



**North Bay Estates Limited v National Environment Management Authority & 2 others
(Tribunal Appeal 22 of 2023) [2024] KENET 504 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KENET 504 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 22 OF 2023
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA,
VICE CHAIR & DUNCAN KURIA, MEMBER
MARCH 18, 2024**

BETWEEN

NORTH BAY ESTATES LIMITED APPELLANT

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

ATLAS TOWER KENYA LIMITED 2ND RESPONDENT

RAMADHANI HAMISI MWAFISI 3RD RESPONDENT

JUDGMENT

Introduction

1. Before the Tribunal for determination is the Appellant's appeal instituted by way of a Notice of Appeal dated 15th August 2023. The appeal principally invites the Tribunal to revoke Environmental Impact Assessment License No. NEMA/EIA/PSL/26397 issued by the 1st Respondent to the 2nd Respondent on 19th June 2023.
2. The face of the Notice of Appeal reveals eight grounds of appeal, which are reproduced verbatim:
 - a. The 1st Respondent issued the NEMA Licence Number NEMA/EIA/PSL/26397 to the 2nd Respondent without taking into consideration the views of the Appellant, who is the immediate neighbour of the project site being, Plot No. Kwale/Mabokni/1466, or other neighbours in close proximity to the proposed project;
 - b. The 1st Respondent failed to conduct a proper and objective due diligence on the 2nd Respondent's project report;



- c. The public participation that was conducted on 14th April 2023 was flawed and inadequate to the extent that the Appellant and others, being the immediate neighbours to the project site were never involved;
- d. The 2nd Respondent failed to carry out adequate public participation, and failure by the 1st Respondent to ensure that adequate public participation was done before the issuance of the licence in question;
- e. The 2nd Respondent failed to consider that the project is very close to the Appellant's gate and the only entrance to the Appellant's camp, and as such, it would be prudent of it to get and consider the Appellant's views on the project;
- f. The 2nd Respondent failed to get and consider the views of the Appellant, who is the immediate resident of the project site on which the 2nd Respondent is setting up a telecommunication mast, and instead involved residents that are more than 10 meters from the project site;
- g. The project report submitted by the 2nd Respondent to the 1st Respondent was manifestly skewed, lacked objectivity, did not properly capture the environmental issues at hand, failed to comply with the applicable mandatory methodology, and was a mere exercise of 'box-ticking' to give credence to an already preordained eventuality;
- h. Failure by the 1st Respondent to conduct a proper and objective due diligence on the 2nd Respondent's project report with the result that it issued an Environmental Impact Assessment Licence improperly and in breach of the applicable laws and regulations.

Background

- 3. The 1st Respondent describes itself as a wireless tower infrastructure company engaged in the business of developing multi-use wireless infrastructure designed to improve connectivity, amongst other purposes. Desirous of installing a new Greenfield Global System for Mobile Communications (GSM) station, the 2nd Respondent applied for an Environmental Impact Assessment Licence for the project to be located on Plot No. Kwale/Mabokoni/1466-Muhaha.
- 4. Satisfied that the application met the threshold laid under section 58 of EMCA, the 1st Respondent proceeded to issue the impugned EIA Licence. It is the 1st Respondent's decision dated 19th June 2023 that forms the substratum of the instant appeal.
- 5. Following the decision, the Appellant moved the Tribunal pursuant to Rule 4(1) of the Environment Tribunal Procedure Rules, 2003, seeking the following reliefs:
 - a. The Appeal be allowed;
 - b. The Environment Impact Assessment Licence No. NEMA/EIA/PSL/26397 issued by the 1st Respondent to the 2nd Respondent on 19th June 2023 revoked;
 - c. Costs be awarded to the Appellants; and
 - d. Any other Order that the Tribunal may deem fit.
- 6. The Appellant's appeal is supported by the witness statement sworn by Joseph Odhiambo Oliech on 15th August 2023 and accompanied by four annexures.
- 7. In opposition to the Appeal, the Respondents filed their Replies to the Notice and Grounds of Appeal dated 4th October 2023 and 7th September 2023, respectively. The 1st Respondent's Reply to the Notice



and Grounds of Appeal is supported by the statement of Esther Mwita sworn on 4th October 2023, while the 2nd Respondent's Reply to the Notice and Grounds of Appeal is supported by the statement of Samuel Kagwi sworn on 9th October 2023.

8. The appeal proceeded by way of viva voce evidence, whereafter parties were directed to file and exchange submissions. The Appellant filed submissions dated 15th November 2023, which were supplemented by further submissions dated 6th February 2024. On the other hand, the 2nd Respondent filed submissions dated 29th November 2023.

Issue for determination

9. Having carefully considered all the pleadings, oral evidence, and submissions filed by the parties, we find that the singular issue that is dispositive of the instant appeal is whether there was sufficient public participation before issuing the impugned EIA license.

Whether there was sufficient public participation before issuing the impugned EIA license.

10. It is the Appellant's case that the 2nd Respondent failed to involve it in the public consultation meeting of 14th April 2023. According to the Appellant, being the immediate neighbour of the project site, it was incumbent upon the 2nd Respondent to invite its representatives to the public consultation forum.
11. During the hearing, the 2nd Respondent's witness, Glorious Mbura, testified that interested persons likely to be affected by the project were invited to the public consultation forum of 14th April 2023. She further testified that she visited the Appellant's premises when the Appellant failed to send a representative to the public consultation forum, only to find no one at the premises.
12. The question we must, therefore, answer is whether the failure to involve the Appellant in the public consultation forum was fatal and whether it offers a sufficient basis for revocation of the EIA license. We shall do this in a little while.
13. Although Glorious Mbura, the 2nd Respondent's witness, testified that the forum attracted between 20 – 25 persons, the evidence on record indicates that the forum attracted 11 participants, all of whom signed the public consultation form annexed to the 2nd Respondent's bundle of documents. She further testified that at the forum, information relevant to the project was disseminated, after which participants were guided on how to fill out the questionnaire. Her testimony is supported by the minutes dated 14th April 2023, forming part of the 2nd Respondent's bundle of documents.
14. The questionnaires annexed to the 2nd Respondent's bundle of documents are eleven (11) in number. They all exhibited favourable responses from the participants. This, in our view, may be attributable to the presentation made by an EIA expert. The minutes reveal that participants were assured that the project would not have adverse effects as studies have shown zero evidence of biological or adverse health effects from the BTS project. Participants were also assured that the area would have enhanced internet services upon completion of the project.
15. Esther Mwita, the 1st Respondent's witness, testified that she visited the project site and had an opportunity to speak to each of the attendees at the public consultation forum. She confirmed to the Tribunal that the public engagement had indeed taken place. Additionally, the attendees pointed out their homes, which were either immediate neighbours of the project or reasonably close.
16. Having set out the rival positions on public participation as pleaded by parties and brought out during the hearing of the Appeal. We now turn to the law on public participation.



17. Article 10 (2) (a) of the Constitution outlines the participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Article 69(1) (d) of the Constitution provides that the State shall encourage public participation in environmental management, protection and conservation.
18. The four corners of public participation were contoured by a 3 Judge bench of the Environment and Land Court in the case of Luo Council of Elders & 8 others V County Government of Bomet & 24 others [2018] eKLR. Creating an awareness of the thematic issues and affording members of the public a reasonable opportunity to air their views unhindered does not in itself satisfy the threshold of public participation. In Mohamed Ali Baadi and others v Attorney General & 11 others (supra), the Court established that there must also be compliance with prescribed statutory provisions on public participation.

‘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.’
19. By dint of Legal Notice No. 150 of 2016, the proponent’s project falls under the second schedule to EMCA as ‘telecommunication infrastructure.’ Consequently, Regulation 17(2)(b) of the Environmental (Impact Assessment and Audit Regulations) 2003, which otherwise calls for a more robust and reinvigorated approach to public participation, does not apply. This position was amplified by Hon. Justice Angote in Douglas Onyancha Omboga & 3 others v Joseph Karanja Wamugi & 4 others [2019] eKLR in the following manner:
 35. Legal Notice No. 150 of 2016 has categorised “Telecommunication infrastructures” amongst the projects that require an Environmental Impact Assessment (E.I.A) Project Report and not an Environmental Impact Assessment (E.I.A) Study Report. The Projects requiring an Environmental Impact Assessment (E.I.A) Project Report are categorised as low and medium risk projects while those that require an Environmental Impact Assessment (E.I.A) Study Report are categorised as “High Risk Projects.”
 36. Unlike Environmental Impact Assessment (E.I.A) Project Reports, all Environmental Impact Assessment (E.I.A) Study Reports are supposed to be published in the Gazette and in at least two Newspapers circulating in the area of the project. As stated above, the construction of “telecommunication infrastructure” does not fall in this category unless the NEMA finds that the project will have a significant impact on the environment, in which case it will require that the proponent undertakes an Environmental Impact Assessment Study
20. Applying the principles enunciated above to the facts presently before us, we are satisfied that the 2nd Respondent made reasonable attempts at facilitating public participation. The Appellant’s invitation to the Tribunal will result in the Appellant’s views being run roughshod over the view of the other residents who live close to the project. We note that during the hearing of the appeal, Esther Mwita’s testimony was uncontroverted.
21. Having failed to attend the public consultative forum held on 14th April 2023, another chance at a second bite at the cherry presented itself with the publication of the notice of ‘extend user’ in two newspapers of nationwide circulation, the Standard and Taifa Leo on 26th April 2023. This publication, in and of itself, dispels the narrative advanced by the Appellant that the project was shrouded in secrecy. Had the Appellant led evidence that it made comments on the project following



the publication of 26th April 2023 and the comments were disregarded altogether, this Tribunal would have taken a different position.

22. To our minds, the constitutional imperative of public participation does not lay an onerous burden on the proponent of a project; on the contrary, it aims to ensure reasonable involvement of the people in the decision-making process.
23. We are satisfied by the efforts made by the 2nd Respondent towards having the Appellant participate in the public consultative forum of 14th April 2023, and we align ourselves with the holding of the Hon. Justice Limo in *Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party) (Constitutional Petition 4 of 2019) [2022] KEHC 158 (KLR)*, "Public participation does not mean that everyone must give their views on the issue at hand as to attain such a standard at times can be impractical." Can it be said that the Appellant seek to vindicate a right to a clean and healthy environment that ranks in priority to the other eleven (11) persons occupying property neighbouring the project? We find in the negative.

Final Orders

24. In view of the above analysis and findings, the conclusion becomes irresistible that the Appellants' Notice of Appeal dated 26th August 2022 is devoid of merit. Accordingly, the same is hereby dismissed with an order that each party bears their own costs.

DATED AND DELIVERED AT NAIROBI, THIS 18TH DAY OF MARCH 2024

EMMANUEL MUMIA - CHAIRMAN

WINNIE TSUMA - VICE-CHAIR

DUNCAN KURIA - MEMBER

