



REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL
AT NAIROBI

APPEAL NO. NET 10 OF 2019

NO TO SAFARICOM B.T.S MAST

RESIDENTS OF NEW VALLEY

KITENGELA (suing through its

Representatives) JACQUELINE

MAKENA ROBERT,

JOSEPH GITHAIGA MUTAHI.....1ST APPELLANT

GEORGE WAITHAKA & 80 OTHERS..... 2ND APPELLANT

VS

DIRECTOR GENERAL NEMA.....1ST RESPONDENT

SAFARICOM LIMITED.....2ND RESPONDENT

JUDGMENT

1.0 Introduction

1) The Appellants lodged this appeal on April 25, 2019. The appeal is against the 1st Respondent's decision to issue a license to the 2nd Respondent to construct a Base Transceiver Station on L.R. No. Kajiado/Kaputiei-North/24490. The grounds upon which the appeal is premised are set out in a Statement on grounds of appeal as follows:

a) NEMA issued the licence in question without taking into consideration the adverse physical danger the installation of the 30M Safaricom Transceiver Station (BTS) on L.R. No. Kajiado/Kaputiei-North/24490

at St, Stephen Kitengela would have on the appellants' immediate neighbours of the project site as the project site is barely 20M from their homesteads;

b) NEMA issued the licence without considering the adverse health hazards the installation of the Base Transceiver Station (BTS) on L.R. No. Kajiado/Kaputiei-North/24490 at St, Stephen Kitengela would have on the appellants due to the electromagnetic radiation from the BTS;

c) The decision by the 2ND Respondent to install the Base Transceiver Station (BTS) on L.R. No. Kajiado/Kaputiei-North/24490 at St, Stephen Kitengela was made in ignorance/disregard of the appellants' views on its impacts which views were submitted to the 2nd Respondent on 10th September 2018 opposing the project;

d) THAT the public hearings were flawed to the extent that the 2nd Respondent failed and/or neglected to provide the truth regarding

the Base Transceiver Station;

e) THAT the projected questionnaire development in the EIA Study Report was barely distributed to all the stakeholders as far as it relates to the 2nd Respondent's Base Transceiver Station;

f) THAT NEMA in approving the licence in question failed to consider that the appellant's views and the fact that the EIA was irregular, flawed, and inadequate;

g) THAT NEMA failed despite notice to ensure that the 2nd Respondent complied with its STOP ORDER issued on 8th April thereby allowing the 2nd Respondent to proceed with the implementation of the project in total disregard of the STOP ORDER and the appellants' grievances;

h) THAT NEMA failed despite notice to ensure that conditions in the license more particularly construction condition number 4 were adhered to by the 2nd Respondent who has in breach of those conditions proceeded to construct during the night following the 1st Respondent's STOP ORDER;

i) THAT the 2nd Respondent failed despite notice to comply with the STOP ORDER issued on 8th April 2019 and by so doing proceeded with the implementation of the disputed project in total disregard of the

STOP ORDER and the appellants' grievances on its impact on their health;

j) THAT the 2nd Respondent failed to comply with the conditions in the license more particularly construction condition number 4 and by so doing proceeded with the construction of the Base Transceiver Station at night contrary to construction conditions.

2) The Appellants ask this Tribunal to visit the site for the Base Transceiver Station to establish its proximity to the appellants' homes, to stop the ongoing installation and order it moved to another non residential area, to find that it is wiser to err in not issuing a license than tolerate possible irreversible harm to the appellants, to revoke the decision of the 1st Respondent to issue the licence to the 2nd Respondent, and to make an order for Respondents to pay costs.

3) The 1st Respondent did not file any response to the appeal.

4) A replying affidavit and a reply to the grounds of appeal were filed on behalf of the 2nd Respondent. The replying affidavit filed on 5th August 2019 was sworn by **Doreen Ochodo**. The reply to the grounds of appeal was filed on even date.

5) The 2nd Respondent states that it conducted all its operations in question in compliance with all statutory requirements. The 2nd Respondent also avers that it undertook public participation and that the Environmental Impact Assessment Project Report presented to the 1st Respondent was a true representation of the factual status quo. It further avers that the Environmental Impact Assessment Project Report reflected all the aspects related to the venture including public opinions and perceptions of the proposed venture.

6) The 2nd Respondent states that it engaged in numerous attempts to schedule a meeting with the appellants to address their concerns and in compliance with the 1st Respondent's directive on the same. It stated that the appellants did not respond to the invitations for mutual consultation to quell anxiety among the appellants.

2.0 Summary of the parties' submissions

2.1 Appellants' Submissions

7) The Appellants filed written submissions on 30th August 2019 through their advocate one **Mr. Makumi**. The submissions addressed four issues for determination. On the issue whether public participation was conducted effectively and satisfactorily, the Appellants contended that they were not properly informed of the pros and cons of the project. The Appellants argue that when they learnt of the project, they immediately raised their concerns with the respondents but their views were only considered when the 1st Respondent issued a STOP ORDER on 8th April 2019. The Appellants further argued that no evidence was led by the respondents to show that the community was ever sensitized about the project or that their issues were addressed. The Appellants relied on *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others Constitutional Petition No. 305 of 2012* [2015] eKLR.

8) On the issue whether the 2nd Respondent breached the conditions of the EIA licence issued to them by the 1st Respondent, the Appellants relied on **Section 63 of the Environmental Management and Coordination Act 1999 and Regulation 45(2) of the Environmental (Impact Assessment and Audit) Regulations, 2008**. It was the Appellant's submission that the 2nd Respondent breached the conditions of the EIA license issued by the 1st Respondent by: (a) failing to undertake proper baseline measurements; (b) constructing at night within a span of 15 days as opposed to 21 days the 2nd Respondent; (c) not communicating the risk of communication and failing to address the appellants' issues vide their various letters; (d) failing to undertake proper mitigation measures in line with the EIA License.

9) The third issue was whether the 2nd Respondent complied with the directives of the Stop Order issued on **8th April 2019**. The Appellants submit that the appellants raised various concerns to the 1st Respondent in response to which the latter issued a STOP ORDER containing a set of conditions. Some of the conditions were the requirement to address the appellants' concerns and to conduct a risk communication exercise to sensitise the project affected persons on the impacts of the installation in question. The Appellant argues that the 2nd Respondent proceeded with construction hurriedly contrary to the STOP ORDER without conducting any consultations.

10) The Appellants' fourth issue is whether the construction of the BTS Mast may cause or has already caused health and safety risks to the appellants and the environment. The Appellants argue that the 2nd Respondent's BTS mast is located too close to residential houses and thus should be relocated to a non-residential area. The Appellants relied on *Nairobi High Court of Kenya Misc Civ Application No 400 of 2006 Sam Odera & 3 Others v The National Environmental Management Authority & another [2006] eKLR*.

2nd Respondent's Submissions

11) The 2nd Respondent filed written submissions on 24th September 2019. In the submissions, they addressed four issues for determination: (a) whether the 2nd Respondent conducted a public participation exercise in accordance with various laws; (b) what is the effect of the appellants' objections to the proposed project; (c) whether the 2nd Respondent is in adherence with the conditions of the EIA License and the STOP ORDER dated 8th April 2019; and (d) whether the appellants stand to suffer health and safety hazards arising from the construction of the project.

12) On whether the 2nd Respondent conducted proper public participation, the 2nd Respondent submitted that the public participation exercise that preceded the construction of the proposed project was undertaken with due regard to all the Project Affected Persons and applicable statutory provisions. The 2nd Respondent relied on *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*.

13) On the third issue, the 2nd Respondent argued that the appellants' beliefs that the installation poses health and safety hazards are misinformed. The 2nd Respondent's position was that there is a rebuttable presumption that the safety of the result of any given procedure is a derivative of the integrity of the procedure employed in the particular end. They argued that they have complied with the applicable laws in every step of the project.

14) On the fourth issue, the 2nd Respondent argued that it has not violated any Operational Conditional as stipulated in the EIA License. It also argued that the appellants have filed their claim in bad faith and on premature allegations. The 2nd Respondent states that the appellants have approached the Tribunal with unclean hands.

15) The 2nd Respondent as represented by **Mr. Omeri** chose not to call any witnesses.

16) The 1st Respondent as represented by **Mr. Wabwoto and Mr. Gitonga** did not file written submissions or call any witnesses.

3.0 Issues for determination

17) We have carefully perused the pleadings, bundles of documents, written submissions and authorities filed on behalf of the parties and have taken into consideration the oral evidence given by the parties. The Tribunal finds that the following issues require determination:

a) Whether the Environmental Impact Assessment License dated 6th March 2019 [Registration No. NEMA/EIA/PSL/7499] was properly issued by the 1st Respondent to the 2nd Respondent;

b) Whether the Proposed Project is likely to pose environmental harm to the Appellants;

c) Which orders should the Tribunal make?

4.0 Analysis and determination

4.1 Whether the Environmental Impact Assessment License dated 6th March 2019 [Registration No. NEMA/EIA/PSL/7499] was properly issued by the 1st Respondent to the 2nd Respondent

18) Section 58 (1) of the Environment Management and Coordination Act provides as follows:

'Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.'

19) **Regulation 4 of the Environment (Impact Assessment and Audit) Regulations, 2003** provides that no proponent shall implement a project –

a) likely to have a negative environmental impact; or

b) for which an environmental impact assessment is required under the Act or these Regulations; **unless an environmental impact assessment has been concluded and approved in accordance with these Regulations.**

20) **Legal Notice 150 of 2016** contains a list of ‘**Projects to Undergo Environmental Impact Assessment**’ and among them is

‘Telecommunication infrastructures’ which is categorized under medium risk projects.

21) The evidence before the Tribunal shows that the 1st Respondent reviewed the Project Report presented by the 2nd Respondent and was satisfied that it did not pose any substantial risk to the environment. Nevertheless, the appellants called one **Jacqueline Makena Robert** as a witness on **28 June 2019** who stated that the residents did oppose the project and wrote to the 1st Respondent’s NEMA office in Kajiado expressing their discontent.

The 1st Respondent never replied to the letter but the 1st Respondent proceeded to issue the 2nd Respondent with the EIA licence while disregarding the views of the resident as to the risks of the project.

22) The Appellants also called an expert witness, one **Benjamin Malwa Langwen** on **7th August 2019** who relied on the report attached to Jacqueline Makena Robert’s witness statement as filed on **25th June 2019**. The witness lead evidence to the effect that the project was bound to comply with the precautionary principle because there was uncertainty as to the risks of the project.

23) It is not in dispute that the Appellants are the immediate residents of the piece of land surrounding **L.R. No Kajiado/Kaputiei-North/24490** (the suit land) on which the 2nd Respondent has erected a base transceiver station. According to the Appellants, they were never consulted before the 1st Respondent issued them with an Environmental Impact Assessment Licence to put up a telecommunication mast on the suit land. To wit, the 2nd Respondent conducted public consultation but tactically avoided the residents that live near the suit land and instead involved residents that are more than 100 metres from the project site.

24) The Appellants wrote to the 1st Respondent expressing their concerns regarding the project but there was no response or action. The 1st Respondent proceeded to issue the 2nd Respondent with the EIA License without due consideration of the residents near the suit land. It is only after the issuance of the license to the 2nd Respondent and the residents’ letter dated 29th March 2019 that the 1st Respondent issued a Stop Order.

25) The Appellants have adduced various documents showing allegations of the risks of radiation which the 2nd Respondent has opposed by classifying their fears as misinformed. The 2nd Respondent labelled the concerns of the residents as a result of the fear of the unknown as shown in the Replying Affidavit of the 2nd Respondent. The 2nd Respondent also responded by stating that the need for public participation is not a requirement that the views of the public must prevail.

26) Essentially, the appellants raise the point that despite raising objections to the project and highlighting their fears and concerns on the possible risk of the BTS, they were ignored by the Respondents. They argue that there was insufficient public consultation and that the EIA License was improperly issued.

27) Pursuant to **Article 2(5) and 2(6) of the Constitution, the Rio Declaration on Environment and Development (1992) applies to Kenya. Principle 10 of the Rio Declaration** requires that environmental issues are best handled with participation of all concerned citizens at the relevant level. **Article 70(3) of the Constitution and Section 3 of EMCA 1999** also reiterate the right to a clean and healthy environment.

28) We have read the EIA Report and we would like to draw particular attention to **page 24, Note 5.3.6 ‘The No Action Alternative’** which highlights the disadvantages of not proceeding with the project. All the disadvantages revolve around the loss of revenue to the 2nd Respondent. The EIA Report should have reflected a proper balance of all relevant considerations and not merely leaning towards the loss of revenue because the residents living in the area deserve a clean and healthy environment. The appellants are not mere instruments of revenue for the 2nd Respondent to the neglect of all other environmental considerations. On balancing between economic development and environmental concerns, we rely on **MC Mehta – v- Union of India AIR 1988 SC 1037** where in ordering closure of a tannery, the learned judges opined that; **“we are conscious that closure of tanneries may bring about unemployment, loss of revenue, but life, health and ecology have greater importance to the people.”**

29) In the creation of an EIA Report, the views of the persons in the vicinity of the project must be consulted and their views taken into account as required in **Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2013** which provides the parameters for public participation. The EIA Report does not disclose any involvement of the residents near the suit land. Chapter 6 of the Report at page 26 only shows stakeholder consultation with no regard to the views of the Appellants.

30) The manner in which the EIA Study was conducted does not show any regard for the views and concerns of the residents who would be affected. As we have shown elsewhere in this judgment, the 2nd Respondent sought the views of residents who are not in the immediate vicinity of the project. Relying on the holding in **John Kabukuru Kibicho & another v County Government of Nakuru & 2 others [2016] eKLR**, the views of the residents near the suit land ought to have been taken into consideration by the 1st Respondent and 2nd Respondent.

31) It behooved the 2nd Respondent to sensitize the public and to address their concerns. It is not enough to rule out their concerns as misinformed or based on a fear of the unknown. In undertaking the project, the 2nd Respondent should have taken more active steps beyond distribution of a handbook as stated on **Page 32-33 of the EIA Report** or box ticking of questionnaires.

32) The upshot of the above is that the 1st Respondent did not conduct due diligence on the 2nd Respondents' project report with the result that it issued an Environmental Impact Assessment Licence improperly. In the same vein, there was inadequate public participation involving the appellants.

4.2 Whether the Proposed Project is likely to pose environmental harm to the Appellants

33) **Principle 15 of the Rio Declaration** states that:

‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’

34) The Precautionary Principle has four central parameters namely:

- a) **taking preventive action in the face of uncertainty;**
- b) **shifting the burden of proof to the proponents of an activity;**
- c) **exploring a wide range of alternatives to possibly harmful actions; and**
- d) **increasing public participation in decision-making.**

35) Preventative action ought to be taken when there is uncertainty as to the extent of the environmental harm a proposed project would occasion. In this case, the feedback from the Appellants and the area residents clearly shows that some of their environmental concerns have not been addressed in the project report and the risk of harm to the environment and health of the area residents who reside near the site of the proposed development is too great to be ignored.

36) Therefore, the proposed project is likely to pose environmental harm to the Appellants.

4.3 Which orders should the Tribunal make?

37) In view of the findings made above, the Tribunal makes the following orders:

- i. The Appellants' appeal is hereby allowed;**
- ii. The Environmental Impact Assessment License dated 6th March 2019 [Registration No. NEMA/EIA/PSL/7499] is hereby set aside and revoked;**
- iii. The 2nd Respondent shall undertake an Environmental Impact Assessment Study Report in accordance with the Environment (Impact Assessment and Audit) Regulations, 2003 and submit it to the 1st Respondent within 30 days from the date of this judgment;**
- iv. Each party will bear their own costs.**

Parties' attention is drawn to the provisions of section 130 of EMCA.

Dated and delivered at Nairobi this 22nd day of June 2020

Mohammed S. Balala Chairperson

Christine KipsangVice Chairperson

Bahati Mwamuye Member

Waithaka Ngaruiya Member

Kariuki Muigua Member

This judgment was delivered by way of sending the same on email to the parties in accordance with their consent of the parties given to the Tribunal by way of video link