



**Greenbelt Movement & 4 others v National Environmental Management Authority
& another; Kenya National Highways Authority (Interested Party) (Tribunal
Appeal 19 of 2020) [2023] KENET 24 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KENET 24 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 19 OF 2020**

**MOHAMED S BALALA, CHAIR, CHRISTINE MWIKALI KIPSANG, VICE CHAIR,
BAHATI MWAMUYE, WAITHAKA NGARUIYA & KARIUKI MUIGUA, MEMBERS**

FEBRUARY 16, 2023

BETWEEN

**THE GREENBELT MOVEMENT 1ST APPELLANT
THE WANGARI MAATHAI FOUNDATION 2ND APPELLANT
DANDORA COMMUNITY JUSTICE CENTRE 3RD APPELLANT
NATURAL JUSTICE 4TH APPELLANT
KATIBA INSTITUTE 5TH APPELLANT**

AND

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 1ST
RESPONDENT**

CHINA ROAD AND BRIDGE CORPORATION (KENYA) 2ND RESPONDENT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY INTERESTED PARTY

JUDGMENT

1. The Appellants herein filed a Notice of Appeal dated 2nd June 2020 and an amended Notice of Appeal on 17th July 2020 in which they appeal against the Environmental Impact Assessment (EIA) License no NEMA/EIA/PSL/9163 issued to China Road and Bridge Corporation (Kenya), the 2nd Respondent herein, on 2nd April 2020 for the construction of the proposed Nairobi Expressway. The said EIA licence states that it is for the 'Construction of the Nairobi expressway covering a total length of approximately 27 km designed as an access controlled dual carriageway to run along the central reserve



of the A8 road starting from Mlolongo all the way to James Gichuru Junction, located at Mlolongo to James Gichuru Junction along Mombasa Road in Nairobi County’.

2. The Appellants seek the following orders:

- i. That the 1st Respondent’s decision to grant the 2nd Respondent an EIA Licence be set aside;
- ii. That the 1st Respondent requires that a Strategic Environmental Assessment be conducted, and a Resettlement Action Plan be developed;
- iii. That, after the submission of a Strategic Environmental Assessment and the Resettlement Action Plan, a new Environmental Impact Assessment Study be conducted;
- iv. That a Restoration Order be issued requiring the 2nd Respondent to restore the environment to the state in which it was before the project activity undertaken by the 2nd Respondent from 2nd June 2020; and
- v. That each party bears its own costs.

3. The Appeal is based on the following summarized grounds:

- i. The 1st Respondent approved the Terms of Reference (ToRs) without any scoping exercise having been conducted, contrary to Regulation 11(1) of the Environment (Impact Assessment and Audit) Regulations, 2003, hereinafter referred to as ‘EIA Regulations’;
- ii. The 1st Respondent issued an EIA Licence for the project before subjecting the project to Strategic Environmental Assessment (SEA) contrary to Section 57A of EMCA and Regulation 42 of the EIA Regulations;
- iii. The 1st Respondent issued the EIA Licence despite the fact that the Environmental and Social Impact Assessment (ESIA) process had failed to meet the threshold set out for public participation under Regulation 17(2) of the Regulations;
- iv. The ESIA Study Report provided by the 2nd Respondent failed to meet the threshold of information and analysis required under the EIA Regulations and could not possibly form the basis for the grant of an EIA Licence;
- v. The ESIA Study Report failed to include critical baseline studies, including hydrology and air quality baseline studies, despite such data being required under paragraph 2.4.2 of the EIA Guidelines issued by the 1st Respondent in 2002;
- vi. The ESIA Study Report failed to adequately assess the project alternatives and only considers the ‘no-go-alternative’; and also fails to include the cumulative impacts of the project, including the impact of the expressway on the existing road infrastructure. According to the Appellants, the absence of analysis of alternatives deprived the 1st Respondent of an objective basis upon which to reasonably decide whether the project as presented by the project proponent is the least environmentally costly option;
- vii. The ESIA Study Report failed to include the cumulative impacts of the project, such as the effect of increasing the vehicular capacity in the city of Nairobi, the impact of the increased vehicle capacity on the green house gas emissions, the impacts on the surrounding green spaces, and the role of these and other impacts on Kenya’s climate change mitigation goals;



- viii. The ESIA Study Report proposed to assess the potential impacts and implement mitigation measures at a later date, which effectively means that the impact analysis would not be subject to public engagement contrary to the requirements of [EMCA](#);
 - ix. The ESIA Study Report failed to provide for detailed impacts of offsite activities and an Environmental Management Plan (EMP), contrary to Regulation 18(1)(b) and Regulation 18(1)(k) respectively; with the 2nd Respondent thereby failing to provide an EMP which meets the requirements in the Regulations and thus compromising the 1st Respondent's ability to assess the proposed mitigation and audit measures;
 - x. The ESIA Study Report did not contain a climate impact assessment and the references to climate change made in the said Report are inadequate; and the Report should have incorporated the principles set out by the International Association for Impact Assessment;
 - xi. The ESIA Study Report failed to include the economic impact of the project as required under Regulation 18(1)(o) of the EIA Regulations; and also failed to take into account social justice considerations given that nearly 90% of city residents walk or use public transport systems but the Report did not indicate how the project would cater for the said majority of city residents; and
 - xii. The EIA Licence conditions on the social impacts of the project on issues such as the gazetted parks, protected areas, noise and excessive vibration pollution control et cetera were too broad, vague, and incapable of enforcement; thus the EIA Licence would be incapable of effectively securing the right to a clean and healthy environment.
4. The 1st Respondent opposed the said Amended Notice of Appeal through its Reply to Appeal and Amended Detailed Statement of the Appellants' Dissatisfaction dated 11th August 2020. The grounds presented by the 1st Respondent as the summary of its Reply to the Appeal and Amended Detailed Statement of the Appellants' Dissatisfaction are as follows:
- i. The ESIA for the construction of additional lanes JKIA-Likoni-James Gichuru-Rironi Road (A104), dualing of Airport South Road, Access to JKIA, widening of access roads (EIA 905) was licensed by NEMA on 4th July 2012 *vide* EIA Licence no 0016896;
 - ii. The said road construction project was later renamed by the 3rd Respondent and given the name Expressway; and redesigned with ten major intersections and an extension of the elevated roadway from Mlolongo to James Gichuru for enhanced faster mobility of the road users at a fee to be charged on the users;
 - iii. The 2nd Respondent submitted the ESIA Study Report to the 1st Respondent on 3rd February 2020 for consideration and review by the 1st Respondent; which the 1st Respondent thereafter submitted to various lead agencies such as the Ministry of Environment and Forestry, Ministry of Transport and Infrastructure, Nairobi Water and Sewerage Company, National Land Commission, Athi Water Services Board among others for their comments on the project report;
 - iv. Pursuant to Section 59 of [EMCA](#) and Regulation 21 of the Regulations, the 1st Respondent invited members of the public through print and broadcast media to present their comments about the project;
 - v. The above stated advertisements attracted responses from some organizations including Kenya Power and Lighting Company, the Nairobi County Director - NEMA, Athi Water Works



Development Agency, Greenpeace Africa, Natural Justice, and Wildlife Direct; with the responses from Natural Justice and Wildlife Direct being submitted after the lapse of the duration set out in [EMCA](#) for receipt of comments from the public;

- vi. Although the 1st Respondent took into account the public consultations as well as the stakeholders' views during the EIA process, it was not legally bound by those views but was instead obligated to undertake its own technical and factual assessment based on various principles such as adequacy of mitigation measures, and adequacy of risk assessment and management among others;
 - vii. Following a perusal of the various responses from the public and other stakeholders, the 1st Respondent wrote to the 2nd Respondent seeking clarification on a number of issues such as the extent to which Uhuru Park would be acquired, provision of the contract between the 2nd Respondent and the Interested Party and the resettlement action plan for all project affected persons; which queries were responded to by the 2nd Respondent vide a letter dated 30th March 2020;
 - viii. The 2nd Respondent's letter dated 30th March 2020 stated that no land was going to be acquired from Uhuru Park, stated that a comprehensive resettlement action plan for all project affected persons and properties was ongoing, and it provided a detailed utility relocation plan for the affected among other clarifications;
 - ix. The 1st Respondent considered all the issues covered in the ESIA Study Report and arrived at the decision to issue an EIA licence for the project and imposed conditions in the said licence to ensure effective execution of the project in line with the principles of sustainable development.
 - x. As for SEA, the 1st Respondent states that the same only applies to plans, programs and policies and not to specific projects as is the case in this Appeal. In a nutshell, the 1st Respondent prays for the dismissal of the Appeal in its totality.
5. The 2nd Respondent opposed the Appeal through a Memorandum of Response dated 5th August 2020 on the following summarized grounds:
- i. The 2nd Respondent is involved in numerous projects both in Kenya and internationally and is established as one of the leading contractors with a reputation of high quality works.
 - ii. The 2nd Respondent entered into a Public Private Partnership Concession agreement with a 30 year concession with the Government of Kenya for the construction of an access controlled dual carriageway to run along the central reserve of the A8 road starting from Mlolongo to James Gichuru.
 - iii. The 2nd Respondent engaged the services of an accredited firm of experts called Centric Africa Ltd to carry out the EIA Study for the purpose of lodging an application for the EIA License. The said EIA experts carried out the ESIA process in accordance with the mandatory stages of the study under the nationally and internationally acceptable standards leading to the grant of an EIA licence by the 1st Respondent on 2nd April 2020.
 - iv. The project presents great benefits to the people of Kenya including: the reduction of the cost of transportation in Kenya and the region, increased revenue collection from the toll collected from the users of the road, reduction of traffic congestion and wear and tear of the A8 road, creation of at least 60 jobs per kilometre during the construction stage, importation of high technology machinery which will be available for improvement of Kenyan road after



completion of the project, creation of demand for large quantities of local inputs such as steel, cement, aggregates et cetera.

- v. The project's detailed terms of reference do comprehensively identify the potential impacts on the physical and biological environment, the existing infrastructure, land based livelihoods including land ownership, socio-economic considerations among other considerations of what would be impacted by the expressway project.
 - vi. On SEA, the 2nd Respondent states that it is not a mandatory requirement prior to the granting of an EIA licence.
 - vii. On public participation, the 2nd Respondent states that it took all reasonable steps to ensure that public participation was effective by placing posters in strategic places, publishing advertisements in newspapers with nationwide circulation, broadcasting the advertisement on KBC radio and held at least 8 meetings on various dates in separate locations within Nairobi.
 - viii. According to the 2nd Respondent, it paid for a Gazette Notice no 1765 which was published by the 1st Respondent on 28th February 2020 in which the 1st Respondent acknowledged receipt of the ESIA report and invited members of the public to submit comments within 30 days. The 2nd Respondent denies that the 1st Respondent published a Gazette Notice dated 13th March 2020 and states that the excerpt from the Kenya Law Reports website as presented in the Appeal does not form part of the official Kenya Gazette of 13th March 2020.
 - ix. The Appellants were well aware of the notices inviting the members of the public for consultations and the specific venues for the meetings but they chose not to participate in those meetings.
 - x. The comprehensive baseline studies including air quality, and hydrology, 'no project alternative' merits and demerits of the 'project as designed', measures envisaged in the design to prevent and/or minimise potential environmental and social environmental impacts are all well set out in the ESIA Report.
 - xi. The impact of the offsite centres outside the subject project herein are independent of the subject project and will be subject to independent EIA studies.
 - xii. The detailed Environmental and Social Management and Monitoring Plan (ESMMP) has been provided under section 11 of the EIA Study Report while the impacts of climate change under the [Climate Change Act, 2016](#) are provided at section 4.1 of the ESIA Study Report.
 - xiii. The project is founded on the social justice principle of sustainable development not only for the current generation and future generations and is a solution to the serious traffic congestion on the A8 road which has caused serious delays for both public and private road users and the resultant pollution, and the reduction in the productive time of the said users.
 - xiv. The bulk of the other grounds of the 2nd Respondent's response are framed as replies to the allegations raised by the Appellants and by way of summary, the said Respondent states that the issues raised by the Appellants are either covered in the ESIA, the conditions to the EIA licence or are succinctly provided for under the [EMCA](#) regulations.
6. The Interested Party opposed the Amended Appeal through a Response to the Amended Appeal dated 6th August 2020 on the following summarized grounds:
- i. The Interested Party (IP) describes itself as a key institution mandated to implement part of Vision 2030's flagship projects to support primary growth sectors.



- ii. The contested project was conceptualised nearly a decade ago when the ESIA for the proposed construction of additional lanes on JKIA-Likoni-James Gichuru-Rironi Road (A104), dualing of Airport South Road, access to JKIA, widening and construction of access road was issued with a licence by the 1st Respondent on 4th July 2012 *vide* EIA Licence no 0016896.
- iii. Once the [*Public Private Partnerships Act*](#), 2013 was enacted, the project evolved into a privately initiated public private partnership undertaking and given the name the Nairobi Expressway and redesigned with eleven major intersections with an elevated roadway from Mlolongo to James Gichuru.
- iv. The Appellants were always aware of the project and had ample opportunities to participate in the same and they indeed participated by expressing concerns about the initial proposal for the project to utilize a small portion of Uhuru Park to provide for an interchange for the Expressway but upon considering the objections by the Appellants, the project was redesigned to avoid excision of Uhuru Park for the project.
- v. The Appellants are not specifically aggrieved by the proposed project but rather are opposed to development infrastructure of whichever kind, regardless of the compliance with the applicable legal processes.
- vi. The [*Constitution*](#) of Kenya and [*EMCA*](#) do empower the 1st Respondent to collect views from the members of public but the members of public and NGOs do not have veto power over the decisions of the 1st Respondent. In addition, sustainable development and environmental conservation go hand in hand.
- vii. The project is a vision 2030 flagship project and a key enabler of sustainable economic development to enable Kenya play its role fully as the preferred gate to the East African Hinterland.
- viii. The IP invites the Tribunal to consider the project as one on sustainable development and to take into consideration the public interest in the project. The EIA licence issued over the project is issued in accordance with the law and the opposition to the same is motivated by bad faith.
- ix. The Appeal is devoid of any environmental concerns capable of being remedied by the Tribunal and invites the Tribunal to independently review the ESIA report and uphold it.

The Appellant's Case

7. The Appellant called the evidence of Abiud Onyach, a Communications Officer in the employ of the 4th Appellant, a position that he claimed to have held since 4th February 2019. The witness adopted his witness statement dated 16th July 2020 in which he stated that in November 2019, the 4th Appellant was informed about public consultation meetings held in Syokimau with regard to the construction of the Expressway. The witness also stated that the 4th Appellant participated in public consultation meetings and also prepared written comments for the ESIA study report for the project.
8. The witness further stated that he is aware that once an Appeal is filed at the Tribunal, the project proponent is supposed to cease all activities at the contested project site. In this case, the witness stated that the project proponent did not cease operations and as a matter of fact, the witness took photographs of the works which he alleged were ongoing in the pendency of this suit and produced the same as his evidence in this Appeal.



9. The second witness for the Appellants, AW2, was mr Maxwell Omondi who similarly adopted his evidence as per his witness statement dated 16th July 2020. In his witness statement, the witness stated that he is a research fellow with the 4th Appellant, a position that he has held since 1st August 2019.
10. The witness stated that he was alerted in November 2019 of the public consultation meetings regarding the proposed project and was furnished with a notice dated 13th November 2019 by the Deputy County Commissioner, Athi River Sub County which notices indicated that there would be meetings over the disputed project on 19th and 20th November 2019.
11. According to the witness, he went with two legal personnel from the 4th Appellant's offices to attend the public consultation meetings but spent three hours frantically looking for the venue of the meeting to no avail and eventually went back to their office without having traced the venue where the meeting was taking place.
12. On 20th November 2019, the witness made a second attempt to locate the venue of the meeting where the public consultation was supposed to have been taking place and this time around he ventured out with Mark Odaga, the 4th Appellant's Program Officer. Once they reached Katani Road, the witness and the program officer alighted from their vehicle and inquired from motor bike (boda boda) riders on whether they knew of the venue of the public consultations meeting for the proposed Nairobi Expressway Project but none of the riders knew of the project let alone the site of the meetings.
13. The directions provided in the invitation letter indicated that the meeting should have been held "Below Eprek Centre" so they made their way to the said venue. Upon reaching the said venue, they again consulted another boda boda rider who informed them that the meeting was being held along Mombasa Road.
14. When they eventually got to the site of the meeting, the witness stated that the EIA expert gave a brief oversight of the project then invited an official of the Interested Party to explain the project design. Unfortunately, according to the witness, the official who was invited did not have a final project design thus it was difficult for the members of the public to engage in the consultation process. The witness further stated that the conveners of the meeting were in a hurry to conclude the same thus denying the attendees a chance for more participation.
15. AW3 was Constant Cap, a gentleman who described himself as an Urban Planner and also the Director and Co-ordinator of Naipolitans which he stated was a 'Kenyan think tank on urban planning'. The witness stated that he is an independent consultant advocating for transformation of the urban planning space in Kenya, a regular commentator about urban planning on different media and he has keenly followed and participated in the EIA process of the Nairobi Expressway project. To that effect, he prepared a report filed in the Appellant's Supplementary Bundle of Documents.
16. In his testimony, the witness gave evidence that the ESIA fails to address various alternatives to address mobility and congestion issues within Nairobi including the Nairobi Integrated Urban Development Plan (NIUPLAN), the Nairobi Metropolitan Integrated Transport Master Plan (NUTRANS), the comprehensive Bus Rapid Transit (BRT) and lastly the detailed designs by GibbAfrica developed designs for Line 1, Lot 1 of the BRT Framework on behalf of NEMA. According to the witness, all these alternatives were ignored and not addressed in the project alternatives covered in the ESIA Study Report. Finally on this issue, the witness stated that in his understanding, the expressway falls within a number of broader plans, thus there should have been a Strategic Environmental Assessment (SEA) prior to the EIA process of the Expressway.



17. The witness further challenged the proposed project for failing to provide for public transport and non-motorised transport, the encouragement of use of more private vehicles for the purposes of attracting more revenue through the toll station, significant land acquisition through funds which could have otherwise been invested for the sake of eighty percent of the Nairobi residents who either walk or cycle to work, the effect of the project on ecologically sensitive areas such as Uhuru Park and the social division of the city into East and West thus re-emphasizing socio-spatial divisions with colonial roots.
18. According to the witness, past experience shows that larger roads tend to increase traffic and because of the limited benefits of the elevated roads, many cities in the world are currently taking down their expressways.
19. Finally, the witness stated that the toll based model of the road had not been covered in the ESIA study report yet they required tolling plazas which would require acquisition of significant portions of land thus increase the cost of environmental footprint in the project. In his opinion, the witness thinks that a proper analysis of the project would have returned the verdict that the proposed expressway is economically, socially and environmentally inferior to other alternatives.
20. AW4, dr Mark Chernaik adopted his Witness Statement dated 16th July 2020 and gave his evidence virtually from the State of Oregon in the United States of America. The witness described himself as a Staff Scientist of the United States Office of the Environmental Law Alliance Worldwide (ELAW). The witness stated that he has provided opinions and analysis to public interest lawyers on environmental matters in more than sixty (60) countries including an expert opinion in the landmark case of *Save Lamu & Others v National Environmental Management Authority (NEMA) & another* (National Environment Tribunal Appeal no 196 of 2016).
21. The witness gave evidence to the effect that he had analysed the ESIA Report for the proposed Nairobi Expressway Project and identified several shortcomings in the same. The witness stated that the ESIA report fails to provide quantitative predictions of how air quality would change during the construction operation of the project contrary to the international best practice for environmental assessments of proposed road and highway projects. The non-quantitative assessment of the ambient air quality fails to show the impacts of the increase in the peak concentration of the ambient air quality thus fails to inform the decision makers and stakeholders about the acceptability of the proposed project.
22. The witness further stated that the ESIA report failed to provide qualitative estimates of the project's greenhouse gas emissions with respect to the alternatives considered thus depriving the stakeholders and decision-makers of information necessary to evaluate the impacts of the project. According to the witness, there should be conducted a qualitative project-level air quality analysis based on new traffic patterns that would emerge from the project, with a focus on the fine particulate matter (P.M 2.5) at potential hotspots and a quantitative project-level greenhouse gas assessment comparing the greenhouse gas emissions of the No-Project Alternative and the Proposed Alternative based on the new traffic patterns that would emerge from the proposed alternative.

The 1st Respondent's Case

23. The 1st Respondent called the evidence of Marrian Kioko who described herself as the Chief Environmental Officer in charge of the EIA section of the 1st Respondent. The witness stated that she was in charge of coordinating the processing of the ESIA report for the project then proceeded to adopt her Witness Statement dated 31st August 2020.



24. The witness adopted the averments in the 1st Respondent's Reply to Appeal as her evidence in the Appeal and reiterated that the EIA process for the disputed project was handled with utmost professionalism and in keeping with the law and that the EIA process does not end at the licensing but continues into monitoring and audit stages to ensure compliance with the project's Environmental Management Programme.

The 2nd Respondent's Case

25. The 2nd Respondent called the evidence of Haroub Ahmed who introduced himself as a Lead EIA/Audit Expert and he adopted his amended witness statement dated 31st August 2020.
26. The witness stated that the ESIA report was prepared by a team of specialists appointed by Centric which comprised of seven experts handling the several technical disciplines of the project. The witness stated that he was the project manager for the EIA process and was also the project manager for the disputed project.
27. The witness stated that the IP undertook Nutrip project ESIA process for construction of additional lanes on JKIA-Likoni-James Gichuru-Rironi Road and an EIA License was issued for the same on 23rd June 2013, varied on 18th April 2017 and varied again on 12th October 2018. another variation was made in October 2019 for the Nairobi Expressway Project for the section between JKIA and James Gichuru but there was guidance from the 1st Respondent that the construction of the section between Mlolongo and JKIA should not commence until ESIA for the redesign of the Expressway was made and a decision made by the 1st Respondent. The said ESIA Study was undertaken by Centric culminating in the disputed EIA Licence.
28. The witness reiterated that the comments presented by the Appellants were submitted after the lapse of the statutory timelines but were similar to what some Appellants had submitted during the stakeholder meetings held by Centric for the public participation aspect of the project and the issues had been fully addressed in the ESIA study report, RAP report and the Project ESMP. The witness stated that Centric had prepared a matrice and the same was in the Respondent's bundle of documents in response to the specific issues raised by the Appellants including a response to the issues raised by the organisations that submitted their responses after the lapse of the timelines provided for the submission of the same.

The Interested Party's Case

29. The Interested Party called the evidence of eng Julie Ondeyo who introduced herself as the Assistant Director of Roads with the Interested Party working in the Directorate of Development thereof. The witness stated that the existing A8 Road (also commonly known as Mombasa Road) forms a part of the Northern Corridor that runs from Mombasa through Nairobi to Malaba (border with Uganda). According to the witness, the Nairobi Expressway project is a key component of the Northern Corridor with the sole objective of reducing congestion within the A8 corridor.
30. The witness reiterated that the IP obtained an EIA Licence on 23rd June 2013 for the NUTRIP Project of construction of some additional lanes and improvement of some sections of the area under consideration in the disputed EIA licence. The said EIA Licence was initially varied on 18th April 2017, then varied again on 12th October 2018 and finally varied again in October 2019.
31. The witness stated that she did a detailed presentation of the disputed project, dated 11th December 2019. She adopted the said presentation as well as her witness statement dated 24th August 2020.



Pending Applications

32. The Appellant filed an Application dated 10th March 2021 seeking that the Respondent does cease any construction works on the project pending the hearing and determination of the Appeal. On the other hand, the 2nd Respondent filed an Application dated 23rd April 2021 in which it sought to expunge some evidence filed by the Appellants in the Appeal alternatively, all the pending Applications be dispensed with and the Tribunal does proceed to determine the Appeal. The two Applications were filed at a time when the matter was part heard and the Tribunal ordered the parties to file written submissions in respect of both Applications. The Tribunal declined to stay its proceedings to entertain the two Applications.
33. Section 126(5) of [EMCA](#) provides that “Except as expressly provided in this Act or regulations made thereunder, the Tribunal shall regulate its proceedings as it deems fit.”
34. The Tribunal has perused both Applications and we are of the view that the two Applications have been overtaken by events since the Tribunal has made the final decision in respect of the dispute between the parties through this judgment. In the circumstances, we shall not render any decision in respect of the two Applications.

Analysis

35. The witnesses were extensively cross-examined by the respective adverse counsel in the Appeal and we have considered all the evidence emanating from the examination and the re-examination, all the documents filed in the Appeal, the submissions of counsel and all the authorities cited thereat.
36. All the parties in this Appeal have admitted that attempts to expand and/or construct additional lanes on JKIA-Likoni-James Gichuru-Rironi Road have been ongoing for almost a decade now. To this end, the Appellants reckon that the Interested Party was first granted the EIA license by the 1st Respondent to construct the additional lanes to the road on 26th June 2013 *vide* EIA licence number 0016896 while both the 1st Respondent and the Interested Party reckon that the EIA License licence number 0016896 for the said additional lanes was issued on 4th July 2012. The parties have all pleaded that the project has mutated over time and its licence has been varied over time and eventually an ESIA Study Report was submitted by the 2nd Respondent and an EIA license number, NEMA/EIA/PSL/9163 (the EIA Licence) was issued on 2nd April 2020.
37. The said EIA Licence is the subject of the Appeal before the Tribunal and was granted by the 1st Respondent to the 2nd Respondent for the,

“Construction of the Nairobi expressway covering a total length of approximately 27 km designed as an access controlled dual carriageway to run along the central reserve of the A8 road starting from Mlolongo all the way to James Gichuru Junction, located at Mlolongo to James Gichuru Junction along Mombasa Road in Nairobi County.”
38. Upon considering all materials filed by the parties, the oral evidence, the submissions by counsel and all matters raised in the Appeal, we find the following to be the issues for determination in the Appeal:
 - a. Whether the EIA License was irregularly issued for lack of a Strategic Environment Assessment.
 - b. Did the Project Proponent conduct adequate public participation before it was granted the EIA Licence?



- c. Is the ESIA Study Report fatally defective?

A. Was the EIA License irregularly issued for lack of a Strategic Environment Assessment?

39. The Appellants have laid claim that the EIA License for the project should not have been issued without a Strategic Environment Assessment (SEA) having first been conducted.

40. Section 57A of [EMCA](#) provides that,

- “(1) All Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment.
- (2) For the avoidance of doubt, the plans, programmes and policies are those that are—
- (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be;
- (b) determined by the Authority as likely to have significant effects on the environment.
- (3) All entities shall undertake or cause to be undertaken the preparation of strategic environmental assessments at their own expense and shall submit such assessments to the Authority for approval.
- (4) The Authority shall, in consultation with lead agencies and relevant stakeholders, prescribe rules and guidelines in respect of Strategic Environmental Assessments.”

41. The position is further buttressed at Rule 42 of the Environmental (Impact Assessment and Audit) Regulations, 2003 which provides that:

- “(1) Lead agencies shall in consultation with the Authority subject all proposals for public policy, plans and programmes for environmental implementation to a strategic environmental assessment to determine which ones are the most environmentally friendly and cost effective when implemented individually or in combination with others.
- (2) The assessment carried out under this Regulation shall consider the effect of implementation of alternative policy actions taking into consideration—
- (a) the use of natural resources;
- (b) the protection and conservation of biodiversity;
- (c) human settlement and cultural issues;
- (d) socio-economic factors; and
- (e) the protection, conservation of natural physical surroundings of scenic beauty as well as protection and conservation of built environment of historic or cultural significance.



- (3) The Government, and all the lead agencies shall in the development of sector or national policy, incorporate principles of strategic environmental assessment.”
42. The National Guidelines for SEA 2012 define SEA as, “a range of analytical and participatory approaches to integrate environmental consideration into policies, plans, or programs (PPP) and evaluate the interlinkages with economic and social considerations. SEA is a family of approaches that uses a variety of tools, rather than a single, fixed, prescriptive approach. The SEA process extends the aims and principles of Environmental Impact Assessment (EIA) upstream in the decision-making process, beyond the project level, when major alternatives are still possible (UNEP, 2002). Consistent with Agenda 21 principles, SEA is a proactive approach to integrate environmental considerations into the higher levels of decision-making.
43. The said Guidelines proceed to define policies, plans and programs as,
- “Policy: A broad statement of intent that reflects and focuses the political agenda of government and initiates a decision cycle. A general course of action or proposed overall direction that a government is or will pursue; a policy guides ongoing decision making.
- Plan: A purposeful, forward-looking strategy or design, often with coordinated priorities, options, and measures that elaborate and implement policy.
- Program: A coherent, organized agenda or schedule of commitments, proposals, instruments, and/or activities that elaborate and implement policy.”
44. At Stage 1 on the screening stage to determine whether SEA is necessary for a given undertaking, the SEA Guidelines at paragraph 3.1 provide that:
- “Applying SEA can be a lengthy and expensive procedure, so it must be conducted only when it is needed. Although legally all policies, programmes and plans are required (sic) carry out SEA screening is used to determine the potential of a PPP to result in significant effects on the environment and to decide whether a SEA is required.
- A screening decision can be influenced by a number of factors, including the sphere of decision-making (e.g., local, national, or regional), the location and sensitivity of the area (if known, e.g., coastal), whether a PPP is being formulated or reviewed, and the potential impacts associated with the particular type/sector of development(e.g., PPPs from water, housing, or energy sectors are often considered to have a high potential for environmental impacts and often lead to projects requiring EIA). In brief, a SEA screening decision mainly considers:
- The nature/type of strategic proposal;The nature of the receiving environment.
- A screening decision will also consider any foreseeable interaction between the nature/type of PPP and the receiving environment.”
45. According to the Appellants, the project is for an extensive integrated plan for the A8 road corridor, which includes the construction and modification of the said corridor and which also features extensively in the Nairobi County Integrated Development Plan. The integrated plans that are available for the A8 corridor as well as the Nairobi County Integrated Development Plan include plans for public transport improvement through a bus rapid transit line along the A8 corridor. The Appellants argue that these integrated plans comprise of the ‘plans’ described at Guideline (iv) of the NEMA and SEA guidelines hence the project was subject to SEA and they rely on the case of



Mohammed Ali Baadi & Others v The Attorney General & 7 Others, Nairobi HCCC Petition no 22 of 2012.

46. On their part, the Respondents and the Interested Party have taken a common stand in the argument that an SEA is not a requirement for an EIA License to be granted for a project, SEA addresses policies, plans, programs and strategies but not projects and that SEA for the A8 corridor was in fact conducted during previous studies and forms the policy and strategic context in which the Nairobi Expressway is being implemented.
47. The 2nd Respondent stated quite emphatically that the SEA for the A8 corridor had been conducted previously by JICA when it was carrying out previous studies on the said corridor. In their Supplementary Bundle of Documents, the Appellants produced several studies carried out by JICA on the decongestion of Nairobi which specifically make reference to the Nairobi Integrated Urban Development Master Plan (NIUPLAN) which subjected the corridor to SEA and was finally approved as Sessional Paper no 2 by the Nairobi County Assembly which adopted the Sessional Paper on 28th June 2016.
48. In *Mohamed Ali Baadi and Others v Attorney General & 11 Others* (2018) eKLR, the court stated that,

“It seems clear to us that NEMA envisaged that SEA will be required for some projects with significant environmental and cumulative impacts where Policies, Plans and Programmes are implicated.” (Emphasis supplied)
186. Given the analysis above, it is our finding and conclusion that the proponent of the LAPPSET Project was duty bound to conduct SEA before the commencement of any of the individual project’s components. Our conclusion is based not only on the text and content of the law but on the nature and magnitude of the LAPPSET project. This is a necessary reading of the environmental governance principles contained in our constitution including Articles 10, 69 and 70. These Articles among other things require a proactive approach to integrate environmental considerations into the higher levels of decision making for projects with the potential to have significant inter-linkages between socio-economic considerations.” (Emphasis supplied)
49. The project anticipated in the disputed EIA License is for the construction of a road along the A8 corridor in which the main unique component is the elevated median lane and the introduction of tolling stations for the users of the elevated road.
50. In the case of Mohamed Baadi the court found that SEA is required for projects ‘with significant environmental and cumulative impacts where Policies, Plans and Programmes are implicated’ and projects whose environmental impacts have a high potential to have significant inter-linkages with social-economic considerations.
51. A holistic reading of section 57A of EMCA, Regulation 18 of the EIA Regulations and the SEA Guidelines gives an overwhelming expectation that SEA shall only be applicable in instances involving plans, programs, policies and strategies which portend significant effects to the environment with far reaching social-economic underpinnings.
52. While the disputed project involves colossal amounts of money during its construction, maintenance and its operation stages, we do not find that the project involves major environmental impacts as to require an SEA. We also do not find the project to be constituting plans, programs or policies by itself as to require an SEA. Lastly, the Tribunal observes that an SEA for the A8 corridor had already been



conducted to cover for the decongestion of the said corridor by improvement of the Mass Transit System for both the railway and bus transit system (BRT-Bus Rapid Transit), road improvements by widening and construction of new roads et cetera and no SEA was required for the disputed project as a stand alone project.

B. Did the Project Proponent conduct adequate public participation before it was granted the EIA Licence?

53. Section 59 of [EMCA](#) provides that,

1. Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state—
 - (a) a summary description of the project;
 - (b) the place where the project is to be carried out;
 - (c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and
 - (d) a time limit of not exceeding sixty days for the submission of oral or written comments on the environmental impact assessment study, evaluation or review report.
2. The Authority may, on application by any person extend the period stipulated in subparagraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.
3. The Authority shall ensure that its website contains a summary of the report referred to in subsection (1).

54. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003, hereinafter called the ‘EIA Regulations’ provides that,

- “(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
- (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—
 - (a) publicize the project and its anticipated effects and benefits by—
 - (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
 - (ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
 - (iii) making an announcement of the notice in both official and local languages in a radio with a



nationwide coverage for at least once a week for two consecutive weeks;

- (b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
- (c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
- (d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.”

55. At Chapter 3 of the Statement of the Particulars in the Amended Notice of Appeal, the Appellants pleaded that the Lead experts together with the 2nd Respondent engaged the stakeholders and the members of the public through stakeholder interviews, questionnaire administration, focus group discussions, and public consultation meetings along the project route from Mlolongo to Westlands. The Appellants proceeded to list a total of eight meetings including the venues and dates where the various meetings were held including two high level meetings held at the College of Insurance at South C Nairobi and at the Kenya Agricultural Livestock Research Organization in Westlands Nairobi, all of which were held between 19th November 2019 and 11th December 2019.
56. The Appellants further pleaded that the said meetings were held for the purposes of informing the public of the proposed design, proposed works, the ESIA process, the various environmental and social impacts that may arise from the project, including resettlement along the road corridor.
57. In his evidence before the Tribunal, Mr Maxwell Omondi testifying on behalf of the 4th Appellant admitted that he was provided with a notice dated 13th November 2019 by the Deputy County Commissioner, Athi River Sub County, notifying residents of Syokimau that public consultation meetings would be held on 19th and 20th November 2019. He testified that he could not make it to the meeting on 19th November 2019 because the directions shown on the notice were erroneous but on 20th November 2019, he went back to Syokimau accompanied by the 4th Appellant’s Program Officer and although they initially could not trace the venue of the meeting due to poor directions indicated in the notice, they eventually got to the venue of the meeting and participated in the public consultations for the disputed project.
58. The witness testified that he was able to ask questions at the said meeting where the EIA expert invited an official of the Interested Party to explain the project design but the said official did not provide sufficient information since she did not have the final project design. The witness conceded that the project proponent held other consultative meetings but he did not attend.
59. On its part, the 1st Respondent through its witness Marrian Kioko, was emphatic that there was adequate public participation which included taking of views from the lead agencies, there was a gazette notice, newspaper and radio announcements inviting members of the public to submit oral and written comments on the ESIA report. The comments arising from the participatory process elicited comments which the 2nd Respondent was required to respond to. These included the need to clarify



- the extent to which Uhuru Park was going to be acquired, the provision of the contractual agreement between the Respondent and the Interested Party detailing the extent of environmental obligations and responsibilities of each party and the provision of a comprehensive action plan.
60. The 2nd Respondent replied to the said issues and stated that it provided clarity on the issues raised during public participation as a result of which the 2nd Respondent clarified that its plans had been amended to avoid acquisition of Uhuru Park for the project, a comprehensive Resettlement Action Plan was ongoing and an inventory of all affected assets would be complete by April 2020.
 61. Similarly, the 2nd Respondent and the Interested Party through their witnesses Haroub Ahmed and eng Julia Ondeyo respectively gave evidence about the adequacy of the public participation process. On his part mr Haroub Ahmed stated that some comments from the Appellants were presented after the close of the 30 days' period required for submission of such comments but the EIA Experts still considered them and they are included in the matrix presented in his evidence. The referenced comments were in response to comments presented by the 1st Appellant, the 4th Appellant and a lobby group by the name Wildlife Direct.
 62. Eng. Julie Ondeyo also produced what she referred to as the 2nd Respondent's presentation at a High Level Stakeholder Meeting at KALRO on 11th December 2019 in which she presented the initiatives on movement along the northern corridor being the Mombasa-Malaba corridor, the interventions that have been made along the said corridor, the traffic forecast between Mlolongo and James Gichuru junction between 2023 and 2049, the justification for the proposed Nairobi Expressway, the project development costs, the social-economic costs of the project, the environmental costs of the project and the proposed solutions to the challenges along the contested project.
 63. The Appellants have pleaded that the different methods used to engage the stakeholders and the public included: stakeholder interviews, questionnaire administration, Focus Group Discussions and Public Consultation Meetings which meetings were convened as follows:
 - a. Bus Park, Mlolongo on 19th November 2019;
 - b. Syokimau/Katani on 20th November 2019;
 - c. CID Training Centre, Nairobi West on 21st November 2019;
 - d. St. Veronica Church, next to South B Shopping Centre, Mukuru Nyayo on 22nd November 2019;
 - e. A8 Median section at the Embakasi turning towards CBD, Imara Daima (Hazina to JKIA) on 26th November 2019;
 - f. Westlands Locations, Westlands Sub Couty at Sarit Centre, Westlands on 27th November 2019; and
 - g. Two high level meetings at the College of Insurance, South C and the Kenya Agricultural Livestock Research Organisation in Westlands, Nairobi on 10th and 11th December 2019.
 64. According to the Appellants, the public participation could not achieve the intended objective since the final designs for the project were not availed for perusal by members of the public and stakeholders during the public participation stage of the project. In response to the requirement for the availability of the final designs for the project, eng Julie stated that she shared the concept designs for the project during the 'high level meeting' of 11th December 2019 but the final designs have not yet been shared in any public stakeholder forum. In re-examination, the witness stated that the final designs are not necessary for public participation to be conducted.



65. During cross examination by the Appellants' counsel, mr Haroub the witness for the I.P was asked whether there could be adequate public participation without the final designs having been presented. The witness stated that the members of the public who were closest to the project as to require compensation were the ones asking for the final designs and were directed to follow up the same with the Interested Party.
66. The Appellants did not state with any specificity as to what environmental issues they wished to raise or get addressed from the final designs of the project which could not be picked out of the project layout and the designs which were availed by the lead experts during the EIA exercise. A perusal of the minutes in the ESIA report shows that a number of participants asked for the final designs and the question over the availability of the final designs was answered that they would be available after the conclusion of the ESIA report as the comments from the EIA process would inform the final designs. We note from the said minutes of the public consultations that the Interested Party and the lead expert advised any person who would be keen on perusing the said final designs to approach the Interested Party after February 2020 for a discussion of any issues that would affect the final designs.
67. The Appellants raised a further concern that the posters inviting members of the public for the public consultation had not been published for two successive weeks as provided in Rule 17. Rule 17 flows from section 59 and the latter was amended through the *Environmental Management and Coordination (Amendment) Act* of 2015 which was amended as follows:
- “by deleting the words ‘for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project’ and substituting therefor the words “in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio”.
68. The Tribunal is aware that the EIA Regulations were not amended after the amendment of section 59 (1) of *EMCA* for uniformity, however, section 31(b) of the *Interpretation and General Provisions Act* provides that, “no subsidiary legislation shall be inconsistent with the provisions of an Act.” It follows that the advertisement for two successive weeks is no longer a legal necessity as the Regulations cannot supersede the substantive amended provisions of the statute.
69. The ESIA Study report contains minutes, photographs, signed attendance forms for the public consultation meetings for the general public, memoranda as well as presentations of two ‘high level meetings’ with focus groups. There are also questionnaires filled out by members of public and corporations over the project. The Tribunal was not furnished with any evidence that discredits the process of inviting members of the public to attend the public consultation meetings or the resultant minutes for the meetings and questionnaires that were attended to by over 1,000 persons ranging from Mlolongo to Westlands which is the route of the disputed project.
70. The Appellants’ other contention was that the 1st Respondent’s failed to observe section 59 (1) and Regulation 21 of the Regulations which requires the 1st Respondent to invite members of public and stakeholders to submit comments on the ESIA study report.
71. Regulation 21 of the Regulations provides that,
- “(1) The Authority shall, within fourteen days of receiving the environmental impact assessment study report, invite the public to make oral or written comments on the report.
- (2) The Authority shall, at the expense of the proponent—



- (a) publish for two successive weeks in the Gazette and in a newspaper with a nation-wide circulation and in particular with a wide circulation in the area of the proposed project, a public notice once a week inviting the public to submit oral or written comments on the environmental impact assessment study report; and
- (b) make an announcement of the notice in both official and local languages at least once a week for two consecutive weeks in a radio with a nationwide coverage.”

72. The 1st Respondent led evidence and produced a Gazette Notice no 1765 published on 28th February 2020 in which it notified the general public that it had received an ESIA Study report from the 2nd Respondent for the disputed project and sought for the comments from the members of the public within 30 days of the publication of the said notice. The 1st Respondent further led evidence of publication of a notice of invitation to the general public for the submission of public comments on the ESIA Study report for the disputed project. The advertisements were published in the Standard Newspaper on 24th February 2020 and in the Business Daily on 27th February 2020. Finally, the 1st Respondent produced a report from the Kenya Broadcasting Corporation’s Radio Taifa showing the dates on which the notification of the project was broadcasted to the general public.
73. In our judgment in *Save Lamu & Others v NEMA & another* (NET 196/16), this Tribunal cited with approval the judgment in Constitutional Petition no 305 of 2012: *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* where 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 v The Attorney General & another ex parte bon 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.”

- 74. Having perused the notices for invitation of members of the public to participate in the public consultation process as required under [EMCA](#) and the Regulations thereof, we are satisfied that the appropriate notices were issued for the interrogation of the project and the ESIA study report thereof by members of the public and the concerned persons.
- 75. Considering the facts presented to the Tribunal on the question of public participation, we find that the Respondents adhered to the law. This ground of appeal fails.

C. Was the ESIA Study Report fatally deficient?

- 76. The Appellant took issue with the ESIA Study Report on allegations that it failed to meet the required parameters in law due to:
 - a. The absence of an adequate alternatives analysis;
 - b. Lack of critical baseline studies;
 - c. Lack of air quality and climate impact assessments;
 - d. Lack of an economic analysis; and
 - e. The absence of an environmental management plan.
- 77. Section 58 (7) of [EMCA](#) provides that EIA shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.
- 78. Regulation 16 of the EIA Regulations provides that:

“An environmental impact assessment study prepared under these Regulations shall take into account environmental, social, cultural, economic, and legal considerations, and shall—

- a. identify the anticipated environmental impacts of the project and the scale of the impacts;
- b. identify and analyze alternatives to the proposed project;
- c. propose mitigation measures to be taken during and after the implementation of the project; and
- d. develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which shall include the cost of mitigation measures and the time frame of implementing the measures.”



79. Regulation 18 of the EIA Regulations provides numerous details that the study report should contain while regulation 23(3) lists the following parameters that the 1st Respondent should consider in making its decision on whether to issue an EIA licence:

- “(3) In making a decision regarding an environmental impact assessment licence under these Regulations, the Authority shall take into account—
- a. the validity of the environmental impact assessment study report submitted under regulation 18 with emphasis on the economic, social and cultural impacts of the project;
 - b. the comments made by a lead agency and other interested parties under these Regulations;
 - c. the report of the presiding officer compiled after a public hearing specified under regulation 22 where applicable; and
 - d. other factors which the Authority may consider crucial in the implementation of the project.”

80. For clarity in addressing the issues raised by the Appellants, we shall address each of the elements of the alleged deficiencies under individual headings.

a. The absence of an adequate alternatives analysis

81. Regulations 16(b), 18 (1)(i & j) require the ESIA Study Report to carry out the analysis of alternative technologies as well as analysis of alternatives to the proposed project. According to the Appellants, the ESIA study report does not provide any analysis of the alternative to the project but only considers the ‘no go alternative’.
82. It is an undisputed fact by all the parties that several studies have been conducted for the expansion, improvement and construction of additional lanes on the A8 road which is the subject of this Appeal. The Appellants presented evidence through their witness Constant Cap that there exists alternatives which are contained in the Nairobi Integrated Urban Development Plan (NIUPLAN) and the Nairobi Metropolitan Integrated Transport Master Plan (NUTRANS) which provide four alternatives to ease congestion in Nairobi. The ESIA Study Report makes reference to the NUTRIP project which includes the Bus Rapid Transit system (BRT) which is another alternative strategy in the decongestion of the city of Nairobi.
83. The Appellants acknowledge the existence of the studies that gave rise to these alternatives but are dissatisfied with the Respondents for failing to consider these alternatives and instead, decided to accord those alternatives just a mere mention.
84. The evidence led by eng Julie Ondeyo, the witness for the 2nd Respondent, was to the effect that the Expressway is not an alternative to the other projects such as the BRT, NUTRANS, NIUPLAN and all the plans contained in the Nairobi County Integrated Urban Development Master Plan et cetera which have been earmarked for the A8 corridor. It is simply meant to complement them as the government is keen on proceeding with all the solutions that have been previously mooted for the A8 corridor.
85. The ESIA Study report and the documents presented by the Appellants including the Nairobi County Intergrated Developemt Plan, 2018 carry proposals such as the BRT system to be developed along the A8 corridor and the Expressway is named as one of the projects to be undertaken for the decongestion of the A8 corridor which congestion also spills over to other parts of downtown Nairobi.



86. Upon cross examination on the alternatives for the disputed project, mr Constant Cap was emphatic that the other plans such as BRT were better alternatives as the vast majority of city commuters rely on public transport and walking but he conceded that the disputed project could decongest traffic in the city and he did not have any alternative for the use of the median strip where the elevated road is scheduled to be constructed.
87. It also came out in the evidence of the 2nd Respondent and the Interested Party that the Expressway Project involves the improvement of the A8 corridor, therefore, there could have been no alternative route for the project. The ESIA report paints a picture that it is either the project is executed or the same is abandoned in its entirety and the effect of that would be the loss of the social-cultural/economic benefits that would arise from the execution of the project. The ‘no project alternative’ would be expensive in the long term as the congestion along the main artery through the Central Business District would remain congested as traffic in and out of the CBD increases.
88. The totality of the above is that we are persuaded by the Respondents’ argument that the disputed project is not a replacement of the other plans that have been previously mooted for the decongestion of the City of Nairobi but they are complimentary to those other plans.

b. Lack of critical baseline studies

89. Regulation 18 (1b) of the Regulations and Section 2.7 of the NEMA EIA guidelines provide that an EIA Study report shall contain a baseline information and any other relevant information related to the project.
90. The Appellants hold the position that the accurate and complete baseline studies are necessary for public participation, provide a basis for effective monitoring and also provide a basis for determination of the proper terms to include in the EIA licence.
91. Whereas baseline studies are extremely critical for greenfield projects, the same may not be said of a brownfield project such as the current project. There is no dispute that numerous studies have been carried out in the past over the expansion of the A8 corridor and the studies are available for perusal. In the circumstances, we do not find it necessary for a repeat of those studies to have been conducted.

c. Lack of air quality assessment

92. The ESIA Study Report states that the air quality measurements that exist for the A8 corridor were for measurements that were conducted between 24th and 28th October 2017 during the repeat presidential elections and the report states that the 2nd Respondent intends to carry out air quality measurements along the proposed road before commencement of the construction.
93. The Appellants called the evidence of dr Mark Chernaik who gave evidence on the need for quantitative air quality assessment and he relied heavily on the Air Quality Project Level Analysis Guidance of the Colorado Department of Transport. On cross examination, the witness admitted that he did not visit Kenya to establish the project site and does not know where the project is being undertaken and also conceded that he is not aware of any other country in the world where the quantitative air quality assessment was a basis for a regulatory decision. To this he added that all other regulators in the world make irrational decisions on EIA licensing for failure to follow the analysis that he believes is the perfect one.
94. Counsel, mr Gitonga for the 1st Respondent referred the Witness to Chapter 7.6.1 of the ESIA Study Report in which the project proponent undertakes to carry out air quality assessment report before the commencement of the construction. The witness was also questioned on whether he knows when



the EIA process in Kenya closes to which he replied that he is not an expert in Kenya's environmental processes and does not know when the process closes. The witness further stated that his concerns on air quality can only be addressed if the air quality study is conducted and subjected to proper public participation.

95. During cross examination by Counsel prof Mumma and mr Agwara for the 2nd Respondent and the Interested Party respectively, the witness stated that the import of the Colorado report was to illustrate the best practice when carrying out such a project. He also stated that he is not aware of the previous EIA licences that had been granted for the expansion and improvement of the various sections of the A8 corridor.
96. At Chapter 7.6 of the ESIA Study Report, the report conceded that a baseline air quality for the A8 corridor has not been carried out but it further states that the project proponent would undertake a baseline survey and air quality modelling in order to develop Air Quality Management Plan before and during the detailed design. The Chapter further notes that several air quality surveys have been carried out in the past and that the project proponent would carry out air quality measurement along the expressway to establish the baseline before construction. The 2nd Respondent claims to have conducted an Air Quality Baseline Assessment and a Baseline Noise Survey Assessment for Nairobi Expressway which it attempted to file in these proceedings after the close of the Appellants' case but the Tribunal declined the invitation to allow such a document after the Appellants had closed their case.
97. We have considered the rival submissions on this issue as presented by the parties and supported in the various documents filed to that effect and noted the provisions of condition 1.9 of the EIA Licence conditions in which the project proponent is required to adhere to the improvement notices issued by the 1st Respondent throughout the project cycle.
98. The Tribunal has not been presented with any evidence of the 1st Respondent's inability to supervise the implementation of the project or to ensure compliance with the conditions of the EIA licence or issue the requisite improvement notices, if at all. The Tribunal does not find this ground of appeal to have been proved.

d. Lack of a climate change analysis

99. The ESIA report at Chapter 4 recognises the [Climate Change Act](#) and states that it has considered the climate change adaptations for management options relating to green house gas emissions during the construction phase. At Chapter 7.5 of the ESIA Study Report, there is a mention of the climate change but there is no analysis on the impact of the project on the climate.
100. Climate change is defined in section 2 of the [Climate Change Act](#) to mean, "a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period." Section 20 of the [Climate Change Act](#) provides that, "The Authority shall integrate climate risk and vulnerability assessment into all forms of assessment, and for that purpose liaise with relevant lead agencies for their technical advice."
101. The project at hand is for the expansion of the A8 corridor by majorly widening the existing road and elevating a road on the median lane of the road. There is no dispute among the parties that the road between Mlolongo and the James Gichuru Junction suffers congestion all the time thus the proposal to construct the Expressway to reduce the congestion on the said road. The road being a project to ease congestion caused by motor vehicles using the A8 corridor as well as the vehicles within the larger downtown Nairobi does require an analysis of the impact of the project on the climate as motor vehicles are known to be emitters of greenhouse gases.



102. Although the ESIA report states that the Expressway shall pass through two distinct climatic zones being the Central Highlands/Rift Valley which includes the Nairobi County's JKIA-James Gichuru Section; and Eastern Kenya which includes the Machakos County's Mlolongo-JKIA Section, the report fails to do any analysis of the impacts created by the emissions of greenhouse gases on the sections affected by the Expressway.
103. We find that climate change analysis was necessary prior to the issuance of the EIA Licence.

e. Lack of an economic analysis

104. Regulation 18 (1)(o) of the EIA Regulations provides that the ESIA study report is required to show the economic and social analysis of the project. According to the Appellants, the ESIA study does not provide a proper analysis of the tolling system and the broader economic impacts of the agreement between the 2nd Respondent and the Interested Party.
105. Chapter 10.9 of the ESIA Study report addresses the social-economic impacts of the project and there is presented an assessment of impacts on local and national economy and employment during the construction and the operation phases of the project. At the construction phase, it is expected that there will be increased employment opportunities, procurement of services and capacity enhancement of workforce.
106. At the operation phase, it is projected that there will be employment opportunities for the local and national workforce for the operation of the tolling system and the maintenance of the Expressway. The other impact is improved connectivity and accessibility to the city of Nairobi which shall enhance competitiveness of Kenya within East Africa region. Further to this, the ESIA report states that the project shall generate taxes through income and corporate taxes on expenditures and revenues payable to employees. The toll fees and the corporate tax from the operation of the toll road is expected to be USD 371M. Finally, the ESIA states that the project shall decongest the city significantly and help save at least ksh 50,000,000.00 lost daily due to the traffic congestion in Nairobi.
107. It is common ground among all parties that the project is being carried out as a Public Private Partnership (PPP) project. The agreement between the 2nd Respondent and the Interested Party is one governed by the [PPP Act](#) and the contents thereof can only be addressed through the legal methods provided in the said Act. This Tribunal does not have the jurisdiction to make orders under the said Act; and a detailed ruling on the same was delivered by this Tribunal in the course of hearing the Appeal.
108. As for the payment of the tolling fees, the ESIA report provides that the same is based on the Ministry of Transport and Infrastructure Policy Statement on National Surface Transport Infrastructure Funding (2016-2025) and the Annex A thereof being the National Road Tolling Policy April 2016 all which shall be addressed through The Public Finance Management (Road Tolls and National Toll Fund) Regulations, 2018.
109. We do not agree with the Appellants that the ESIA Report is deficient in terms of the economic analysis of the project.

f. Lack of an environmental management plan

110. Regulations 16(d) and 18 (1k) of the Regulations require the ESIA to include the environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which shall include the cost of mitigation measures and the time frame of implementing the measures.



111. The Tribunal has perused Chapter 11 of the ESIA Study Report and established that the Environmental Management Plan is part of the said report. The said plan covers numerous issues ranging from contractor management plan, traffic management plan, grievance redress mechanism, site closure and restoration plan among many other factors. We have considered the contents of the management plan and find the same to be suitable for the nature of the project before the Tribunal.

g. Was a scoping exercise required prior to the grant of an EIA Licence for the project?

112. The Appellants contend that there was no scoping exercise for the project prior to the award of the EIA licence. The scoping exercise is a screening mechanism to determine whether the project is high risk, medium risk or low risk. The 2nd Respondent produced the Terms of Reference that were received by the 1st Respondent on 11th October 2019 for the disputed project but still submitted that the same was not a mandatory requirement of the law.
113. Section 58 (2) of [EMCA](#) provides that,

- “2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority: Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.”

Legal Notice no 150/2016 replaced the second schedule of the [EMCA](#) in which at paragraph 2(4), a project such as the disputed Expressway project is listed among the roads that require the submission of an EIA study report.

114. Considering the amendments carried in Legal Notice 150/2016, we find that it was not necessary for the project proponent to carry out a scoping exercise prior to commencing the ESIA Study.

D. Does the EIA Licence render itself for cancellation?

115. This Tribunal derives its powers from section 129 of [EMCA](#). The powers of the Tribunal are well set out under section 129 (3) of the Act which provides that:

“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.”

116. The Tribunal has considered the Appeal, the evidence presented by the parties and perused the voluminous bundles of documents presented by the parties. We have found that the project proponent largely complied with the stringent requirements of [EMCA](#) and the EIA Regulations for the licensing of the project but did not carry out a climate change analysis.
117. The Tribunal is faced with the monumental task to make a decision on whether to cancel the EIA Licence in its entirety due to the stated deficiencies or step into the shoes of the 1st Respondent and make orders for compliance on the aspects that we find being incomplete. The effects of cancellation



of the licence would be to cause a repeat of the process that has been carried out including public participation and the ensuing processes. We are minded to consider that colossal public funds are incurred during such processes and the repeat of that process does not serve to offer any solution on the environmental impacts involved in the project especially on aspects of the EIA process that have not been impeached.

118. Considering the nature of the project and noting that the project proponent has largely complied with the requirements for the grant of the EIA Licence, the Tribunal declines to cancel the licence but we shall issue orders under sections 129 (3) (c) of [EMCA](#) to ensure compliance with the requirement for climate change analysis for the disputed project.

Orders

119. For the foregoing reasons the Tribunal makes the following orders:
- a. The Appellant's appeal is hereby dismissed;
 - b. The Tribunal invokes its powers under section 129(3) (c) of [EMCA](#) to make orders for the preservation of the environment and for sustainable development and hereby orders the 2nd Respondent to carry out and complete a climate change analysis for the project within eighteen (18) months from the date of this judgment;
 - c. The 1st Respondent shall ensure compliance with order (b) above and the [Climate Change Act](#), Act no 11 of 2016; and
 - d. Each party shall bear their own costs.

Parties' attention is drawn to Section 130 of the [Environmental Management and Coordination Act](#).

DATED AND DELIVERED AT NAIROBI, THIS 16TH DAY OF FEBRUARY 2022.

Mohammed Balala Chairperson

Christine Kipsang.....Vice Chairperson

Bahati Mwamuye.....Member

Waithaka Ngaruiya.....Member

Kariuki Muigua.....Member

