



**Maina (Suing as the Chairman of Lavington Five Roads Association) v
National Environment Management Authority & another (Tribunal Appeal
36 of 2022) [2023] KENET 1348 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KENET 1348 (KLR)

**REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 36 OF 2022**

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

NOVEMBER 21, 2023

BETWEEN

**NDIRANGU WA MAINA (SUING AS THE CHAIRMAN OF LAVINGTON FIVE
ROADS ASSOCIATION) APPELLANT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST
RESPONDENT**

WOODRIDGE CENTRE LIMITED 2ND RESPONDENT

JUDGMENT

1. The Appellant instituted this appeal vide a Notice of Appeal dated 4th October 2022 and filed on 11th October 2022.
2. The Appeal is against the grant of an Environmental Impact Assessment License No. NEMA/EIA/PSL/21303.
3. The relief which the Appellant is seeking before the Tribunal is the revocation of the EIA License No. NEMA/EIA/PSL/21303.

Parties' Submissions

4. The Appellant filed his written submissions dated 18th October 2023 and the 2nd Respondent filed its written submissions dated 31st October 2023.
5. The 1st Respondent did not file its written submissions.



Analysis and Findings

6. Having considered the Appellant's appeal, responses by the Respondents and submissions by the parties, the Tribunal has identified the following issues for determination:
 - a. Whether public participation was undertaken before commencement of the project;
 - b. Whether EIA License No. NEMA/EIA/PSL/21303 was lawfully and regularly issued by the 1st Respondent to the 2nd Respondent; and
 - c. What orders should the Tribunal make?Whether public participation was undertaken before commencement of the Project
7. The Appellant submits that the EIA license was issued contrary to the laid down requirements and was never involved in public participation despite the fact that the Appellant and members of the Resident's Association would be most likely to be affected by the development of the petrol station.
8. The Appellant further submits that the 2nd Respondent in Paragraph 12 (f) of its response to the Statement of Appeal stated that it:

“published a public notice in the Kenya Gazette and in a leading newspaper with Nationwide circulation calling for the public to submit oral and written comments on the ESIA Study Report.”
9. It is the Appellant's submission that the 2nd Respondent's Director, Mohammed Salah Ismail and its expert witness, Solomon Kyeni, both admitted at cross-examination that contrary to the 2nd Respondent's averment in its response, there was never a notice published in the Kenya Gazette.
10. It is the Appellant's further submission that the 2nd Respondent's director and witness, confirmed that the advertisement in the daily newspaper related only to an application for change of user and not in the application of the EIA License. Nothing in the newspaper advertisement made mention of an EIA Licence.
11. The Appellant contends that the purported Environmental Impact Assessment Study Report failed to meet the criteria set forth in Rule 17 of the Environmental (Impact Assessment and Audit) Regulations 2003, Legal Notice No. 101 as follows:
 - a. The 2nd Respondent did not consult the persons likely to be affected by the project, which includes the Appellant and the residents around the said estate.
 - b. The 1st Respondent failed to ensure that the appellant and multiple other residents including learning institutions around the area were consulted or their views were taken into account in preparing the study report.
 - c. The 2nd Respondent did not post any posters in the vicinity of the project site regarding the proposed project.
 - d. The 2nd Respondent did not publish a notice of the proposed project at all or for 2 successive weeks in a newspaper of nationwide circulation regarding the application for the change of user. The 2nd Respondent only published an advertisement for a change of user for a single day.



- e. The 2nd Respondent did not make an announcement for the notice in both official and local languages in a radio with nationwide coverage for at least once a week for two consecutive weeks.
 - f. The 2nd Respondent did not hold even a single meeting to discuss the project and its effects, whereas three were required. Only a single meeting was held and that revolved around the change of user application and in the said meeting the Residents' Association aired its objections as regards the change of user and no conclusion was arrived at, with the promise of future engagement.
12. The Appellant further contends that the 2nd Respondent presented before this Tribunal a total of 12 questionnaires as evidence of public participation and that some of the questionnaires have no names, it is also unclear how the 2nd Respondent, embarking on such a huge development of a petrol station elected to engage only a hand full of person for their views, it is unclear how these participants were selected and so many other persons likely to be affected by the construction were left out.
 13. The Appellant therefore submits that in any event any attempt by the 2nd Respondent fell below the legal requirements.
 14. The 2nd Respondent contends that it submitted an Environmental Impact Assessment Report where it highlighted the environmental concerns raised by the persons affected by the project and the various mitigation measures incorporated into the project to make it sustainable, safe and legally compliant.
 15. The 2nd Respondent submits that the impugned project does not fall within the projects classified as high risk as it does not pause any significant adverse effect on the environment therefore the 1st Respondent did not require the 2nd Respondent to conduct an Environmental Impact Assessment Study but rather submit an Environmental Impact Assessment Project Report and in that regard, the 2nd Respondent complied with the provisions of [Environmental Management and Co-ordination Act \(EMCA\)](#).
 16. The 2nd Respondent further submits that Regulation 7 of the Environmental (Impact Assessment and Audit) Regulations, 2016 provides for what is to be included in such a report and that none of these requirements specify that the Report must be gazetted in the Kenya Gazette or published in the dailies before the presentation of the project report to the 2nd Respondent.
 17. The 2nd Respondent contends that Legal Notice No. 31 of 2019 at paragraph 9 has categorized "service stations" under Hydrocarbon Projects as being Medium Risk Projects under hydrocarbons projects which include, inter alia, service stations that require an Environmental Impact Assessment Project Report and not an Environmental Impact Assessment Study Report.
 18. The 2nd Respondent further contends that the project undertaken by the 2nd Respondent falls within the realm of Regulation 7 of the Environmental (Impact Assessment and Audit) Regulations 2003 under categorization of low and medium risk projects.
 19. The 2nd Respondent points to several exhibits showing that there was public participation with the neighbours and stakeholders.
 20. The 2nd Respondent contends that the Minutes produced as Annexure WC – 5 of the 2nd Respondent's Statement of Response at page 23 under Minute 4, the environmental concerns raised by the residents was discussed and the mitigation measures under page 74 were proposed.



21. The 2nd Respondent submits that the planning meeting which the Appellant is referring to was held on 28th June 2022 as demonstrated by the Minutes at pages 33-38 whereby the parties discussed wholistically the issues specific to the planning aspect of the project.
22. The 2nd Respondent further submits that in addition to the meeting held on 11th June 2022, the 2nd Respondent engaged the neighbours and stakeholders through Social Site Assessment questionnaires pursuant to the provisions of Sections 58 of the Environmental Management and Coordination Act and Environmental (Impact Assessment and Audit) Regulations 2003.
23. It is the 2nd Respondent's submission that what has been demonstrated is reasonable public participation and that the Tribunal should not reinvent the wheel on the statutory provision on public participation in respect of Project Reports.
24. Public participation has been enshrined as a national value and principle of governance under Article 10 (2) (a) of [*the Constitution*](#) of Kenya, 2010.
25. Public participation is a key component of the EIA process in Kenya. Part VI of EMCA provides the procedure for Environmental Impact Assessment.
26. Public participation was discussed in the case of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, where the Court observed as follows in relation to the principle of public participation:

‘Public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.’
27. Justice E. K. Wabwoto in Communist Party of Kenya v Nairobi Metropolitan Services & 3 others; National Environment Management Authority & another (Interested Parties) [2022] eKLR stated that:

“Regulation 17 only applies to Environmental Impact Assessment reports that have been submitted as “study reports” and not “project reports”. The Petitioner totally misapprehend the law when they referred to the application of this provision to the 1st Respondent’s project herein. In a project report, NEMA is not mandated to conduct a separate public participation. The Court agrees with the submissions made by the 1st Interested party that there is no law requiring Environmental Impact Assessment (E.I.A) Project Reports to be published in the Kenya Gazette and in at least two Newspapers circulating in the area of the project. Project reports are governed by Part II of the Legal Notice No. 101 of 2003, while study reports are governed by Part III thereof as was further demonstrated in case of Douglas Onyancha Omboga & 3 others v Joseph Karanja Wamugi & 4 others [2019] eKLR, Environment and Land Case 102 of 2017.”
28. The Tribunal has considered the evidence and submissions by parties on this issue.



29. Considering the facts presented to the Tribunal on the question of public participation, the Tribunal finds that there was proper public participation before issuance of the EIA License No. NEMA/EIA/PSL/21303.

Whether EIA License No. NEMA/EIA/PSL/21303 was lawfully and regularly issued by the 1st Respondent to the 2nd Respondent

30. This Tribunal is established under Section 125(1) of EMCA, and its jurisdiction is provided for under Section 129(1) and (2) of EMCA which provides as follows.

“Any person who is aggrieved by: -

- (a). The grant of a license or permit or a refusal to grant a licence or permit or the transfer of a licence or permit under this Act or its Regulations.
- (b) The imposition of any condition, limitation, or restriction on the persons license under this Act or its Regulations.
- (c) The revocation, suspension, or variation of the person’s license under this Act or its Regulations.
- (d) The amount of money which required to paid as a fee under this Act or its Regulations.
- (e) The imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations,

“May within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal, in such manner as may be prescribed by the Tribunal.”

- (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

31. The Tribunal can thus only determine whether the EIA licence was lawfully and regularly issued within the confines of its jurisdiction. The Tribunal therefore shall not address the issue of change of user.
32. The Tribunal finds that the EIA licence was lawfully and regularly issued by the 1st Respondent to the 2nd Respondent.

What orders should the Tribunal make?

33. Based on the foregoing analysis, the Tribunal makes the following orders:

- a. The Appeal be and is hereby dismissed; and
- b. Each party to bear their own costs.

34. The parties’ attention is drawn to the provisions of Section 130 of the EMCA.

DATED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2023

EMMANUEL MUMIA.....CHAIRPERSON



WINNIE TSUMA.....VICE-CHAIRPERSON
KARIUKI MUIGUA.....MEMBER
DUNCAN KURIAMEMBER
RONALD ALLAMANOMEMBER

