



**REPUBLIC OF KENYA**

**IN THE NATIONAL ENVIRONMENT TRIBUNAL**

**AT NAIROBI**

**TRIBUNAL APPEAL NO. NET 19 OF 2020**

THE GREENBELT MOVEMENT.....1<sup>ST</sup> APPELLANT  
THE WANGARI MAATHAI FOUNDATION.....2<sup>ND</sup> APPELLANT  
DANDORA COMMUNITY JUSTICE CENTRE.....3<sup>RD</sup> APPELLANT  
NATURAL JUSTICE.....4<sup>TH</sup> APPELLANT  
KATIBA INSTITUTE.....5<sup>TH</sup> APPELLANT

**VERSUS**

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT  
CHINA ROAD AND BRIDGE CORPORATION (KENYA).....2<sup>ND</sup> RESPONDENT  
KENYA NATIONAL HIGHWAYS  
AUTHORITY.....INTERESTED PARTY

**RULING**

1. This matter is coming up for Ruling on the Appellants' Notice of Motion Application dated 22<sup>nd</sup> September 2020 which seeks the following orders:

***a. Spent.....***

***b. That the Tribunal direct the Respondents and Interested Parties to disclose the following information:***

***i. The Final Design for the Expressway; and***

***ii. The Public-Private Partnership Agreement (PPP Agreement) entered into between the 2<sup>nd</sup> Respondent and Interested Party.***

***c. The Tribunal conduct a site visit at the earliest opportunity not later than the opening of the Respondent's and Interested Party's cases.***

2. The Application is based on the grounds that:

i. Rule 14(2) of the National Environmental Tribunal Rules requires the 1<sup>st</sup> Respondent to submit all the relevant documents for an Appeal to the Tribunal;

ii. Rule 8(2) of the Rules requires any party to the Appeal to submit to the Tribunal any document that it wishes to rely upon during the Appeal;

iii. The Final Designs of the proposed project are critical for assessment of the reasonableness of the 1<sup>st</sup> Respondent's decision to issue the EIA licence;

iv. The PPP Agreement formed a core reason for the 1<sup>st</sup> Respondent's requirement for a full Environmental Social Impact Assessment (ESIA) study for the proposed project and is necessary for assessment of the sufficiency of the economic and social analysis of the project as required in the (Environmental Impact Assessment and Audit Regulations, 2003;

v. The requested documents are not part of the ESIA Study Report and have not been produced by any parties to the Appeal and the Interested Parties have failed to produce the said documents despite requests for production of the same;

vi. There are demolitions that have been carried out due to the proposed project thus the need to conduct a site visit to establish the adequacy of the mitigation measures as proposed in the EIA Study Report and the EIA Licence.

3. The 1<sup>st</sup> Respondent opposed the said Application through a Replying Affidavit sworn on 30<sup>th</sup> September 2020 by Marrian Kioko, the Chief Environment Officer of the 1<sup>st</sup> Respondent. In its opposition to the Application, the 1<sup>st</sup> Respondent stated that:

i. The EIA reports only required the provision of preliminary designs and not the final designs as the EIA process may influence some changes in the design of the project;

ii. The final designs would only be required during the annual audits to be submitted by the project proponent for aiding monitoring and evaluation;

iii. The 1<sup>st</sup> Respondent does not have the PPP Agreement in its custody; and

iv. There are no cogent reasons for the site visit during the current times of Covid 19 when social distance is required a safety measure.

4. The 2<sup>nd</sup> Respondent opposed the Application through the Replying Affidavit of Shi Yucheng, who described himself as the company's Deputy General Manager, sworn on 6<sup>th</sup> October 2020, in which it urged the Tribunal to dismiss the Application on the following summarized grounds:

i. The Appeal before the Tribunal is based on allegations of lack of public participation, lack of a strategic environmental impact assessment and a deficient EIA report but not about the final designs or the PPP Agreements;

ii. The documents required for the prosecution of the Appeal including the terms of reference, the environmental social impact assessment report and the proof of public participation have already been availed to the Appellants for prosecution of the Appeal;

iii. Section 60 of the PPP Act provides the nature and scope of the matters that require to be published and does not include the PPP Agreement;

iv. Section 67 of the PPP Act provides for a petition committee with mandates to consider the petitions and complaints emanating from the tendering processes through PPP should be handled through the said committee and not through the National Environmental Tribunal;

v. The information sought by the Appellants violates the provisions of Section 6 (1e) of the Access to Information Act, 2016 as disclosure of that information does prejudice the commercial interests of the 2<sup>nd</sup> Respondent;

vi. The Appellants have not demonstrated how the requested information shall be useful in their presentation of the Appeal as filed; and

vii. The prayer for a site visit is premature and would require the tribunal to evaluate evidence and make an informed decision on whether it requires a site visit.

5. The Interested Party filed a Replying Affidavit sworn on 6<sup>th</sup> October 2020 by Julia Ondeyo, who is described as the Assistant Director of Roads for the Interested Party. The 2<sup>nd</sup> Respondent and the Interested Party are represented by the same firm of advocates and their Affidavits in response to the Notice of Motion Application dated 22<sup>nd</sup> September 2020, largely mirror each other.

6. The Tribunal ordered that the said Application be disposed of by way of written submissions. All the parties filed their respective submissions to the Application. The Tribunal has considered all the pleadings, the submissions and authorities as filed by the parties.

### **Analysis**

7. The Tribunal finds the following to be the main issues for determination by the Tribunal:

a. Whether the Tribunal should order the production of the the final design for the proposed project as well as the PPP Agreement; and

b. Whether the Tribunal should conduct a site visit for the project.

**a. Whether the Tribunal should order the production of the the final design for the proposed project as well as the PPP Agreement.**

8. The Appellants filed the Appeal based on various grounds among them being the fact that there was no adequate public participation for the proposed project and other deficiencies in the EIA Study report, which the Appellants believe ought to have been addressed before grant of the EIA Licence.

9. The hearing of the main Appeal has already commenced and some of the witnesses for the Appellants have given their oral evidence. At this stage of the proceedings, the Appellants are seeking discovery of documents that they believe are in the custody of the Respondents and the Interested Parties. According to the Appellants, the Tribunal Procedure Rules should be invoked to cause the production of these documents by the Respondents and the Interested Parties.

10. Rule 8(1) of the Tribunal Procedure Rules provides that,

*“(1) Any party to proceedings before the Tribunal shall deliver to the Tribunal with his Appeal or reply, as the case may be, a copy of every document including every map, plan, certificate or report upon which he intends to rely for the purposes of his Appeal or reply:*

*Provided that where any such document is already in the possession of the Tribunal or the party or parties to the proceedings, the Tribunal may, on such terms as it thinks fit, excuse a party from the provisions of this rule.*

*(2) If any document required to be delivered to the Tribunal under this rule, in the opinion of the party who has possession of the document, relates to his intimate personal or financial circumstances or is commercially sensitive and the party concerned seeks to restrict its disclosure, he shall inform the Tribunal of that fact and of his reasons for seeking such a restriction; whereupon the Tribunal shall serve the copies as provided in this rule only in accordance with the directions of the Chairman.”*

11. The Appellants have relied on Rule 8 of the Tribunal Procedure Rules to demand that the Respondents and the Interested Parties do produce the documents comprising the final design and the PPP Agreement for the proposed project. The said Tribunal Procedure Rules, relate to filing of documents by the party who wishes to rely on the specific documents subject of the dispute. In the instant Application, the Appellants have not filed the alleged documents. They are actually seeking that other parties be compelled to file those documents. We do not see how this Rule is applicable in the present Application before us.

12. Rule 14 (2) of the Tribunal Procedure Rules provides that,

*“Subject to paragraph (2) of rule 8, the Authority shall include with its reply a statement summarizing the facts relating to the disputed decision and, if they are not part of that decision, the reasons therefor, and shall deliver to the Tribunal sufficient copies of the reply and other relevant documents to enable the Tribunal to provide a copy of each of them to the appellant and any other person or persons named by the Authority as having a direct interest in the subject matter of the Appeal.”*

13. In its response to the Application, the Authority (meaning the 1<sup>st</sup> Respondent) has deponed that it did not require to be provided with the final designs of the project at the point of issuing an EIA licence for the project. This is a matter of evidence that we choose not to delve into at this stage of the proceedings and reserve it for evidence to be tendered during the hearing of the main Appeal and our decision on that issue shall be in the judgment during the determination of the Appeal.

14. Access to information is a fundamental right enshrined at Article 35 of the Constitution of Kenya. The modalities of accessing such information has been set out in the Access to Information Act, Cap 31 of 2016.

15. Section 2 of the Access to Information Act provides for modalities of accessing information from both private and public entities as stipulated in the the said Act. The disputed project as per the EIA licence is the ‘Construction of the Nairobi expressway covering a total length of approximately 27 km designed as an access controlled dual carriageway to run along the central reserve of the A8 road starting from Mlolongo all the way to James Gichuru junction, located at Mlolongo to James Gichuru Junction along Mombasa road in Nairobi County’. There is no doubt that the disputed project is an undertaking of the Government of Kenya which is funded by the taxpayers of the Republic of Kenya in one way or the other, therefore, the information sought by the Appellants falls squarely within the provisions of the Access to Information Act.

16. In the case of **Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR**, the court held that,

*“[23] Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.”*

17. Whereas the Applicants may have genuine concerns over what they deem to be important information for the prosecution of their Appeal, there are procedures that are well set down in the law for access of such information. The Tribunal is bound by the law of the land and cannot purport to deliver justice while at the same time flout the same laws that guide the various operations of judicial and quasi judicial institutions in Kenya.

18. In our view, should the Appellants desire to rely on the documents that they have applied for in the instant application, they must observe the dictates of the Access to Information Act and the PPP Act and any other relevant statutes to access such information.

19. Considering the above, we find that the prayer for disclosure of the information as framed in the Application before us cannot be granted by the Tribunal.

**b. Whether the Tribunal should conduct a site visit for the project.**

20. The Appellants have submitted that the Tribunal ought to conduct a site visit to appreciate the alleged demolitions which have been going on along the proposed project. The Appellants do not point out the unique features of the project that it wishes for the Tribunal to observe that cannot otherwise be provided in form of photographs to be filed at the Tribunal.

21. The nature of the disputes filed at the Tribunal is such that a majority of the parties would wish that the Tribunal does visit the project sites. Unfortunately, the Tribunal does not have the luxury of time to visit all the sites as it has numerous disputes before it thus requires cogent reasons as to why photographs or videos would not be sufficient for it to appreciate the nature of the project or the concerns that the parties may have over a project. These reasons coupled with the now notorious Corona virus ravaging the country, the Tribunal does shy away from exposing its members, staff and the parties involved in the proceedings from congregating as this may have fatal consequences on all those involved.

22. In the circumstances, the Tribunal shall not allow that prayer for the site visit, however, the Tribunal may after listening to the parties decide on its own motion to conduct a site visit of the proposed project.

**Finding**

23. We have considered the prayers for the disclosure of documents and find the said documents are governed by the Access to Information Act and the PPP Act.

24. The order for a site visit cannot be made at this juncture as there is no clear demonstration of the reason for such a visit.

**Determination**

25. The Appellants' Notice of Motion Application dated 22<sup>nd</sup> September 2020 is dismissed.

26. The Tribunal may on its motion conduct a site visit at any stage of these proceedings.

27. Costs in the cause.

**DATED and DELIVERED at NAIROBI, This 8<sup>TH</sup> DAY of DECEMBER 2020.**

**Mohammed Balala .....Chairperson**

**Christine Kipsang.....Vice Chairperson**

**Bahati Mwamuye.....Member**

**Waithaka Ngaruiya.....Member**

**Kariuki Muigua.....Member**