Al Bayt Properties Limited t/a Al Bayt Properties Hotel v Hanning & 2 others (Environment and Land Appeal E063 of 2023) [2025] KEELC 112 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELC 112 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E063 OF 2023

AA OMOLLO, J

JANUARY 23, 2025

BETWEEN

AL BAYT PROPERTIES LIMITED T/A AL BAYT PROPERTIES HOTEL ..... APPELLANT

AND

JOHN MWAMBILI HANNING ..... 1ST RESPONDENT

NAOMI NYAMBURA NDONGA (SUING ON THEIR BEHALF AND ON BEHALF OF UCHUZI COURT RESIDENTS WELFARE ASSOCIATION) ..... 2ND RESPONDENT

DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... 3RD RESPONDENT

JUDGMENT

Background:

1. The Appellant here was the 2nd Respondent in the appeal lodged before the National Environment Tribunal (hereafter referred to as NET). It had been sued by the residents of Uchuzi Court Residents Welfare Association on the following grounds inter alia;

    a. Erroneous approval of the EIA Report by the 1st Respondent despite the proposed location of the site, which is within a residential estate.

    b. Failure by the 2nd Respondent to fulfill the conditions under the license.

    c. Erroneous approval of the EIA Report despite several letters by the residents warning the 1st Respondents to not grant any approval.

d. Erroneous approval of the EIA Report despite poor analysis of mitigation measures contrary to the provisions of Regulations 16 of the Environmental (Impact Assessment and Audit Regulations).

e. Lack of public participation contrary to Regulation 17(2) of the Environmental Impact Assessment Audit) Regulations.

f. Adverse effects of the project to nearby institutions like a junior school.

g. Negative Impact on the sewerage system of the estate which was never designed to accommodate a high rise building.

h. Invasion of the privacy of the residents within the estate.

i. Lack of hazard and risk impact assessment study and or any mitigation measures provided.

j. Lack of baseline survey of key environmental parameters such as noise pollution, air pollution, water pollution, air quality, storm water drainage at the project, power consumption, effects of the lack density of the project, comprehensive evaluation of the anticipated environmental impacts.

2. After considering the appeal, the NET agreed with the Uchuzi Residents Welfare Association by allowing their case. The Tribunal held that the process of the 1st Respondent (NEMA) to issue the EIA license No NEME/EIA/PSL/23624 to the 2nd Respondent was not lawful and procedural as it did not involve sufficient public participation of residents and the community within the project area. They also found that the project being a ten-storeyed hotel was out of character with all the adjacent properties. The Tribunal proceeded to order the EIA licence cancelled and for restoration of the project site.

3. Being unhappy with the decision of the Tribunal, the Appellant lodged the present appeal which raises 8 grounds as indicated below;

1. That the Honourable Tribunal erred in law and fact by failing to consider the facts and evidence laid before it by the Appellant.

2. That the Honourable Tribunal erred in law and fact by failing to consider that the Appellant satisfied the conditions set out before grant of the Environmental Impact Assessment Licence by the 3rd Respondent.

3. That the Honourable Tribunal erred in law and in fact by failing to appreciate that the Appellant's project report had provided for mitigatory measures for any foreseeable environmental concerns as required by law.

4. That the Honourable Tribunal erred in law and fact in failing to consider in its entirety the evidence adduced by the Appellant as proof of public participation carried out before issuance of the Environmental Impact Assessment License to it by the 3rd Respondent.

5. That the Honourable Tribunal erred in law and fact in failing to render its reasoning on whether the public participation undertaken by the Appellant was sufficient in the circumstances and thereby arrived at an erroneous finding.

6. That the Honourable Tribunal erred in law and fact in failing to consider evidence adduced as to the location of the project site hence arriving at an erroneous conclusion.

7. That the Honourable Court erred in law and fact in finding that the project site was out of character with all the adjacent properties hence erred in its final determination.

8. That the Honourable Tribunal erred in law and fact by failing to consider the glaring inconsistencies in the Respondents' testimonies and evidence adduced therefore arriving at an erroneous determination.

4. The Appellant sought to be granted the following reliefs;

a. That the appeal be allowed.

b. That the Honourable Tribunal's Judgment delivered on 21st November, 2023 and consequential orders be set aside and vacated in its entirety and the Appeal filed before the Tribunal be dismissed in its entirety.

c. That costs of this Appeal and the Tribunal matter be borne by the Respondents.

d. Such further orders as it may deem just in the circumstances.

Submissions:

5. The directions were given for prosecution of the appeal by way of written submissions. The Appellant's submissions are dated 5th August, 2024. The 1st and 2nd Respondents submissions are dated 20th September 2024 while the 3rd Respondent (NEMA) submissions in support of the appeal is dated 20th September, 2024.

6. The Appellant blames the NET for ignoring the evidence it presented. It submits that it duly adhered to the provisions of Section 58 of EMCA and Regulation 7 & 10 (2) of the EIA Regulations 2003. It averred that a project a report was submitted as required under the Act. The Appellant states that it conducted adequate public participation but not in accordance with the strict requirements listed in Regulation 17 (which it argues only apply when undertaking EIA study).

7. The Appellant cited the Court of Appeal in the case of Legal Advice Center & 2 Others vs County Government of Mombasa & 4 Others (2018) eKLR which stated that public participation means the mechanism used to facilitate participation through meetings, press conference, briefings of numbers of the public and for receiving concerns about the project was adequate in the circumstances.

8. The Appellant avers that it conducted several meetings with the residents of Uchuzi Court and sought their opinion regarding the project that the 1st Respondent confirmed in her testimony before the NET that she remembered a meeting with the project manager on 27th February, 2022. The Appellant added that other meetings were held on 1st November, 2022, 13th November, 2022, 10th December, 2022. It further submitted that the residents wrote a letter dated 25th February, 2022 through the law firm of Nyamira Wakobwa & Co. that they had considered the set standards and terms to be met by the project and they had no objection to its commencement.

9. It pleaded that it was absurd that the 2nd Respondent alleges that it failed to disclose the correct location of the project. Yet from the documents attached by the 2nd Respondent as part of their list of documents and the invitation letters sent by the Appellant to the Residents of Uchuzi Courts indicate that several meetings between the Appellant and the Respondents were held at the project site as seen in pages 149 to 153 and pages 183 to 207 of the Record of Appeal.

10. With regard to whether the project is out of character to the adjacent properties, the Appellant argued that the 2nd Respondent did not either call an expert to testify or provide any expert report to prove the

allegation. Instead, it was the opinion of the 2nd Respondent who is not an expert, that the project was out of character with all the adjacent properties. It was also established that there was a commercial building next to the site, housing a supermarket, among others, a fact that was not controverted by the parties during the trial hearing. That the Tribunal ignored and misapplied the law based on the arguments by the 2nd Respondent who lacked expertise in survey work or land economics. Hence the Appellant posits that there was no basis for the Tribunal to find out that the project was out of character with all the adjacent properties.

11. It is the submissions of the Appellant that the Honourable Tribunal failed to provide any basis for making the orders that the project is out of character with the adjacent properties. The 3rd Respondent issued the Appellant with an EIA license to construct a ten (10) storey building in accordance with Section 63 of EMCA and Regulation 24 of the (Environment Impact Assessment) Regulations and that the Appellant complied with the legal and regulatory requirements in obtaining the EIA License issued for the construction of ten floors.

12. The 3rd Respondent submitted in support of the appeal inter alia stated that the 1st and 2nd Respondents knew the location of the project site as the meetings held and details given in the structured questionnaires. That offices of the 3rd Respondent visited site on 20th January, 2023 and confirmed the same was not out of character with its surroundings. That this was confirmed by the 2nd Respondents statements at pages 19 – 22 of the record.

13. The 3rd Respondent submits that upon review of the project report, the Authority was satisfied that public participation had been adequately done based on the evidence of questionnaires and public participation meetings. This was in line with the classification as a Medium Risk Project as provided under the Environmental (Impact Assessment and Audit) Regulations, *Legal Notice No. 101 of 2003* as amended by the *Legal Notice No. 150 of 2016* on Environmental (Impact Assessment and Audit) (Amendment Regulations, 2016 and Legal Notices No. 31 and 32 of 2019 on Environmental (Impact Assessment and Audit (Amendment) Regulations, 2019, thus requiring submissions of an Environmental Impact Assessment Project Report under section 58(1) of the *Environmental Management and Co-ordination Act*, 1999.

14. They submitted further that the "no objection letter" from the residents was sufficient proof of public participation. It is their contention that this was a medium risk project which has no particular prescribed way of conducting public participation. They relied on the case of Nairobi Metropolitan PSV Saccos Union limited & 25 Others Vs County of Nairobi Government & 3 Others (2013) EKLR Petition 486 of 2013, where the High Court stated;

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

        > "The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of public and all interested parties to know about the issue and to have adequate say."

15. In addition, the 3rd Respondent submits that it conducted all its licensing procedures in question in compliance with all statutory requirements and further avers that the Environmental Impact Assessment Project Report presented by the Appellant reflected all the aspects related to the proposed

development including public opinions and perceptions of the proposed project, and also considered the physical planning approvals by the Nairobi County Government.

16. The 1st & 2nd Respondents in opposing the appeal submitted that the Tribunal was well guided in law in its decision. That the Appellant took no mitigating steps to secure and protect the site from being a nuisance to the existing population and adjacent buildings. That the demarcated project site is too small to accommodate any of its construction vehicles with the vehicles now being parked in the middle of the road causing traffic within the area.

17. The 1st & 2nd Respondents submitted that the green mesh that secures construction sites have not been used. That the project site an intended high-rise building is in the middle of 38 residential houses. Its construction is stressful and depleting to the existing natural & environmental resources. That should the appeal succeed, the 1st and 2nd Respondents right to a clean, secure and habitable environment as protected in the controlled comprehensive scheme (in Uchuzi Court) will be grossly breached.

18. Further, the 1st and 2nd Respondents asserted that the Appellant misrepresented the locations of the project site as Ole Sankale road and not Mugi Road off Mohoho Road where Uchuzi Court estate is. That there is no denial by the Appellant that the project site is situated in a controlled residential scheme. They urged the court to find that this appeal lacks merit and dismiss it with costs.

Analysis and Determination:

19. From the analysis of the evidence contained in the record of appeal and the submissions rendered, I frame the following questions as arising for determination;

    i. Whether there was sufficient public participation.

    ii. Whether or not the license was procedurally obtained or

    iii. If the development was out of character with its surroundings

    iv. Whether the NET erred in failure to give reasons for its decision.

20. This is a first appeal, I am guided by the principle as has laid down in the case of Selle & Ano. vs Associated Motor boat Co. Ltd (1968) E.A 123 where the Court of Appeal held that;

> " ...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..."

21. Hence as the first appellate court, I shall proceed to review the evidence tendered before the Tribunal whose decision is now appealed, while taking cognizance that I did not have the benefit of seeing the demeanor of the witnesses who testified.

Whether there was sufficient public participation:

22. The Appellant has submitted in detail that they complied with the requirements of Section 58 of Environmental Management and Coordination Act (EMCA) with respect to public participation and it referred to the pages which contained evidence of public participation. The 1st and 2nd Respondents in their submissions said nothing about the non-compliance with the rules on public participation. The Appellant referred to meetings held inter alia on 13th November, 2022 and 21st December, 2022.

The minutes of these meetings are found at page 188 & 194 of the record. The minutes at page 188 does not record names of participants. If they are persons in the list at page 187, it is not stated that the listings were pursuant to a meeting, where and when that meeting was held.

23. At pages 30 to 38 and 197 – 200 of the record contained copies of the questionnaires filled. The Appellants stated that they held more than 10 meetings and referred this court to pages 513 – 533 and 630 – 631 of the record. These pages contain proceedings from the Tribunal which records the evidence of the 2nd Respondent confirming to the Tribunal that the developer held meetings with the residents of Uchuzi estate. She also confirmed receiving questionnaires from the developers to distribute to the residents. However, it was her evidence that the developers never came back for the questionnaires. As the chair of Uchuzi residents' association, she did not say her efforts to return the filled questionnaires.

24. In further, cross-examination the 2nd Respondent admitted that the residents' association engaged a surveyor to undertake a survey exercise, on the premises and advise them. All she remembers was that the surveyor said this was a gated community. There was also evidence of a meeting involving others members of the public to wit the SOUCRA Chairman.

25. The Appellant cited the case of Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy & 17 Others (2015) EKLR which discussed the elements of public participation to include among others;

    1. One of the tests courts use to test public participation is effectiveness.

    2. Access to and dissemination of relevant information.

    3. The right of public participation does not guarantee that each individual's view will be taken into consideration.

26. The Supreme Court in a recent decision in the case of Cabinet Secretary for National Treasury & 4 Others versus Okoiti and 52 Others; Bhatia (amicus curiae) (2024) KESC discussed the process of public participation. At paragraph 88 of the judgement they quoted their earlier decision in the BAT case thus:

    a. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.

    b. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

    c. Public participation is not an abstract notion; it must be purposive and meaningful.

    d. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case-to- case basis.

    e. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

    f. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case-to-case basis.

27. The Supreme Court in the same proceeded to highlight the components of public participation to include;

    a. Clarity of the subject matter for the public to understand;

b. Structures and processes (medium of engagement) of participation that are clear and simple;

c. Opportunity for balanced influence from the public in general;

d. Commitment to the process;

e. Inclusive and effective representation;

f. Integrity and transparency of the process;

g. Capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

28. I have perused the record and I have not seen any publication in the daily newspaper with nation-wide circulation. There was also no evidence of an advertisement placed in any local radio station. What is produced are notices issued to the ward administrator; the OCS Akila Police Station, and the Chairlady Uchuzi Court inviting them to a public participation forum to be held on site (formerly Uchuzi Court inviting them to a public participation forum to be held on site (formerly Uchuzi Supermarket). This explains why the Appellant state in their submissions that they did not fully with the regulations on public participation.

29. Hence from the evidence on record, the mode of public participation undertaken appears informal. The Appellant's representative called Ibrahim engaged the 1st and 2nd Respondents in three meetings to wit, two meetings with the executive office of the Estate Association and one with the membership of the Association. In these meetings, some of the issues discussed included a suggestion to scale down the project to two floors or have remain as it is (page 518 of the record).

30. There is evidence on record that the proponent gave out questionnaires to the 2nd Respondent to give out to their members. Her complaint is that the Appellant's representative, Mr. Ibrahim did not come back for these forms. Copies of some of the forms are part of the record as documents produced the three Respondents. It was also the 1st and 2nd Respondents case that the Appellant told them what was to be put up was an apartment and they only learnt it was a hotel when the signboard was put up in the impugned premises giving details of the project.

31. As stated by the Supreme Court of Kenya decisions cited herein above, public participation must be purposive, there should be clarity of the subject matter and integrity of the process. There is produced at pages 194 -196 minutes of a meeting held in September, 2022 which had in attendance the listed persons, the area Chief, the ward administrator and the EIA consultant of the Appellant. At page 196, it is indicated that the EIA consultant introduced the project as Al Bayt hotel. There is also at page 151-152 a document addressed to whom it may concern dated 23rd Sept 2022 by the members of Uchuzi Court. In it, they registered their objection to the construction of any building that would disrupt the quiet and peaceful existence of the court. The house numbers are indicated beside the names.

32. In the evidence of the witnesses of the Appellant before the Tribunal, they indicated that some of the meetings took place in the residence of the 2nd Respondent. The questionnaires filled as part of the record also expressed the views of the persons who filled them including the views opposing the project. Although there was dispute whether the proponent put up notices on site, the evidence on record show that the 1st and 2nd Respondents and the members of Uchuzi Court were made aware of the project after which they registered their objections on the proposed development. These objections were raised before the impugned license was issued.

33. Thus, they were heard although their views did not succeed, as the parties directly affected they were sufficiently engaged. Consequently, under this heading, I hold the NET erred in their holding that there was lack of public participation.

Whether or not the Licence was irregularly obtained:

34. The next question was whether or not the license was procedurally obtained/issued. The 3rd Respondent has submitted on its mandate as given under the EMCA. The mandate includes issuing licenses to developers once they have satisfied the requirements of the law. In its finding, the NET after re-stating the submissions by the parties, it held thus;

> " The Tribunal finds that Environmental Impact Assessment Licence No. NEMA/EIA/PSL/23624 was not lawfully and procedurally issued to the project proponent on the grounds that the process leading to its issuance did not involve sufficient participation of residents and the community within Uchuzi Estate and the nature of the project being a 10 storey Hotel Building is within a residential estate hence of character with all the adjacent properties."

35. The Tribunal did not give details of the procedure which was not followed but this court being empowered to review the evidence presented will consider whether there was any lapse on the part of the 3rd Respondent. Among the complaints by the 1st and 2nd Respondent was that the Appellant had given a wrong project site i.e Ole Sang'ale Road which is in Madaraka instead of Mugi road off Muhoho road. Secondly, that the project was out of character with its surroundings.

36. In terms of location of the project, the 1st and 2nd Respondents knew the physical location of the proposed project. The question which in issue is whether the approving authority was misled going by the documentation presented for approval. The questionnaires supplied stated it is located on Muhoho Rd off Ole Sang'ale Rd. The EIA Report also stated the same location. The handwritten notes of the officer who visited the site on 20th January 2023 gave the location of the project as off Muhoho Road along Uchuzi road which corroborates the position taken by the 1st and 2nd Respondents. It is the same description provided in the Development Approval License from the Nairobi City Government.

37. On the face of these documents, one cannot say that a plot on Muhoho road off Ole Sangale road occupies the same ground position as one described as existing in Uchuzi Rd off Muhoho Road. The Appellant did not show evidence to the Tribunal that the coordinates provided in the EIA report referred to the impugned premises and not one in Muhoho Road off Ole Sangale road. No explanation was tendered before the Tribunal of the Appellant's choice of the road description which I find misleading.I am persuaded to find that the project site was misdescribed which may have intended to influence the approval of their application.

38. In the witness statement of Jimmy Owiti found at page 200 of the record, the 3rd Respondent stated that it received an application for plot No. 103/483 located in South C. along Muhoho Road, off Ole Sangale Road, Nairobi County for a project classified as medium risk. The 3rd Respondent confirms receipt of Environmental Impact Assessment Project report No. NEMA/NRB/PR/5/1/17, 981(35, 617) prepared by Boniface Osoro.

39. The 3rd Respondent stated that they contacted the relevant lead agencies in accordance with the requirements of the law requesting for their views. Under the Environment (Impact Assessment and Audit) Regulations 2003, Regulation 9(1) provides as follows:

> " Where the project report conforms to the requirements of regulation

7(1), the Authority shall within seven days upon receipt of the project report, submit a copy of the project report to -

(a) each of the relevant lead agencies;

(b) the relevant District Environment Committee; and

(c) where more than one district is involved, to the relevant Provincial

Environment Committee, for their written comments which comments shall be submitted to the Authority within twenty one days from the date of receipt of the project report from the Authority, or such other period as the Authority may prescribe."

40. Thus, the Authority is to share the report with Lead Agencies for any comment regarding the approval of the proposed project. In this case, the EIA report submitted by the Appellant was dated 6th January, 2023 and which was received on the same day going by the evidence of Jimmy Owiti for the 3rd Respondent. They proceeded to have the EIA License issued on 24th January 2023 which is a period of 17 days from 6th January, 2023. The 3rd Respondent did produce a dispatch letter at page 175 of the record stating that copies of the report were dispatched to the Lead agencies on 10th January 2023. The 21 days for giving comments started running from 10th January 2023 to terminate on 31st of January 2023. Probably, the timeline would be overlooked if the 3rd Respondent produced copies of comments received from any of the institutions. I did not see any comments in the record of appeal.

41. Regulation 9(2) states thus;

> "On receipt of the comments referred to in subparagraph (1) or where no comments have been received by the end of the period of thirty days from the date of receipt of the project report, the Authority shall proceed to determine the project report." (underline mine for emphasis).

42. The 3rd Respondent was required to make a determination on the report upon the lapse of 30 days from the date of submission which in this case would have been 5th February 2023. Without any justification why the Authority did not permit the 30 days requirement as per the Regulations is in itself a procedural lapse which cannot be understated.

43. Besides sending out notices to the lead agencies seeking their comments on the proposed project, the 3rd Respondent as an administrative body is required under article 47(2) of *the Constitution* to give feedback to persons who raise objections such as the 1st and the 2nd Respondents. The feedback would state where a license has been issued inter alia that their objection was taken into consideration.

44. Article 47(2) of *the Constitution* provides that, "(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. and the mitigating measures taken to address them."

45. In the case of Cabinet Secretary of the National Treasury and 4 others vs Okoiti and 52 others supra, the Court of Appeal had this to say about giving feedback (found at paragraph 136 of the SC decision);

> " Accountability, one of the principles in Article 10 (2)(c) means that officials must explain the way in which they have used their power. Transparency, also a requirement in the exercise of public power means openness, which is the opposite of secrecy. Therefore, the constitutional requirement for transparency and accountability imposes an obligation upon

State organs to inform the general public and stakeholders why their views were not taken into account and why the views of some of the stakeholders were preferred over theirs. Such an approach will not only enhance accountability in the decision-making processes by State organs but also it will enhance public confidence in the processes and in our participatory democracy. To suggest otherwise would be a serious affront to Article 10 (2)."

46. The 3rd Respondent filed copies of notices and minutes supplied to them by the Appellant. I say supplied to them because Mr Owiti who testified on behalf of this Respondent stated that all these documents were attached to the EIA report. There were 3 questionnaires which had names of Benard Munyao, Alphonse Mitei and Kioko (pages 197-199) with phone numbers provided. They all ticked that they did not support the proposed project. There is also ticked yes on the expected negative impacts. The 3rd Respondent did not say they gave to these three a feedback by way of advice that their concerns were considered.

47. Thus, I hold the lack of procedure included;

    a. The Appellant giving wrong description of the physical location of the plot in the application document for the EIA licence (contravening EIA regulations 7(1)(b) of 2003).

    b. the failure by the 3rd Respondent (NEMA) to give reasons for their decision to these affected parties which contravened *the Constitution* and their Statutory mandate.

    c. Failure by the 3rd Respondent to allow for time of receiving comments before making a determination.

whether the license was issued to a project that was out of character with its surrounding therefore null:

48. The 1st & 2nd Respondent averred that the intended high-rise building is right in the middle of 31 residential houses, that its construction is stressful and depleting the existing resources. That it would be a breach of their right to a secure, clean and habitable environment as protected in the controlled comprehensive scheme and *the Constitution*. That their controlled scheme allowed buildings up to first floor only hence the intended project is illegal.

49. On the other hand, the Appellant submitted that there was mixed development in the area. During the hearing before the NET, the Appellant's witness stated thus;

> " To clarify with context for the entire court, it was a factory that was renovated to be a mall, where Naivas mall is way back when I was younger, it was a factory for making bread. So it was renovated to make a mall. And for context again so that the judges can hear, because I had them speak earlier, that is only bungalow, no, it's not only bungalows. There is a 15 storey apartment behind the mall coming up right now."

50. In looking for answer to the conflicting positions take between the 1st and 2nd Respondents and the Appellant, I have looked at the Environmental Impact Assessment report presented by the Appellant. At paragraph 2.6.2 which is at page 12 of the report and page 248 of the record, the expert writes thus;

> " The project site is currently used as a residential bungalow. In order to pave way for the proposed project, the existing structure shall be demolished. Relevant permits from KFS & NCC should be obtained before commencing the demolition and the cutting down of trees..."

51. The status of the project site is restated at paragraph 3.3.1 at page 17 & 18 of the report and pages 253 & 254 of the record. The expert records thus;

> "The proposed site is currently occupied by a residential bungalow that will soon be demolished when the construction works begin."
>
> Page 17 shows the picture of the existing bungalow while page 18 has pictures said to be of neighbouring houses.

52. The report contradicts the assertion of the Appellant's witness that the site premises was already a commercial building. The 3rd Respondent put forth an argument that the mandate of heights of buildings rests with the department of planning of the Nairobi City County. However, he admitted at page 602 of the record that they usually ask for no objection letter in a gated community. He stated that there was a "no objection letter" attached to the EIA Report which was submitted to them for consideration. This letter was disowned by the 1st and 2nd Respondents as they said they have always objected to the project.

53. The comments given by the officer of the 3rd Respondent called Daniel who made a site visit report dated 20th January, 2023 (page 177 of the record) did not say anything on site suitability. He reported thus, "area is characterized by low lying single dwelling bungalows and maissoinettes." This leaves no doubt that the proposed project was going to be a commercial high-rise (hotel) in the middle of low-lying single dwelling residences.

54. I note that being out of character with its surrounding per se is not illegal as the Regulations require of the proponent to undertake an environmental impact assessment to ascertain its viability as provided in the Second Schedule of the Environmental and Management Coordination Act. The Second Schedule provides on the issues to be considered during impact assessment under paragraph *2* thus;

> Social considerations including—
>
> (a) economic impacts;
>
> (b) social cohesion or disruption;
>
> (c) effect on human health;
>
> (d) immigration or emigration
>
> (e) communication —roads opened up, closed, rerouted
>
> (f) effects on culture and objects of culture value

55. I have underlined two of the social impacts issues which I think is relevant in this case. One of the Tribunal members asked the parties to address them in their submissions on the social impact assessment. This issue was not addressed by the Appellant in their submissions before the Tribunal found at pages 331-346 of the record. In the EIA report, the social considerations mentioned that the project was in line with the government housing policy aimed at attaining adequate hospitality accommodation and healthy living environment to all socio-economic groups in the country. It does not address the concerns raised by the 1st and 2nd Respondents in terms of interfering with their peaceful environment (cohesion and or disruption).

56. One of the other issues raised was the suitability of the sewer system put up for single dwellings now going to serve a commercial enterprise. The 1st and 2nd Respondents stated they feared blockage of their

sewer lines if the project is allowed to go on (see the questionnaire at pages 31 and 36 of the record) In the EIA report submitted to the 3rd Respondent, it is stated that the proponent intended to connect to the trunk sewer for sewerage disposal and in order to reduce overload, the proponent said it would set up a waste treatment plant to treat sewer before release into the main system. This proposal was not included as one of the conditions in the EIA License to be complied with. How would the 3rd Respondent implement in case of non-compliance?

57. These are gaps which show the 3rd Respondent issued the license without giving due consideration to the social impact the development would have on the occupiers of the said single dwelling houses in an already controlled development area. The action of the 3rd Respondent contravened the pre-cautionary principle that "where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing."

58. The principle looks at a situation whether the damage is serious or irreversible and while the sewerage system can be improved or modified, it is my view that the social impacts of the proposed project on the 1st and 2nd Respondents and the membership of Uchuzi court if allowed to proceed will be irreversible. It is on this account and the other reasons stated herein above that I decline to set aside the decision of the Tribunal in nullifying the EIA License issued to the Appellant.

Whether the 3rd Respondent could cancel the license:

59. To deal with the question whether NEMA could withhold license of a building because it was considered to be out of character with its surrounding, the Tribunal asked the parties to address them in their submissions on the provisions of Section 147(a) and 148 of EMCA. Section 147 states;

> "(1) The Minister may, on the recommendation of the Authority and upon consultation with the relevant lead agencies, make regulations prescribing for matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving full effect to the provisions of this Act.
>
> (2) Regulations made under subsection (2) may—
>
> (a) make provisions for the issue, amendment and revocation of any licence."

60. 148 states thus;

> " Any written law, in force immediately before the coming into force of this Act, relating to the management of the environment shall have effect subject to modifications as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act, the provisions of this Act shall prevail."

61. The prevailing law gives the 3rd Respondent authority to refuse to license a development even if has approvals from other agencies such as the County Government where there is evidence of the same causing or likely to cause harm to the environment for any other reasons provided in the regulations. In this case, the proposed project was out of character with its surroundings as the activities/businesses to be undertaken if allowed to proceed would be in conflict with those allowable in the comprehensive controlled estate.

62. For the noise, dust and traffic pollution associated with construction of this magnitude, they cannot be avoided. They cannot form a basis to cancel a license other than directing the Appellant to undertake

measures to minimize the inconveniences to the neighbourhood and in particular to the 1st and 2nd Respondents and their members. The project report stated mitigating measures at pages 19 (255 of the record) and 40 (283 of the record) of the EIA report. If the proposed measures are complied with, the concerns of the membership of the 1st and 2nd Respondents regarding the nuisances would have been sufficiently addressed had this appeal succeeded.

63. In conclusion, I find that although the Appellant complied with the other provisions of public participation, it failed to abide by the requirement of disclosing the correct location of the project to the 3rd Respondent. Secondly, even if the location of the project was a minor issue (which I hold it is not), nature of the impugned project will be greatly prejudice the members of Uchuzi estate welfare Association if the project which is out of character with its surrounding is allowed to proceed. Although the Tribunal did not give reasons for their findings, it does not alter the weight of the evidence on record.

64. Consequently, I hold that the appeal succeeds only on grounds challenging the public participation. However, there is no merit in grounds 1, 2, 3, 6, 7 and 8 of the memorandum of appeal dated 20th December, 2023. The result is that the findings of the Tribunal made 21st November 2023 upheld. The costs of the appeal to 1st and 2nd Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY, 2025

A. OMOLLO

JUDGE