



**Shah & 3 others v National Environment Management Authority & another (Tribunal Appeal 29 of 2022) [2024] KENET 339 (KLR) (19 February 2024) (Judgment)**

Neutral citation: [2024] KENET 339 (KLR)

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI  
TRIBUNAL APPEAL 29 OF 2022  
EMMANUEL MUMIA, CHAIR, WINNIE TSUMA, VICE CHAIR,  
DUNCAN KURIA & RONALD ALLAMANO, MEMBERS  
FEBRUARY 19, 2024**

**BETWEEN**

**SULBHA BHUPENDRAKUMAR SHAH ..... 1<sup>ST</sup> APPELLANT  
SHAH KAUSHIK LALJI KARAMSHI ..... 2<sup>ND</sup> APPELLANT  
RASHMIKANT TEJPAR SHAH ..... 3<sup>RD</sup> APPELLANT  
SHAH ANJANA RASHMIKANT ..... 4<sup>TH</sup> APPELLANT**

**AND**

**THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT  
SHALIN SURESH THAKRAR ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellants moved this Tribunal by way of a Notice of Appeal dated 26<sup>th</sup> August 2022. The appeal challenges the 1<sup>st</sup> Respondent’s decision to issue the 2<sup>nd</sup> Respondent with an Environmental Impact Assessment License No. NEMA/EIA/PSL/20842 for the construction of a five (5) level residential apartment building comprising twelve (12) one-bedroom serviced apartment units, four (4) two-bedroom serviced apartment units, a swimming pool and other associated facilities on Plot LR. No. 1870/1/519 off General Mathenge Drive, Westlands area in Nairobi County.
2. The face of the Notice of Appeal reveals three grounds of appeal, which are reproduced below:
  - a. The 1<sup>st</sup> Respondent erred in law by issuing a license to the 2<sup>nd</sup> Respondent to construct multiple dwelling units on Plot LR. No. 1870/1/519 without taking into consideration the Appellants’



objection to the change of user of the aforesaid Property from a single dwelling unit to multiple dwelling units, which objection was served upon the 1<sup>st</sup> Respondent on 26<sup>th</sup> April 2022;

- b. The 1<sup>st</sup> Respondent erred in law by issuing a license to the 2<sup>nd</sup> Respondent to construct multiple dwelling units on Plot LR. No. 1870/1/519 without taking into consideration the adverse physical danger that the said construction may have on the Appellants' Properties, which are adjacent to the 2<sup>nd</sup> Respondent's aforesaid Property;
  - c. The 1<sup>st</sup> Respondent erred in law by approving a project that poses the following physical dangers to the Appellants' Properties:-
    - a. The 2<sup>nd</sup> Respondent's Property shares a wall with the 3<sup>rd</sup> and 4<sup>th</sup> Appellant's property, and as such, they are apprehensive that demolition of the subject property so as to effect the change of user shall interfere with the stability of their Property and/or even lead to his house collapsing.
    - b. The Appellants' properties are single dwelling units with no columns and beams and no supporting structures, and as such they are apprehensive that changing the user of the 2<sup>nd</sup> Respondent's property to multiple dwelling units may cause the building to strain under the weight, causing it to collapse hence endangering the Appellants' units which are adjacent to it;
    - c. The Appellants' properties are located in a gated community with a total of two flats and four Maisonettes in which all the houses are single-dwelling residential houses, and as such, the Appellants are apprehensive that the change of user of the subject property, which is adjacent to their Properties may interfere with their privacy and quiet enjoyment of their properties;
    - d. The entrance to the Maisonettes owned by the Appellants is only one which is also the entrance to the 2<sup>nd</sup> Respondent's Property. With the change of user of the 2<sup>nd</sup> Respondent's property to multiple dwelling units, the same will be compromised, leading to insecurity risk to children as the same also acts as their playing area and higher vehicular traffic;
    - e. Given the size of the 2<sup>nd</sup> Respondent's property, in order to construct multiple dwelling units on the same, there will need to be extensive evacuation thereof. Given the close proximity with the other Maisonettes belonging to the Appellants and the fact that the 2<sup>nd</sup> Respondent's property shares a wall with one of the Maisonettes, the change of user will lead to a disaster with a higher possibility of loss of property and/or even death;
    - f. The 2<sup>nd</sup> Respondent bought the Property knowing very well the user thereof, and he did, in fact, represent to the Vendor then that he intended to have the Property used by his son as a residence and nothing more;
    - g. The 2<sup>nd</sup> Respondent does have apartments next to the subject Property but within a different entry, which he uses as serviced Apartments/hotels. Should he, therefore, be allowed to proceed with the development, he will definitely convert it into a hotel to the detriment of the Appellants herein.
3. In further support of the appeal, the Appellants filed a witness statement sworn by Rashmikant Tejpar Shah and dated 27<sup>th</sup> February 2023.



4. In opposition to the Appeal, the Respondents filed their Replies to the Notice and Grounds of Appeal dated 3<sup>rd</sup> March 2023 and 10<sup>th</sup> September 2023, respectively. While the witness statement of Isaac Kimite supports the 1st Respondent's case dated 31<sup>st</sup> March 2023, the 2<sup>nd</sup> Respondent's case is supported by the witness statement of Shalin Suresh Thakrar dated 27<sup>th</sup> February 2023.
5. Pursuant to the directions of the Tribunal, the Appellant filed submissions dated 7<sup>th</sup> December 2023, while the Respondents filed their submissions dated 4<sup>th</sup> January 2024 and 10<sup>th</sup> January 2024, respectively.

### **Issue for determination**

6. Having carefully considered all the pleadings, oral evidence and submissions filed by parties, we find that the singular issue dispositive of the instant appeal is whether there was sufficient public participation before issuing the impugned EIA license.

### **Whether there was sufficient public participation before the issuance of the impugned EIA license**

7. The Appellants' contention under this limb is two-pronged. First, the impugned license was issued without proper public participation. Second, the Appellants' concerns relating to the physical dangers the project will pose to the Appellants' Properties were not considered.
8. The foundation of public participation is to be found in Principle 10 of the Rio Declaration on Environment and Development (1992), which states as follows:

“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 the decision-making process...”

9. Public participation lies at the heart of environmental democracy. Mohamed Ali Baadi and Others vs Attorney General & 11 Others[2018] eKLR defined environmental democracy in the following manner

“a term that reflects increasing recognition that environmental issues must be addressed by all, or at least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors.[75] It captures the principle of equal rights for all, including the public, community groups, advocates, industrial leaders, workers, governments, academics, and other professionals involved in environmental governance.[76] It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.[77] Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy.”

10. Law Society of Kenya vs Attorney General & 3 others; Katiba Institute & 6 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2023] KEELC 20583 (KLR) (12 October 2023) (Interim Judgment) identified the three critical components of environmental democracy as being “(a) access to information, (b) participation in decision-making, and (c) access to justice.”



11. In Kenya, Article 10 (2) a of *the Constitution* outlines the participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Article 69(1) (d) of *the Constitution* provides that the State shall encourage public participation in environmental management, protection and conservation.
12. The four corners of public participation were contoured by a 3 Judge bench of the Environment and Land Court in the case of Luo Council of Elders & 8 others V County Government of Bomet & 24 others [2018] eKLR.
13. Creating an awareness of the thematic issues and affording members of the public a reasonable opportunity to air their views unhindered does not in itself satisfy the threshold of public participation. In Mohamed Ali Baadi and others v Attorney General & 11 others (supra), the Court established that there must also be compliance with prescribed statutory provisions on public participation.
 

‘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.’
14. Before determining whether public participation was meaningful, we must review the evidence on record against the prescribed statutory provisions under the Environmental (Impact Assessment and Audit) Regulations, 2003, to determine compliance.
15. By dint of Legal Notice No. 150 of 2016, the proponent’s project falls under the second schedule to EMCA as an ‘Urban development on establishment of multi-dwelling housing development not exceeding one hundred units.’ Such a project is categorised as medium risk, and the proponents are therefore required to submit an Environmental Impact Assessment Project Report as opposed to an Environmental Impact Assessment Study Report.
16. Consequently, Regulation 17(2)(b) of the Environmental (Impact Assessment and Audit Regulations) 2003 does not apply to the project. This position was amplified by Hon. Justice Angote in Douglas Onyancha Omboga & 3 others v Joseph Karanja Wamugi & 4 others [2019] eKLR:
  35. Legal Notice No. 150 of 2016 has categorised “Telecommunication infrastructures” amongst the projects that require an Environmental Impact Assessment (E.I.A) Project Report and not an Environmental Impact Assessment (E.I.A) Study Report. The Projects requiring an Environmental Impact Assessment (E.I.A) Project Report are categorized as low and medium risk projects while those that require an Environmental Impact Assessment (E.I.A) Study Report are categorised as “High Risk Projects.”
  36. Unlike Environmental Impact Assessment (E.I.A) Project Reports, all Environmental Impact Assessment (E.I.A) Study Reports are supposed to be published in the Gazette and in at least two Newspapers circulating in the area of the project. As stated above, the construction of “telecommunication infrastructure” does not fall in this category unless the NEMA finds that the project will have a significant impact on the environment, in which case it will require that the proponent undertakes an Environmental Impact Assessment Study
17. The 2<sup>nd</sup> Respondent's bundle of documents contains questionnaires, 12 in number, filled out by persons the 2<sup>nd</sup> Respondent indicates are the immediate neighbours of the proponent’s project.



18. Questionnaires filled out by the Appellants are annexed to the 2<sup>nd</sup> Respondent's bundle of documents. The Appellants do not dispute filling out the questionnaires. Their case is that their objections were not considered. Could this be the case? We hold a different view.
19. The concerns raised in the questionnaires revolve around solid waste, water and drainage, dust, noise and vibration, health and safety and the risk of houses collapsing. These concerns are addressed on pages 8 and 9 of the Project Report submitted by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent. The Appellants have not demonstrated the inadequacy of the mitigation measures as proposed by the 2<sup>nd</sup> Respondents.
20. It is the Appellants' submission that the persons who offered support for the project are not the immediate neighbours of the project site. Absent evidence supporting this assertion, the Tribunal lacks the tools to ascertain this averment.
21. Was the public participation conducted by the 2<sup>nd</sup> Respondent meaningful? We turn to Nairobi Metropolitan Psv Saccos Union Limited & 25 others v County Of Nairobi Government & 3 others [2013] eKLR where Justice Lenaola (as he then was) opined as follows:

Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation, and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

“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 issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”
22. Guided by the above-cited decision, we are satisfied that the public participation conducted by the 2<sup>nd</sup> Respondent by way of issuance of questionnaires to persons in close proximity to the project was meaningful.
23. Before we pen off, we must reiterate that as a Tribunal, we lack the jurisdiction to interrogate the decision to either grant or deny a change of user. The *Physical and Land Use Planning Act* vests such power in the Liaison Committee. We therefore decline the invitation to interrogate the change of user granted to the 2<sup>nd</sup> Respondent by the Nairobi County Government.

#### **Final Orders**

24. In view of the above analysis and findings, the conclusion becomes irresistible that the Appellants' Notice of Appeal dated 26<sup>th</sup> August 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 19<sup>TH</sup> DAY OF FEBRUARY 2024**

**EMMANUEL MUMIA - CHAIRMAN**

**WINNIE TSUMA - VICE-CHAIR**

**DUNCAN KURIA - MEMBER**

**RONALD ALLAMANO - MEMBER**

