



REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL APPEAL NO. NET 177 OF 2016

BETTY MBUGUA

DAVID NDIRANGU & 100 OTHERS APPELLANTS

VS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT.

MANAGEMENT AUTHORITY (NEMA).....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

ROBERT MBATIA3RD RESPONDENT

JUDGMENT

BACKGROUND OF THE CASE

1. The Appellants instituted this appeal vide a Notice of Appeal filed before the Tribunal on 30/05/2016 under Rule 4(1) of the National Environment Tribunal Rules, 2003. The Appellants challenge the issuance of an Environmental Impact Assessment License No. NEMA RB/P2/5/1/9141 of 29/04/2016 on the basis that the same was issued without proper consultation.
2. The said Environmental Impact Assessment License issued by the National Environmental Management Authority (NEMA) on 29/04/2016 stems from an Environmental Impact Assessment Study Report submitted to the NEMA by the Chief Officer Education, Youth Affairs & Social Services c/o Nairobi City County.
3. The Study Report was in respect to a proposed social hall development that entails construction of one (1) leveled building comprising six (6) seminar rooms and a hall for recreational/social purposes at Uhuru phase 4 playgrounds-Uhuru estate area, Makadara Sub County in Nairobi County.
4. The Appellants in their Notice of Appeal seek the revocation of the said license and demolition and removal of structures constructed on Uhuru Phase 4 playgrounds-Uhuru estate area, Makadara Sub County in Nairobi County.
5. The Respondents replied to the Notice of Appeal vide the 1st Respondent's Reply to Grounds of Appeal lodged before this Tribunal on 23/01/2017 and the 2nd and 3rd Respondents Replying Affidavit lodged before the Honourable Tribunal on 13/09/2016.

6. In its Reply to the Grounds of Appeal, the 1st Respondent states that on or about 27/11/2015, it was furnished with an Environmental Impact Assessment Project Report by the 3rd Respondent for purposes of consideration for issuance of an EIA license. The 1st Respondent states that in the spirit of collaboration with lead agencies and due diligence, it wrote a letter dated 28/11/2015 seeking the views of the relevant lead agencies on the proposed project.
7. The 1st Respondent further states that none of the lead agencies responded objecting to the proposed project prompting a site visit and verification exercise on the proposed venue. Further, in its testimony, the 1st Respondent states that it wrote to the County Government on 18/01/2016 seeking for approved drawings of the hall and a public meeting with all stake holders owing to the sensitivity of the matter and the issues that had arisen from the project.
8. The 1st Respondent states that a stakeholders meeting was held on 13/02/2018 at Uhuru Estate Phase 4 Sports Ground with a total of 106 in attendance. It however acknowledges receipt of a letter from the residents association which states that they were unable to attend the meeting.
9. The 1st Respondent further states it wrote a letter to the County Government on 05/04/2016 seeking to get more details on the project and it received a reply from the County Government vide a letter dated 12/04/2016 giving further clarification on the matter.
10. The 1st Respondent states that having been satisfied that the 2nd Respondent's proposed project had met all legal requirements for issuing an EIA license, it issued an EIA license dated 29/04/2016.
11. It is the 1st Respondent's case that it did in all circumstances ensure that it took the views of the Appellants in consideration before issuance of the EIA license and that it followed all the laid down procedures before it issued the license.
12. In support of its case, the 1st Respondent called one witness, Mr. Andrew N. Ndung'u, whose testimony from the witness statement filed before the Tribunal on 28/09/2018 largely reiterated the assertions contained in the 1st Respondent's Reply to the Grounds of Appeal.
13. On this basis, the 1st Respondent argues that the allegations by the Appellants against it are baseless and unfounded and prays for the appeal to be dismissed with costs.
14. On the other hand, the 2nd and 3rd Respondents in their Replying Affidavit contend that the said social hall being constructed is for recreation and social purposes which are all public purposes and for the benefit of the general public hence the need for the same. They further contend that the said construction and the process leading to the same did not just begin and end without consultations as intimated by the Appellants and that the process has never been a secret.
15. The 2nd and 3rd Respondents assert that the process leading to the current construction has complied with all laws including the requirement for public participation. They allude to various meetings held between the residents and the city council before issuance of the EIA license to commence the project. In particular, they make reference to an alleged meeting held on 13/02/2016 which was purportedly attended by more than 100 people who endorsed and supported the construction. They also contend that the two Appellants herein attended the meeting but walked away when the residents were called upon to give views on the project.
16. They assert that the Appeal herein has been filed for the sole purpose of personal gratification and not for the benefit of the community or for the protection of the environment as all the preliminaries to the issuance of the license were complied with and public participation carried out before the license was issued to the county to construct/continue the construction of the social hall.

17. They further contend that the Appeal herein is unmerited, a clear abuse of the process of this Honorable Tribunal and only meant to frustrate a project made for the public good and supported by all residents except the Appellants.

18. They further allege that the said project has been supported by the National Land Commission as it is a noble project being carried out by a public body, the Nairobi City County, for the benefit of the public and on public land.

19. On this basis, the 2nd and 3rd Respondents pray that the appeal be dismissed with costs to the Respondents.

SUBMISSIONS BY THE PARTIES

APPELLANTS' SUBMISSIONS

20. In support of the present appeal, the Appellant filed its written submissions on 02/11/2018. In their submissions, the Appellants reiterated that the place where the Respondents intend to have the social hall is meant to be a playground for their use.

21. In their submissions, the appellants further place reliance on the testimony of four witnesses it called. The 1st witness, Betty Mbugua testified that construction of the social hall started in the year 2011 but the construction was stopped as the respondents did not have the requisite approvals. The witness further testified that the 1st Respondent issued the approvals in the year 2015 yet the construction began in the year 2011. The witness further asserted that before issuing the approvals to the Respondents, NEMA did not inform the residents who are stakeholders of the playground.

22. The Appellants also placed reliance on the testimony of their second witness, Mr. John Kihuto who stated that the construction of the social hall was being done without regard to the provisions of construction procedures. The witness further stated that the area residents were not consulted and that consultations were necessary since the playground belongs to the residents' children.

23. The Appellants submitted that all witnesses who testified stated that there was no consultation before the construction started.

24. The Appellants further contend that the residents filed complaints with the relevant authorities among them Nairobi City County and the National Construction Authority but the complaints were not addressed to their expectations.

25. The Appellants also allege that there were numerous attacks upon the residents by hired thugs with a motive of intimidating the residents from protecting what lawfully belongs to them.

26. In response to the 2nd and 3rd Respondents Replying Affidavit dated 08/09/2016, the Appellants submitted that the appeal is not misconceived but a genuine intention to protect their rights and interests which would be in serious jeopardy if the Respondents are not stopped from proceeding to construct the social hall. The Appellants contend that if the construction of the social hall is not stopped until proper consultations and procedures are followed to determine a better way the playground can be upgraded for their benefit then they are likely to suffer irreparable loss and damage.

27. The Appellants place reliance on this Honourable Tribunal's decision in Tribunal **Case No. NET/25/200B, Gaetano Grasso & Others –vs- The Director General, National Environment Management Authority (NEMA) & Another**. The case involved an appeal against the decision of the 1st Respondent to lift a stop order issued on 10/07/2007 against the 2nd Respondent's construction of holiday apartments and villas known as Blue

Lagoon on Plot Nos. 45 and 46 in Watamu, Malindi District. The Tribunal in the case revoked the 1st Respondent's approval of the development and cancelled the EIA license issued to the 2nd Respondent by the 1st Respondent on 23/05/2007 on grounds *inter alia*: that the project report lacked pertinent information required by law and was inadequate and that the 1st Respondent approved the development in question without sufficient information.

RESPONDENTS' SUBMISSIONS

28. The 1st Respondent filed its submissions on 05/11/2018. It framed one issue for determination by this Tribunal, *'Whether there was public consultation of the residents (sic) in this matter'*

29. The 1st Respondent submitted that **section 58(1)** of the **Environment Management and Coordination Act, Cap 387**, requires a project proponent to undertake a project report and submit the report to the Authority (NEMA) in the prescribed form. The 1st Respondent further cites **Regulation 7** of the **Environmental (Impact Assessment and Audit) Regulations, 2003** which specifies the issues to be included in the project report. On this basis, the 1st Respondent submitted that under both substantive law being EMCA and the regulations thereof, public participation can only be inferred and is not explicit on project reports as opposed to study reports.

30. The 1st Respondent submits that evidence of public participation was adduced in form of minutes for public meeting, signed attendance sheet by the estate members, notifications sent to the members of the public on the same and newspaper adverts on the project. On this basis, the 1st Respondent contend that the appellants' views were considered and it was satisfied that public participation was undertaken.

31. The 1st Respondent further submitted that the issue of public participation is a fiddly affair whose threshold is infinite and subject to various variations. The 1st Respondent contends that the mere fact that the Appellants' views did not take over the day do not in any sense invalidate the whole process.

32. The 1st Respondent placed reliance on Justice Mativo's decision in *JR MISC. Application No. 485 of 2016, Republic v Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development & another Ex-parte Kenya National Union of Co-operatives Staff (2018) eKLR* where the court observed that:

'The question that calls for an answer is whether in the circumstances of this case, the first Respondent undertook public participation that in any meaningful sense meets the threshold appropriate for public participation. Differently put, what was the threshold for public participation which would have been appropriate for this exercise' As Justice Sachs observed... 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 have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.'

33. On the basis of the foregoing, the 1st Respondent submitted that a reasonable opportunity was offered to the members of the estate to give their views on the project and the same were considered. On this basis, the 1st Respondent prays that the Appellants appeal be dismissed.

34. There were no submissions filed by the 2nd and 3rd Respondents.

ANALYSIS AND DETERMINATION BY THE TRIBUNAL

35. After considering the Appellants appeal filed via the Notice of Appeal lodged before the Tribunal on 30/05/2016, the 1st Respondent's Reply to the Grounds of Appeal dated 04/01/2017, the 2nd and 3rd Respondent's Replying Affidavit filed on 13/09/2016 and the written submissions by the parties, the Tribunal has identified the following issues for determination:

- a) Whether there was public participation before issuance of the EIA license; and
- b) What orders should the Tribunal make"

Whether there was Public Participation before Issuance of the EIA License

36. The crux of this appeal is whether there was public participation before issuance of the EIA license. From the evidence tendered before this Tribunal, the land in dispute, Uhuru phase 4 playgrounds-Uhuru estate area, Makadara Sub County in Nairobi County is public land held by the County Government of Nairobi on behalf of the residents. To this effect, the City Council of Nairobi through its Town Planning Committee meeting held on 20/06/1995 observed that,

'.....the area was reserved for a playground and that was the only open space for that use in the area. It was therefore imperative for the area to be reserved for that use.'

The said meeting resolved to approve the recommendation to develop the area as a sportsground.

This fact was is uncontroverted. Therefore, the Tribunal admits in evidence that the fact that the land in question is public land.

37. Being public land, the management and development of the said parcel is governed by the law relating to public land. **The Constitution of Kenya under Article 61 (2)** classifies land as public, community or private. **Article 62 (2)** further provides that *'Public land shall vest and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission.'*

38. It is evident from the above Constitutional provisions that the National Land Commission is tasked with the role of administering public land. This position is further buttressed under **Article 67 of the Constitution** which establishes the National Land Commission and which provides its functions to *inter alia* include managing public land on behalf of the national and county governments and to monitor and have oversight responsibilities over land use planning throughout the country.

39. The National Land Commission therefore had a critical role to play in any purported development activity on the said parcel of land since it was public land vested in the commission. The 2nd and 3rd Respondents in paragraph 31 of their Replying Affidavit filed on 13/09/2016 state that the project has been supported by the National Land Commission as it is a noble project being carried out by a Public Body, being the Nairobi City County for the benefit of the Public and on public land. They make reference to a letter dated 23/05/2016 from the National Land Commission to the Governor, Nairobi County in support of this assertion. However, the said letter does not expressly approve the project but expresses concerns about ownership of the property and requests for further information on the same. Part of the letter states, *'.....kindly provide any documents, claim of community ownership of the plot by the other proponents, failure of which will open up the way to proceed with your plans for urban renewals. It will be unfortunate if the awarded contract will be dishonored yet we have little or no confirmation of ownership by other entities.., you may also present to us the other referred to documents for further information.'*

40. The Constitution of Kenya, 2010 enshrines national values and principles. To this effect, **Article 10 (1)** stipulates that, *'The national values and principles in this article bind all state organs, state officers, public officers and all persons whenever any of them-*

- a) *Applies or interprets this Constitution;*
- b) *Enacts, applies or interprets any law; or*

c) *Makes or implements public policy decision*

Further, **Article 10 (2) (a)** recognizes, participation of the people as one of the national values and principles.

Therefore, public participation is not a foreign concept in our jurisdiction as it has been constitutionally entrenched under Article 10 (2) (a) of the Constitution of Kenya, 2010. Thus, the 1st and 2nd Respondent being state organs, are bound by the provisions of Article 10 of the Constitution on Public Participation.

41. The 2nd and 3rd Respondents allude to various meetings with the residents before issuance of the EIA license by the 1st Respondent and in particular, a meeting held on 13th February 2016 that was purportedly attended by more than 100 people who are said to have endorsed and supported the construction of the social hall. The Appellants however contend that there was no consultation before the construction started. The Tribunal is therefore called upon to determine whether there was public participation before commencement of the project and whether the said meetings alluded to by the 2nd and 3rd Respondent satisfy the criteria on consultation and public participation.

42. The question of public participation was discussed by the High Court of Kenya in the case of **Republic v County Government of Kiambu Ex Parte Robert Gakuru & another (2016) eKLR** where Odunga J. observed that *'Public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by Black's Law Dictionary 9th Edn. at page 358 as "the act of asking the advice or opinion of someone", "participation" on the other hand is defined at page 1229 thereof as "the act of taking part in something, such as partnership..." Therefore public participation is not a mere cosmetic venture or a public relations exercise.'*

The court further noted that *'it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say.'*

43. However, the mere fact that particular views have not been incorporated in the decision making does not invalidate such decision. This was appreciated by **Lenaola, J** in **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013**, where he held that *'public participation is not the same as saying that public views must prevail.'*

44. The Appellants called five witnesses who all testified that there was no consultation before the EIA license was issued. Further, it has been testified that the said construction started in 2011 before the 2nd Respondent had submitted a project report and an Environmental Impact Assessment License issued by the 1st Respondent. The Tribunal finds that the 2nd Respondent acted illegally and contrary to the principle of public participation enshrined under **Article 10 of the Constitution of Kenya, 2010 and section 3 (5) (a) of the Environmental Management and Co-Ordination Act, No. 1999** in embarking on the said construction before following the due process.

45. In light of the above, the 1st Respondent testified in its witness statement that it issued a stop order against the construction for failing to comply with the requisite procedures. It is only after the stop order was issued and the construction stopped, when the 2nd respondent undertook the Environment Impact Assessment that led to the issuance of Environmental Impact Assessment License No NEMA RB/P2/5/1/9141 of 29/04/2016 by the 1st Respondent. It can be deduced from this fact that the said construction was began without following due procedure with regard to safeguarding the environment.

46. Further, evidence has been adduced before this Tribunal that the site was set aside as a communal playing ground as per the recommendations of the Director of City Planning and Architecture Department presented to the Town Planning Committee on 20/06/1995. This recommendation was also upheld by the City Planning Department in November 2011. Consequently, any improvement or development on the parcel should only be authorized where the initial use has ceased to exist and for the good of all the residents. However, the Appellants have demonstrated

that the site is still being used as a playground for their children and for other social activities.

47. The 2nd and 3rd Respondents in their Replying Affidavit contend that the development is noble and community oriented that is for the benefit and exclusive use of the community. They have however not shown how the public good that will be accrued from the project will outweigh the current use of the site as a playground.

48. The 3rd Respondent's role in the development is also called into question. In paragraph 32 of his Replying Affidavit, he describes the Appellants as having approached the Tribunal with unclean hands with the sole aim of frustrating a County Government project for their own malicious and ill motives and not deserving of any orders from the Tribunal. However, as demonstrated, the site is public property set aside for the use and benefit of all residents of Uhuru Estate Phase 4. They are entitled to protect the suit property from illegal use.

49. In light of the foregoing, the Tribunal is inclined to find in favour of the Appellants on the grounds that the process leading to the issuance of Environmental Impact Assessment License No NEMA RB/P2/5/1/9141 of 29/04/2016 did not involve the participation of residents of Uhuru Estate Phase 4. Further, the site was set aside as a playground by the Town Planning Committee in 1995 a recommendation that was upheld by the City Planning Department in November 2011. The public good to be accrued from construction of the social hall does not in any way outweigh the current use of the playground. Finally, public land is held and managed by the National Land Commission on behalf of the people and a County Government cannot embark on any development on public land without the necessary authorization by the National Land Commission.

What orders should the Tribunal make"

50. **Section 129 (3) of the Environment Management and Co-Ordination Act, No. 8 of 1999** empowers the Tribunal to make either of the following orders upon hearing an appeal:

- a) Confirm, set aside or vary the order or decision in question;
- b) Exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or
- c) Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just.

51. In this case the Tribunal allows the Appellant's appeal and makes the following orders:

- a) The Environmental Impact Assessment License No NEMA RB/P2/5/1/9141 issued by the 1st Respondent on 29/04/2016 is hereby revoked.
- b) The intended development of a social hall at Uhuru Phase IV playgrounds-Uhuru estate area, Makadara Sub County in Nairobi County, by the 2nd Respondent is hereby stopped.
- c) An environmental restoration order is hereby issued against the 3rd Respondent. The 1st Respondent shall enforce the order at the cost of the 3rd Respondent. This order requires the demolition of the social hall structure on Uhuru Phase IV Estate playground, the restoration of all soils, flora and natural features therein, together with the supervised removal of all building materials and sources or causes of pollution and/or environmental hazard or damage on the Suit Premises; within sixty (60) days after the lapse of the period set out under Section 130 (1) of the Environmental Management and Co-ordination Act; and
- d) The Costs of the Appeal are awarded to the Appellants and to be borne by the 3rd Respondent.

Dated at Nairobi This 5th Day of March 2019

MOHAMMED S BALALACHAIRPERSON

CHRISTINE KIPSANG.....VICE-CHAIRPERSON

BAHATI MWAMUYEMEMBER

WAITHAKA NGARUIYAMEMBER

KARIUKI MUIGUAMEMBER



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