



Bayusuf & 4 others v Marble Inn Developers Limited & another (Tribunal Appeal 43 of 2022) [2023] KENET 1254 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KENET 1254 (KLR)

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI
TRIBUNAL APPEAL 43 OF 2022
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR, KARIUKI
MUIGUA, DUNCAN KURIA & RONALD ALLAMANO, MEMBERS
DECEMBER 21, 2023

BETWEEN

ABDULHAKIM AHMED BAYUSUF 1ST APPLICANT
KUTBUDIN SADIQALI DUNGARAWALLA 2ND APPLICANT
SALIM HASSANALI BHALLOO 3RD APPLICANT
KISHOR MEGHJI GUDKA 4TH APPLICANT
FARHIYA ABDI YUSUF 5TH APPLICANT

AND

MARBLE INN DEVELOPERS LIMITED 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 2ND
RESPONDENT

JUDGMENT

A. Introduction

1. The Appellants moved the Honorable Tribunal by way of a Notice of Appeal dated 7th November 2023 seeking that the Tribunal issue the following reliefs:
 - a. Set aside the decision of NEMA delivered on 7th December 2022 and revoke the EIA license NEMA/EIA/PSL/21427
 - b. Issue an injunction restraining the 2nd Respondent, his agents, assignees, representatives and/or contractors from commencing, proceeding or continuing the proposed development by the 2nd Respondent of the development of forty-two (42) apartments on seven(7) floor and two



(2) 5-bedroom penthouse with a total built area of 9,211m² on Plot L.R. No. 7812/Section I/ Mainland North in Mkomani, Mombasa County

- c. To make a declaration that the Comprehensive Environmental Impact Assessment Project Report (CPR) for the proposed Development on plot L.R. No. 7812/Section I/Mainland North in Mkomani, Mombasa County, dated 19th August 2022, contains false or misleading information, pertaining to public participation.
 - d. To make a declaration that the Comprehensive Environmental Impact Assessment Project Report (CPR) for the proposed Development on plot L.R. No. 7812/Section I/Mainland North in Mkomani, Mombasa County, dated 19th August 2022, contains false or misleading information, pertaining to Title with specific reference to Clause 3 & 4 of the Special Conditions contained therein.
 - e. To revisit the factual evidence and find that the 2nd Respondent is guilty of submitting a report to the 1st Respondent containing false or misleading information and issue orders accordingly.
2. The Notice of Appeal was accompanied by a Notice of Motion Application dated 7th November 2022. The Said Application is supported by six affidavits sworn by the Appellants. Noting that no witness statements were filed in support of the appeal, the Tribunal will consider the affidavits in determining the appeal. However, noting that the 5th Appellant has filed a Notice of Withdraw from the suit, his affidavit will not be considered.
 3. Whereas the Appeal is premised on 5 grounds. The Tribunal notes that the same can be condensed into 2 grounds as follows: Grounds 1, 2, and 3 allege that there was no adequate public participation before the issuance of the impugned EIA license, while Grounds 4 and 5 raise issues pertaining to control developments, change of user and special conditions of titles. In essence, the Appellants allege that the proposed development is against the special conditions attached to the title in question.
 4. The 2nd Respondent is opposed to the appeal through its Response dated 16th November 2023.
 5. Parties agreed to canvass the appeal by way of written submissions, and in that regard the Appellants filed their submissions dated 5th December 2023 while the 2nd Respondent filed its submissions dated 8th December 2023 and undated supplementary submissions.

B. Analysis And Determination

6. Having considered the parties' pleadings, the evidence on record and the submissions by parties, the Tribunal has distilled the following as the issues arising for determination:
 - i. Whether there was sufficient public participation before the issuance of the impugned EIA license
 - ii. Whether the Tribunal has jurisdiction to hear and determine Grounds 4 & 5 of the Notice of Appeal.
7. 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.
8. 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.



9. 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 representatives 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)

10. 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.
11. 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.
12. Indeed, looking at international law and comparative law and how this right of public participation has been contextualised, 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 constitutionalisation 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.
13. 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.
14. 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.’

15. 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. The Appellants allege that there was no sufficient public participation conducted before the issuance of the impugned EIA license. In particular, the Appellants allege that there was no compliance with Rules 17 & 21 of the Environmental (Impact Assessment and Audit) Regulations.
16. It is the Appellant’s case that the 2nd Respondent failed to hold at least three public meetings with the affected parties and issue meeting notices to be sent out at least one week prior to the meetings as provided under Regulation 17. Further, the Appellants allege that the 2nd Respondent did not appoint a suitably qualified coordinator to receive and record both oral and written comments during public meetings.
17. It is further urged by the Appellants that the 1st Respondent did not abide by Regulation 21 by failing to invite members of the public to give their comments on the environmental impact assessment report and by failing to publicize the proposed project for two successive weeks in the Gazette and in a newspaper with a nation-wide circulation.
18. In response, the Respondent argues that Regulations 17 and 21 are not applicable to the proposed project, which is a middle-risk project. The Tribunal takes cognizance of the fact that under the Regulations the extent of public participation varies depending with the nature of the project and further depending on whether the Environmental Impact Assessment Report is processed as a project report or a study report.
19. The proposed project is for construction of (42) apartments on a ground plus 7 floors which is a medium risk project as per Paragraph 2 of the Second Schedule;

Medium Risk Projects

- (1) Urban Development including —
 - (a) establishment of multi-dwelling housing developments of not exceeding one hundred units;
 - (b) tourism and related infrastructure;
 - (c) hotels with bed capacity not exceeding one hundred and fifty; and
 - (d) shopping centers, commercial centers and complexes, business premises, shops and stores not exceeding ten thousand square meters.
20. For medium risk projects, the applicable legal framework is Regulations 7-10. They provide as follows:
 7. Preparation of project report
 - (1) Every proponent undertaking a project specified in the Second Schedule of the Act as being a low risk project or a medium risk project, shall submit to the Authority a summary project report of the likely environmental effect of the project.
 - (2) The project report submitted under sub regulation (1) shall specify —



- (a) the nature of the project;
 - (b) the location of the project including —
 - (i) proof of land ownership, where applicable;
 - (ii) any environmentally sensitive area to be affected;
 - (iii) availability of supportive environmental management infrastructure; and
 - (iv) conformity to land use plan or zonation plan; and
 - (c) potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project.
- (3) Upon receipt of the project report under sub regulation (1), the Authority shall, within five days, undertake screening and assessment thereof for completeness and—
- (a) where the Authority considers that the proposed project may have a significant adverse environmental impact, it shall recommend that the proponent should prepare and submit a comprehensive project report; or
 - (b) where the Authority considers that the proposed project is not likely to have any significant adverse environmental impact, it shall exempt the proponent from submitting a comprehensive project report and issue the proponent with an approval to proceed with the project.
- (4) The comprehensive project report prepared pursuant to a recommendation under sub regulation (3) (a), shall specify —
- (a) the nature of the project;
 - (b) the location of the project including —
 - (i) proof of land ownership;
 - (ii) the Global Positioning System coordinates; and
 - (iii) the physical area that may be affected by the project's activities;
 - (c) the activities that shall be undertaken during the project construction, operation and decommissioning phases;
 - (d) a description of the international, national and county environmental legislative and regulatory frameworks on the environment and socio-economic matters;
 - (e) the preliminary design of the project;
 - (f) the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal;
 - (g) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project;
 - (h) an analysis of available alternatives including an alternative —



- (i) project site;
 - (ii) design;
 - (iii) technologies; and
 - (iv) processes, and the reasons for preferring the proposed site, design, technologies and processes;
 - (i) an action plan for the prevention and management of possible accidents during the project cycle;
 - (j) a plan to ensure the health and safety of the workers and neighbouring communities;
 - (k) the economic and socio-cultural impacts to the local community and the nation in general;
 - (l) a plan to ensure the relocation or resettlement of persons affected by the project;
 - (m) a strategic communication plan to ensure inclusive participation during the study and provide a summary of issues discussed at the public participation forum;
 - (n) an environmental management plan;
 - (o) integration of climate change vulnerability assessment, relevant adaptation and mitigation actions;
 - (p) the project cost; and
 - (q) any other information the Authority may require.
- (5) In preparing a project report under this regulation, the proponent shall consider the issues specified in the Second Schedule.
- (6) A project report prepared under this regulation shall be prepared by an environmental impact assessment expert who is registered under these Regulations.

8. Submission of project report

A proponent shall submit at least two copies of the project report to the Authority or the Authority's appointed agent in the prescribed form accompanied by the prescribed fees.

9. Comments on project report

- (1) Where the project report conforms to the requirements of regulation 7(1), the Authority shall within seven days upon receipt of the project report, submit a copy of the project report to—
- (a) each of the relevant lead agencies;
 - (b) the relevant District Environment Committee; and
 - (c) where more than one district is involved, to the relevant Provincial Environment Committee, for their written comments which comments shall be submitted to the Authority within twenty one days from the date of receipt



of the project report from the Authority, or such other period as the Authority may prescribe.

- (2) On receipt of the comments referred to in subparagraph (1) or where no comments have been received by the end of the period of thirty days from the date of receipt of the project report, the Authority shall proceed to determine the project report.

10. Approval of project report

- (1) On determination of the project report, the decision of the Authority, together with the reasons thereof, shall be communicated to the proponent within forty-five days of the submission of the project report.
- (2) Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule to these Regulations.
- (3) If the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with these Regulations.
- (4) A proponent who is dissatisfied with the Authority's decision that an environmental impact assessment study is required may within fourteen days of the Authority's decision appeal against the decision to the Tribunal in accordance with regulation 46.

21. From the above provisions, the Tribunal deduces that every proponent of a medium-risk project is required to submit to the Authority (NEMA) a summary project report of the likely environmental effect of the project. If the Authority considers that the proposed project may have a significant adverse environmental impact, it shall recommend that the proponent should prepare and submit a comprehensive project report.

22. Upon submission of the comprehensive project report, if the Authority is satisfied that the project will have no significant impact on the environment or that the project report discloses sufficient mitigation measures, the Authority may issue the EIA License. On the other hand, if the Authority finds that the project will have a significant impact on the environment and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study. It is only upon preparation and submission of the environmental impact assessment study report that Regulation 17 and Regulation 21 become applicable.

23. In the instance case, the Tribunal notes that the Authority was satisfied that there was no need for an environmental impact assessment study. We have reviewed the comprehensive project report annexed to the 1st Appellant's Affidavit, and we agree that the same discloses sufficient mitigation measures for any impacts the proposed project may have on the environment. It is, therefore, our finding that Regulations 17 and 21, which the Appellants are relying on in arguing that there was no sufficient public participation, are not applicable in this case.

21. That said, noting that public participation is a constitutional imperative, we are mandated to review the evidence on record to determine whether there was sufficient public participation. A perusal of the Comprehensive Environmental Impact Assessment Project Report shows that the project proponent submitted public consultation questionnaires to the members of the public who are likely to be affected by the proposed project. This is evidenced by the completed



questionnaires found at pages 81 to 108 of the 1st Appellant's affidavit. We also find that the Comprehensive Environmental Impact Assessment Project Report satisfied the requirements of Regulation 7 of the Environmental (Impact Assessment and Audit) Regulations.

24. Considering the nature of the proposed project, it is our finding that there was sufficient public participation before the issuance of the impugned EIA license. We are guided by the principles of public participation set out in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, where the Court held 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) SA 311 (CC))”

- a. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.

- a. Fourth, 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.

- a. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
- a. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

ii. Whether the Tribunal has jurisdiction to hear and determine Grounds 4 & 5 of the Notice of Appeal

25. It is trite that the jurisdiction of a Court flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. In the context of this appeal, the Tribunal's jurisdiction stems from Section 129 of EMCA which provides for, inter alia, appeals emanating from grievances about the grant or refusal or transfer of a license or permit, the imposition of any condition, limitation, or restriction on any license, the revocation, suspension or variation of a person's license, or the imposition against the person of an environmental restoration order or environmental improvement order by the Authority.
26. We note that Grounds 4 and 5 raise development control and planning issues in that the proposed project is in conflict with the special conditions of the title in question. The Tribunal does not have jurisdiction to deal with development control and planning issues. This is a preserve of the County Physical and Land Use Planning Liaison Committee Pursuant to Sections 78, 79, and 80 of the Physical and Land Use Planning Act.
27. As such, it is our finding that the Tribunal does not have jurisdiction to hear and determine Grounds 4 and 5 of the Notice of Appeal. To hold otherwise would amount to encroaching on the jurisdiction of the County Physical and Land Use Planning Liaison Committee.

C. Conclusion

28. In view of the above analysis and findings, the conclusion becomes irresistible that the Appellant's Notice of Appeal dated 7th November 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 21ST DAY OF DECEMBER 2023

EMMANUEL MUMIA - CHAIRMAN

WINNIE TSUMA - VICE-CHAIR

KARIUKI MUIGUA - MEMBER

DUNCAN KURIA - MEMBER



RONALD ALLAMANO - MEMBER

