

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
PETITION No. .... OF 2012

IN THE MATTER OF ARTICLES 22, 70 AND 258 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 19, 20, 22, 27, 35, 42, 43, 44 OF THE CONSTITUTION OF KENYA 2010

AND IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2(5) &(6) ,10, 60, 62, 63,69, 70,  
73 and 258 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

MOHAMED ALI BAADI AND  
THE OTHER PETITIONERS AS NAMED IN THE SCHEDULE ANNEXED.....PETITIONERS

AND

THE HON. ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT  
THE MINISTER FOR ENVIRONMENT AND  
NATURAL RESOURCES.....2<sup>ND</sup> RESPONDENT  
THE MINISTER FOR LANDS.....3<sup>RD</sup> RESPONDENT  
THE MINISTER FOR INFORMATION AND COMMUNICATION.....4<sup>TH</sup> RESPONDENT  
THE MINISTER FOR TRANSPORT.....5<sup>TH</sup> RESPONDENT  
THE MINISTER FOR ROADS AND PUBLIC WORKS.....6<sup>TH</sup> RESPONDENT  
THE MINISTER FOR ENERGY.....7<sup>TH</sup> RESPONDENT  
KENYA PORTS AUTHORITY.....8<sup>TH</sup> RESPONDENT  
NATIONAL ENVIRONMENT AND MANAGEMENT AUTHORITY.....9<sup>TH</sup> RESPONDENT

TO

THE HIGH COURT OF KENYA

PETITION

The humble petition of the Petitioners listed in the Schedule annexed all of care of Abdulrahman, Saad & Associates Advocates for the purposes of this Petition and resident in the Republic of Kenya are as follows:

**A. NAMES AND DESCRIPTION OF PETITIONERS AND OTHER PARTIES**

1. A description of each of the Petitioners is set out in the Schedule hereto.

2. The 1st Respondent is the principal legal adviser of the Government of Kenya (the “**Government**”) and is made party to this application on behalf of the Government of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners’ advocates).
3. The 2<sup>nd</sup> Respondent is the Minister responsible for the Ministry of Environment and Natural Resources in Kenya which is the ministry of the Government of Kenya having overall responsibility for among other things, the development of a national environmental policy, sustainable management of mineral resources and conservation of the environment within the Republic of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners’ advocates).
4. The 3<sup>rd</sup> Respondent is the Minister responsible for the Ministry of Lands in Kenya which is the ministry of the Government of Kenya having overall responsibility for, among other things, the national land policy, physical planning, land transactions, surveys and mapping within the Republic of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners’ advocates).
5. The 4<sup>th</sup> Respondent is the Minister responsible for the Ministry of Information and Communication in Kenya which is the ministry of the Government of Kenya having overall responsibility for, among other things, the dissemination of public information, national information and communication policy and public relations services within the Republic of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners’ advocates)
6. The 5<sup>th</sup> Respondent is the Minister responsible for the Ministry of Transport in Kenya which is the ministry of the Government of Kenya having overall responsibility for, among other things, national transport policy, the Kenya Ports Authority and development of regulatory frameworks for the transport sector within the Republic of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners’ advocates).
7. The 6<sup>th</sup> Respondent is the Minister responsible for the Ministry of Roads and Public Works in Kenya which is the ministry of the Government of Kenya having overall responsibility for, among other things, the development, construction, establishment, and maintenance of public roads

within the Republic of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners' advocates).

8. The 7<sup>th</sup> Respondent is the Minister responsible for the Ministry of Energy in Kenya which is the ministry of the Government of Kenya having overall responsibility for, among other things, the regulation, development, construction, establishment, and maintenance of petroleum refineries within the Republic of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners' advocates).
  
9. The 8<sup>th</sup> Respondent is the Kenya Ports Authority, established under the Kenya Ports Authority Act, Chapter 391, Laws of Kenya as a body corporate capable of suing and being sued in its own name. It is charged with the responsibility of *inter alia* constructing, operating, maintaining ports within the Republic of Kenya. (Service for the purpose of these proceedings shall be effected by the Petitioners' advocates).
  
10. The 9<sup>th</sup> Respondent is the National Environmental Management Authority ("**NEMA**") established under the Environmental Management and Co-ordination Act, Number 8 of 1999 ("**the Environmental Act**") as a body corporate capable of suing and being sued in its own name. It is charged with the responsibility of *inter alia* co-ordinating the various environmental management activities in the country, carrying out surveys which will assist in the proper management and conservation of the environment and identifying projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted.

## **B. THE MATTERS COMPLAINED OF**

### **11. Introduction**

Lamu Island is a region rich in ecological and cultural diversity, for which reason it was designated a United Nations Educational Scientific and Cultural Organization ("**UNESCO**") World Heritage Site in 2001 and was designated as a national monument in 1986. With a destroyed ecosystem and no mitigation plan, residents of Lamu will not only be economically displaced through reduced tourism, but also culturally marginalized as a result of the drastic population increase expected of 1.25 million people as per the Proposed Project Feasibility Study Report.

The protection and preservation of the cultural heritage and history of Lamu is imperative for the following reasons:

- (a) Lamu is already on the **"World heritage danger list"**.
- (b) Lamu is important for the study of Swahili and Islamic culture drawing scholars from across the globe to study its unique and surviving cultural traditions such as the Maulidi, which have been preserved and remain unchanged due to Lamu's relative isolation.
- (c) UNESCO has repeatedly made declarations urging the Government to draw up management plans to preserve what is left of the rich legacy of Lamu; and
- (d) Lamu in its own right is an endangered settlement, being one of the foremost pre industrial urban settlements left in Africa and classified as one of the world's few 'antique living cities'. Most similar towns as old and historic as Lamu have either fallen into ruin or have been overtaken by modernisation, permanently losing their rich legacy and history.

12. According to the very limited information made available by the Government and specifically the Respondent Ministries, Lamu will, if they have their way, soon see the development of a \$20 Billion (Twenty billion United States Dollars) project called the Lamu Port-Southern Sudan-Ethiopia Transport and code-named LAPSSET (**"the Proposed Project"**). When complete, the project will comprise a port, international airport and oil refinery at Lamu, and a labyrinth of road, rail and pipeline covering Kenya, Ethiopia and Southern Sudan as well as tourist resort villages. Specifically, the Proposed Project will have the following components:

- Lamu Port, a large scale sea port at Manda Bay (**"the megaport"**)
- Standard gauge railway line to Juba
- Road network
- Oil pipelines (Southern Sudan and Ethiopia)
- Oil refinery at Lamu
- Three Airports
- Three resort cities (Lamu, Isiolo and Lake Turkana shores)

13. The Petitioners submit to this Honourable Court that the Proposed Project and its conception, implementation and facilitation by the Respondents, who constitute the Government and the relevant Ministries, as well as two statutory bodies, infringe and violate the provisions of the Constitution of Kenya 2010 (**"the Constitution"**) including the Fundamental Rights and

Freedoms of the Petitioners as guaranteed by the Bill of Rights (Chapter Four of the Constitution).

**14. Environmental impact of the Proposed Project on the Lamu area**

The Petitioners submit that the Project will have devastating consequences for the delicate marine ecosystem of the Lamu region. In order to begin building, pristine mangrove forests in the Manda Bay area from Mkanda Channel to Dodori Creek would require extensive felling. Mangrove forests are the first line of defence against sea level rise associated with global warming and destruction of these forests would imperil this fragile eco system and reduce its capacity to mitigate the effects of climate change.

The port, oil refinery and oil pipelines, together with the rail and road transport hub that is envisaged, will transform the area from an unspoilt and pristine marine conserve to a large industrial zone with the attendant problems of discharge of oil and oil products and other industrial effluents into the air, water and land, other pollution, land degradation and destruction of the ecology. The Respondents have not shown any serious intent to undertake or disclose for public understanding and debate any studies on the environmental impact of the Proposed Project and proposed ways of negating such impact. Nor has the 9<sup>th</sup> Respondent, NEMA, shown any willingness to discharge its statutory obligations and responsibilities under the Environmental Act to safeguard Lamu and its environs against the inevitable large scale pollution and degradation that will be brought by the Proposed Project.

15. Also greatly affected and transformed by construction of the Proposed Project will be the Manda bay which is protected by coral reefs and the inland channel, sheltered from the open sea by Pate Island. The area is known to support corals, sea grass beds and lush stands of mangroves – marine turtles use these areas as feeding grounds and many species of reef fish and crustaceans feed here. The importance of this region to several critically endangered species, including the well known dugong, is also of paramount concern as these creatures depend on shallow sea grass beds exclusively for their survival.

For all these years the Creek area has been a shrimp (sea water prawn) sanctuary, vital to the livelihoods of local subsistence fishermen. The construction of the megaport in this area would undoubtedly have a major negative impact on their livelihood.

16. Environmental challenges will be posed by the shipping traffic, particularly container vessels and oil tankers, to the megaport, including operational waste, sewage and garbage, effluent discharge and hazardous cargo. Inevitably there will be maritime accidents and collisions. Bunkering of ships and vessels will also easily and invariably cause oil pollution. In addition, the transit of chemical and oil products, necessary to the economies of the countries that the proposed megaport will service will cause problems, leading to changes in freshwater availability, altering the diversity of species within the ecosystem. Water quality will be altered affecting drinking water and human health.<sup>1</sup>
17. An area of 60,000 hectares off the coast north of Lamu has been designated as a “Biosphere Reserve” by UNESCO. The Dodori Creek mouth, proposed to be “developed” as the Land port area and the subject of substantial construction as part of the Proposed Project, sits at the edge of this biosphere reserve. The environmental impact of the Proposed Project will have a devastating effect on this hitherto pristine Biosphere Reserve and completely negate the intention of designation of this site to preserve the natural resources and ecology of the area. In addition it will have a substantial negative effect on the livelihood of local subsistence fishermen and local farmers. Construction would also impact the migratory corridors of wildlife from the two national reserves to the north of the proposed port site: Kiunga Marine National Reserve and Dodori National Reserve.
18. There will be adverse effects from the inevitable road traffic and noise from cargo handling equipment.
19. The proposed “tourist village” is likely to introduce high numbers of low profit tourists to the region thus transforming the tourism industry in Lamu from the existing high value, ecologically sensitive operations with small manageable numbers to a budget tourism centre that can, due to the large footfall, only further erode the environment.

20. In July 2010, the 9<sup>th</sup> Respondent stated that the organization would carry out Environmental Impact Assessments from September 2010 but would only intervene if it is found that the Proposed Project is likely to cause “serious damage” to the marine ecosystem and that too by only advising against it. However, the 9<sup>th</sup> Respondent is thereby conceding that ordinary “damage” will not suffice for its intervention, and that it will adopt a passive stance, which is in breach of its mandate under both its constituent statute the Environmental Management and Co-Ordination Act (EMCA) and the Constitution of Kenya 2010. “Serious damage” is too vague and ambiguous a phrase to be the requirement for intervention and to date there is little evidence of any intervention by the 9<sup>th</sup> Respondent. There is no evidence that Environmental Impact Assessments have been conducted by the Governmental authorities or by the 9<sup>th</sup> Respondent as part of proactive and holistic development planning, or an environmentally sensitive overall development plan for the Proposed Project.

21. The Respondents are under a constitutional obligation and duty to strengthen existing mechanisms and better coordination between the Government and related organizations, enabling environmental and development issues to be integrated into decision making at both national and sub-regional levels. Instead the Respondents, in breach of the provisions of the Constitution and their Constitutional and statutory obligations and responsibilities, have conceived the Proposed Project and are intent on rendering nugatory projects such as the Kenya SECURE Project currently underway which is aimed at securing land and resources belonging to indigenous coastal communities, improving livelihood, and supporting bio-diversity conservation and sustainability. The project has been implemented by the Ministry of Lands in collaboration with the Kenya Wildlife Service as well as various civil societies and the community living in Lamu region.

## **22. Cultural and Heritage Issues**

The massive Proposed Project would result in unprecedented new levels of population growth in a very short space of time – almost overnight – and put strong pressures on both the cultural and natural values of the region. Through the Project Feasibility Study carried out by consultants contracted by the Respondents, an influx of 1.25 million people is expected. To date, there have been no measures taken to prepare Lamu for this growth in population. There is poor access to

health facilities, water, education, communication, and transport, which has left Lamu unprepared for such a drastic change. Since most government services are based in Lamu town, the overpopulation would further expose the world heritage site to environmental and infrastructural degradation. Reports received in the media are that with the Proposed Project, UNESCO is currently on high alert, closely monitoring the Proposed Project to ascertain its interference with the town's heritage.

23. Far from promoting the culture of the people of the Lamu region, the Government and the Respondents will in fact be destroying it as a result of the developments and the influx of skilled and semi-skilled workers as well as migrant labourers seeking work from the rest of the country, all with diverse cultures. Whilst gradual population change is expected with increasing development, the drastic and overwhelming numbers may result in severe culture-shock. The sudden introduction of large numbers of residents with cultures that are contradictory to the local cultural heritage which has made Lamu renowned as a world heritage site will threaten the tourism appeal of the area. Considering that Lamu has one of the lowest populations and poverty levels in the country, the chances of benefitting from these new job opportunities as an alternative livelihood to tourism will be much lower than their immigrant counterparts. The immigrants will therefore likely dominate all aspects of Lamu's institutions, causing the locals to become an oppressed minority if no provisions are made to protect their interests.
  
24. The special identity and the cultural heritage unique to Lamu Island have been preserved because it is the local indigenous communities who are engaged in its local industry. Everything on the island is currently done on a small-scale basis. From tourism, fishing to ship building, all the industries that sustain the island are localized much in the same way when the island was first settled on around 1160 AD. Local officials note that only 5% of the population has sufficient skills to seek employment in the Proposed Project. The Government has therefore absolutely failed to give any attention to or even begin addressing the drastic demographic and cultural changes that will take place overnight if the Proposed Project goes ahead, starting with the large numbers of construction workers, who will in turn be replaced by the influx of workers for the port, the oil refinery, the transportation facilities including the trucks, tankers and pipelines and for the tourist village. Whilst it may introduce economic and commercial "development" which all too often in the history of Kenya is dominated and enjoyed by a small elite, the price in terms of the



devastation of culture and way of life of a thousand years will be immeasurable, for the culture and way of life will disappear never to return if measures are not taken to protect them.

25. While Lamu has been renowned for its peaceful atmosphere where petty crime as well as violent robberies are almost unheard of on the streets there are high fears that crimes will significantly increase if the Proposed Project proceeds without proper planning, consideration and open discussion on the best way forward. Recent events through the kidnapping of two tourists and killing of one in Lamu have proved that the security in Lamu is a far cry from prepared for the population influx that is expected.
26. Little attention has been given to the protection and promotion of the culture of the indigenous people of Lamu. As far as is known, no legislation has been proposed to preserve for the people of Lamu for use of their culture and cultural heritage by way of introducing institutions and funding for the purpose. With the anticipated international trade, inflows of people, and the use of Lamu as a gateway, the culture and way of life of this region is bound to be battered. The Government, with the exception of lodging an application through the National museums of Kenya to UNESCO applying to include Lamu as a world heritage site, has done little to promote cultural traditions in Lamu dating as far back as a thousand years. The intensity of demands of a port and the capacity to meet the needs of the Proposed Project in the future will outgrow the need to protect and preserve the diverse and storied cultural history of Lamu. The purely money generating rationale of the Proposed Project for the political and economic elite of Kenya has to be carefully controlled in the context of the wellbeing of the people of Lamu, and safeguarding the cultural heritage of Lamu.
27. It is critical to maintain the history and traditions of Lamu, to enhance and enshrine for the future this extraordinary and important area of emphasis of cultural heritage. If the Proposed Project gives rise to circumstances which destroy, harm and disturb the cultural traditions of Lamu, then there is a duty under the Constitution to safeguard the right of any individual to freely participate and engage in their cultural life. Furthermore, depriving an individual of enjoying their culture is a fundamental breach of their human rights. It should be made clear what thought (if any) has been given by the Government and the Respondent Ministries to safeguarding and protecting Lamu's

heritage, and how the enjoyment of culture will be protected and be sustained in the years ahead against the erosion that will be caused by the Proposed Project.

To date, the Government has failed, neglected and omitted to take the following measures with regard to Lamu's cultural heritage:

- Seek dialogue with the community to hear its concerns about the construction of the megaport, the Proposed Project as a whole and the cultural and demographic effects this will have in order to take these into consideration in its planning; and
- Commission a comprehensive assessment of its impact on the region's cultural heritage.

## 28. **Public access to Information**

The Proposed Project is a development many Lamu residents and interested Kenyans are watching with a sense of uncertainty and the proposed multibillion dollar Proposed Project that affects them all remains shrouded in mystery and tales of corrupt and irregular practices, including the failure to provide public documentation or carry out consultative meetings with the affected communities.

The Government of Kenya, represented by the Respondents, has to date omitted and failed to inform, consult with or hear the local people and residents of Lamu or involve them in the Proposed Project in its various phases. No attention has been paid to the local people of Lamu, their identity, lifestyle and orientation when clearly the Proposed Project will completely redefine their lifestyles. Despite their demands for proper information on the Proposed Project and the commissioning of a full Environmental and Social Impact Assessment (ESIA) no response has been forthcoming from the Government and its constituent ministries.

29. Newspaper clippings about the progress of the port are the main way in which the people of Lamu have come to hear about the Proposed Project, emphasizing the levels of miscommunication as they ironically rely on news reports from the rest of the country, and particularly the media in Nairobi, to find out what is happening at the island's doorstep. The last time information was provided publicly to the people of Lamu about the Proposed Project was through verbal presentations at the Lamu Port sensitization meeting at Lamu town in January,

2009. Subsequent meetings have only been with elites and leaders within closed doors, and public announcements carried out at conferences and meetings Nairobi, which remains unreachable for most of the affected communities.

30. The information that the Government has been withholding from the public is clearly information that the public is entitled to, because it is about a huge economic project that directly affects them and one which they should be allowed and encouraged to participate in, and the Government therefore has an obligation to share information on, dialogue and discuss with the affected local populace and the public.
31. However, the Government has failed to publish or publicise information in this respect. The only information that is published by the Government is its Request for Expression of Interest (International Competitive Bidding) Construction of Lamu Port at Manda Bay advertised in the newspapers and periodicals, and a paragraph on the proposed development located on the Ministry for Transport's website. Attempts by the Parliamentary Committee on Transport, Public Works and Housing to procure more information from a Japanese consulting firm contracted to design the proposed port in early December 2011 were rebuffed by the firm on the ground of confidentiality.

In an article posted in the *East African* on 15th June, 2009 the director of Shipping and Maritime Affairs at Kenya's Ministry of Transport stated that the Government had started the tendering process for the development of the port, which is expected to cost \$16 billion. The project will be implemented through a public private partnership and feasibility studies are being undertaken. Neither the feasibility study nor details on the details of the Proposed Project have been published. Copies of the draft feasibility study have been obtained only through insider contacts with the government who provided the documents in confidentiality whilst the final copy of the report has still not been publicized.

Newspaper reports in September, 2010 stated that a Japanese firm, Japan Port Consultant, was in May 2009 given ten (10) months to carry out a feasibility study on the port as well as produce an estimated cost of the development of the port. The article stated that the Government in the last financial year allocated Kenya Shillings 500million for the studies. The feasibility study which

includes hydraulic, bathymetric and geophysical surveys prepared by Japan Port Consultant ought to have been completed in March 2010. However, no such details have been published by the Government. According to a summary of the report presented during the COMESA-EAC-SADC Tripartite and IGAD Infrastructure Investment Conference on 28th September, 2011, prior to commencement of construction works, the government of Kenya should administratively, legally, and financially authorise a new Lamu City Development Plan, additional Geotechnical Surveys, establish a suitable Port Management Body (PMB), carry out a Resettlement Action Plan (RAP), Archaeological Impact Assessment, and Environmental Impact Assessment (EIA). To date, no information has been publicised to indicate that any of these steps have been carried out prior to the commencement of the works.

These articles illustrate the magnitude of the Proposed Project and the paucity of information being made available to the public.

### **32. Land Tenure Insecurity**

Since the plans on the port are not being publicly discussed, individuals with access to the relevant organs of the state are engaged in a buying frenzy of prime land in the project area resulting in increase of land speculators in the area which is perpetuating the highly sensitive nature of land tenure insecurity in the area. Secretive alienation of substantial chunks of public land to government officials and individuals with government connections and patronage, has led to the exclusion of the local populace which is indigenous to area that remain without any land tenure security.

33. Local farmers in the proposed location for the megaport were visited in January 2009 by an official Government delegation and told that some of the 6,000 families likely to be displaced by the project. Verbal assurances were given of compensation for the land if the Proposed Project proceeds but there has been nothing concrete or in writing, and no safeguards for appropriate compensation have been proposed. In view of the Proposed Project's size, investment and impact, surprisingly little has been disclosed or written about the protection that will be given to the indigenous community land where the Proposed Project falls. Since sections of the Proposed Project Site falls where the hunter-gather Boni(Aweer) community have traditionally occupied, and pastoralist communities graze, it is expected that they will be greatly affected by the change of land use in the area. The Aweer use their vast lands land to gather honey, herbs, and wild

fruit. Being a very small minority in Lamu consisting of about 3,000 people, their livelihoods are under threat as the Proposed Project which includes a sophisticated transport network, but is right across their indigenous forests. The marginalized Orma community additionally face greater threats to their grazing practices. The only indication that the government recognizes the unique tenure needs for these communities was the initiation of the Kenya SECURE project through the Land Reform and Transformation Unit which aims to pilot a model for administering community land. The project however has not borne any fruits so far as no legislation has been put in place three years.

34. Prior to the new constitution, land in Lamu County was categorized as Government Land (GL). During this time, a significant amount of land in Magogoni, the Proposed Project site, was procured under questionable circumstances, for which locals originating from the area have filed several petitions and filed memorandums to have the historical land injustices addressed. Already, an overwhelming number of speculators have flocked down to Lamu to grab land and procure titles through hasty and fraudulent means due to the gap in legal transition whereby some of the land where the Proposed Project lies should have been vested in the County government as public land converted into public land and administered by the National Land Commission. Since the Proposed Project is being rushed prior to the enactment of the National Land Commission Bill and the existence of a County government, land security problems in the region have been compounded and Lamu has been exposed to more violations against land tenure rights outside of those which are already pending investigations. Without their right to land ownership recognized, Lamu people will be excluded from most benefits, have reduced power in negotiations and fail to be involved in the development plans being made.

**35. Breach of National Values and Principles of Government**

Article 10 of the Constitution makes clear that national values and principles of governance include :

- (a) Sharing and devolution of power
- (b) Participation of the people of Kenya
- (c) Good governance, integrity, transparency and accountability
- (d) Sustainable development.

In going about in the manner it has with regard to the Proposed Project the Government has neglected, disregard and breached these national values and principles of governance. Notwithstanding the enormity of the construction of the Port and its subsequent effect on the residents in and around Magogoni, Pate Island, Manda Island, and their environs, there is currently underway the establishment of a Task Force to supervise and control the construction of the Port. Additionally, the residents have not been furnished with any information on the extent of the Task Force's operation in the area or whether there is an opportunity for the residents to participate in the Task Force.

### **36. Devolution of Power**

Chapter 11 of the Constitution introduces devolved government and the establishment of the new County governments and assemblies. Under Article 186 of the Constitution the functions and powers of the national government and the county government are set out in the Fourth Schedule to the Constitution. Part 2 Paragraph 5 of Schedule of the Fourth Schedule clearly provides that the responsibility for harbours, (which would include the proposed port), and public road transport is the exclusive preserve of the county government. Whilst the provisions as to county governments are suspended until the first election for county assemblies and governors, in embarking on the Proposed Project it is incumbent on the Government of Kenya to recognise that the Proposed Project will have substantial and irreversible long term consequences for the Lamu region, which will fall within the Lamu County, and in recognition of the devolution of power ushered in by the Constitution and the principles of governance set out, to wait until the county government and assembly of Lamu are in place before approving and embarking a project of this magnitude.

### **C. BREACH OF CONSTITUTIONAL PROVISIONS**

37. The consequences of the actions and implementing legislation (including regulations issued) of the Government in respect of the Proposed Project are that such actions and implementing legislation are in contravention of and inconsistent with the provisions of the Constitution and are therefore void or invalid.

### 38. Environment

- (a) **Article 42** of the Constitution provides every person has the right to a clean and healthy environment, which includes the right:
- i. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
  - ii. to have obligations relating to the environment fulfilled under Article 70.
- (b) **Article 69** imposes a number of positive obligations on the part of the Government with respect to the environment including obligations on the Government to ensure sustainable utilisation, management and conservation of the environment and natural resources and imposes an obligation on the Government to establish systems of environmental impact assessment, environmental auditing and monitoring of the environment.
- (c) **Article 70** gives every person the right to apply to the courts for redress if the rights provided for under Article 42 have been or are likely to be infringed, denied, threatened and/or violated. In this respect, the court may make any order, or give any directions it considers appropriate so as to prevent, stop or discontinue any act or omission that is harmful to the environment. The court may also make orders to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (d) **Article 23**. In order to assert the right to a clean and healthy environment under Article 42, an applicant does not have to demonstrate that any person has incurred loss or suffered injury. As per Article 23 of the Constitution, the High Court will have jurisdiction to hear any issues arising from the alleged infringement of any rights in Chapter 4. The court may grant a declaration of rights, an injunction, a conservatory order, an order for compensation and an order for judicial review.

Applying these constitutional provisions, a declaration from the Courts that their rights have been infringed may be sought by any person in Kenya. This order would be as against the Government

and other public bodies and/or private individuals responsible on the grounds that the Petitioners' rights to a clean and healthy environment have been or will be threatened if the proposed construction of the megaport in Lamu is allowed to continue. There will be no need to prove actual damage or any further *locus standi* as in the Constitution any person may seek the declaration.

### 39. Environment - International Law

**Article 2(5)** of the Constitution provides that all general rules of international law shall form part of the law of Kenya. In addition, Article 2(6) states that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.

This is important as Kenya is a signatory to a number of conventions relating to the protection of the environment. In light of Article 2(5) and 2(6), the Government is under a positive obligation to follow the conventions as these have now become part of Kenyan law under the Constitution. Of particular significance in this regard is the **Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean** (“the **Nairobi Convention**”) which came into force in 1996 with Kenya being a signatory. Article 4 of this Convention provides that each contracting party shall take all appropriate measures to ensure sound environmental management of natural resources, using for this purpose the best practicable means at their disposal, and in accordance with their capabilities. Article 12 further states that each contracting party should take all appropriate measures to prevent, reduce and combat environmental damage in the Convention area, in particular the destruction of marine and coastal ecosystems, caused by engineering activities such as land reclamation and dredging.

As at the date of the promulgation of the Constitution, the Nairobi Convention text has become part of Kenyan law and to act in contravention of the Convention would consequently be an act in contravention of the Constitution. The Government must therefore ensure the protection of all coastal environment and therefore the proposed construction of the megaport and the Proposed Project must either be halted or implemented in accordance with the convention thus ensuring that all natural resources in Lamu are properly protected.

It is clear then that if the Kenyan government were to proceed with these plans a number of constitutional provisions in our Kenyan Constitution would most likely be infringed.



#### 40. Culture

- (a) **Article 11 (1)** states that “This Constitution recognizes culture as the foundation of the nation” and Article 11(2) (a) which states that “The State shall promote all forms of national cultural expression through literature, the arts, traditional celebrations...libraries and other cultural heritage”

#### 41. International Law on Culture and Heritage

**Article 2 (5) and (6)** of the Constitution provides that: “The general rules of international law shall form part of the law of Kenya” and that “any treaty ratified by Kenya shall form part of the law...” The Kenyan government is a state party to the International Covenant on Civil and Political Rights which obliges the government in Article 27 to protect and promote the culture of minority groups. The government is also a state party to the African Charter on Human and Peoples Rights which under article 17(2) protects the rights of every individual to freely take part in the cultural life of his community.

Kenya acceded to the **UNESCO World Heritage Convention** in 1991 and this is now part of the national law following the promulgation of the Constitution.

The following are Articles of the UNESCO World Heritage Convention:

“Article 4

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain. “

“Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

- (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.”

“Article 6

1. Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

2. The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request.

3. Each State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention. “

”Article 7

For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international cooperation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.”

Following from these Articles, the Government is under a duty to ensure that Lamu is protected. There is a duty to plan for the future conservation, and to co-operate with international bodies in maintaining this area. The Government is also obliged not to take any deliberate action which could directly or indirectly damage the site – construction of the port would fall foul of this obligation. So far, declarations made by UNESCO requiring action on the part of the Government have not been acted upon. The Government is also under an obligation to ensure that the cultural heritage of Lamu is protected and preserved. UNESCO can also support conservation programmes if the Government requires assistance. Lamu is now on the World Heritage danger list. The convention places positive obligations which require steps to be taken to properly plan and conserve cultural heritage. UNESCO can also provide the wherewithal to protect and preserve world heritage sites in the form of expertise and financial resources to assist the Government. Should the Government not take this issue seriously, and disregard its obligations to the international community which it has voluntarily entered into, it will have caused a serious breach of the Constitution and international law, which would necessitate action to be taken by the international community against the Government to remedy these breaches in the form of warnings, reprimands or sanctions and a case before the International Court of Justice.

**42. Information**

- (a) **Article 35(1)** of the Constitution grants every person the right of access to information held by the Government; and access information held by another person and required for the exercise or protection of any right or fundamental freedom.

It is clear that the government's actions thus far have not been in keeping with the spirit, purport and objects of the Constitution.

Article 35(1) found in the Chapter on the Bill of Rights of the Constitution provides that "every citizen has the right of access to –

- (a) information held by the State; and
- (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

Accordingly, under Article 35(1) (a) citizens are entitled to receive information in regards to the Proposed Project.

**(b) Article 35 (3)**

More importantly, Article 35(3) provides that "the State shall publish and publicise any important information affecting the nation."

This places a positive burden on the Government to publish any important information affecting the nation.

**43. Land**

- a) **Article 60(1)** of the Constitution demands the sustainable and productive management of land and sound conservation and protection of ecologically sensitive areas.
- b) **Articles 62(2)** state land is vested in the County government and is to be administered by the National Land Commission. This land cannot be disposed of or otherwise used except in terms of Act of Parliament specifying the nature and terms of that disposal or use.
- c) **Article 63** of the constitution recognizes that land and forests used for grazing or shrines, and ancestral lands and lands traditionally occupied by hunter-gatherer

communities shall vest in and be held by communities as community land. The article specifies that this land shall not be used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively as mandated by the article.

#### **D. REMEDIES UNDER THE CONSTITUTION**

The Constitution prescribes the following remedies available to counter these breaches of the Constitution.

- (a) **Article 2(1)** of the Constitution states: “This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.”
- (b) **Article 2(4)** of the Constitutions states: “Any law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”. Acts by the Government contravening an individual’s right to culture as per Articles 11 and 44 and any acts not complying with Article 35, where the Government must publish any important information, can be declared void to the extent of the inconsistency.
- (c) **Article 23** prescribes the remedies that are available for enforcing the Bill or Rights and the Fundamental Rights and Freedoms.

#### **E. RELIEFS SOUGHT:**

##### **The Petitioners pray for the following Reliefs:**

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

45. A declaration that the Petitioner's rights, individually or in association with others, to access to information held by the Government and information held by other persons and required for the exercise or protection of any right or fundamental freedom guaranteed by Article 35 of the Constitution have been contravened.
46. A declaration that the Petitioner's rights, individually or in association with others, to participate in the cultural life, of the person's choice guaranteed by Article 44 of the Constitution have been and will be contravened if the intended development of a Port in Lamu is effected and which intended development is unlawful and illegal.
47. A declaration that the Respondents have contravened Article 10 of the Constitution in that the National Values and Principles of Governance set out have not been observed and that decisions regarding and the implementation of the Proposed Project require the participation and general approval of the people and residents of Lamu.
48. A declaration that decisions regarding and the implementation of the Proposed Project require the involvement and approval of the County Government of Lamu as and when constituted.
49. A declaration that the 9<sup>th</sup> Respondent, NEMA, has in breach of the Petitioners' fundamental rights and freedoms under Article 42 of the Constitution failed to discharge its statutory obligations and responsibilities under the Environmental Management and Co-ordination Act, Number 8 of 1999 to safeguard Lamu and its environs against the inevitable large scale pollution and degradation that will be wrought by the Proposed Project.
50. Conservatory orders in respect of the town of Lamu and its environs and in particular the areas which are the subject of the Proposed Project until further or other orders of this Honourable Court. Alternatively the order of prohibition or injunctions against the Respondents restraining them from undertaking or implementing the Proposed Project until safeguards and remedies in respect of the subject matter of the declarations above are put in place to the satisfaction of this Honourable Court.

51. Orders of mandamus compelling the Respondents and each of them to discharge their lawful statutory and constitutional obligations by extensively consulting the people of Lamu and its environs, engage at the expense of the Government of Kenya credible and reputable local and international independent experts in the appropriate fields and, with their assistance and in consultation with the people of Lamu and its environs who are likely to be or may be affected by the Proposed Project, prepare and implement protective and remedial measures to avoid and ameliorate the matters complained of in this Petition and which are the subject matter of the declarations above.
52. An order of mandamus compelling the 3<sup>rd</sup> Respondent to finalize legislation for the creation of the National Land Commission so as to address historical injustices, facilitate for land tenure security through land adjudication, and convert un-alienated land in Lamu into community land and public land as will be prescribed by the legislation in place.
53. An order of mandamus against the 9<sup>th</sup> Respondent compelling it to ensure that all the requirements of the Environmental Management and Co-ordination Act in respect of the Proposed Project including the preparation of environmental impact assessment studies by reputable local and international experts in consultation with the people of Lamu and its environs are prepared, and all safeguards and requirements are instituted and complied with before any licences under the Act are issued.
54. Orders of mandamus compelling the Respondents and the Government of Kenya as a whole to publish, disseminate and make available to the people of Lamu and of Kenya, all relevant information about the Proposed Projects including the contracts involved, the proposed tendering process, the parties owning the land to be acquired for the Proposed Projects, the purchases of land, services, goods and equipment for the Proposed Project and the costs involved, and generally to observe principles of good governance, transparency and accountability in the implementation of the Proposed Project.
55. This Honourable Court do issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitutional rights of the Petitioners and the people of Lamu and its environs in the context of the declarations made.

56. The Costs of the Petition be awarded to the Petitioners as against the Government of the Republic of Kenya and the other Respondents.

**Dated at Nairobi this**

day of January 2012.

**ABDULRAHMAN, SAAD & ASSOCIATES**  
**ADVOCATES FOR THE PETITIONER**

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**SCHEDULE**  
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Walid Ahmed Ali	Box 64, Lamu,80500	Chair, Lamu Youth Alliance	
Ali Shaibu Shekuwe	Box 64, Lamu,80500	Local from Pate Island	
Mohamed Mbwana Shee	Box 64, Lamu,80500	Local from Mkokoni (Vice Shungwaya Welfare Association)	
Abubakar Mohamed Ali	Box 64, Lamu,80500	Lamu Island Resident	
Umulkher Ali	Box 64, Lamu,80500	Lamu Island Resident	