



**Haki Kenya Organisation & 3 others v National Environment Management Authority & another
(Tribunal Appeal 18 of 2022) [2023] KENET 1349 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KENET 1349 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 18 OF 2022**

**EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS**

DECEMBER 13, 2023

BETWEEN

**HAKI KENYA ORGANISATION 1ST APPELLANT
BAKARI MATANO ABDALLAH 2ND APPELLANT
MICHAEL BARASA NATO 3RD APPELLANT
KIBWANA MWIJUMA KIBWANA 4TH APPELLANT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT
SEASCAN ENERGY LIMITED 2ND RESPONDENT**

JUDGMENT

A. INTRODUCTION

1. The Appellants moved the Tribunal by way of the Notice of Appeal dated 26th May 2022 seeking cancellation of EIA License No: NEMA/EIA/PSL/17984 issued to the 2nd Respondent for the establishment of a 42,000MT Liquefied Petroleum Gas Mounded Storage Depot, comprising 6No. mounds with 4 No. tanks each of 7,000MT and filling plant, 15Km long 300mm diameter LPG import pipeline from the New Kipevu Oil Terminal Common User Manifold (KOT-CUM) via Kenya Petroleum Refineries Limited wayleave, tanker-truck loading gantry of 20No. trucks capacity, rail siding, 2No. fire water storage tanks each of 1,017m², vehicle parking, associated facilities and amenities Located at Unsurveyed Kenya Railway Corporation's Land in Changamwe Marshalling Yard, Mombasa County.



2. Contemporaneous to the filing of the Notice of Appeal, the Appellants filed three witness statements by Bakari Matano Abdallah, Michel Barasa Nato & Kibwana Mwijuma Kibwana all dated 26th May 2022. Subsequently, the Appellants filed the witness statement of Stephen M. Rukwaro dated 14th March 2023.
3. In summary, the Appeal raises the following grounds:
 - a. Failure by the 2nd Respondent to carry out any public participation and failure by the 1st Respondent to ensure that public participation was done before the issuance of the license in question;
 - b. Failing to assess safety, security and environmental concerns before issuance of the impugned license;
 - c. Failing to consider that the project is very close to navigation channel, a major highway- the only road connecting the City of Mombasa with the Mainland West and the only entrance to the port and any incident or accident would have devastating effect on the coastal economy that is heavily dependent on the said road and port as well;
 - d. Failure by the Respondents to consider that the project operations will affect air quality on micro-scale through exhaust emissions from trucks as well as fugitive emissions (leakages);
 - e. Failure by the respondents to simulate potential disaster scenarios which for liquefied petroleum gas (LPG) include 'Boiling Liquid Expanding Vapor Explosions' (BLEVE) which may arise in such projects and the containment measures thereof. Minimum safety distances (In case of worst case of a BLEVE scenario) to the facilities and residential areas have not been assessed. The surrounding areas of Kibarani, Chaani and Bahati residential areas within the BLEVE radius;
 - f. Failure by the respondents to respond on or act on several complaints by the Appellants concerning the failure to incorporate overall petroleum standards, the hazards of the road transport access and exit through Highway have not been appreciated and no alternatives have been considered;
 - g. Failure of the Respondents to consider that the project will cause air and noise pollution that will adversely affect the health of the residents living near the site. The potential air pollution risks to respiratory systems increasing chances of asthma and bronchitis attacks; and
 - h. Failure by the Respondents to consider impact on marine bio-diversity and the social economic activities of the fishermen along Makupa creek in case of marine pollution.
4. The appeal did not go unopposed, and in that regard, the 1st Respondent filed the Statement of Reply dated 22nd August 2022 and the Witness Statement of Joseph Makau of even date. Equally, the 2nd Respondent filed the Replying Affidavit of Bernard Odhiambo sworn on 24th June 2022 and the affidavit of Philip Abuor sworn on 15th July 2022.
5. The appeal was heard via oral hearing whereby all parties presented their respective witnesses who gave oral evidence.
6. Subsequently, parties were directed to file submissions. Pursuant to the Tribunal's directions, the 1st Respondent filed its submissions dated 31st October 2023 while the 2nd Respondent filed its submissions dated 19th October 2023. The Appellants did not file submissions.



B. ANALYSIS AND DETERMINATION

7. Upon considering all materials filed by the parties, the oral evidence, the submission by parties, the Tribunal has isolated the following as the issues arising for determination in this appeal:
- i. Whether there was a failure to conduct public participation before the issuance of the EIA license.
 - ii. Whether there was failure to assess safety, security and environmental concerns before the issuance of the EIA license.
 - iii. Whether there was failure to consider the project's proximity to a navigation channel and a major highway
 - iv. Whether there was failure to consider that the project operations will affect air quality on micro-scale through exhaust emissions from trucks as well as fugitive emissions (leakages).
 - v. Whether there was failure to stimulate potential disaster scenarios and the containment measures thereof.
 - vi. Whether the Respondents failed to respond and/or act on the Appellants' complaints
 - vii. Whether the Respondents failed to consider the project's impact on marine biodiversity

Whether there was sufficient public participation before the issuance of the EIA license

8. It was urged by the Appellants that there was a failure to carry out public participation before the issuance of the impugned EIA license. Public participation is generally the real involvement of all social actors in social and political decision-making processes that potentially affect the communities in which they live and work.
9. Article 10 of *the Constitution* imposes an obligation on the State, that is to say, every State organ, State officer or public officer to facilitate a consultative process with the public in the State organs or State officers' processes, application of any law, public policy or decision making. Separately and regarding matters of environment, Article 69 of *the Constitution* also imposes parallel obligations on the state to encourage public participation in the management, protection, and conservation of the environment.
10. A five-judge bench of the High Court in the case of Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, succinctly explained the rationale of having public participation as a constitutional imperative as follows:

'It may be tempting to ask why the law and indeed *the Constitution* generally imposes this duty of public participation yet the State is generally a government for and by the people. The people elect their representative and also participate in the appointment of most, if not all, public officers nowadays. The answer is, however, not very far. Our democracy contains both representative as well as participatory elements, which are not mutually exclusive but supportive of one another. The support is obtained even from that singular individual.

We also have no doubt that our local jurisprudence deals at length with why *the Constitution* and statute law have imposed the obligation of public participation in most spheres of governance and generally we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation.' (emphasis ours)



11. Equally, the Tribunal takes the view that public participation entrenches and facilitates environmental democracy, a term that reflects increasing recognition that environmental issues must be addressed by all, or at least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors. It captures the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance. It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government. See *Mohamed Ali Baadi and others v Attorney General & 11 others*, supra.
12. Principle 10 of the Rio Declaration on Environment and Development provides that environmental issues are best handled with the participation of all concerned citizens at the relevant level and that each individual shall have the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Additionally, Principle 22 provides for the effective participation of indigenous people and their communities and other local communities in the achievement of sustainable development.
13. Public participation is therefore regarded both as a proper and fair conduct of democratic government in public decision-making activities and as a fundamental component of the EIA process. Citizens have a right to be involved in the decision-making about the planned interventions that will affect their lives, and the opinions and views of experts should not be the sole consideration in decisions about planned interventions.
14. Indeed, we dare say that looking at international law and comparative law and how this right of public participation has been contextualized, it is proper to conclude that public participation in environmental law issues and governance has risen to the level of a generally accepted rule of customary international law. Thus, in Kenya, in addition to the explicit constitutionalization of this right in Articles 10, and 69 of our Constitution, the right to public participation in environmental governance is further entrenched under Article 2 (5) of *the Constitution*. See *Mohamed Ali Baadi and others v Attorney General & 11 others*, supra.
15. The Tribunal notes that Kenya has embraced the principles of sustainable development. These are not only captured in *the Constitution* but also in section 3(5) of the EMCA. EMCA defines sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. Section 3(5) of EMCA recognizes the principle of public participation in the development of policies, plans and processes for the management of the environment as one of the key principles of sustainable development.
16. Having opined as hereinabove, we are bound to review the evidence on record to determine whether there was sufficient public participation before the issuance of the EIA license. Towards that end, we are bound by the decision of the High Court in *Mohamed Ali Baadi and others v Attorney General & 11 others*, supra where a Five-Judge Bench laid down the test of determining the adequacy of public participation in environmental matters. The Court held as follows:

‘The standard of ascertaining whether there is adequate public participation in environmental matters, in our view, is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. This means, for example, if you do not comply with the set statutory provisions, then per se there is no



adequate public participation. And, the question is not one of substantial compliance with statutory provisions but one of compliance.’(emphasis ours)

17. We must, therefore, review the evidence on record against the prescribed statutory provisions regarding public participation to determine whether there was compliance with the same.
18. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 imposes an obligation on the proponents of any project in consultation with NEMA to seek views of persons who may be affected by the project. The said regulation states as follows:
 17. Public participation
 - (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.
19. Additionally, under Regulations 21 and 22, prior to the making of any decision on the ESIA Report received by NEMA, NEMA is again required to involve the public. The Regulations specifically requires NEMA to invite the public through the print media and in a prescribed format to make oral and written comments on the ESIA Report. Further, Regulation 20 obligates NEMA to submit a copy of the report to the relevant lead agencies for their comments.
20. Having reviewed the evidence on record, the Tribunal notes that at pages 270-380 of the 2nd Respondent’s Replying Affidavit, the 2nd Respondent has provided documentary evidence minutes of public participation meetings with various groups. In addition, the 2nd Respondent has provided evidence of completed questionnaires indicating feedback from various members of the public.



21. Additionally, the 2nd Respondent published a public advertisement through the Star Newspaper on 5th July 2021 and Standard Newspaper on 8th July 2021, inviting comments from the members of the public on the proposed project. A similar advertisement was run on Radio Salaam, a renowned radio station domiciled in the coastal region, from 6th July 2021 to 25th July 2021. A further advertisement was published in the Kenya Gazette on 16th July 2021 inviting members of the public to submit their comments on the proposed project.
22. The Tribunal also notes that pursuant to its mandatory obligation under Regulation 20, the 1st Respondent submitted a copy of the ESIA report to the relevant lead agencies for their comments. This is as per the letter dated 21st June 2021 at pages 309-310 of the 1st Respondent's Witness Statement.
23. That said, it is the Tribunal's finding that there was no full compliance with the prescribed statutory provisions on public participation. In particular, there was no compliance with Regulation 17. For starters, no evidence was placed before the Tribunal to show that the proponent of the proposed project publicised the project and its anticipated effects and benefits by 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 as mandatorily required.
24. Further, whereas there was publication of a notice of the proposed project in two newspapers of nationwide circulation, the same was not done for two successive weeks in total defiance of Regulation 17(2)(a)(ii).
25. In addition, whereas the Respondents have provided evidence of public participation meetings in compliance with Regulation 17(2)(b), no evidence has been placed before the Tribunal to show compliance with Regulation 17(2)(c). Under the said regulation, the proponent of the project is required to 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. Evidence of such notices was not availed.
26. Lastly, under Regulation 17(2)(d), the proponent of the proposed project is mandated to ensure, in consultation with the Authority, that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority. There was no evidence placed to show that such a qualified coordinator was appointed.
27. Having found that there was no compliance with the set statutory provisions regarding public participation, it follows that there was no sufficient public participation before the issuance of the impugned license. Therefore, the Tribunal finds the 1st ground of appeal to be merited.

Whether there was failure to assess safety, security and environmental concerns before the issuance of the EIA license

28. The Appellants allege that there was a failure to assess safety, security and environmental concerns before the issuance of the EIA license. Apart from making a blanket statement, the Appellants have not specified the concerns which were not addressed.
29. Be that as it may, the Tribunal notes that in approving the TOR for the EIA study, the 1st Respondent made it mandatory for the proponent to undertake a Quantitative Risks Assessment (QRA) and Cumulative Impacts Assessment (CIA) of the Potential Environmental and Social Impacts of the proposed project. Further on TOR approval condition 4 and 5 the proponent was required to ensure the project design complies with the Gazetted Kenyan standards, codes of practice and guidelines used



in safety, design, installation and operation of bulk LPG facilities, common user manifolds and LPG pipelines. Further, the proponent was required to provide a risk-based emergency response plan with sufficient proof of risk management capacity. This is evidenced by the 1st Respondent's letter dated 7th June 2021 found at pages 149-150 of the 1st Respondent's witness statement.

30. The Tribunal has reviewed the EIA study report and the oral evidence presented by parties, and notes that the report adequately addresses the impacts of the project on safety, security and environment. That notwithstanding, the 1st Respondent vide the letter dated 14th October 2021, raised several issues to be addressed by the 2nd Respondent. The 2nd Respondent's consultant replied through the letter dated 21st October 2022.
31. The response was found to be inadequate and further issues on the project's risks and safety were raised vide the letter dated 9th November 2021. On 18th March 2022 the proponent submitted a qualitative risk assessment with risk assessment matrix with clear potential risks, mitigation measures and risk rating before and after mitigation.
32. It was only after the 1st Respondent was satisfied that the potential impacts of the proposed project on safety, security and environment were adequately assessed, mitigatable and the appropriate safeguards put in place that it issued the EIA license.
33. Further, the Tribunal agrees with the 1st Respondent's submissions that the responsibility of a project proponent towards the environment does not end with the issuance of an EIA licence. The EIA process continues through the EIA Licence conditions and which form the premise on which NEMA and other lead agencies can monitor compliance by the proponent and issue improvement orders where necessary. Indeed, condition 1.9 of the EIA license provides that the proponent shall comply with NEMA's improvement orders throughout the project cycle.
34. From the foregoing, it is evident that the impacts of the project to safety, security and the environment were assessed, and the appropriate safeguards put in place. It must therefore follow that the claim that there was failure to assess safety, security and environmental concerns before issuance of the impugned EIA license is without merit and the same is hereby dismissed.

Whether there was failure to consider the project's proximity to a navigation channel and a major highway

35. It is urged by the Appellants that there was no consideration that the project is close to a navigation channel and a major highway and therefore any incident or accident will have a devastating on the coastal economy that is heavily dependent on the said road and port.
36. After reviewing the evidence on record, the Tribunal notes that the project is located 10 kilometers from the ocean and 600 Meters from Mikindani Highway. Between the project and the Highway there is the Kenya Railways Cargo Shank area.
37. In any case, we note that the project is proposed for construction of a purely storage depot. All pipelines that will transport liquefied gas from the Kipevu Oil Terminal common user manifold shall run along the Kenya Petroleum Refineries Limited wayleave set aside for that specific purpose.
38. The Tribunal, therefore finds that no evidence has been provided by the Appellants to show how the project risks the navigation channel and the road. Consequently, this ground of appeal fails.



Whether there was failure to consider that the project operations will affect air quality on micro-scale though exhaust emissions from trucks as well as fugitive emissions (leakages)

39. It is alleged that the Respondents failed to consider that the project operations will affect air quality. Regarding the emissions from trucks, we agree with the 2nd Respondent that the law places the responsibility of controlling air pollution by motor vehicles on the owner of the vehicle. This is provided under Section 82 of EMCA.
40. With respect to leakages, the Tribunal notes that the project is exclusively a storage facility. There will be no combustion, and therefore the risk of leakage is minimal. Further, to mitigate on potential disasters occasioned by leakages, the project proponent, undertook, in the ESIA report to add an odorant to the gas once pumped to the facility for ease of detection in case of any leakage. Further, under conditions 2.12, 3.14 and 3.15 of the EIA license, the 2nd Respondent is obligated to comply with Environmental Management and Coordination (Air Quality) Regulations of 2014 and ensure that appropriate and functional efficient air pollution control mechanisms are installed in the facility to control air emissions.
41. It is therefore follows that the claim that the Respondents failed to consider that the project operations will affect air quality is misplaced and without merit. Consequently, this ground of appeal also fails.

Whether there was failure to stimulate potential disaster scenarios and the containment measures thereof.

42. It is the Appellants' contention that the Respondents failed to stimulate potential disaster scenarios associated with the project and the containment measures thereof. It is alleged that some of the risks associated with LPG include 'Boiling Liquid Expanding Vapor Explosions' (BLEVE)
43. As testified by the 2nd Respondent's witnesses and as clearly stated on the face of the EIA license, the LPG will be stored and transported from the Kipevu Oil Terminus in mounded bullet storage containers. Philip Abuor, the 2nd Respondent's expert witness, testified that the mounded bullets are a safer option for LPG storage than conventional methods because situations leading to a possible boiling liquid expanding vapour explosion (BLEVE) are eliminated. It was further testified that the mound protects the plant from fire, radiation and acts of terrorism and vandalism.
44. It is also urged by the 1st Respondent that compliance with KS 1938-3:2012: -The handling storage and distribution of LPG in domestic commercial and industrial installation; KS EAS 924-3:2020: -providing minimum safety distances and above ground fire water storage tank; API 2510:-The American Petroleum Institution Standard on design and construction of LPG installation and handling facilities and ASTM A106-02s: Standard specifications for seamless carbon steel pipe for high-temperature service; will make the occurrence of BLEVE impossible.
45. The Tribunal takes note of condition 3.2 of the EIA licenses, which in no uncertain terms requires the proponent to put in place adequate LPG spill/leakage containment measures. Further, the proponent is liable to maintain the hazard and impact zones of the LPG depot and associated facilities, such as the delivery pipeline and tankers on transit within the perimeters of the permitted project site, including the worst case of BLEVE.
46. From the foregoing, the Tribunal finds that there are adequate safeguards put in place to deal with any disaster which might arise from the project's operations. Therefore, this ground of appeal is without merit and the same is hereby dismissed.



Whether the Respondents failed to respond and/or act on the Appellants' complaints

47. The Appellants allege that the Respondents failed to respond and/or act on their complaints. It is trite law that who alleges must prove pursuant to Section 107 of the [Evidence Act](#). The Appellants have not provided evidence of the alleged complaints which were not responded to or acted upon. Consequently, the Tribunal finds this claim to be without merit and the same is hereby dismissed.

Whether the Respondents failed to consider the project's impact on marine biodiversity

48. The Tribunal agrees with the 1st Respondent's contention that the proposed project's marine footprint is limited to the LPG importing vessels which are well regulated and governed by the relevant national and international laws. Further, in case of accidental leakages, the LPG vaporizes into gaseous form under normal atmospheric conditions and hence very low likelihood of spillage into the ocean.
49. In addition, the Tribunal notes that under EIA license conditions 2.1 & 3.19 the proponent is obligated to comply with the relevant laws and lead agency requirements like the Kenya Maritime Authority, Kenya Fisheries Service, Kenya Wildlife service, Kenya Forest Service, Kenya Marine and Fisheries Research Institute hence safeguarding the marine biodiversity and the socio-economic activities of fishermen along Makupa Creek and beyond.
50. The Tribunal therefore finds this ground of appeal to be without merit and the same is hereby dismissed.

C. Final Orders

51. Under Section 129(3) of EMCA, upon hearing any appeal, the Tribunal has powers to issue orders that are necessary for the enhancement of the principles of public participation. This is in line with Article 159(2)(e) which obligates Courts and Tribunals to promote the values and the principles of [the Constitution](#) while exercising judicial authority. Among these principles is Sustainable development provided under Article 10(2)(d) of [the Constitution](#).
52. Further, Section 3(5) of EMCA provides public participation as one of key principles of sustainable development. As such, having found that there was no sufficient public participation before the issuance of the impugned EIA license the Tribunal allows the Appellant's Appeal in the following terms:
- a. EIA License No: NEMA/EIA/PSL/17984 issued on 28th March 2022 to the 2nd Respondent by the 1st Respondent for the establishment of a 42,000MT Liquefied Petroleum Gas Mounded Storage Depot, comprising 6No. mounds with 4No. tanks each of 7,000MT and filling plant, 15Km long 300mm diameter LPG import pipeline from the New Kipevu Oil Terminal Common User Manifold (KOT-CUM) via Kenya Petroleum Refineries Limited wayleave, tanker-truck loading gantry of 20No. trucks capacity, rail siding, 2No. fire water storage tanks each of 1,017m², vehicle parking, associated facilities and amenities Located at Unsurveyed Kenya Railway Corporation's Land in Changamwe Marshalling Yard, Mombasa County is hereby cancelled.
 - b. The Respondents are hereby directed to undertake fresh public participation in full compliance with the law and in particular the Environmental (Impact Assessment And Audit) Regulations, 2003.
 - c. Upon compliance with (b) above, the 1st Respondent be at liberty to re-issue the EIA license to the 2nd Respondent.



d. Each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI, THIS 13TH DAY OF DECEMBER 2023

EMMANUEL MUMIA.....CHAIRMAN

WINNIE Tsuma.....VICE-CHAIR

KARIUKI MUIGUA.....MEMBER

DUNCAN KURIA.....MEMBER

RONALD ALLAMANO.....MEMBER

