

REPUBLIC OF KENYA  
IN THE ENVIRONMENT & LAND COURT AT MALINDI  
APPEAL NO. 6 OF 2019



AMU POWER COMPANY LIMITED.....APPELLANT  
=Versus=  
SAVE LAMU.....1<sup>ST</sup> RESPONDENT  
SOMO M. SOMO.....2<sup>ND</sup> RESPONDENT  
RAYA FAMAU AHMED.....3<sup>RD</sup> RESPONDENT  
MOHAMMED MBWANA.....4<sup>TH</sup> RESPONDENT  
JAMAL AHMED ALI.....5<sup>TH</sup> RESPONDENT  
ABUBAKAR MOHAMMED TWALIB.....6<sup>TH</sup> RESPONDENT  
NATIONAL ENVIRONMENTAL MANAGEMENT  
AUTHORITY (NEMA).....7<sup>TH</sup> RESPONDENT

*(An appeal against the Decision and Orders of the National Environment Tribunal  
(Mr. Mohammed S. Balala, Mrs. Christine Kipsang, Mr. Bahati Mwamuye, Mr.  
Waithaka Ngaruiya & Dr. Kariuki Muigua) delivered at Nairobi on 26<sup>th</sup> June, 2019)*

IN THE NATIONAL ENVIROMENTAL TRIBUNAL  
AT NAIROBI  
TRIBUNAL APPEAL NO. NET/196/2016

SAVE LAMU.....1<sup>ST</sup> APPELLANT  
SOMO M. SOMO.....2<sup>ND</sup> APPELLANT  
RAYA FAMAU AHMED.....3<sup>RD</sup> APPELLANT  
MOHAMMED MBWANA.....4<sup>TH</sup> APPELLANT  
JAMAL AHMED ALI.....5<sup>TH</sup> APPELLANT  
ABUBAKAR MOHAMMED TWALIB.....6<sup>TH</sup> APPELLANT  
VERSUS  
NATIONAL ENVIRONMENTAL MANAGEMENT  
AUTHORITY (NEMA).....1<sup>ST</sup> RESPONDENT  
AMU POWER COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT

MEMORANDUM OF APPEAL

The Appellant, AMU POWER COMPANY LIMITED, being dissatisfied with the Decision and Orders of the National Environment Tribunal comprising Mr. Mohammed S. Balala, Mrs. Christine Kipsang, Mr. Bahati Mwamuye, Mr. Waithaka

Ngaruiya & Dr. Kariuki Muigua dated and delivered at Nairobi on 26<sup>th</sup> June, 2019 appeals to this Honourable Court on the following grounds:

- 1 The Tribunal erred in law and in fact in cancelling the Environmental Impact Assessment Licence (EIA Licence) solely on the basis of purported flaws in the consultation process.

The Appellant points out the following grounds as the basis for seeking to overturn the Tribunal's finding that the process leading to the preparation of the ESIA Study by the Appellant did not involve proper public participation:

- (i) The Tribunal erred in fact and in law in allowing the appeal despite the failure by the Appellants to tender any evidence to a standard sufficient to discharge the requisite legal burden of proof cast upon them by law.
- (ii) The Tribunal erred in law and in fact in entertaining the appeal by the 1<sup>st</sup> Respondent without first satisfying itself that it had *locus standi* to urge seek the prayers sought. The Tribunal had no legal basis of regarding the 1<sup>st</sup> Appellant as a 'community-based organization representing the interests and welfare of Lamu.
- (iii) The Tribunal erred in fact and in law in failing to find that the 1<sup>st</sup> Appellant was not an entity incapable of suing especially as it had tendered no evidence regarding its registration status and who it purportedly represented.



- (iv) The Tribunal erred in failing to appreciate that the purpose of public meetings with the affected parties and communities was to explain the project and its effects and to receive oral and written comments for consideration and it therefore was wrong to disregard evidence by the Appellants showing that the project was explained to the 2<sup>nd</sup> to 6<sup>th</sup> Respondents and the communities likely to be affected by the project.
- (v) The Tribunal, as a consequence, was wrong to place undue emphasis on procedure rather than maintain focus on the substance, the spirit behind public participation.
- (vi) The Tribunal was wrong to cancel the 7<sup>th</sup> Respondent's decision to issue the Appellant with an EIA Licence based solely on the purported flaws in the consultation process. The alleged flaws in the consultation process, if at all, were not serious enough to deprive the consultation process of efficacy.
- (vii) The Tribunal was wrong in holding that there was no proper public participation by communities and people of Lamu when no representatives of such people were before it to complain about their non-involvement. The finding has no basis in fact and in law.
- (viii) The Tribunal erred in law and in fact in disregarding in its entirety the Appellant's evidence showing that the public participation conducted in the process of preparing the ESIA study and reasonable opportunity had been given to the public, including the Appellants, to know about

the proposed project and to give their views thereon. Consequently, the finding that there was no public participation manifested a blatant error of both law and fact.

- (ix) The Tribunal erred in law and in fact in disregarding the clear evidence showing that the 1<sup>st</sup> to 6<sup>th</sup> Respondents were afforded ample opportunity to participate in the ESIA study process and that they were so involved at every stage and tendered their views during the entire process. The failure by the Tribunal to put due weight on the evidence adduced by the Appellants and the 7<sup>th</sup> Respondent regarding the involvement of the 1<sup>st</sup> to 6<sup>th</sup> Respondents' involvement in the ESIA study process therefore manifested an error of law and fact.
- (x) The Tribunal erred in law and in fact in disregarding the evidence tendered by the Appellant and the 7<sup>th</sup> Respondent showing that the ESIA study was prepared in full compliance with the Terms of Reference formulated by the Appellant and approved within the discretion of the 7<sup>th</sup> Respondent.
- (xi) The Tribunal erred in law and in fact in blatantly disregarding, mentioning or failing to consider the uncontroverted evidence tendered by the Appellant's Witnesses, **SANJAY GANDHI** and **ABDULRAHMAN ABOUD** which showed that there was effective public participation in the preparation of the ESIA study process.



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- (xii) The Tribunal was wrong in disregarding evidence by the Appellants showing the effectiveness of the public participation, the Stakeholder Engagement Chapter of the Environmental Impact Assessment study, the 7<sup>th</sup> Respondent's evidence as well as the admissions by the various witnesses who testified on behalf of the 1<sup>st</sup> to 6<sup>th</sup> Respondents.
- (xiii) Having made an express finding at paragraph 43 of the judgment by which it accepted that wide public participation had been undertaken during the scoping phase for the project, the Tribunal was wrong not to find that this issue as raised by the Appellants in their grounds of Appeal had been satisfactorily addressed. It thus made a finding outside what was pleaded in the appeal.
- (xiv) The Tribunal was wrong to conclude that the public participation meetings conducted by the Appellant and exhibited in evidence were 'introductory in nature and not structured to share information on the possible effects and impacts of the project.' This Tribunal's finding was not anchored on any evidence, was speculative and wrong.
- (xv) The Tribunal erred in disregarding and/or faulting the clear evidence tendered by the Appellants and the 7<sup>th</sup> Respondents showing their compliance with Regulation 21 of the Environmental (Impact Assessment and Audit) Regulations, 2003 as regards the publication of the ESIA study and the collection of views from the Public within the period set out in the Notices.

(xvi) The Tribunal was wrong to make a conclusion that the public hearing that was held at Kwasasi was premature and its conclusion that the public hearing was converted into a popularity contest was wrong. The conclusion was not supported by the Minutes of the said Meeting which were not contested by any party.

**2    The Tribunal Erred in Law and in Fact in Holding that the Appellant did not Conduct a Proper Analysis of the Alternatives to the Project.**

The Appellant urges the Court to set aside the Tribunal's findings on this ground on the following bases:

- (a) The Tribunal to disregard the uncontroverted evidence by the Appellant's witness, SANJAY GANDHI, regarding the analysis of the alternatives to the site as well as the evidence contained in the ESIA study.
- (b) The Tribunal was wrong to make a finding based on the unpleaded issue that there was no Strategic Environmental Assessment (SEA) study undertaken in respect of the LAPSSET project.
- (c) The Tribunal erred in law in making the Appellant liable for the purported failure of a 3<sup>rd</sup> party (the Government) to prepare a SEA in respect of the LAPSSET project when the Government was not party to the appeal.
- (d) The Tribunal was wrong to shift the burden upon the Appellant to submit a detailed architectural or engineering plan of the coal plant or the site



plan without a basis laid by the Appellants and without reference to the applicable law.

(e) The Tribunal erred in law and in fact in constituting itself as a body to handle technical matters by requiring the Appellant to submit before it detailed architectural or engineering plans when it lacked the expertise and the legal mandate to do so.

(f) The Tribunal failed to recognize the expertise of the 7<sup>th</sup> Respondent and the discretion vested in it by law as to the manner of handling technical matters such as the requirement for detailed architectural or engineering plans.

**3 The Tribunal Erred in Law and in Fact in its Holding that the ESIA Study did not Contain Adequate Mitigation Measures**

The Tribunal had not basis upon which to fault some of the mitigation measures it identified as being deficient in the ESIA study:

- (i) With regard to Ash Yard and Ash-handling, the Tribunal's findings regarding the insufficiency of the mitigation measures proposed disregarded the unchallenged evidence by the team of experts who prepared the study.
- (ii) The Tribunal was wrong to reach the findings regarding the sufficiency of the mitigation measures in relation to the ash-yard and ash-handling

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when no evidence had been tendered by the 1<sup>st</sup> to 6<sup>th</sup> Respondents to challenge the sufficiency of the contents of the ESIA study.

- (iii) The Tribunal consequently had no legal or factual basis for reaching the finding that the mitigation measures on the ash yard and ash pit were inadequate.
  - (iv) The Tribunal's findings that the ESIA study regarding coal conveyor belt system was inconclusive and insufficient were baseless and not anchored in law and in fact as the 1<sup>st</sup> to 6<sup>th</sup> Respondents tendered no evidence to controvert the ESIA study in this respect.
  - (v) The Tribunal's was wrong to reject the mitigation and adaptation measures provided in the ESIA study against climate change merely on the basis of what it termed "a lack of clarity on the consequences of certain aspects of the project." This finding has no foundation in law or in fact.
4. The Tribunal erred in law and in fact in finding that the grant of the Environmental Impact Assessment Licence (EIA Licence) issued to the Appellant by the 7<sup>th</sup> Respondent was in violation of the Environmental (Impact Assessment & Audit) Regulations and Constitution and/or any such violation was sufficient to result into the cancellation of the EIA Licence.
5. The Learned Chairman and members of the Tribunal erred in law and in fact in making a finding that the ESIA Study lacked completeness and scientific



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sufficiency' when no evidence had been laid before it by the Appellants to arrive at such a conclusion.

6. The Tribunal erred in law and in fact in finding that the conditions of the Environmental Impact Assessment Licence (EIA Licence) issued to the Appellant by the 7<sup>th</sup> Respondent were general in nature.
7. The Tribunal otherwise failed to properly exercise its jurisdiction as conferred by s. 129(3) of the Environmental Management & Co-ordination Act.
8. The National Environment Tribunal erred in law and in fact in faulting the studies carried out by the Independent Experts as contained in the appendices to the main Environmental Impact Assessment Study without any other study being tendered by any experts presented by the 1<sup>st</sup> to 6<sup>th</sup> Respondents to controvert the findings made by the Independent Experts.
9. The Tribunal was wrong in usurping the jurisdiction that it did not possess and consequently made erroneous findings.
10. The Tribunal erred in its final Orders issued in its Judgement dated 26 June 2019 as the same had no legal or factual basis.

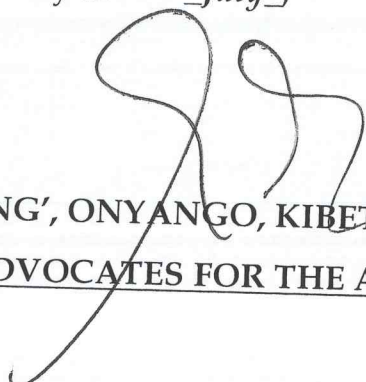
**WHEREFORE:** The Appellant prays that this Honourable Court makes the following **ORDERS THAT:**

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- (a) The decision of the Tribunal dated and delivered on 26<sup>th</sup> June, 2019 be and is hereby set aside.
  - (b) That the 7<sup>th</sup> Respondent's decision granting the Appellant an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/3798 on 7<sup>th</sup> September, 2016 be and is hereby affirmed.
  - (c) In the alternative and without prejudice to Prayer (a) above, the Court hereby exercises any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought by including the issuing of and/or proposing additional conditions for inclusion into the Environmental Impact Assessment Licence No. NEMA/EIA/PSL/3798 issued by the 7<sup>th</sup> Respondent on 7<sup>th</sup> September, 2016.
  - (d) In the alternative and without prejudice to Prayer (a) above, the Honourable Court hereby exercises any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought by upholding the Environmental Impact Assessment Licence No. NEMA/EIA/PSL/3798 issued by the 7<sup>th</sup> Respondent on 7<sup>th</sup> September, 2016 and, additionally, prescribes any such additional measures as may be undertaken by the Appellant in ensuring that any deficiencies in the EIA study are cured.



(e) The costs of this appeal and of the Tribunal be awarded to the Appellant.

DATED at NAIROBI this 24<sup>th</sup> day of July, 2019

  
MESSRS OCHIENG', ONYANGO, KIBET & OHAGA  
ADVOCATES FOR THE APPELLANT

Drawn & Filed By:- 

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[Ref: 4/3284/002]

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