proper detailed architectural or engineering plan of the coal plant or the site plan, whether approved by the Lamu county government, or otherwise, for the preferred pre-selected location and

instead referred the Tribunal to a sketch plan of the site (refer: pages 1674-1686 of volume II) accompanied by oral explanations as to where different elements of the plant layout would be set out. This presented a challenge to the Tribunal in considering some of the mitigation measures proposed, as will be seen later in the judgment. This lack of specific and current information on where various components of the project would be placed did not give an opportunity for the Tribunal or other members of the public at the study stage, to consider the likely effect of each project component on the environment. For instance, precise measurement of distances between different features on the site as well as distances of each feature to the fragile sea shore became difficult to examine.

84. The 2nd Respondent has referred us to the authority in ***Jamii Bora Charitable Trust &*** **Another V Director General National Environment Management Authority & Another [2006] eKLR** where the Tribunal expressed itself as follows:

> *"The Tribunal does not consider that an analysis of alternative sites is always practicable. A developer cannot reasonably be expected to compare the potential impacts of developing a project on a site which he owns as against the potential impacts of developing the project on another alternative site, which he does not own*. Such a comparison would not be meaningful, as the developer may well not be able to acquire the alternative site. *Yet, a developer cannot be expected to acquire alternative sites for the sole reason of comparing the potential impacts of the proposed project on those alternative sites."*

85. This is true in smaller projects where a proponent had a say and participated in the choice of location and when such proponent had already invested in immovable property but not in large scale projects of this nature where the developer is not in control of the site and location and where acquisition of the property remained pending so that there still existed room for relocation should a project location found to be unsuitable. In the instant case, evidence was led that the government had intended to acquire the land through compulsory acquisition hence the same cannot be equated to private land in the hands of a project proponent

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

87. The omission to carry out a SEA by the Government prior to the expression of interest put stakeholders such as the Kenya Forest Service, a statutory body established under the Forests Act and a lead agency under Section 60 of EMCA, who have the overall functions of management of all state forests and providing plans for utilization of all forests in the country, in difficulty as they remained opposed to the location of the project and its location. They expressed grave concern on the possible impact to mangroves and other forest cover. Their views were not heeded nor could the concerns of any other stakeholder be taken into account on this issue by virtue of the pre-selection of the site and the failure to undertake an Strategic Environmental Assessment in respect of the entire LAPPSETT project.

88. In addition to the location alternative, the report mentioned the scheduling alternative (refer at Page 263 of the ESIA Study – Volume II of the Appellant s' Bundle of Documents) from a time frame perspective concluded that the Government needed to accelerate power generation from coal in order to supply baseload electricity to the economic activities envisaged by the policy behind the Expression of Interest. This was not challenged.

89. On Energy Supply Alternatives considered in the ESIA report, the proponent purported to identify and consider Nuclear Power, Large Hydro power, Geothermal Power, Natural Gas Power, Coal fired power, Medium Speed Diesel Power, solar and wind power. This was highly contentious for the parties. The 2nd Respondent's witness, ***RW2*** **SANJAY GANDHI**, gave his evidence on the various available energy alternatives and the choice of coal power, which in his view, remained a viable alternative based on his own personal involvement in other alternative energy source projects in Kenya. ***RW3*** **ANDREAS SZECHOWYCZ** also testified on the Project alternatives. ***APW7*** **Mr HINDPAL SINGH JABBAL**, the Appellants' Witness, on the other hand, considered the economic value of coal generated power as opposed to other energy sources. His testimony was based on his Witness Statement dated 24th February, 2017 which he adopted as his evidence-in-chief and focused on submissions he had already made to the Energy Regulatory Commission on the issuance of the Power generation licence. While the ERC decision, annexed to the 2nd Respondent 's Supplementary Bundle of Documents, dismissed the Appellants' objection to the grant of a Power Generation licence to the 2nd Respondent, the Tribunal is not prevented from considering the environmental impact of the submissions made with relation to the EIA licence issued by the 1st Respondent but not the entire presentation by **HINDPAL SINGH JABBAL** that had already been submitted before the ERC in objection to the application by the 2nd Respondent for a Power Generation Licence on matters beyond the environment. This would essentially be tantamount to this Tribunal being converted into an appellate body against the ERC's decision with potentially embarrassing consequences. The Tribunal finds that the evidence of **HINDPAL SINGH JABBAL,** while useful for purposes of considering the various economic impacts of the different energy supply alternatives was more suited for presentation before the ERC process. The Appellants at this stage failed to exhibit evidence such as the power purchase agreement (PPA) to enable the Tribunal determine the agreed rates between the 2nd Respondent and the Government of Kenya that would have assisted their evidence on whether the consumer rates would be affected adversely. In any event this aspect of the case was best left for the Energy regulators determination rather than the environmental authority. Notwithstanding, the testimony (and evidence submitted) of both **SANJAY GANDHI** and **ANDREAS SZECHOWYCZ** on Project Alternatives, the ESIA Study analysed the economic advantages and disadvantages of the various available sources of energy including nuclear, large hydro, geothermal, natural gas, coal fired power, medium speed diesel power, solar and wind power concluding that the benefit of the project for the development of the 1050 MW coal fired power plant in Lamu overrode any other alternative energy source for the same.

90. The ESIA also analysed alternative technologies e.g. sub-critical, supercritical and ultra-super critical and processes available and reasons for preferring the chosen technology and processes as required under Regulation 18 (i) of the Environmental (Impact Assessment and Audit) Regulations

91. The ESIA analysed the available Fuel Combustion technologies, the cooling system technologies, the Once-Through Cooling and the Direct-dry cooling system and settling on once-through cooling system as it provided the highest efficiency for cooling using supercritical boiler technology. To this extent, there was an analysis of the technological alternatives.

92. Finally, in considering the '**do-nothing'** option (analysed at Page 267 of the Appellants' Bundle of Documents (Volume II)) the 2nd Respondent makes the conclusion that although the do-nothing option entails no environmental or social impacts in the project area, not undertaking the project will mean that Kenya will not manage to produce the electricity that it needs under the 5000 Plus MW program which will have adverse socio-economic impacts. ***AW10*** Dr Jackson Kiplagat, witness for the Appellants working with WWF, was of the view that in his opinion, there were no appropriate mitigation measures that could be introduced in the ESIA license conditions that would make the project viable not only in Lamu but anywhere else in Kenya; the *o*nly option was to stop the project completely and invalidate the ESIA license. We find this approach to development as too simplistic and unrealistic. Development projects will always have an environmental impact. The extent and magnitude is the difference. To these impacts, the law has set out requirements for mitigation measures to be put in place. Accordingly, and as stated earlier, in view of the provisions of the Energy Act 2019, we do not find that an approach that suggests a blanket denial of licenses for such projects as not being very helpful. A number of factors have to be considered in deciding to licence such a project or not.

D.Whether the Respondents conducted a proper analysis of the economic viability of the project

93. The 2nd Respondent in its ESIA Study report justified the need for the construction of the 1050 MW Coal Fired Power Plant on the Government's vision 2030 predictions on the intensive economic activities that were intended to be achieved by this Vision 2030 together with the analysis of the available energy supply alternatives mentioned above.

94. The 2nd Respondents submitted that Chapter 8 of the ESIA Study contains an in-depth analysis of the economic viability of the project in the Social Impact Assessment Study contained at Pages 1009-1051 of the ESIA. At Pages 1109-1116. It analysed the socio-cultural environment and the resultant increase in affordability, reliability and stability of electricity supply from the coal power project.

95. The 2nd Respondents ought to justify that once complete, the project would constitute approximately 36% of the new combined grid capacity as well as bring down the average cost of generation for Kenya Power & Lighting Company Limited (KPLC) which would, as a result, *inter alia*, reduce the cost of electricity charged to consumers;.

96. At Pages 1113-1115 of the ESIA Study, the Study analyses the magnitude of the projected growth likely to arise from the project to the whole country and the East African region through the elevation of the Lamu county's profile with subsequent infrastructural development, increased revenue and investment in the county, access to renewable and reliable power, enhanced availability of markets for local products and increased tax revenue.

97. At Pages 1115-1116 of the ESIA Study, the Study analyses the impact of the project on infrastructure development and concludes that the proposed project will stimulate the enhancement of the transport, public health, communications and energy infrastructure.

98. Reminding ourselves of the limit of the Tribunal's jurisdiction, the economic viability of the project (as opposed to the economic impact of the project) is not within the jurisdiction of the Tribunal to consider but that of the policy makers and the Energy Regulatory Commission and we will not delve into this issue.

99. On the last two agreed issues dealing with mitigation measures, the same are addressed as follows:-

E. Whether the ESIA Study Report prepared by the 2nd Respondent contains adequate mitigation measures.-

and-

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

100. Regulation 16 (c) of the Environmental (Impact Assessment & Audit) Regulations requires the ESIA study to propose mitigation measures to be taken during and after the implementation of the project.

101. From the Study and the evidence of the Lead ESIA Expert who prepared the Study, Sanjay Gandhi**,** identified the anticipated environmental impacts of the project and the scale of the impacts under Chapter 8 – at Pages 275-392 of the Main ESIA Study, as well as the Cumulative Impacts of the Project in Chapter 10 at Pages 409-416 of the Main Study. In addition, the ESIA proposes mitigation measures to be taken during and after the implementation of the project under Chapter 8 – at Pages 275-392 of the Main ESIA Study.

102. The chapter on mitigation measures is one of the largest sections in the ESIA Report and there was an attempt to broadly cover different areas such:

a. Surface and Ground water Quality;

b. Thermal effluent;

c. Terrestrial Fauna and Flora ;

d. Air Quality Impacts;

e. Emission control technologies;

f. Visual/Aesthetic Impacts;

g. Cultural Heritage Impacts

103. Under Chapter 8 of the Study Report, the conclusions at part 12.2 summarized the proposed mitigation measures (refer to Pages 483 - 491 of the Appellant s' Bundle of Documents – Volume II) which were also supported by specialized studies undertaken. The 2nd Respondent provided the following listed mitigation measures:

Atmospheric Emissions/Air Quality

104. From the Atmospheric Dispersion Modeling Report (Air Quality Study) the study considered the following Pollutants of Concern due to their known impact on human health and their potential to be released to the atmosphere from project activities:

a. NOx – The sum of Nitric oxide (NO) and nitrogen dioxide (NO2);

b. Sulphur dioxide (SO2);

c. Particulate Matter (PM): PM10 and PM2.5 (fine particulate matter);

105. The adverse effects of the combustion of coal identified in the Study and as explained by the Lead ESIA Expert, RW3, Sanjay Gandhi and RW4 Andreas Sczechowycz are associated with Sulphur dioxide (SO2), (Nitrous Oxide) NOx and Particulate Matter (PM) emissions.

106. They proposed to put in place certain Mitigation measures against these air emissions from the Power plant during the operational phase including the installation of a **Wet Flue Gas Desulphurization (FGD)** system to remove Sulphur dioxide from the flue gas before the flue gas is emitted into the atmosphere. within SO2 emission limits recommended by the International Finance Corporation (IFC) EHS Guidelines for Thermal Plants; the use of **low NOx burners to reduce nitrous oxide (NOx)** before the flue gas is discharged into the atmosphere; the design and installation of **Electrostatic Precipitator (ESP)** upstream of the Flue Gas Desulphurization (FGD)/ chimney and downstream of the air heaters by the Project Contractor; the installation of a Continuous Emission Monitoring System (CEMS) mounted within the Stack would continuously monitor NOx, SOx, CO2 and PM10 emissions to ensure compliant conditions are maintained through appropriate process controls.

All these were intended to be within by the International Finance Corporation (IFC) EHS Guidelines.

107. AW6 Lauri Myllvtrta, challenged the modelling and sampling method used as well as the period when such sampling was done as completely inadequate. He testified that the air pollution would cause a significant amount of indoor air pollution that has detrimental health impacts on children and parents exposed to these uncontrolled and untreated emissions. However, no evidence was laid to challenge the mitigation measures proposed and we find this was adequately covered.

The Coal Handling and Storage

108. The ESIA had identified potential adverse impacts in relation to the Coal Storage yard which was a recurrent theme in the Appellants' evidence.

109. At Page 145 the ESIA study states thus as regards Coal storage yard and the proposed mitigation measure to control its dust:

> "To control dust to the air from the coal storage area, a permanent water sprinkler system shall be provided. *The coal storage area will need a coal setting basin that can be cleaned* with a loader and sump pumps in a separate bay for handling overflow and runoff.
>
> The entire coal handling system, including the coal conveyors shall be completely encapsulated by dust-proof enclosures. *At areas where dust formation is expected, e.g*. at transfer points, dust shall be collected by suction systems with filters. *Collected dust shall be returned to the main coal flow.*"

110. We also find that the mitigation measure provided for the coal handling and storage to be adequate.

Ash Yard and Ash-handling

111. The other concern raised was that of the Ash yard and the Ash pit where the ash would be accumulated.

112. The ESIA Study (at pages 153-154 of the Appellant s' Bundle of Documents (Volume II)) deals with the Coal Combustible Products (CCPs), Fly ash and bottom ash. Fly ash is generated from the Electrostatic Precipitators (ESPs) connected to each boiler while bottom ash will be generated as a result of the coal burning process. These were to be stored in the ash yard. At Page 150 of Main ESIA study, the ash-yard was stated to be designed to prevent subsurface soil and groundwater contamination by leachates. The witness for the 2nd Respondent explained that the design of the ash yard impermeable layers foundation will be composed of three layers of protection and constructed as per the specifications which take mitigating measures under Table 8-23 at Page 316-317 of the ESIA study:

a. A 1.5 M thick in-situ compacted layer of clay;

b. An appropriately designed HDPE layer around the ash yard;

c. A 200mm thick layer of sand on top of the HDPE layer for protection;

d. A network of perforated pipes to collect leachate for subsequent treatment.

e. A leachate collection system will be incorporated in the ash yard design and provided at the lowest point(s) of the ash yard. The leachate and runoff will be collected from the coal ash pile and diverted into a leachate storage or treatment system.

f. A groundwater monitoring system made up of wells will be installed and operated around the ash yard capable of verifying whether coal ash or leachate has penetrated the pad or HDPE liner.

113. It was stated that storm-water canals will be constructed along the perimeter of the ash dump. The leachate from the canals will be collected and treated in the ash treatment pool with the treated water used in the ash yard through a sprinkler system for dust suppression. A 7 m wide road will be constructed along the perimeter of the ash yard complete with drains for access purposes

114. Despite this attempt to make the ash yard seem foolproof, RW4 Andreas was hard pressed to explain what would happen in the event of a flood to the area. He pleaded ignorance of knowledge of overflow from ash pits in other jurisdictions such as the USA during the occurrence of hurricanes and the long term pollution it leaves behind in the event of a mishap. The ESIA study report presented acknowledges that the location where the plant would be located is a flat plain land close to the sea shore and prone to flooding. Other than for the explanation that the canals will be constructed and separated also by a road with drainage no other details were provided to justify its construction on an area prone to flooding. In fact, the problem of failure to provide proper architectural site plans for the plant and associated facilities made it difficult to determine its proximity to the sea shore and whether the proposed mitigation measures would be adequate. As these were also not within the knowledge of the public, who are more familiar with the sea levels and tides in the areas, it would have been difficult for them to raise meaningful suggestions in the absence of details of the ash yards/ ash pits proximity to the sea.

115. AW3 Dr. David Obura, a marine biologist testifying on behalf of the Appellants, pointed out that the information pertaining to the ash-yard was inadequate or unclear. In his opinion, the ash heap in the ash yard will, over time, likely be as long as 4km and form a mountain of ash. How this waste will be contained was not addressed at all in the ESIA report despite the capacity being for 5 years, yet the plant was planned for operation over a 30 year period. This observation is significant.

116. RW1, Mr. Gideon Kipchirchir Rotich gave the Tribunal an overview of the site. His testimony was worrying. The proposed site of the plant was prone to tidal flooding and that climate change was likely to exacerbate this issue. Nonetheless, he stated that the site was appropriate as it was the most convenient for transportation of coal and near a water source for cooling purposes. He confirmed that no quantity or estimates of fly ash had been provided in the ESIA and that there was no explanation of what would happen once the 15 years storage capacity of the ash was reached.

117. He also confirmed that he was familiar with the design and layout of the plant particularly where the ash yard is to be constructed but on cross examination conceded that the ESIA acknowledged that an environmental analysis of the coal handling system had not been done because at the time of submission of the report to NEMA, the design had not been completed.

118. It is the Tribunal's finding that the unclear location of the ash yard in relation to the plant and the sea shore gives rise to an inference of the ash pit being located in a highly risky area susceptible to floods. The ash pit location was an important factor in deciding to issue the licence or not and stringent conditions ought to have been imposed in the EIA Licence on its location, construction and continuous monitoring.

119. As regards the utilization of the fly ash, commercial use can be found in road paving, manufacture of concrete blocks and manufacture of cement etc. Whereas the Appellants' 5th Witness, DR. MARK CHERNAIK, confirmed the beneficial use of CCPs in his evidence, DR. DAVID OBURA, PW 3 clearly contradicted this by stating that the CCPs are poisonous and cannot be used at all. DR. CHERNAIK confirmed that best practice (drawing of India's example) require that the CCPs should be capable of being recycled and used as intended in this project.

120. The ESIA Study has articulated the principle of managing coal dust pollution through Good International Industry Practice (GIIP) in Table 8-6 of the ESIA Study (Pages 287-288 of the Appellant's Bundle of Documents – Volume II) and under Table 11-3 of the ESIA Study (Pages 448-449 of the Appellant's Bundle of Documents – Volume II) located in Section 11 – Environment and Social Management Plan. According to the study, the design company was to incorporate dust suppression systems for the coal handling system to be constructed by the EPC Contractor. An Operations and Maintenance (O&M) Company was proposed to have responsibility for managing the system during the operational phase of the project. While the fly ash stock may be used towards commercial application as explained by witnesses for both the Appellant s and the 2nd Respondents , no evidence was laid before the Tribunal to show that this was anything but speculative and no mention was made of the time frame within which industries would be set up to take up this harmful by product from the plant or provision made for the infrastructure necessary like road networks and situation of factories to deal with these by products. In fact, the lead agent in charge of roads voiced concern on this in his comments.

121. To this end, the mitigation measures on the ash yard and ash pit are found to be inadequate.

The Coal Conveyor System & the 2000-Acre Limestone Concession Quarry

122. Finally, on the Appellants complaint that the ESIA Study report omitted critical information such as the 2000 acre limestone concession, 15km conveyor belt and a coal handling berth, we observe that the report made mention of the availability of coal handling facilities and a 15km long conveyor belt system with a preliminary routing provided for.

123. The 2nd Respondent admitted to the lack of the actual design of the coal conveyor system and this was again information not available to the public or provided for at the time of the hearing of this appeal other than for a general description that the same will be completely encapsulated. The omission was attributed to the uncertainty created by change of location where the coal would be shipped. The 2nd Respondent's witness explained that the ideal receiving port for the coal was intended for Kwasasi but the Government changed this to the Lamu port, thus the omission in consideration of the transportation system. These aspects were important omissions that ought to have been dealt with by the 2nd Respondent and their exclusion questioned by the 1st Respondent. The 1st Respondent failed in its duty to ensure that engineering plans for the same were provided for along the entire routing. To this extent the Study report on this aspect was incomplete.

124. With respect to the limestone concession area, we agree that the same is not the subject of this process as the 2nd Respondent has indicated that it was going to procure the same from third parties. The limestone quarry would be the subject of an independent EIA process undertaken by the third party supplier. It is not relevant to the present proceedings.

125. Based on the foregoing measures, the Appellants' contention in the grounds in support of their appeal that the ESIA Study is silent on pertinent matters on coal handling and storage have no basis whatsoever but we do find that such mention to be incomplete, insufficient and inconclusive to form the basis for the 1st Respondents decision to issue a licence.

Ecological Impacts Mitigation

126. The Study Report addressed the Marine Ecological Impacts at Chapter 8.9 from Pages 326-331 of the Appellants' Bundle of Documents (Volume II). These impacts include:

a. Impacts of construction of activities of marine structures; and

b. Impacts during operation – impingement and entrainment of organisms due to intake of large quantities of seawater;

c. Localised rise of sea water temperature due to cooling water discharge;

d. Impacts on water quality.

127. The Study then sets out the proposed mitigation measures to address the impacts to the marine ecology at Pages 329-331; Terrestrial Ecological Impacts and the mitigation measures at Pages 332-343; Impacts on Herpetofauna and the mitigation measures thereof at Pages 334-350; Impacts on mammals and mitigation measures thereof at Pages 357-359.

128. Accordingly, subject to the issue of public participation these matters were covered.

Thermal Effluent & Mitigation Measures

129. From the evidence tendered the proposed coal fired power plant will utilize a once-through cooling system for the condenser. This cooling system carries off waste heat from the power plant by means of water obtained directly from the sea flowing through the condenser and discharges it to the back to the sea. The water temperature will vary on discharge.

130. The Appellant's contention is the Study report indicates that a significant temperature increase of 9?C is likely as a result of the discharge, but does not fully analyze the impacts this change in temperature will have on the marine ecosystem.

131. RW3 Sanjay Gandhi during cross-examination explained that there will be a 600m long pipe from the condenser outlet to the circulating water discharge outlet which will reduce the elevated temperature differential of 9?C at the condenser to temperatures lower than 9?C at the discharge point. His evidence was that although the temperature discharge limit of ±3?C set in the Third Schedule of the Environment Management and Coordination (Water Quality) Regulations, 2006 does not specify if this is applicable to a point of discharge, an ambient criteria or within a mixing zone, the thermal effluent will not exceed the limits set out in Kenyan law. According to him, in order to resolve this problem, the specialist engaged by the 2nd Respondent utilized the World Bank Group's General EHS Guidelines for Wastewater and Ambient Water Quality (April 2007). This guideline recommends that the "temperature of wastewater prior to discharge should not result in an increase greater than 3°C of ambient temperature at the edge of a scientifically established mixing zone which takes into account ambient water quality, receiving water use and assimilative capacity among other considerations".

132. The World Bank Group's EHS Guidelines for Thermal Power Plants (December 2008) defines a mixing zone as "*the zone where initial dilution of a discharge takes place within which relevant water quality temperature standards are allowed to exceed and takes into account the cumulative impact of seasonal variations, ambient water quality, receiving water use, potential receptors and assimilative capacity among other considerations*".

133. From the results of the marine thermal discharge modelling study the 2nd Respondents did, they believed that using the selected design of the outfall pipe and diffuser, the proposed project will be able to comply with the guidelines of EMCA, the World Bank Group's General EHS Guidelines and EHS Guidelines for Thermal Power Plants and subsequently may have minimal detrimental impacts to the marine ecology.

134. RW1, Mr. Rotich from the 1st Respondent, however, testified that there would be likelihood of rapid increases in water temperature due to intake and out take of sea water for cooling of the plant. He agreed that warm waters hold less oxygen, which in turn has impacts on marine life, and eventually negative impacts on the people of Lamu who dependent on the Environment for their livelihood and further agreed that there were no specific conditions for the protection of sea grass, corals and mangroves. He explained that NEMA's role in approval of ElA's is to ensure a proper review even after a project approval.

Climate Change & Mitigation Measures

135. The Appellants' criticism against the proposed project is that it is in breach of Kenya's obligations under the Paris Agreement. The 2nd Respondents in reply pointed out that the Paris Agreement entered into force on 4th November, 2016, way after the ESIA study had been concluded and the ESIA Licence issued to the 2nd Respondent and in their view, the Appellants never demonstrated how and to what extent the proposed project violates Kenya's commitments under the Agreement, especially in the light of the mitigation and adaptation measures put in place in the ESIA study regarding the challenge of climate change.

136. The ESIA study has set out adaptation measures for climate change at Table 8-19 at pages 308-309 upon an analysis of the potential Climate change risks and consequences set out at Table 8-18 at Pages 306-307 of the Study

137. Kenya had enacted the Climate Change Act whose commencement date was set as 27th May 2016. Mr Gandhi in his evidence confirmed a failure to consider and comply with the provisions of the Climate Change Act, 2016 but explained that the omissions arose from the fact that the legislation was enacted during the process of the study.

138. Climate Change issues are pertinent in projects of this nature and due consideration and compliance with all laws relating to the same. The omission to consider the provisions of the Climate Change Act 2016 was significant even though its eventual effect would be unknown.

139. In applying the precautionary principle where there is lack of clarity on the consequences of certain aspects of the project it behooves the Tribunal to reject it. On climate change issues this is of greater importance and made the provisions on climate change within the report incomplete and inadequate.

140. Other Environmental Impacts and the attendant mitigation measures had been provided for in the ESIA Study report and included:-

a. Socio-economic-cultural environment – P. 359-365

b. Land Acquisition and Involuntary Resettlement – P. 368-372

c. Impacts to Demographic profile – P. 372-374

d. Impact on Public health, Occupational Health and Safety – P. 377-382

e. Impacts on Archaeological Artefacts – P. 385-386

f. Landscape and Visual Impacts – P. 386-389

g. Cultural Heritage Impacts – P. 389-391

h. Impacts Associated with World Heritage Site/Outstanding Universal Value – P. 391-392

141 We find that, as shown above, that despite the ESIA Study Report prepared by the 2nd Respondent containing mitigation measures as required under EMCA and the Environmental (Impact Assessment & Audit) Regulations, the adequacy of those measures are yet to be subjected to proper public participation and until then may remain mere academic presentations.

142. This brings us to the question of whether the 1st Respondent Authority having considered these mitigation measures properly evaluated the same and thus discharged its mandate in relation to the issue of an ESIA Licence as stipulated in EMCA and the Environmental (Impact Assessment & Audit) Regulations.

143. The 1st Respondent in issuing the EIA licence for the project, imposed conditions for the approval. These are attached to the licence. The conditions attached are in generalized terms and do not appear to make mention of the matters identified by the 2nd Respondent in its mitigation proposals. Accordingly, the Tribunal is unable to say with certainty whether there was a proper evaluation undertaken by the 1st Respondent in issuing the licence.

144. The conditions imposed ought to have been more comprehensive and bind the 2nd Respondent to its commitments as spelt out in ESIA Study report. To this extent, the conditions set are inadequate and display a casual approach by the 1st Respondent to an otherwise serious and important project.

145. Despite objections made to the 1st Respondent around the 29th August 2016, it appears that most of these concerns were largely ignored. We have stated before that it is not oblationary for the 1st Respondent to accept all comments given but it must give due consideration to the

same whether accepted as being meritorious or not.

146. NEMA could not have made an informed decision without at least having given serious consideration to further specialist advice, comments or opinions. The inference is that the 1st Respondent failed to place due weight on the necessity of making a properly informed decision about the impact of the proposed development on the natural environment and as a result had no substantial basis for grant of the licence or imposition of generalized conditions.

147. The EIA Licence conditions appeared to be generic and not targeted at the project before it. For instance, the General conditions 2.10 and 2.11 of the EIA Licence conditions appear to be relevant to a fuel depot and storage conditions of fuel rather than a coal plant. Conditions for coal storage and ash yard were either too basic or lacking thus suggesting a pedestrian and casual consideration of the Environmental impacts identified by the proponent.

148. As a general principle, the Tribunal will not interfere with the exercise of discretion by an administrative body even if the Tribunal were to act differently were it in the shoes of that body. The discretion involved is that of the administrative body, in this case the 1st Respondent, not of the Tribunal. The circumstances under which the Tribunal would interfere with such decisions are limited: if the decision is unreasonable or violates the law, in this case EMCA and the regulations.

149. In ***Claim No. 550 of 2010 – Peninsula Citizens for Sustainable Development Limited v Department of the Environment & Placencia Marina Limited*** where the claimant had challenged the decision to build the dam as unlawful on the ground that the procedure by which the decision was made was not in accordance with several provisions of the Environmental Protection Act and the Environmental Impact Assessment Regulations, 1995 [Kenya's equivalent of EMCA and the Environmental (Impact Assessment and Audit) Regulations] in that the steps required by the Legislation to be followed prior to approval of the project were not complied with by the government before approval of the construction of the dam, both the Supreme Court and the Court of Appeal in Belize? and the Privy Council rejected the case for the claimant and held as follows at Page 37:

> "*The Privy Council held that it was not necessary that the ESIA should pursue investigations to resolve every issue or topic*. "The fact," says Lord Hoffman, "that the environmental impact statement does not cover every topic and expose every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations: See also to the same effect Cripps J in **Prineas v.** ***Forestry Commission of New South Wales 1983 49 LGRA 402 at p. 417***.
>
> The court further held that, there must be included into the statutory obligations a concept of reasonableness, where an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out of the activity, it meets the standards imposed by the regulation…"

Similarly, in ***MEC for Environmental Affairs and Development Planning v Clairison's*** *CC* (408/2012) [2013] ZASCA 82 (31 May 2013)**, the Supreme Court of South Africa held as**

> **follows**
>
> "*What was said in Durban Rent Board is consistent with present constitutional principle and we find no need to re-formulate what was said pertinently on the issue that arises in this case*. The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere. *That seems to us to be but one manifestation of the broader principles explained – in a context that does not arise in this case–*
>
> 1. There is one further matter under this heading that we need to deal with. The MEC shared the opinion of his department that the proposed development was detrimental to the biodiversity of the area, and to an environmental corridor between two rivers. *Expert opinion advanced by Clairisons challenged that opinion. On that controversy the court below said the following:*
>
> 'Much of the information relied upon by the [MEC] seems to amount to academic statements about, and definitions of, the nature of critical biodiversity areas and corridors and very little is provided in the way of factual evidence under the guise of engaging with the critique provided by [Clairisons] specialist. *As far as the functionality of the corridor between the rivers is concerned, it seems to me that this type of dispute cries out for independent specialist input (which it was open to the [MEC] to call for)... It is difficult to understand how the [MEC] could have made an informed decision merely by weighing up*
>
> [Clairisons] input against the department's input and without at least having given serious consideration to further specialist advice. *The inference is that he failed to place due weight on the necessity of making a properly informed decision about the impact of the proposed development on the natural environment and as a result the grounds relied upon by him were insubstantial. This also constitutes a ground for review.'*

150. In the case of **Republic v Institute of Certified Public Accountants of Kenya *ex parte* Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006** the court held that:

> **"**Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. *No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.***"**

151. The Tribunal has considered all these cases and finds that despite the ESIA Study reports endeavour to capture as much of the reasonably foreseeable anticipated impacts of the proposed project and attempted to address the mitigation measures to be put in place to mitigate the various matters identified as Environmental and Social impacts, however, the comprehensiveness of the EIA Study report did not excuse the failure to carry out effective public participation during this process as well as after the preparation of the voluminous EIA study report. The EIA study and report thereof were thus never subjected to proper and effective public participation that would have covered most of the grievances now raised in this appeal. As we have found earlier, the 1st Respondent's approval of the ESIA Study and the consequent issue of the ESIA Licence and its conditions failed to meet the requirements of the law. The 1st Respondent therefore failed in discharging its mandate as provided for under the enabling Statute, EMCA by appearing to have only formally endorsed the EIA study process and ESIA Study report contrary to its own directive. It is also clear from the 2nd Respondent's own witness that he failed to consider certain factors such as the impact of climate change in relation to the Climate Change Act to determine compliance.

152. To repeat the words of the court in In Nairobi HCCC Petition NO 22 OF 2012**: MOHAMED ALI BAADI AND OTHERS vs THE HON. ATTORNEY GENERAL and 7 others**:-

> "Of all the functions of the Tribunal under Section 129 of EMCA, the only applicable one would **be Section 129(1)(a) to the extent that the Petitioners challenge the completeness and scientific sufficiency of the ESIA Report that resulted in the license issued by NEMA".** In the instant case, in addition to the failure to undertake proper and meaningful public participation, the 2nd Respondent's ESIA Study report was incomplete and scientifically insufficient for the omissions mentioned above.

153. Having made the above findings what orders should we make. The Tribunal is empowered under Section 129(3) of the EMCA to make the following orders upon hearing of an appeal:-

> 3. Upon any appeal, the Tribunal may—
>
> a. confirm, set aside or vary the order or decision in question;
>
> b. exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
>
> c. make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

154. Accordingly, for the reasons stated above, we allow the appeal and set aside the decision of the 1st Respondent to issue the Environmental Impact Assessment Licence No. **NEMA/ESIA /PSL/3798** dated **7th September 2016** to the 2nd Respondent.

155. In furtherance of our powers under section 129(3) (b) and (c) we order the 2nd Respondent, should it still wish to pursue the construction and operation of the project, to undertake a fresh EIA study following the terms of reference already formulated in January 2016, and in compliance with the Director - general's directive of 26th October 2015, as well as adhere to each step of the requirements of the EIA Regulations on EIA Studies. The fresh EIA study, if undertaken, is to, inter alia, include all approved and legible detailed architectural and engineering plans for the plant and its ancillary facilities (such as the coal storage and handling facility and the ash pit with its location in relation to the sea shore), consideration of the Climate Change Act 2016, the Energy Act 2019 and the Natural Resources (Classes of Transactions subject to Ratification) Act 2016 in so far as the project will utilise sea water for the plant and/ or if applicable.

156. Subject to these steps being undertaken, a fresh EIA study report is to be prepared and presented to the 1st Respondent. The 1st Respondent is directed to comply with the provisions of regulations 17 and 21, engage with the lead agencies and the public, in the manner and strict timelines provided for under the said law. The 1st Respondent is to share its memorandum of reasons for reaching its decision whether for or against the project with the relevant parties and publish its decision on the grant or refusal to issue an EIA Licence accompanied with a summary of its reasons within 7 days of its decision. Such publication should be in a newspaper with nationwide circulation.

157. These extraordinary measures are necessary to ensure sufficient access to information by the public on a project that will be the first of its kind in Kenya and the East African region.

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158. As the Appellant had prayed for each party to bear its own costs, we so order.

159. The parties attention is also drawn to the provisions of section 130 of the EMCA on the right of appeal within 30 days of this decision.

160. Finally, we would like to commend and thank all counsel who appeared before us for their patience and persistence during the course of the hearing of this Appeal and who were always courteous and cooperative with the Tribunal and the witnesses who appeared in the matter.

DELIVERED at **NAIROBI** this **26th** day of **June** , 2019

MOHAMMED S BALALA……..……..……CHAIRMAN

CHRISTINE KIPSANG……..VICE-CHAIRPERSON

BAHATI MWAMUYE……..……..……..MEMBER

WAITHAKA NGARUIYA…..……..…..MEMBER

KARIUKI MUIGUA……..……..…….MEMB