



**Menegai West Stakeholder Forum & 10 others v National Environmental
Management Authority & another (Tribunal Appeal 6 of 2021)
[2023] KENET 1263 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KENET 1263 (KLR)

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 6 OF 2021
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
DECEMBER 5, 2023

BETWEEN

MENEGAI WEST STAKEHOLDER FORUM 1ST APPELLANT
SOLOMON MANYARKIR 2ND APPELLANT
JACKSON KIMELI 3RD APPELLANT
RAY K. KIPTANUI 4TH APPELLANT
ALLEXANDER K. KENDA 5TH APPELLANT
LUKA K. R TUIGONG 6TH APPELLANT
TIMOTHY NGETICH 7TH APPELLANT
LYDIA J. KOMEN 8TH APPELLANT
EVANS K. KIPTUI 9TH APPELLANT
DANIEL Y. CHIRCHIR 10TH APPELLANT
ROSE KOMEN 11TH APPELLANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 1ST
RESPONDENT
SOSIAN ENERGY LIMITED 2ND RESPONDENT



JUDGMENT

1. The Appeal before this Tribunal for determination was instituted by way of a Notice of Appeal dated 13th April 2021 and filed on even date. The Appeal primarily challenges the 1st Respondent's decision to issue the 2nd Respondent with an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/10003 for Geothermal Exploration Drilling. The impugned Licence was issued on 12th February 2021 to the 2nd Respondent.
2. In their Notice of Appeal, the Appellants seek the following reliefs:
 - a. That the 1st Respondent's decision to grant the 2nd Respondent an EIA License be set aside.
 - b. That a Strategic Environmental Assessment be undertaken for all geothermal activity planned by the Geothermal Development Company within Menengai area under what it refers to as the 'Menengai Geothermal Project'
 - c. That after the said Strategic Environmental Assessment, a new Environmental Impact Assessment Study be conducted by the 2nd Respondent in full compliance with the law, including regulations, based on specific and current information, and involving all relevant stakeholders
 - d. That each party bears its own cost.
3. When the matter was set down for hearing, the Tribunal heard the testimony of seven witnesses from the Appellant, one witness from the 1st Respondent and four witnesses from the 2nd Respondent. Following the close of the hearing, the Tribunal directed parties to file written submissions.
4. The Appellants filed written submissions dated 12th July 2022, the 1st Respondent filed written submissions dated 7th September 2022, and the 2nd Respondent filed written submissions dated 6th September 2022.

Analysis and Findings

5. Having considered the Appellants' appeal, responses by the Respondents and submissions by the parties, the Tribunal has identified the following issues for determination:
 - a. Whether the requirement of public participation was complied with before issuance of the EIA license;
 - b. Whether Environmental Impact Assessment Licence No. NEMA/EIA/PSL/10003 was lawfully and procedurally issued to the project proponent; and
 - c. What orders should this Tribunal make?Whether the requirement of public participation was complied with before the issuance of the EIA licence
6. The Appellants pleaded, called evidence and submitted at length on the inadequacy of the public participation conducted prior to the issuance of the disputed EIA Licence.
7. Public participation is a constitutional imperative and finds statutory expression under section 59 of EMCA. Regulation 7 of the Environmental (Impact Assessment and Audit) Regulations, 2003, hereinafter called the 'EIA' Regulations' provides that:



- (1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
- (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—
 - (a) Publicize the project and its anticipated effects and benefits by:
 - (i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
 - (ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and
 - (iii) making an announcement of the notice in both official and local languages on a radio with nationwide coverage 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."
8. In their evidence before the Tribunal, the Appellants' witnesses testified that there was no public participation in the project as they did not see the notices inviting them for the meeting before the date of the public hearings.
9. Principle 10 of the Rio Declaration on Environment and Development, 1992 provides that:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."
10. In Constitutional Petition No. 305 of 2012, *Mui Coal Basin Local Community & 51 Others v Permanent Secretary Ministry of Energy & 17 Others*, the Court set out the minimum basis for adequate public participation as follows:-

"From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

 - a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft



the modalities of public participation but in so doing, the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed, and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

Sachs J. of the South African Constitutional Court stated this principle quite concisely thus: “The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) AS 31 (CC.”

11. The Appellants contend that the 2nd Respondent failed to publicise the project for the benefit of the residents to know the projected effects and impact by way of posters informing the affected parties and communities of the proposed project.
12. The Appellants further allege that the 2nd Respondent failed to hold at least 3 public participation meetings with the affected people and other concerned parties before the approval of the of the Environment Project Report.
13. The Appellants further contend that the EIA Licence was granted without a sufficient public hearing being conducted to enable the Appellants and persons living in close proximity to the project give feedback on the serious environmental challenges caused by the project to enable the 2nd Respondent mitigate the same.
14. The 1st and 2nd Respondents, on the other hand, contend that in carrying out the EIA Study, they invited residents living within the proximity of the project site as required under the Regulations in order to allow them to participate by rendering their opinions regarding the various diverse effects the project was likely to have on them.
15. 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.
16. 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 impugned EIA License.
Whether Environmental Impact Assessment Licence No. NEMA/EIA/PSL/10003 was granted on the basis of a deficient EIA study Report
17. The Appellants contend that the EIA license was issued on the basis of a deficient EIA study report. They contend that the EIA study report does not contain baseline data on air quality, mischaracterizes the health effects of the exposure to hydrogen sulphide, failed to undertake a climate change vulnerability assessment and failed to conduct a baseline noise measurement.



18. The Appellants further contend that the approval did not consider the statutory guidelines on the sustainable development of the area where the project is being undertaken and the environment surrounding it. This limb of the submission is vehemently opposed by the Respondents.
19. The 1st Respondent further submits that the testimony given by the expert witnesses called by the Appellant failed to disclose sufficient reasons to doubt that the conditions set out in the licence were insufficient to address the concerns raised by the Appellant.
20. We have carefully reviewed the conditions set out on the face of the licence and are satisfied that the conditions address the concerns raised by the Appellants. However, as an additional safeguard, we direct that the Appellants prepare and lodge with the 1st Respondent a Climate Impact Assessment Study Report within 24 months of the Judgment.

Orders

21. Based on the foregoing analysis, the Tribunal makes the following orders:
 - a. The Appellants' appeal be and is hereby dismissed:
 - b. The 2nd Respondent is directed to prepare and lodge with the 1st Respondent a Climate Impact Assessment Study report within 24 months of this Judgment: and
 - c. Each party to bear their own costs.

DATED AND DELIVERED ELECTRONICALLY THIS 5TH DAY OF DECEMBER 2023

EMMANUEL MUMIA.....CHAIRPERSON

WINNIE TSUMA.....VICE-CHAIRPERSON

KARIUKI MUIGUA.....MEMBER

DUNCAN KURIAMEMBER

RONALD ALLAMANOMEMBER

