Menengai West Stakeholders Forum & 10 others v National Environmental Management Authority & another (Environment and Land Appeal E001 of 2024) [2025] KEELC 1169 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1169 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E001 OF 2024

MAO ODENY, J

MARCH 13, 2025

BETWEEN

MENENGAI WEST STAKEHOLDERS FORUM ..... 1ST APPELLANT

SOLOMON MANYARKIR ..... 2ND APPELLANT

JACKSON KIMELI ..... 3RD APPELLANT

RAY K. KIPTANUI ..... 4TH APPELLANT

ALEXANDER K KENDA ..... 5TH APPELLANT

LUKA KR TUIGONG ..... 6TH APPELLANT

TIMOTHY NGETICH ..... 7TH APPELLANT

LYDIA J KOMEN ..... 8TH APPELLANT

EVANS K KIPTANUI ..... 9TH APPELLANT

DANIEL Y CHIRCHIR ..... 10TH APPELLANT

ROSE KOMEN ..... 11TH APPELLANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 1ST RESPONDENT

SOSIAN ENERGY LTD ..... 2ND RESPONDENT

(Being an Appeal against the decision and order of the National Environment Tribunal, Tribunal Appeal No. 6 of 2021(Emmanuel Mumia, Winnie Tsuma, Kariuki Muigua, Duncan Kuria and Ronald Allamano) delivered on 5th December 2023)

JUDGMENT

1. This appeal arises from the Judgment and order of the National Environment Tribunal, Tribunal Appeal No. 6 of 2021 (Emmanuel Mumia, Winnie Tsuma, Kariuki Muigua, Duncan Kuria and Ronald Allamano) delivered on 5th December 2023. The Appellants being aggrieved by the Judgment lodged a Memorandum of Appeal dated 19th December, 2023 and listed the following grounds:

   Denial of a right to remedy

   1. The Tribunal erred in law and in fact in delivering a decision devoid of any reasoned analysis or justification for its determination on any of the issues raised for adjudication thereby denying the Appellants their right to remedy.

      Erroneous finding of adequate Public Participation

   2. The Tribunal erred in law and in fact in finding that there was proper public participation without setting out any reasoned analysis for arriving at its determination.

   3. The Tribunal erred in law and in fact in finding that there was proper public participation without demonstrating why the Respondent's evidence outweighed the Appellants' on a balance of probabilities.

   4. The Tribunal erred in law and in fact in holding that there was proper public participation by the 2nd Respondent on the basis of meetings convened as part of the scoping phase of the ESIA process before the Terms of Reference were approved by NEMA to pave way for the preparation of the environmental and social impact assessment study report.

   5. The Tribunal erred in law and in fact in holding that there was proper public participation despite evidence by NEMA disavowing any purported public participation meetings held in line with regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 (the 'EIA Regulations")

      Failure to address the validity of an ESIA Study Report substantially undertaken by a Lead EIA expert without a valid licence.

   6. The Tribunal erred in law and in fact in failing to address itself to the issue that the ESIA Study process was substantially undertaken by an unqualified/unlicensed Lead EIA expert contrary to Regulations 13 and 15 of the EIA Regulations.

      Failure to address the adequacy of the ESIA Study Report.

   7. The Tribunal erred in law and in fact in failing to address the absence of air quality and noise baseline information in the Environmental and Social Impact Assessment study report in contravention of the approved Terms of Reference and Regulation 18(1) (b) of the EIA Regulations.

   8. The Tribunal erred in law and in fact in failing to address the absence of air quality and noise baseline information on which basis EIA licence conditions and subsequent oversight, monitoring and audit of the proposed exploration could be undertaken.

      Erroneous finding that the EIA licence conditions adequately address the Appellants concerns

9. The Tribunal erred in law and in fact in holding that the EIA license conditions address the Appellants concerns without giving any analysis, reasons or justifications for such a determination.

10. The Tribunal erred in law and in fact in holding that the EIA licence conditions address the Appellants concerns in light of the admission by the lead EIA expert that the noise levels indicated in the ESIA Study Report exceed that the noise levels indicated in the ESIA Study Report exceed allowable limits under the relevant regulations.

11. The Tribunal erred in law and in fact in holding that the EIA licence conditions would be sufficient to address the concerns regarding the noise and vibration impacts raised by the Appellants when the licence conditions were based on the erroneous information that there were no sensitive noise receptors within a 2Km radius of the noise and vibration sources as per Regulation 14(2) of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations.

    Erroneous requirement for a climate impact assessment without making this a condition for project activity.

12. The Tribunal erred in law and in fact by requiring the 2nd Respondent to carry out a climate impact assessment without making this a pre-condition for the commencement of any project activity.

    Failure to address the lack of a cumulative impact assessment.

13. The Tribunal erred in law and in fact in failing to address the absence of a Strategic Environmental Assessment to account for and address the cumulative impacts of several geothermal activities in the Menengai Area.

2. The Appellants pray that this Honourable Court Orders/Declares that:

    a. The decision of the Tribunal dated 5th December 2023 be set aside.

    b. The ESIA Study Report was fatally defective for failing to meet requirements of the Environmental (Impact Assessment and Audit) Regulations, 2003.

    c. The 1st Respondent's decision granting the 2nd Respondent an Environmental Impact Assessment License No NEMA/EIA/PSL/10003 based on a procedurally defective process and substantively defective ESIA Study Report to be set aside.

    d. Each party bears its own costs.

3. The Appellants had instituted an Appeal before the National Environment Tribunal dated 13th April 2021 seeking the following reliefs:

    a. That the 1st Respondent's decision to grant the 2nd Respondent an EIA License be set aside.

    b. That a Strategic Environmental Assessment be undertaken for all geothermal activity planned by the Geothermal Development Company within Menengai area under what it refers to as the 'Menengai Geothermal Project'.

    c. That after the said Strategic Environmental Assessment, a new Environmental Impact Assessment Study be conducted by the 2nd Respondent in full compliance with the law, including regulations, based on specific and current information, and involving all relevant stakeholders.

d. That each party bears its own cost.

4. The Appeal was heard and the National Environment Tribunal in its Judgment dated 5th December, 2023 made the following orders:

   a. The Appellants' appeal be and is hereby dismissed.

   b. The 2nd Respondent is directed to prepare and lodge with the 1st Respondent a Climate Impact Assessment Study report within 24 months of this Judgment and

   c. Each party to bear their own costs.

Appellants Submissions

5. Counsel for the Appellants filed submissions dated 30th September, 2024 and identified the following issues for determination:

   a. Whether the Tribunal erred in law and fact in finding there was adequate public participation.

   b. Whether the Tribunal erred in law and in fact in failing to address validity of an ESIA Study Report substantially undertaken by a Lead EIA expert without a valid licence and whether this lapse was fatal to SEL's EIA Application.

   c. Whether the Tribunal failed to address the adequacy of the ESIA Study Report and whether issuance of an EIA Licence based on an inadequate ESIA Study Report was contrary to law.

   d. Whether the tribunal erred in law in finding that the EIA licence conditions adequately address the Appellants' concerns?

   e. Whether the Tribunal erred in requiring a climate impact assessment without making this a condition for project activity?

   f. Whether the Tribunal erred in law in failing to address the absence of a Strategic Environmental Assessment for "the Menengai Geothermal Project" and whether NEMA should have required an SEA as a condition for issuing an EIA Licence.

   g. Whether the nature of the Tribunal's Judgment was such as to deny the Appellants' right to remedy.

6. Counsel gave a brief background that forms the basis of this appeal, grounded on facts and law.

7. It was the Appellant's case that in or around 2017, Sosian Energy Limited (SEL) applied and was granted a Geothermal Resource Licence No. 8/2017 by the Ministry of Energy, which licence was issued for exploration and development of the geothermal resources in Makongeni/Menengai Geothermal prospect as part of the greater Menengai Geothermal Resource area under the Geothermal Development Company's Menengai Geothermal Project.

8. The Appellants' Appeal to the Tribunal arose from the decision of the 2nd Respondent (NEMA) to grant the 1st Respondent SEL an Environmental Impact Assessment (EIA) Licence to undertake geothermal exploration drilling, including the drilling of 3No. Thermal Gradient Holes (TGH) to a depth of 200 m, 4No. Water wells, 3No exploration drilling to a depth of 2.7Km and construct associated facilities and amenities on Plot No LR Makongeni/Menengai Block 1/169 (Menengai) and 161 in Makongeni/Menengai Area, Nakuru County.

9. Counsel further stated that the disputed geothermal activities are to be undertaken on private property but within proximity of a bustling agricultural settlement with a population of approximately 163, 864 people who have faced challenges of air pollution, excessive noise and vibration from the activities.

10. It is upon this backdrop that the Appellants filed the current Appeal whereby they contend, that the Tribunal fundamentally failed to consider the matters of fact and expert evidence before it and hence misapprehended the law and its jurisdiction and consequently arrived at a wrongful decision.

11. On the first issue as to whether the Tribunal erred in finding that there was adequate public participation, counsel submitted that there was no reasoned analysis that supported the finding and hence a clear failure to comply with EMCA and the EIA Regulations.

12. According to counsel, the 1st Respondent (NEMA) as a Regulator owed them a constitutional duty to properly supervise the Environmental Impact Assessment process and ensure compliance with the law but failed and/or neglected to do so.

13. Counsel further submitted that this omission is incurable and fatal to the entire EIA process, including the grant of the EIA Licence and could not be cured even by convening of a public hearing and relied on Article 10 (1) (a) of the *Constitution* of Kenya, Sections 58 (2) & 58 (7) of EMCA, Regulations 11-30 of the Environmental (Impact Assessment and Audit) Regulations, 2003. Counsel also relied on the cases of Save Lamu & Others vs NEMA & Another, Tribunal Appeal No NET 196 of 2016 and Mohamed Ali Baadi & Others vs the Attorney General & 11 others [2018] eKLR.

14. It was counsel's submissions that according to SEL's response to the Appeal, the proponent conducted a scoping exercise in June 2019, which included the development of a Stakeholder Engagement Plan through an alleged participatory process that involved different stakeholders, which resulted in a scoping report. SEL indicated that the objective of engagement plan was to guide stakeholder engagement, identify key stakeholders affected and able to influence the project and identify the most effective methods and structures through which to disseminate project information and to develop an engagement process that provided stakeholders with an opportunity to influence project planning and design.

15. Counsel therefore stated that EMCA and its EIA Regulations are unique law that specifically and elaborately provide for how and when public participation should be undertaken before any decision is made by NEMA to issue an EIA licence.

16. While referring to the jurisdiction of the Tribunal, counsel relied on the Mohammed Baadi case (supra), where the court held that the standard of ascertaining whether there is adequate public participation in environmental matters, is the reasonableness standard which must include compliance with the prescribed statutory provisions as to public participation. Counsel also relied on Save Lamu case, where the court held that the Tribunal's jurisdiction does not allow it to waive provisions of statute or regulations made thereunder hence the legal requirements imposed on the 1st and 2nd respondents when undertaking EIA study have to be strictly complied with and in the present case the same were not complied with.

17. On the second issue as to whether the Tribunal erred in failing to address the validity of an ESIA study report prepared and EIA study process substantially undertaken by an unqualified/unlicensed Lead EIA expert, counsel submitted that despite the issue being pleaded and argued by the Appellants before the Tribunal, the Tribunal completely failed to consider or address it in its judgment.

18. It was counsel's submission that the EIA expert's licence status was a pertinent issue of the appeal before the Tribunal and that there is a mandatory requirement that environmental impact assessments

only be carried out by individuals or experts who are duly authorized by NEMA as per Section 58(5) of EMCA.

19. Counsel submitted that the evidence before the court demonstrates that the lead EIA expert did not have a valid practicing certificate before 8th August, 2019 and consequently there are sufficient grounds to hold the 1st Respondent (NEMA) erred in issuing a license. Counsel relied on the case of Chandaria vs Njeri [1982] eKLR where the Court of Appeal considered the implications of a Judgment that fails to address all issues raised in pleadings by the parties and held that it could amount to a complete mistrial. Further, that failure to address the issues in the judgment invalidates the Tribunal's judgment.

20. Mr. Odaga further relied on Sections 57 (5 &8) , 58 (5), 130 (4c), Regulations 13 (2), (3) & 15 of the EIA Regulations, Section 14 (4) (a) of the Code of Practice and Professional Ethics for Integrated Environmental Assessment and Audit Experts and submitted that the claim by Prof. Krhoda that he had applied for the renewal of his licence was not supported by any evidence Further that even if there was a delay in the issuance of the licence, Prof. Krhoda could have provided a payment receipt as evidence of compliance of which SEL failed to adduce such evidence. Similarly, counsel submitted that SEL did not provide any evidence to show any communication from NEMA regarding the approval of the Lead expert as required under Regulation 15 (3) of the EIA Regulations.

21. On the third issue, on as to whether the Tribunal failed to address the adequacy of the ESIA Study Report and whether issuance of an EIA Licence based on an inadequate ESIA Study Report was contrary to law, counsel submitted that this was a central issue pleaded and argued before the Tribunal whereby the Appellant presented expert opinion evidence of Dr. Mark Chenaik of which the Tribunal failed to analyse or give a reasoned determination on the issue.

22. Mr. Odaga further submitted that the ESIA Study Report does not include baseline data on air quality as SEL failed to carry out a baseline data collection on air quality including pre-development ambient air quality sampling results as well as other pollutants such as particulate matter, Sulphur dioxide and nitrogen dioxide which was in contravention of Regulation 18(1)(b) of EIA Regulations which expressly provides for baseline information.

23. According to counsel, the inadequate consideration of air quality impacts was fatal to the validity of the ESIA Study as a basis for the 1st Respondent's (NEMA's) decision making and relied on the cases of Michael Abongo Gilbert Makhulo & Another (suing on their own behalf and on behalf of Marafiki Road Residents) vs Director General National Environment Management Authority (NEMA) & Another [2021] eKLR and Company Secretary, AcelorMittal South Africa Ltd and Another vs Vaal Environmental Justice Alliance 2015 (1) (SA) 515 (SCA).

24. On the fourth issue, as to whether the Tribunal erred in finding that the EIA Licence conditions adequately address the Appellants 'concerns, counsel urged the court to hold that the ESIA Study Report does not adequately address the noise and vibration impacts since it did not include a baseline noise assessment, fails to assess the impacts of the project on the surrounding communities and as a result contains inadequate mitigation measures which would protect the community from the significant noise impacts.

25. Counsel relied on Section 18 of the *Environment and Land Court Act*, Regulation 16 of the EIA Regulations, Regulation 15 of the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations and Regulation 14 (2) of the Noise Regulations and the cases of Dick Omondi Ndiewo t/a Ditech Engineering Service vs Cell Care Electronics [2015] eKLR and National Environment Management Authority & 3 others vs Maraba Lwatingu Residents Association & 2 others [2020] eKLR. Counsel further urged the court to apply the precautionary

principle to cancel the licence and prevent environmental harm than proceed with a project on inadequate data.

26. On the fifth issue, as to whether the Tribunal erred in requiring a climate impact assessment without making this a condition for project activity, counsel submitted that the law and the applicable principle requires climate impact assessment to be undertaken prior to the proposed activity which is the basis of the assessment. That impact assessment is by their very nature ex ante processes which inform the decision as to whether a proposed activity will be granted approval, denied approval or approved subject to conditions determined based on the information and analysis generated through the impact assessment process.

27. Counsel invited the court to hold so as guided by the pre-cautionary principle under Section 18 (a) (iv) of the *Environment and Land Court Act*, relied on Section *2* of EMCA and Section *20* of the *Climate Change Act*, 2016 and the cases of Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others (65662/16) [2017] and Communities for a Better Environment vs City of Richmond 184 Cal. App 4th 70 (2010).

28. On the sixth issue, as to whether the Tribunal erred in failing to address the absence of Strategic Environmental Assessment (SEA) for "Menengai Geothermal Project" and whether NEMA should have required an SEA as a condition for issuing an EIA Licence, Mr. Mboya submitted that the failure to conduct a SEA is a further reason rendering the EIA process for the proposed geothermal exploration procedurally flawed and relied on the case of A and Others against Gewestelijkestedenbouwkundige ambtenaar van het department Ruimte Vlaanderen, afdeling Oost-Vlaanderen, interested party: Organisatie voor Duurzame Energie Vlaanderen VZX (2020) where the European Court of Justice held that the failure to carry out a SEA would result in the consent for a proposed wind farm being cancelled.

29. Mr. Mboya further submitted that the conduct of SEA is not optional but a legal requirement under Section 57(a) of EMCA and EIA Regulations part 6. It is required by law to policies, programs, plans and other strategic initiatives as per Section 2 of EMCA and that the larger Menengai geothermal Project is a strategic initiative by the government. There are other geothermal well sites within the region and for those reasons, SEAS are required to be conducted.

30. On the seventh issue, as to whether the Tribunal's decision amounts to a denial of the Appellants' right to remedy, counsel submitted that the judgment delivered by the Tribunal is not objectively clear on what basis the Tribunal arrived at the conclusion that there was adequate public participation since the judgment contains no analysis of the evidence presented by the respective parties on the issue. And cited Articles 20 (1), 21 (1), 42, 69 (1) and 70 (1) of the *Constitution* of Kenya and the case of State of West Bengal 7 Another vs Alpana Roy & Others 2005 (8) SCC.

31. Counsel therefore urged the Court to find that the NET decision of 5th December 2023 violated the Appellants' right to remedy pursuant to Article 70(1) as read together with Articles 20(1) and 21(1) of *the Constitution*, the decision be set aside, the ESIA Study Report prepared by the 2nd Respondent was fatally defective for failing to meet the requirements of the Environmental (Impact Assessment and Audit) Regulations, 2003 and finally that the 1st Respondent's decision granting the 2nd Respondent an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/10003 based on a procedural defective process and substantially defective ESIA Study Report be set aside with each party bearing their own costs.

2nd Respondent's Submissions

32. Counsel for the 2nd Respondent filed submissions dated 5th November, 2024 and identified the following issues for determination:

    a. Whether the Tribunal erred in finding that there was adequate public participation;

    b. Whether the ESIA Study Report that was undertaken was valid;

    c. Whether the ESIA Study as undertaken by the 2nd Respondent was adequate and in conformity with the law;

    d. Whether the EIA license conditions adequately address the Appellants concerns;

    e. Whether the Tribunal erred in failing to address the absence of a Strategic Environment Assessment (SEA) for 'the Menengai Geothermal Project."

    f. Whether the Tribunal's decision amounts to a denial of the Appellant's right to remedy?

33. On the first issue, as to whether the Tribunal erred in finding that there was adequate public participation, counsel relied on the case of Constitutional Petition No 305 of 2012 (Mui Coal Basin Local Community and 15 others vs PS Ministry of Energy and 17 others (2015) and submitted that the 2nd Respondent as the project proponent sought the views of persons who were likely to be affected by the project, the community members, during all the phases of the project hence it stands absolved of any claims of dereliction of duty as they followed through with all the principles laid down in the Mui Case and in accordance with Regulation 17 of the Regulations. Further that the public participation that was done was procedural, extensive and sufficient.

34. It was counsel's submission that the 2nd Respondent accorded members of the community and all relevant stakeholders an opportunity to familiarize themselves with the ideas of the project, opportunities to make contributions, and raise any concerns which was done through consultation meetings, stakeholder meetings, and public barazas that were announced well in advance.

35. Ms. Thande also submitted that the EIA study report submitted by the 2nd Respondent particularizes all the meetings that were held and that the attendances were confirmed through minutes and attendance lists together with photographs. Counsel further stated that the Appellants' witnesses who testified confirmed that they indeed participated in various meetings and gave their views on the proposed project during the hearing at the National Environment Tribunal.

36. The 2nd Respondent contends that they fully complied with provisions of Regulation 17(2) in publicizing the project by:

    i. Posting posters at strategic places to inform the public and affected persons of in the vicinity of the project site of public participation meetings held at various venues in the respective areas of Mercy Njeri Centre, Kwa Gitau Centre, Ol Rongai, Kipngochoch and Tulwobmoi

    ii. Sending notices of the proposed consultation meetings, as detailed herein below:

        a) Letter to AIC Church Kiamunyi

        b) Letter to Catholic Church Kiamunyi

        c) Letter to CEC Energy Nakuru County

d) Letter to County Commissioner Filed on: - No Paid- - BY: KMK Africa Advocates LLP - Reference: E3MY4ZB6 - KSH. 0.00

e) Letter to friends to Menengai NGO f) Letter to GDC South Rift Manager g) Letter to Gospel Community Church Kiamunyi

h) Letter to Kiamunyi Secondary School

i) Letter to MCA

j) Letter to Ward representative

iii. Issuing notices on the proposed project and its anticipated impacts which were published in newspapers and a radio station for two successive weeks with nationwide coverage as follows:

i. The Standard Newspaper and the Star Newspapers –published on 22nd January 2020

ii. ii. Radio announcement on Radio Maisha

37. The 2nd Respondent further submits that at least seven (7) public meetings were held with various stakeholders/participants, a fact evidenced by attendance sheets and minutes of the public meetings conducted in separate locations on diverse dates. Some of the said public meetings include: (a) Meeting with community representatives and county government officials on 12th June 2019 at Donnies Hotel (b) Meeting on 21st June 2019 at A.I.C Tulobmoi Secondary School (c) High level meeting to which all project affected persons were invited and actively participated held at AIC Tulobmoi Secondary School on 21st June 2019, as admitted by the Appellants at paragraph 7 of their Appeal.

38. Counsel relied on the cases of Poverty Alleviation Network & Others vs President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5, Legal Advice Centre & 2 others vs County Government of Mombasa & 4 others [2018] eKLR, Communist Party of Kenya vs Nairobi Metropolitan Services & 3 others: National Environment Management Authority & another (2022) eKLR, Supreme Court of Belize in Claim No 223 of 2014-Belize Tourism Industry Association vs National Environmental Appraisal Committee & 2 others and Save Lamu & Others vs NEMA & Another, Tribunal Appeal No Net 196 of 2016 and urged the court to find that there was adequate public participation.

39. On the second issue, as to whether the ESIA Study Report that was undertaken was valid, counsel submitted that the EIA Study and the resultant report based on which the EIA licence was issued was undertaken by properly qualified and licensed the Lead EIA Expert and firm of experts. Further that the EIA study was conducted by REDPLAN Consultants Limited, which is a duly certified firm of experts, led by Prof George Krhoda who is a certified EIA Lead Expert and duly registered by National Environment Management Authority under Registration Number 1485 and is the Managing Director of REDPLAN Consultants Limited.

40. The 2nd Respondent submitted evidence, of NEMA licenses for the year 2019 showing that the firm of experts was licensed to practice for the year 2019 which is requisite proof that the firm of experts and the lead expert, Prof George Krhoda were well authorized to conduct the EIA studies which in any case were presented to the Authority in November

41. Ms. Thande submitted that no evidence has been led showing that a perusal of the register by NEMA shows that the firm of experts is not authorized to conduct an EIA study and relied on Section 58 (5) of the Environmental Management and Coordination Act.

42. On the third issue, as to whether the ESIA Study was undertaken by the 2nd Respondent was adequate and in conformity with the law, counsel submitted that contrary to the allegations by the Appellants, the EIA study report contains baseline data on air quality. Paragraph 4.4 of the ESIA Study Report is the methodology section and indicates that the EIA Lead Expert conducted a field survey whose purpose was to gather data on the existing physical and socio-economic conditions (baseline data). At paragraph 4.1 of the Report (page 66 of the Bundle), it is indicated that the techniques adopted included baseline data collection.

43. Further that the conditions of the EIA Licence issued will be continuously monitored and enforced by the 1st Respondent and the Appellant's concerns have no factual or legal basis and that the EIA Study Report outlines comprehensive procedures on how to implement mitigation measures through the detailed Environmental and Social Management and Monitoring Plan which informed the 1st Respondent's decision to grant the EIA.

44. Counsel did not submit on the fourth issue identified for determination. On the fifth issue as to whether the Tribunal erred in failing to address the absence of a Strategic Environment Assessment (SEA) for "the Menengai Geothermal Project" counsel submitted that the subject project is not the same as the one contemplated as a Public Private Partnership project as this project merely sought the testing of wells for viability of geothermal power and where the tests are positive, the 2nd Respondent would then apply for another licence from the 1st Respondent after following the laid down processes and procedures. Counsel submitted that there is/was no requirement to conduct of a Strategic Environmental Assessment for the subject proposed project as per the EIA Regulations.

45. On the sixth issue, as to whether the Tribunal's decision amounts to a denial of the Appellant's right to remedy, counsel submitted that the Tribunal properly scrutinized the documents before it and in doing so were able to reach a well-reasoned conclusion. Counsel submitted that the only shortcoming of the whole process was the additional safeguard directing the Appellant to prepare a Climate Impact Assessment Study Report within 24 months of the Judgment and urged the court to dismiss the Appeal with costs for lack of merit.

Analysis and Determination

46. The issues for determination that arise from the Memorandum of Appeal and the record of Appeal essentially revolve around whether there was adequate public participation, the validity of an ESIA Study Report substantially undertaken by a Lead EIA expert without a valid licence, whether the Tribunal erred in requiring a climate impact assessment without making this a condition for project activity, failure to address the absence of a Strategic Environmental Assessment for "the Menengai Geothermal Project" and whether NEMA should have required an SEA as a condition for issuing an EIA Licence and finally whether the Tribunal's Judgment denied the Appellants' right to remedy.

47. This being a first appeal, it is the duty of the Court to review the evidence adduced before the Tribunal and satisfy itself that the decision was well-founded. In the case of Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal held as follows:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

48. The Appellants and the Respondent elaborately presented their cases at the Tribunal and filed exhaustive submissions in respect of this Appeal. The main issue for contention is whether there was adequate public participation by the 2nd Respondent leading to the issuance of EIA licence by NEMA. The Appellant claimed that there was lack of adequate public participation, which is the gist of this Appeal of which the 2nd Respondent disagrees with.

49. The *Constitution* of Kenya under Article 10 (2) identifies public participation 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 the management, protection and conservation of the environment. Public participation is anchored in the *Constitution* and its importance cannot be over emphasized. It is an important principle of governance, which has to be adhered to. It should also be noted that public participation must be meaningful and not just done to tick boxes.

50. Similarly, Principle 10 of the Rio Declaration on Environment and Development (1992) also states as follows on the issue of public participation:

> "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 decision making process..."

51. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations prescribes the nature of public participation that ought to be undertaken while conducting an environmental impact assessment study. It provides 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 nationwide circulation; and
>
> (iii) making an announcement of the notice in both official and local languages in a radio with a nationwide 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."

52. The 2nd Respondent contends that they fully complied with the provisions of Regulation 17 (2) by publicizing the project by posting notices at strategic areas within the vicinity of the project site and sending notices of the proposed consultation meetings detailing the areas covered. The Respondent further stated that they made radio announcement on Radio Maisha, published on The Standard and Star Newspapers on 22nd January 2020. Counsel stated that these meetings met the threshold for public participation.

53. The Appellants, however, were of a contrary opinion on the adequacy of the notices and public participation and submitted that the Respondent only conducted a scoping exercise in June 2019, which included the development of a stakeholder engagement plan through the alleged participatory process that resulted in a scoping report. The 2nd Respondent admitted that they conducted a scoping exercise in June 2019.

54. It should be noted that while a stakeholder plan is a crucial component of public participation in Environmental Impact Assessments (EIAs), it is not equivalent to public participation itself, as it focuses on identifying and engaging relevant parties, whereas public participation encompasses the actual process of involving them in the EIA. Stakeholder Plan outlines the process for identifying, engaging, and managing interactions with all parties affected by or interested in a proposed project, further it maps out who the stakeholders are, how they will be contacted, and what methods of involvement will be used, in other words it is a strategic plan for ensuring that public participation, consultation and engagement are implemented effectively.

55. The question is whether the scoping report would be termed as adequate public participation. At what stage or point did the 2nd Respondent engage in meaningful public participation with the people who would be affected by the project. Did the 2nd Respondent comply with the prescribed statutory provisions as to public participation as laid down in the case of Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy and 17 Others [2015] eKLR, where the Court set out the minimum basis for adequate public participation as follows:

"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.

56. The meetings mentioned by the 2nd Respondent did not meet the threshold for meaningful public participation as stipulated in the Regulations and in the Mui Case above. The meetings were not structured to share information on the possible effects and impacts of the project on the population and the proposed mitigation measures that the 2nd Respondent would undertake.

57. Vide a letter dated 24th January 2020, SEL the 2nd Respondent wrote to NEMA indicating that it had come to their attention that the contents of impacts and proposed mitigation measures were for a different project but not the contents of the EIA report findings and asked NEMA to withdraw the advert and allow them to place an apology to the public to ignore the impacts and the measures. Further hat the contents of the advertisement on the Standard and Star Newspapers were misleading as it referred to a dam construction instead of Geothermal Exploration drilling. It should also be noted that in 2019 and 2020 the world was hit by the COVID -19 pandemic and vide a letter dated 17th March 2020 NEMA suspended all public hearings and later gave guidelines for undertaking public participation in May 2020.These are the red flags, that should have been dealt with.

58. Did the 1st and 2nd Respondents take into account the quantity and quality of the affected persons' participation on how the proposed project would affect them and the mitigation measures explained to them.

59. The scoping meetings were held in June 2019 before the preparation of the ToRs by the proponent and it was mandatory by law for SEL to organize at least three meetings with the affected people and other concerned parties before the submission of the ESIA study Report for approval by NEMA which was never done in accordance with the law and Regulations.

60. It is also on record that the Appellants' witnesses stated that they attended scoping meetings on 21st June 2019 organized by SEL and the 2nd Respondent did not hold any other meetings before the approval of the ToRs by NEMA paving way for the preparation of the ESIA Study Report or after the approval of the ToRs.

61. It is further not disputed that the Appellants' witnesses raised concerns about noise and air pollution via emails and letters but the same were inadequately addressed in the ESIA Study Report. Further that no notices of the ESIA Study Report were published to inform the local community residents of the proposed project or invite them for consultation meetings during the ESIA study phase after November 2019. This was confirmed by the testimony of Prof. Krhoda who stated that there were no other meetings held after the approval of the ToRs further that there were only two scoping meetings held on 12th June 2019 and 21st June 2019. This shows that there was a lapse in mandatory procedure for

meaningful public participation. A project of such magnitude must address the concerns and potential risks and mitigation to the project affected people.

62. In the case of Republic vs County Government of Kiambu ex parte Robert Gakuru & Another (2016) eKLR, Justice Odunga held that:

> " Here I must say 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."

63. I find that the Tribunal erred in finding that there was adequate public participation yet there were glaring gaps in the procedures and processes to enable it to meet the threshold.

64. On the issue of whether the Tribunal's failure to address the validity of an ESIA study report undertaken by a Lead EIA expert without a valid licence, I have perused the licence that was exhibited by Prof. Krhoda for the year 2019 with an expiry date of 31st December 2019 from Director General NEMA, The Licence indicated that Prof. Krhoda was the Lead Expert as per Licence No. NEMA/EIA/EL/14923. Prof. Krhoda also exhibited a licence from NEMA for the year 2017 with and expiry date of 31st December 2017. I find that the Lead expert had a valid licence to carry out the ESIA Study but the issue remains whether it was done within the law and Regulations, which I have already rendered a decision on the lack of adequate public participation. I will therefore not deal with the issue of the consequences of the Tribunal not analyzing the issue yet it was pleaded and argued, as precedent is clear on it as submitted by the Appellant's counsel.

65. On the issue as to whether the Tribunal erred in failing to address the absence of a Strategic Environmental Assessment (SEA) for the project and whether NEMA should have required SEA as a condition for the EIA licence, Section 57A of EMCA refers to SEA as a threshold which all policies, plans and programmes for implementation ought to be tested against.

66. Section 2 of EMCA defines "Strategic environmental assessment" to mean a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives.

67. The Appellant argued that the 2nd Respondent's project had no Strategic Environmental assessment which was a requirement, while the 2nd Respondent submitted that the same is a public policy tool for strategic decisions by lead agencies. Counsel further submitted that the Appellants affiliated the project with GDC, which is not the true position as the project is a stand-alone project that is to be carried out in North and west of Menengai Caldera. Counsel also stated that it is not an independent power producer in partnership with GDC hence there is no policy or program that would require a SEA.

68. Strategic Environmental Assessment being a public policy tool for formulation and approval of policies plans and programmes to inform strategic decisions by lead agencies to necessitate environmental considerations was not necessary in this project. I agree with the submissions made by the 2nd Respondent that the Strategic Environmental assessment was not a requirement in this project therefore the Tribunal did not err in not making it a requirement for the EIA study. I am further persuaded by the decision in the case of Mohammed Ali Baadi and Others v Attorney General & 11 Others [2018] e KLR (supra) in which the court took a similar view. I therefore hold and find that the strategic environmental assessment being a tool for public actors in environmental governance, was not a requirement for compliance by the 1st Respondent before issuance of the impugned EIA licence.

69. The Appellants also faulted the Tribunal in its finding that the EIA licence adequately addressed the Appellants' concerns. The Appellants stated that the report did address the impacts and mitigation measures of the production of hydrogen sulphide, and air quality impacts hence failed to adequately safeguard their right to a clean and healthy environment. Further that there was no baseline data on air quality including pre- development ambient air quality sampling results as well as other pollutants. These issues were raised during the scoping study by the affected persons but the concerns were never taken into consideration. I, therefore, find that the Respondents failed to interrogate the concerns raised by the Appellants to incorporate their concerns on the possible risks and mitigation measures on air quality and noise pollution.

70. On the issue as to whether the Tribunal erred in requiring a climate impact assessment without making it a condition for the project activity, climate impact assessment is a tool used to guide policy development and decision-making, ensuring actions align with climate change duties, by identifying potential impacts and risks associated with climate change and proposed projects or policies.

71. Climate impact assessments are crucial for understanding the potential consequences of climate change and for developing effective adaptation and mitigation strategies. Like any other assessments, it is done prior to the commencement of a proposed project where scoping, stakeholder engagement, risk assessment and impact analysis considered.

72. In the South African case of Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others (65662/16) [2017] the court held that:

> " the decision to grant the authorization without proper prior consideration of the climate change impacts is prejudicial in that permission has been granted to build a coal- fired power station which will emit substantial GHGs in an ecological vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting the authorization."

73. Similarly, in the Californian case of Communities for a Better Environment vs City of Richmond 184 Cal. App 4th 70 (2010), where the State of California permitted a project proponent to proceed with its development subject to the requirement that it hires an independent expert to conduct an impact assessment within a year. The Court of Appeal held that:

> " the solution is not to defer the specification and adoption of mitigation measures until a year after the project approval; but rather , to defer approval of the project until proposed mitigation measures were fully developed , clearly defined , and made available to the public and interested agencies for review and comments."

74. I am persuaded by the above authorities and find that the climate impact assessments should be done prior to approval to allow proposed mitigation measures to be developed, clearly defined and made available to the affected persons and agencies to review and give their comments. At what stage are the affected people and agencies supposed to interrogate the climate impact assessment if it is done at the tail end of the project?

75. NEMA should not be used as an institution for rubber stamping illegalities and taking into consideration of the "triple planetary crisis" which refers to the interconnected and escalating environmental challenges of climate change, biodiversity loss, and pollution. The effects of climate change are with us and mitigation and adaptation measures have to be put in place to ensure a sustainable future for all.

76. Consequently, I find that the Appeal has merit and is therefore allowed in the following terms:

a. The decision of the Tribunal dated 5th December 2023 is hereby set aside.

b. The 1st Respondent's decision granting the 2nd Respondent an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/1003 is hereby set aside and Licence cancelled.

c. An order is hereby issued directing the 2nd Respondent to carry out a comprehensive Environmental and Social Impact Assessment Study in compliance with all relevant laws and regulations taking into account the views of the Appellants and the affected persons within the project area.

d. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF MARCH 2025.

M. A. ODENY

JUDGE