



Makau & 3 others (Suing in their Own Name and on Behalf of the Syokimau Residents Association) v Amalla & 2 others (Environment & Land Petition 14 of 2017) [2023] KEELC 20020 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20020 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 14 OF 2017**

A NYUKURI, J

SEPTEMBER 20, 2023

IN THE MATTER OF ARTICLES 10, 22, 23, 24, 40, 42, 43, 47, 60, 66, 68, 69, 70, 73, 162 (B), 232, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER CHAPTER 4 ARTICLES 22 AND 23(1) & (3), ARTICLE 47 AND CHAPTER 10 ARTICLE 162(B), ARTICLE 174 OF THE CONSTITUTION OF KENYA, IN 133 OF 2001 CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL, PRACTICE AND PROCEDURE RULES)

AND

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT
IN THE MATTER OF THE ENVIRONMENTAL, MANAGEMENT & CO-ORDINATION ACT
IN THE MATTER OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**IN THE MATTER OF SECTIONS 87, 91, 102, 103,
105 & 107 OF THE COUNTY GOVERNMENTS ACT**

IN THE MATTER OF THE ALLEGED THREATENED & CONTRAVENTION OF SECTIONS 4 & 5 OF THE FAIR ADMINISTRATIVE ACTION, SECTIONS 87 & 103 OF THE COUNTY GOVERNMENTS ACT & THE NATIONAL VALUES & PRINCIPLES OF NATIONAL GOVERNANCE UNDER ARTICLES 10 & 232 OF THE CONSTITUTION OF KENYA

BETWEEN

**JUSTUS KALII MAKAU 1ST PETITIONER
MOHAMED ISMAILI ABDI (CHAIRMAN) 2ND PETITIONER
SHADRACK GATORE MBURU (SECRETARY) 3RD PETITIONER
KELVIN OCHIENG NYAMOR (TREASURER) 4TH PETITIONER**



**SUING IN THEIR OWN NAME AND ON BEHALF OF THE SYOKIMAU
RESIDENTS ASSOCIATION**

AND

LINNET ACHIENG AMALLA 1ST RESPONDENT

THE COUNTY GOVERNMENT OF MACHAKOS 2ND RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD
RESPONDENT**

JUDGMENT

Introduction

1. On 4th September 2017, the four (4) Petitioners herein, filed a Petition dated even date, seeking the following orders:
 - a. A declaration that the Environmental Impact Assessment License (EIA) Number 0041528PR2 issued to the 1st Respondent by the 3rd Respondent is null and void and the same be revoked forthwith.
 - b. A declaration that the processes of seeking building approval and approval of change of user by the 1st Respondent from the 2nd Respondent in respect of L.R. Number 12715/12673 were unlawful, irregular and null and void ab initio.
 - c. An order that all the building approvals, licences and/or permits in respect of the development of the multiple dwelling units on L.R. Number 12715/12673 be cancelled and quashed in totality.
 - d. A mandatory order for the demolition of the multiple dwelling units constructed by the 1st Respondent on Land Parcel Number 12715/12673 in Syokimau.
 - e. An order directing that a fresh wide, fair, publicized public participation process be undertaken amongst all the stakeholders before any further development of the said multiple dwelling units on Land Parcel Number 12715/12673 and block number 12715/261 is undertaken.
 - f. Costs of the Petition with interest at court rates.
 - g. Any further orders, writs, directions and relief as this Honourable Court may deem fit.
 - h. Costs of the Petition with interest at court rates.
2. The Petition was anchored on the Affidavit of Justus Kaliu Makau, the 1st Petitioner sworn on 30th August, 2017. The Petitioners averred that the 1st Respondent was constructing multiple dwelling units on land parcel LR. No. 12715/12673 in Syokimau in an area that is demarcated as a single dwelling unit zone, which compromised social amenities and posed serious health hazards. They further stated that residents of Syokimau had raised objections to the 1st Respondent's project but that she continued with the same despite a court order issued on 22nd February, 2017 in Machakos ELC Case Number 761 of 2016, and stop orders issued by the National Environment Tribunal in NET 207 of 2017.



3. It was the Petitioners' contention that the Environmental Impact Assessment Licence (EIA licence) was irregularly issued to the 1st Respondent by the 3rd Respondent. Further that the project commenced before issuance of an EIA licence. They also stated that building approvals, change of user and the EIA licence were unlawfully, improperly and irregularly obtained after the deed plans for the land upon which the project is to be constructed had been cancelled. They complained that their right to Fair Administrative Action under Article 48 of *the Constitution* of Kenya was violated. They stated that their views and concerns were not considered and that Articles 10 and 69 of *the Constitution* of Kenya 2010 were violated. They averred that they were apprehensive that the project poses grave environmental, infrastructural, health, sanitation and other social economic dangers and that if the project proceeds, the same will prejudice and compromise water, drainage, sanitation and infrastructure as there are no sewer lines in Syokimau as the multiple dwelling units are using bio digesters most of which are defective and discharging sewer in the open and on public roads, thus compromising the health of Syokimau residents. They averred that one Gideon Amalla was frustrating them, in cahoots with the 1st Respondent.
4. They attached a Notice of Appeal, to the National Environment Tribunal; Summons to enter appearance from the National Environment Tribunal; copies of alleged doctored Social Site Assessment forms; copies of alleged actual social site assessment forms; a letter dated 18th January, 2017 from the Ministry of Lands, Housing and Urban Development; a court order issued on 22nd February, 2017 in Machakos ELC. No. 5 of 2017; a stop order in respect of NET No. 207 of 2017; and a letter dated 20th February, 2017 by the Petitioners to the Director of Environment Machakos County.
5. In response to the Petition, the 1st Respondent filed a Replying Affidavit sworn on 20th May, 2021. She averred that she began constructing a multiple dwelling units on her land known as LR. No. 12715/12673 after complying with all the requisite laws and regulations by obtaining change of user from single dwelling to multiple dwelling units which was published in a Notice in the Newspaper which was not objected to by the Petitioners in fourteen (14) days in accordance with provisions of Section 41 of the Physical Planning Act; and that she engaged professionals who designed and complied with County Government Planning Standards, Public Health Standards, NEMA, County Land Administration and National Construction Authority.
6. She further averred that a social survey was done and the Petitioners and all their members were requested to give their views, which they did and whose views were captured in the Social Site Assessment/Public Participation Forms. She denied obtaining the EIA licence irregularly. She maintained that she began constructing the project only after obtaining the EIA licence. She averred that the Petitioners did not raise any concerns when the Environmental Impact Assessment study was posted online by the 3rd Respondent.
7. On the issue of sewerage, she averred that she had provided for a bio digester septic tank of adequate capacity. She also stated that building plans were approved by the 2nd Respondent in this matter. She stated further that the Petitioners' allegations were not supported by any evidence.
8. As regards the court order in ELC. No. 5 of 2017, she stated that the order therein was a temporary order to last for a period of fourteen (14) days only. She also stated that the stop order issued by NET in its letter of 27th June, 2017 was issued way after the proposed development had begun. She denied the allegation that one Gideon Amalla was acting in concert with police officers to frustrate the Petitioners.
9. She maintained that the Petition had been brought in bad faith because her Application for approval by the 3rd Respondent was granted without any objections from the Petitioners; and that the Petitioners are hiding behind the principles of public participation to usurp the decision making powers of public



- agencies. She stated that her neighbours had not complained and that she was not a member of Syokimau Residents Association and that therefore they have no supervisory role over her.
10. The 1st Respondent stated further that her neighbours have put up multiple dwelling units, some that are even higher than her proposed project, but the same has not attracted any objection from the Petitioners and that therefore this suit is malicious and that the Petitioners have been discriminatory against her. She maintained that she complied with *the Constitution* of Kenya and the Physical Planning Act. She attached a Newspaper Notice; Social Site Assessment Forms; EIA licence and Certificate of Compliance; and photographs of houses adjacent to the proposed project.
 11. The 2nd Respondent also opposed the Petition. They filed a Replying Affidavit sworn on 31st October, 2017 by one Mwikali Muthoka, the Chief Officer, Department of Lands and Urban Development of the County Government of Machakos. She deposed that there was no evidence that the proposed project lies in a single dwelling unit zone. She stated that the 2nd Respondent only issued change of user and not the EIA licence.
 12. She termed as farfetched the Petitioners' averment that the Social Site Assessment Forms were doctored. She stated that the views given by the Petitioners were taken into account before the EIA licence was issued and stated that the 3rd Respondent could not be expected to anchor its decision only on the negative responses. She pointed out that the order issued by the court in Machakos ELC. No. 5 of 2017 was a temporary order meant to last for only fourteen (14) days and that the same did not restrain the 2nd Respondent permanently. She stated that the Petition in ELC. No. 5 of 2017 was dismissed by court on 22nd September, 2017, and that the stop order from NET was issued after the project had commenced. She maintained that the proposed project will help in wealth creation, creation of jobs, improving security situation of the area and improving the social-economic facilities of the area. She took the position that if the procedures and requirements given to the 1st Respondent by the 2nd Respondent are complied with strictly, the community near the project will not be negatively affected. She stated that there was no evidence to show that the project was commenced before the requisite licences were issued.
 13. No response was filed by the 3rd Respondent despite service. The 1st Respondent's Notice of Preliminary Objection dated 27th September, 2017 challenging this court's jurisdiction was dismissed with costs by this court vide its Ruling delivered on 27th September, 2017.
 14. On 5th May, 2021, the court directed that the Petition be disposed by way of written submissions. On record are the Petitioners' submissions filed on 25th April, 2022; the 1st Respondent's submissions filed on 23rd May, 2022 and the 2nd Respondent's submissions filed on 26th April, 2022.

Petitioners' submissions

15. Counsel for the Petitioners submitted that the Petition raised two issues namely;
 - a. Whether the processes seeking building approval and approval of change of user by the 1st Respondent from the 2nd Respondent in respect of L.R. Number 12715/12673 were unlawful, irregular and null and void ab initio; and
 - b. Whether the Environmental Impact Assessment Licence number xxxx issued to the 1st Respondent by the 3rd Respondent is null and void.
16. On the first issue, counsel submitted that the 1st Respondent was constructing multiple dwelling units in an area zoned for single dwelling units without complying with the provisions of *the Constitution* and Section 3 of the Physical Planning Act. Counsel submitted that once an application for change



of user is lodged, an Applicant together with the Physical Planner are required to put up a Notice of change of user in two local Dailies and also erect a site notice for purposes of inviting public objections and submissions in the proposed development and change of user. Therefore, counsel argued that in this matter no advertisement was made to notify the public of the intended change of user before the impugned project was started. Counsel also argued that the 1st Respondent “doctored” Social Site Assessment Form dated 25th February, 2017 which contained information that was not true and was not authored by persons whose names appear on the forms. Counsel added that the Petitioners were only able to fill the Social Site Assessment Forms on 13th March, 2017 when the construction had already commenced.

17. In addition, counsel submitted that the 2nd Respondent granted building approvals despite the Petitioners’ objection to the project citing negative environmental impacts and cancellation of subdivision of LR. No. 12715/261 which is the land on which the proposed project is to be constructed. Counsel also submitted that despite the ELC Court in Machakos issuing the 2nd Respondent with a restraining order against approving construction of more than single residential building the same was granted. Reliance was placed on the case of Ken Kasinga v. Daniel Kiplagat Kirui & 5 Others, Nakuru ELC Constitutional Petition No. 50 of 2013, for the proposition that where a lawful procedure for protection of the environment is not followed, the assumption ought to be drawn that the project violates the right to a clean and healthy environment.
18. On whether the EIA licence is null and void, counsel submitted that despite the Petitioners’ objections to the project, the 3rd Respondent failed to consider the objections and did not give the Petitioners a hearing. Counsel argued that public participation is key in safeguarding the environment as provided in Principle 10 of the Rio Declaration on Environment and Development (1992) and the Bali Guidelines for the Development of National Legislation on access to information, public participation and access to justice in environmental matters.
19. In regard to Public Participation, counsel cited Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003 that provides for the manner of conducting public participation in the process of conducting an Environmental Impact Assessment Study. Therefore, counsel submitted that Regulation 17 above was not complied with as no posters were affixed in strategic public places in the project’s vicinity and that there was no public advertisement in the Newspapers inviting comments.
20. Counsel argued that the 3rd Respondent’s action of granting the impugned EIA licence without complying with relevant procedures, caused the Petitioners to lodge an Appeal to the National Environment Tribunal which issued a stop order on 27th June, 2017. Reliance was placed on the case of John Kabukuru Kibicho & Another v. County Government of Nakuru & 2 Others (2016) eKLR for the proposition that where there are objections to a project, those in administration must consider them.

1st Respondent’s submissions

21. Counsel for the 1st Respondent submitted that the Petition raised two issues namely:
 - a. Whether the process of applying for and obtaining building approvals including change of user by the 1st Respondent was irregular and unlawful; and
 - b. Whether the Environmental Impact Assessment (EIA) Licence from the 3rd Respondent was irregular.



22. On the first issue, counsel submitted that the 2nd Respondent granted building approvals including change of user from single dwelling house to multiple dwelling house to the 1st Respondent in the exercise of the powers conferred on the 2nd Respondent as a statutory body and that the latter rightfully issued the change of user and no evidence was adduced by the Petitioners to the contrary.
23. It was contended for the 1st Respondent that Section 29 of the repealed Physical Planning Act which is applicable in the circumstances, granted powers to the 2nd Respondent to approve and consider all development permissions and grant development permissions accordingly. Counsel submitted that prior to obtaining approval for change of user, the 1st Respondent made a notice in the Newspaper inviting objections on the proposed change of user.
24. Counsel submitted that the purpose of publishing a notice and conducting a social survey was to invite public participation on the proposed change of user according to the provisions of Physical Planning Act. Reliance was placed on the case of Nairobi Metropolitan PSV Sacco Union Limited & 25 Others v. County Government of Nairobi & 3 Others (2013) eKLR for the proposition that it is not the form of public participation that matters but what is needed is that the public is accorded a reasonable level of participation. Counsel maintained that the 2nd Respondent did not need to do more than making any advertisement inviting objections to the application for change of user. Counsel observed that the Petitioners did not raise any objections within fourteen (14) days as was required and that therefore the opportunity for objecting lapsed and they cannot come before court claiming lack of participation, as they are now estopped.
25. As regards the Petitioners' concerns over health risks of the project including sewerage, counsel submitted that the Petitioners' allegations were unfounded as the 1st Respondent had provided for a bio digester septic tank of adequate capacity. Further, counsel argued that the Petitioners have not demonstrated allegations of pollution and no Environmental Impact Assessment report was filed to support existence of pollution. Counsel maintained that the Petitioners' right to a clean and healthy environment has not been infringed as no evidence of violation has been presented. Counsel held the position that it is irrational for the Petitioners to make bare allegations when the neighbours around the proposed project have built multiple dwelling units which are at the same level and some are even of higher levels as compared to the proposed project, yet the Petitioners have not brought any action against them.
26. On whether the EIA licence was irregular, counsel argued that the licence was duly applied for and on compliance with the relevant conditions the licence was issued to the 1st Respondent allowing her to commence the project. Reliance was placed on Article 69 of *the Constitution* of Kenya 2010 which stipulates that the State is obligated to encourage public participation in the management protection and conservation of the environment and that everyone should cooperate with State organs and other persons to protect and conserve the environment. Counsel took the view that public participation does not entail usurping the decision making powers of public agencies and that public participation does not always mean that the outcome hereof must result in what the objectors want.
27. It was contended for the 1st Respondent that the 1st Respondent complied with Section 28 of the Environment Management and Coordination Act (EMCA) as well as Regulations 4(1) and 17 of the Environmental (Impact Assessment and Audit) Regulations 2003 before the impugned licence was issued. Counsel maintained that the Environmental Impact Assessment Study was posted online by the 3rd Respondent for review by the general public including the Petitioners. Therefore, counsel submitted that the Petitioners and other residents affected by the proposed project were given opportunity to give their views before the EIA licence was issued by the 3rd Respondent.



28. On whether Articles 42 and 69 of *the Constitution* were violated, counsel submitted that the Petitioners failed to provide particulars for the alleged violations. That they failed to discharge the burden of proof on how the environment would be polluted, as they did not avail any expert evidence to demonstrate their allegations.
29. Counsel further submitted that the Order dated 27th June, 2021 of the National Environment Tribunal was to preserve the status quo pending determination of the Appeal and that the Petitioners proceeded to abandon the Appeal to pursue this Petition. Counsel argued that the Petitioners failed to meet the standard of proof in Constitutional Petitions set out in the case of *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR.

The 2nd Respondent's submissions

30. Counsel for the 2nd Respondent submitted that the issues for determination are whether the 2nd Respondent irregularly issued building approvals to the 1st Respondent and who bears the costs of the Petition.
31. On whether the 2nd Respondent irregularly issued building approvals to the 1st Respondent, counsel submitted that Sections 29(c) and 36 of the repealed Physical Planning Act provided for the power of the 2nd Respondent to consider and approve all development applications and grant all development permissions as well as require an Applicant to submit a development application together with an Environmental Impact Assessment Report where a local authority is of the opinion that the development activity will have injurious impact on the environment.
32. Counsel submitted that following subdivision of the original parcel of land it was inevitable that individual owners should apply for change of user depending on desired purposes and that the 2nd Respondent complied with the Physical Planning Act in approving the change of user. Counsel submitted also that before granting development approvals, the 2nd Respondent considered all stakeholder's views including Social Site Assessments and public participation and that therefore allegations that Site Assessment Forms were doctored are farfetched. Counsel maintained that public participation for all stakeholders including the Petitioners was done and that public participation did not mean that the decision must be in favour of the Petitioners.
33. Counsel observed that the Petitioners largely relied on the interim orders issued by this court in ELC No. 5 of 2017, which application was dismissed on 22nd September, 2017 where the court took the view that the Petitioners failed to cite the law requiring that the whole area must have a gazetted development plan before the 1st Respondent can approve developments and change of user in the area, save that in the approvals for change of user, the Petitioners ought to be involved in the process. Counsel insisted that through public participation, the 2nd Respondent involved residents of Syokimau before change of user and development approvals and that the 2nd Respondent should not be barred from issuing development approvals because of an unknown zoning requirements that the property is situated on a single dwelling unit zone.
34. On who should bear the costs of the Petition, reliance as placed on several authorities which the court has considered, for the proposition that the Petitioners having failed to prove violation of their rights ought to pay costs.

Analysis and determination

35. I have carefully considered the Petition and the Supporting Affidavit, as well as the Replying Affidavits and the parties' rival submissions. The issue that arise for determination is whether the Petitioners'



rights were violated, in the 2nd Respondent's grant of approvals for the 1st Respondent's building plans and the grant of the EIA licence to the 1st Respondent by the 3rd Respondent.

36. For a Petition to meet the threshold for a Constitutional Petition, it must state with clarity and precision the Petitioners' rights alleged to have been violated or threatened with violation and the specific acts of the Respondents constituting the violations or threats of violations. In other words, a Constitutional Petition must specify with a degree of precision the Petitioners' complaint, the infringed constitutional provisions and the manner those provisions have been infringed. (See *Anarita Karimi Njeru v. Attorney General* [1979] KLR 154).
37. In the case of *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR, the court held as follows:
- (44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have been the need to amend the Petition so as to provide sufficient particulars to which the Respondents could reply, viewed thus, the Petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the Superior Court below to lament that the Petition before it was not the epitome of precise, comprehensive or elegant drafting, without remedy by the 1st Respondent...
- it is our finding that the Petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the Petition and Supporting Affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act* 2011, accordingly the Petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.
38. In this Petition, the Petitioners' complaints are two (2) namely;
- a. That the 2nd Respondent irregularly and fraudulently issued building approvals to the 1st Respondent for construction of multiple dwelling units in an area restricted and zoned for single dwelling units and on land parcel number 12715/12673 which does not have any deed plans contrary to land policy principles in Article 60 of *the Constitution*. In that regard they also complained that they were not notified of change of user from single dwelling unit to multiple dwelling units as required by the Physical Planning Act; and
- b. That the issuance of the Environmental Impact Assessment Licence by the 3rd Respondent to the 1st Respondent was made long after the development of the impugned project had begun and in violation of the constitutional and statutory requirement for a transparent and credible public participation. They denied having been given opportunity to be heard in the process of the issuance of the EIA licence, contrary to Article 47 of *the Constitution*.
39. Therefore the crux of this dispute is the contention by the Petitioners that the principle of public participation was not complied with by the Respondents in both the approval of building plans and change of user and the grant of the EIA licence for failure to avail the Petitioners with an opportunity to be heard. In my view therefore, as the Petitioners have stated the constitutional provisions and or rights alleged to have been violated and the nature of the alleged violations, I am satisfied that this Petition has met the threshold for Constitutional Petitions as envisaged in the *Anarita Karimi* case (supra).



40. Article 60 of *the Constitution* of Kenya provides for land use and states that land in Kenya shall be held, used and managed in an equitable, efficient, productive and sustainable manner. It is therefore the duty of the State to ensure that land use in Kenya is sustainable and therefore any change of user maintains the sustainability element. Besides, under Article 69 of *the Constitution*, the State is obligated to encourage public participation in the management, protection and conservation of the environment. The principle of public participation which requires involving the people in decision making, is at the core of governance and is based on the sovereignty of the people as captured in Article 1 of *the Constitution*. Indeed Article 10(2) recognizes participation of the people as one of the national values and principles of governance.
41. Therefore those public agencies involved in processes geared towards environmental protection and conservation must involve the people in decision making. As regards a proposed development project, the same obligation for public participation is placed on State agencies to ensure that decisions take into account the views of the people and especially those that will be affected by the project. In this case, those living in Syokimau area including the Petitioners are stakeholders in all projects within the area and the State is obligated to grant them opportunity to give their views before making decisions including change of user and granting EIA licences.
42. On the question of change of user, as acts complained of in regard to the proposed project were done in 2017, the applicable law therefore is the Physical Planning Act No. 6 of 1996 (repealed), which Act was repealed in August, 2019 by the Physical and Land Use Planning No. 13 of 2019. Section 29 of the repealed Act granted powers to local authorities (County Governments) to among others, control the use and development of land and buildings for orderly development and to consider and approve all development applications and all development permissions. Therefore, the 2nd Respondent had power to grant approval for change of user.
43. While the Petitioners maintained that the area within which the proposed project is to be constructed is zoned for single unit dwelling, no evidence for this preposition was presented. The 2nd Respondent having challenged the allegation that the area in issue was not zoned for specific developments, it was upon the Petitioners to avail evidence for their allegations. This is necessary in view of the fact that the Petitioners referred to a case they filed in this court being Machakos ELC No. 5 of 2017, Syokimau Residents Association Limited v. County Government of Machakos & Another (2017) eKLR where the court observed that the Petitioner had not cited any law requiring that the whole area of Syokimau must have a gazetted development before the County Government of Machakos can approve development and change of user. Subsequently, in that case, the court dismissed an Application by the Petitioners herein against the County Government of Machakos and NEMA, seeking to restrain Machakos County Government from issuing building approvals for any construction that is not a single residential building, issuing change of user licences and any other building licence due to the Respondents' failure to have an approved and legal development plan for the whole area and or structural guidelines for such approvals within Syokimau Estate which is L.R. No. 12715 as per the requirements of the Physical Planning Act.
44. In my view, it is ironical for the Petitioners to have stated categorically in Machakos ELC Case No. 5 of 2017 that the County Government of Machakos had failed to have an approved and legal development plan for the entire Syokimau Estate being LR. No. 12715 contrary to the Physical Planning Act, and at the same time in 2017 when they filed this suit, insist that the same area had been zoned for single dwelling units. This is exhibited from the Order dated 22nd February, 2017 produced by the Petitioners. There being no evidence that the area is zoned as a single dwelling unit zone, I am not satisfied that the 1st Respondent was barred from obtaining building approvals for a multiple dwelling unit. The



mere fact that a change of user was advertised by the 2nd Respondent, does not in my view validate the unsubstantiated allegations of existence of zoning of Syokimau area. In my view the change of user was based on assumptions.

45. In any event, the change of user having been published in the Newspaper was a proper opportunity given to the Residents of Syokimau to provide their views, and therefore the Petitioners allegations that they were not accorded a right to be heard are not correct. Section 13 of the repealed Physical Planning Act No. 6 of 1996, provided that any person who was aggrieved with the decision of the local authority was at liberty to Appeal against such decision in sixty (60) days from the date of notification of the decision before the liaison committee. The Petitioners did not file an Appeal or complain before the liaison committee as soon as they became aware of the decision. Therefore the opportunity to be heard was availed to the Petitioners.

46. On the legality of the EIA licence, Section 58 of EMCA provides as follows:

58 (1) 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 for an 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.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

47. Therefore, whether or not a project proponent has an approval, permit or licence granted under laws other than EMCA, they must submit a project report to NEMA with all the necessary information.

48. Section 59 of EMCA requires publication of the Environmental Impact Assessment by NEMA where the report is done pursuant to Section 58(2) of EMCA that is in respect of projects specified in the Second Schedule which required a full Environmental Impact Assessment Study, which are in regard to low risk projects like places of worship; medium risk projects like multi-dwelling housing developments of not exceeding one hundred units; and high risk projects which include any structure of a scale not in keeping with its surrounding.

49. On the question of public participation in regard to the process for the issuance of the impugned EIA licence, Section 59 of EMCA provides as follows:

59(1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project a notice which shall state—

- a. a summary description of the project;
- b. the place where the project is to be carried out;
- c. the place where the environmental impact assessment study, evaluation or review report may be inspected; and



- d. a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.
 - (2) The Authority may, on application by any person extend the period stipulated in subparagraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.
50. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 provides for public participation as follows:
- (1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.
 - (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall –
 - a. publicize the project and its anticipated effects and benefits by-
 - i. posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
 - ii. publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; and
 - iii. making an announcement of the notice in both official and local languages in a radio with a nation-wide coverage for at least once a week for two consecutive weeks;
 - b. hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
 - c. ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
 - d. ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

51. Therefore, Section 59 of EMCA as read with Regulation 17 of the above Regulations envisages that public participation ought to be adequate and effective both qualitatively and quantitatively so that all those that may be affected by a proposed project are aware of the impacts of the project; are given opportunity to give their views and the entity conducting public participation to ensure that their views count. Principles for public participation are now well settled. The Programme applied must be flexible to meet the required standard of effectiveness and adequacy. In the case of *London Distillers (K) Limited v. NEMA and 2 Others Machakos ELC Appeal No. E010 of 2022 consolidated with ELC Appeal No. E011 of 2022*, this court held at paragraph 49 of the Judgment as follows:

The Programme chosen for conducting public participation should have the flexibility and versatility that is necessary to meet the required standard of effectiveness and adequacy. The minimum is that it must avail in a user friendly form, all the necessary information concerning the project for purposes of obtaining the most informed views on the project



and taking into account the participants' views, but bearing in mind that not every view should be reflected in the project, but allowing the collected views to enrich the perspectives of the technical entity collecting the views.

52. In the case of *Mui Coal Basin Local Community & 15 Others v. Permanent Secretary Ministry of Energy & 17 Others* (2015) eKLR, it was held as follows:

97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

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 issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC).
- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.
- d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal



by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

- e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
 - f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.
53. In the instant Petition, the Petitioners' complaint is that in the process of granting the impugned EIA licence, they were not given opportunity to be heard. They confirmed that they gave their views as per the annexure marked JMM3 which are five Social Site Assessment Forms. They insist that their opinion is that the proposed project will have a negative impact on the environment in Syokimau Estate. Having considered the said annexure JMM3, I note that the Petitioners' concerns revolved around Syokimau area's lack of sewer system; lack of waste water and solid waste management system; lack of water and power supply and the risk of noise, vibration and dust from the project.
54. I have considered the EIA licence granted to the 1st Respondent by the 3rd Respondent and I note that the same was in respect of construction of eight (8) units on two floors being a residential development. But most importantly, that EIA licence is subject to several conditions including construction of septic tank and soak pits; obtaining effluent discharge licence; installation of buffers; taking measures to minimize dust pollutions; as well as ensure disposal of waste water; compliance with the Environmental Management and Co-ordination (Noise and excessive vibration pollution control) Regulations 2009; provide drainage facilities; and ensure proper handling of solid waste.
55. That being the case, it is my view that the concerns of the Petitioners are in fact part of the conditions of the EIA licence issued to the 1st Respondent and therefore, I find that the concerns and views of the Petitioners were taken into account in the issuance of the EIA licence. I take the view that taking into account objection views does not only mean that the application for an EIA licence should be rejected. Even including those concerns as conditions on which the licence is subject, is sufficient demonstration of considering the views of those affected by the proposed projects.
56. In the circumstances, I find no merit in the Petition and the same is hereby dismissed. Each party shall bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Kathike holding brief for Mr. Maluki for 1st, 2nd, 3rd and 4th Petitioners



Ms. Oduo holding brief for Mr. Achiando for 1st Respondent

Ms. Kyania for 2nd Respondent

No appearance for 3rd Respondent

Ms. Josephine Misigo - Court Assistant

