



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

APPEAL NO. NET 173 OF 2016

JOSEPHAT KYOLOLO WAMBUA1ST APPELLANT

MIKE MULUNGA MUTUA 2ND APPELLANT

VERSUS

DIRECTOR GENERAL–

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 1ST RESPONDENT

JEFERSON MWENDWA MUTHAMA 2ND RESPONDENT

JOYCE MUTINDI MUTHAMA 3RD RESPONDENT

JUDGMENT

1.0 Introduction

1. The Appellants lodged this appeal on 15th March 2016. The appeal is against the 1st Respondent's decision to issue a license to Jefferson Mwendwa Muthama to construct 12 dwelling units at Syokimau. The grounds upon which the appeal is premised are set out in a Statement on grounds of appeal as follows:

- a) At all material times, the 1st & 2nd Appellants were the registered proprietors of all those parcels of land known as L.R 12715/10194 and L.R 12715/10191 both located at Syokimau area of Machakos County;
- b) The 2nd & 3rd Respondents were at all material times the registered proprietors of all those parcels of land known as L.R 12715/10192 and L.R 12715/10193 both located at Syokimau area of Machakos County;
- c) The aforesaid parcels of land known as L.R 12715/10192 and L.R 12715/10193 are adjacent to each other and are located in between the Appellants' respective properties;
- d) The Syokimau area is a zoned location and in particular, the area where the Appellants' as well as the 2nd & 3rd Respondents' properties are situated is designated as a low density user zone (Z4) and in this regard, only one dwelling house is permitted for construction on every 1/8 acre area;
- e) The 2nd & 3rd Respondents' land parcels L.R 12715/10192 and L.R12715/10193 measure up to an 1/8 of an acre each and ¼ acre in total since their utilization is for all practical purposes consolidated;
- f) The Appellants aver that the 2nd & 3rd Respondents in their tiny plots commenced construction of 12 family dwelling units sometimes in October 2015 on plots that were ideally meant for 2 dwelling units only;
- g) The Appellants aver that the subject development by the 2nd & 3rd Respondents was subject to obtaining an Environmental Impact Assessment (EIA) and the NEMA Environmental Impact Assessment Licence but however the excavation, building of the foundation and laying of the structure by the 2nd & 3rd Respondents was carried out contrary to the requirements of Section 58 of the Environment Management & Coordination Act;
- h) The Appellants aver that they have raised protests through themselves and through the Syokimau Residents Association but NEMA failed and or ignored to give any due regard to the issues being raised or otherwise to address them;

i) The Expert and the Proponent did not obtain a public opinion by publicizing the project and its anticipated effects and benefits; did not hold at least three public meetings with the affected parties and communities to explain the project and its effects and to obtain their oral or written comments; did not ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meeting are convenient for the affected communities and other concerned parties;

j) The Respondents after having been stopped by NEMA with (sic) construction resumed again around 2nd March 2016 before the licence was issued on 9th March 2016;

k) The Officer in-charge of NEMA at Machakos County lied to the Appellants that the licence had by the time the construction resumed on 2nd March 2016 been issued with a licence when he knew that fact to be untrue;

i. The Appellants aver that the subject construction by the 2nd & 3rd Respondents have adverse environmental effects as follows:

ii. The mushrooming of a high density residential premises on an area meant for low density due to the existing topography will lead to a strain in all the infrastructures including roads, drainage, sewerage system and garbage disposal and collection;

iii. The manner in which the 2nd & 3rd Respondents have carried out the development where the buildings are placed wall to wall leaved little room and space for other facilities and Natural Disaster prevention;

iv. There is no sewer line in the area and neither a septic tank due to capacity nor a bio digester due to the existing impervious rock can manage the waste emitted which waste shall inevitably spill over to the Appellants premises thus endangering the Appellants', their households and placing them at risk of contracting water borne diseases;

iv. Water in Zone 4 area is scarce and introducing a huge population will lead to sanitation challenges;

v. The Syokimau area is prone to flooding due to the topography and other factors and when the flooding happens, the sewerage management on the 2nd & 3rd Respondents developments will certainly be a disaster and the most direct victims of this mess will be the Appellants;

vi. The provision of other utilities including water, roads and power to the subject property in issue will adversely affect the Appellants;

vii. By building the residential premises on a wall to wall basis without leaving any room in between the wall and the residential premises, a shadow will be cast over the Appellant's premises thus depriving them of their ancient right to light.

2. The Appellants ask this Tribunal to revoke the EIA licence issued by the 1st Respondent, Make an order for restoration of the premises against the 2nd & 3rd Respondents and make an order for Respondents to pay costs.

3. The 1st Respondent filed a Reply to Grounds of Appeal. In the response, the 1st Respondent states that it received an EIA project report on 18th December 2015 from the 2nd Respondent for consideration in order to issue the EIA licence. It states that the report contained questionnaires filled by various stakeholders during consultation and that the issues that were raised during consultation were factored in the mitigation section of the report. The 1st Respondent states that despite forwarding the EIA report to lead agencies and requesting for feedback from them regarding the proposed project, none of the lead agencies objected to the project.

4. The 1st Respondent's Officers visited the site on 7th January 2016 for site verification and prepared a report. After it was satisfied that the 2nd Respondent's proposed project had met all the legal requirements for issuing an EIA licence it issued the licence together with various conditions.

5. The 1st Respondent states that it ensured that it took the Appellants' views into consideration, followed all laid down rules and procedures and was satisfied that the proponent had obtained all approvals from the relevant authorities and used the threshold established by the law before approving and granting the subject licence.

6. A replying affidavit was filed on behalf of the 2nd and 3rd Respondents. The affidavit was sworn by Jefferson Mwendwa Muthama. The 2nd and 3rd Respondents oppose the appeal on the grounds that the reliefs sought by the Appellants cannot issue because the project they are undertaking falls outside the criteria required for submission of an Environmental Impact Assessment Study Report. Secondly, the grounds of appeal do not disclose particulars in support of their alleged cause of action/claim relating to the decision by the Respondent (sic). Thirdly, the 2nd and 3rd Respondents state that the Appeal is an abuse of court process because the Appellants had been offered an opportunity to express their objections but chose to waive that right. Therefore the Appellants cannot seek refuge from this Honourable Court (sic) after sleeping on their rights.

7. The 2nd and 3rd Respondents state that the Appellants have not annexed anything to show that they have proprietary interests in L.R 12715/10194 and L.R 12715/10191. They aver that they obtained all the necessary permissions and approvals for development and that no appeal or suit has been lodged contesting the approvals. They state that the Survey of Kenya took into consideration the dwelling units intended to be constructed on their property before authorizing an approval and that it is improper for the Appellants to allege that only one dwelling house is permitted in a low density user zone (Z4).

8. The 2nd and 3rd Respondents state that public meetings were held between the expert and all affected parties, questionnaires were issued and filled, multiple on-site meeting and deliberations were held on the effects and implications of the project and all issues were taken into

consideration during preparation of the EIA report. They state that the allegations made against them by the Appellants are malicious and constitute falsehoods. The 2nd and 3rd Respondents ask this Tribunal to dismiss the appeal and to allow them to resume construction on their property.

9. A Further Affidavit and Additional Further Affidavit were filed on 14/09/2016 and 24/10/2018 on behalf of the Appellants. Both affidavits were sworn by Mike Mulunga Mutua, the 2nd Appellant. A Supplementary Affidavit sworn by Jefferson Mwendwa Muthama was filed on 17/03/2017 on behalf of the 2nd and 3rd Respondents.

2.0 Summary of the parties' submissions

2.1 Appellants' Submissions

10. The Appellants filed written submissions on 23rd September 2019. The submissions address five issues for determination. On the issue whether the 2nd and 3rd Respondents commenced the project before issuance of an EIA licence, the Appellants contend that under section 58 of the EMCA the 2nd and 3rd Respondents were forbidden from commencing a project of the kind they were undertaking without authority from the 1st Respondent. The Appellants argue that the 2nd and 3rd Respondents began construction activities in October 2015 and that the 2nd Respondent confirmed in his testimony that he had started the project before the acquisition of the EIA licence and that the cover page of the EIA report.

11. On the issue whether the 2nd and 3rd Respondents continued with construction despite the existence of the appeal, the Appellants argue that under Section 129 (4) of the EMCA, an appeal acts as a stay of construction pending determination of the appeal. They contend that the photographs on the cover page of the EIA report, the photographs attached to the supporting affidavit sworn by the 1st Appellant on 21st April 2016 and the photographs attached to the Further Affidavit sworn by the 2nd Appellant on 23rd October 2018 show the progression of the construction and dispel the averments made by 2nd Respondent that construction stopped. In addition, the Appellants submit that the 2nd and 3rd Respondents changed the building plans since pictures the finished building show a flat roof yet the building plans submitted show that the roof was to be slanted.

12. The Appellants submit on the issue whether procedure was followed in obtaining the EIA (sic) that the licence was procured irregularly because the process for change of user suffered a number of irregularities and there was no public participation during the formulation of the EIA report. On whether the project affects the environmental rights of the neighbours and area residents, the Appellants submit that the area in question is zoned and that although a zoning map executed by the county has not been availed, the titles show in the special conditions that the area is a low density residential area. In addition, the Appellants submit that the 2nd and 3rd Respondents have violated that the fundamental rights under Article 42 of the Constitution of Kenya as well as Section 3 of the Environmental Management and Coordination Act.

13. The fifth issue addressed by the Appellants is whether the 2nd and 3rd Respondents have an Environmental Management Plan in place. The Appellants submit that the 2nd Respondent admitted in his testimony that he doesn't know what is an environmental management plan and that there is nothing to show that proper environmental management practices are adhered to during the operation of the project. Further that the hazards and concerns raised by the Appellants have not been addressed in any EMP.

2nd and 3rd Respondents' Submissions

14. The 2nd and 3rd Respondents filed written submissions on 6th December 2019. In the submissions, they argue that they confirmed to this Tribunal that after acquiring all the approvals to start the project, they sought an opinion from the 1st Respondent's office about issuance of an EIA licence and were advised their project fell short of the requirements to conduct an Environmental Impact Assessment Study under the second schedule of the EMCA (Amendment) Act, 2015. However, out of prudence, they sought for the services of a lead expert registered by NEMA to conduct an Environmental Impact Assessment report for residential flats on L.R No. 12715/10192/93. They contend that the construction of the project was only started on the second week of March 2016.

15. The 2nd and 3rd Respondents submit that since the Appellants have admitted that questionnaires were filled regarding the project this amounts to public participation despite the contents therein. They argue that the prior to issuance of the EIA licence by the 1st Respondent, all the factors raised by the Appellants were considered by lead experts and the EIA licence was issued with conditions. In addition the 2nd and 3rd Respondents submit that all the approvals they obtained have not been challenged or revoked and that this Tribunal does not have jurisdiction regarding those matters. They maintain that they have complied with all the conditions in the EIA licence and that there is no basis to warrant the revocation of the EIA licence.

16. The 1st Respondent did not file written submissions.

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 9th March 2016 [Registration No. 0035128] 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 9th March 2016 [Registration No. 0035128] was properly issued by the 1st Respondent to the 2nd & 3rd Respondents

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. In the Second Schedule to the Act among the projects which require submission of an Environment Impact Assessment Study Report is a change in land use including major change in land use.

21. The Appellants have contended that the 2nd and 3rd Respondents commenced construction on their property before obtaining an EIA Licence contrary to Section 58 of the Environment Management and Coordination Act. The 2nd and 3rd Respondents state that they had not obtained the licence during the initial building of the foundation because their project fell short of the projects requiring approval by the National Environmental Management Authority. Although in their submissions they contend that the construction of the project was only started on the second week of March 2016.

22. The 2nd and 3rd Respondents written submissions contradict the averments made by the 2nd Respondent in the Further Affidavit. The pictorial evidence adduced before the Tribunal clearly shows that the 2nd and 3rd Respondents' project commenced before they obtained the EIA licence and continued even after this appeal was lodged by the Appellants. Indeed the EIA Site Inspection Report confirms that the construction activities were going on as at 7th January 2016.

23. This Tribunal's mandate at this juncture is to examine whether the EIA report submitted to the 1st Respondent addressed all the environmental concerns affecting the 2nd and 3rd Respondents' project.

24. Regulation 10 (2) of the Environment (Impact Assessment and Audit) Regulations, 2003 provides that 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. Regulation 10 (3) provides that 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.

25. This Tribunal has examined the Environmental Impact Assessment Report submitted by the 2nd and 3rd Respondents to the 1st Respondent vis-à-vis the environmental issues raised by the Appellants. Most of the issues raised by the Appellants revolve around the negative impacts which the 2nd and 3rd Respondents' project will have in the area during its operational phase.

26. Part 5 of the report deals with impact identification and analysis. Paragraph 5.3.2 of the report deals with the negative impacts of the project during its operational phase and the recommended mitigation measures. The report deals with the issue of water shortage and recommends mitigation measures, solid waste and the recommended mitigation measures, fire hazards and the recommended mitigation measures and lastly insecurity and the recommended mitigation measures.

27. The report does not identify deprivation of light on neighboring properties as a negative impact in order to recommend a mitigation measure, if at all. The report does not provide for mitigation measures when the area is flooded yet at paragraph 3.2.4 the report states that the area is fairly plain with little amount of runoff. Therefore, waste water disposal is a likely negative impact during the operational phase of the 2nd and 3rd Respondents' projects.

28. This Tribunal notes that a majority of the area residents where the 2nd and 3rd Respondents' project is constructed are opposed to the development based on the feedback in the filled questionnaires. It behooves the 1st Respondent to conduct a thorough inspection of the site. However, the EIA Site Inspection Report has very scanty details. It does not state which negative impacts were identified by the report vis-à-vis the site of the project.

29. The upshot of the above is that the 1st Respondent did not conduct due diligence on the 2nd and 3rd Respondents' project report with the result that it issued an Environmental Impact Assessment Licence improperly.

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

30. 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.’

31. 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.

32. 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.

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

4.3 Which orders should the Tribunal make?

34. 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 Licence [Registration No. 0035128] dated 9th March 2016 is hereby set aside and revoked;
- iii) The 2nd and 3rd Respondents 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) The 2nd and 3rd Respondents shall not let out, sell or in any way part with possession of the houses to any person or entity until the Environmental Impact Assessment Study Report submitted to the 1st Respondent has been considered.
- v) 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 3rd day of June 2020

Mohammed S. Balala Chairperson

Christine Kipsang Vice Chairperson

Bahati Mwamuye Member

Waithaka Ngaruiya Member

Kariuki Muigua Member