



REPUBLIC OF KENYA



KENYA LAW
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**AMU Power Company Limited v Lamu & 6 others (Civil Appeal
6 of 2019) [2022] KEELC 2999 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL APPEAL 6 OF 2019**

MAO ODENY, J

MAY 26, 2022

BETWEEN

AMU POWER COMPANY LIMITED APPELLANT

AND

SAVE LAMU 1ST RESPONDENT

SOMO M. SOMO 2ND RESPONDENT

RAYA FAMAU AHMED 3RD RESPONDENT

MOHAMMED MBWANA 4TH RESPONDENT

JAMAL AHMED ALI 5TH RESPONDENT

ABUBAKAR MOHAMED TWALIB 6TH RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY

[NEMA] 7TH RESPONDENT

RULING

1 This ruling is in respect of a Notice of Motion dated 4th October 2021 by the 1st - 6th Respondents seeking the following orders: -

- a. Spent.
- b. The Honourable Court be pleased to certify that the Appeal and Cross Appeal raise substantial questions of law and refer the case to the Chief Justice for appointment of a bench of five judges pursuant to Article 165 (4) of *the Constitution*, Section 79C of the *Civil Procedure Act* and Section 21(2) of the *Environment and Land Court Act*, 2011.
- c. There be no orders as to costs.



2 Counsel agreed to canvas the application vide written submissions which were duly filed.

1st -6th Applicants' Submissions

3 Counsel gave a brief background to the case and stated that main appeal arises from the decision of the National Environmental Tribunal (NET) dated 26th June 2019 in NET Appeal No. 196 of 2016 cancelling the Environmental Impact Assessment (EIA) Licence No. NEMA/ESIA/PSL/3798 issued by the National Environmental Management Authority (NEMA) to Amu Power. That the licence was for the construction of Kenya's first-ever, a 1,050 MW, Coal-burning power plant at Kwasasi, Lamu County within an ecologically sensitive UNESCO World Heritage Site.

4 Mr. Lempaa submitted that the Tribunal found that there were substantial and procedural infirmities in the EIA process which would cause immense environmental harm and therefore cancelled the license which stopped the project. Amu Power appealed on 24th July 2019 raising ten grounds and similarly Save Lamu cross appealed on 5th September 2019 raising nine grounds.

5 Counsel submitted that both the appeal and the cross appeal raise substantial questions of law which transcend the litigation interests of the parties here and impact the fundamental rights and freedoms of the people of Lamu, the coastal region, and Kenya which include the right to health, life, livelihood, culture, and to a clean and healthy environment.

6 Mr. Lempaa therefore stated that the current application seeks that this court certifies this appeal as raising substantial questions of law under Article 165(4) and therefore deserving to be heard by an expanded bench appointed by the Chief Justice.

7 Counsel listed two issues for determination namely: -

- a. Whether the Appeal and Cross Appeal raise substantial question of law.
- b. Whether constituting a five Judge Bench would defeat the overriding objective under Section 3 of the *Environment and Land Court Act*.

8 On the first issue as to whether the appeal and cross appeal raise substantial question of law counsel relied on Article 165(4) of *the Constitution* which provides as follows: -

Any matter certified by the court as raising a substantial question of law under clause (b) (c) or (d) shall be heard by an uneven number of judges being not less than three, assigned by the Chief Justice.”

9 Further that Section 21(2) of the *Environment and Land Court Act*, 2011 fixes the quorum of the court at one except that “any matter certified by the court as raising a substantial question of law (a) under Article 165(3) (b) of (d) of *the Constitution*; or concerning impact on the environment and land shall be heard by an uneven number of judges, as determined by the Chief Justice”.

10 Counsel also relied on Section 79C of the *Civil Procedure Act* which provides that: -

Appeals from subordinate courts shall be heard by one judge of the High Court except when in any particular case the Chief Justice shall direct that the appeal be heard by two or more judges of the High Court.

11 Mr. Lempaa submitted that the questions raised in this Appeal and Cross Appeal amount to substantial questions of law as it was defined in the cases of *Stanley Livondo v AG* [2020] eKLR; *Okiya*



Omtatab Okoiti & another v Uburu Muigai Kenyatta & 4 others Petition No. 53 of 2015; and in *Okiya Omtatab Okoiti & another v Anne Waiguru* [2017] eKLR.

- 12 Counsel submitted that the issues raised in both the appeal and cross appeal raise substantial issues of law of general public interest namely to: -
- a. Establish the basis on which the proposed coal-fired power plant is constructed and the terms on which it will be operated with the least climate, environmental and social impact for at least twenty-five years.
 - b. Guide NEMA's interpretation and application of the procedural laws impacting the right to a clean and healthy environment.
 - c. Establish the scope of the National Environment Tribunal's oversight of NEMA's interpretation and application of the laws.
 - d. Provide legal guidance on the factors NEMA must consider when exercising its discretion to constitute a technical advisory committee under section 61 of the *Environmental Management and Co-ordination Act*, 1999 (EMCA) and Regulation 5 of the Environmental Impact Assessment and Audit Regulations, 2003 [the EIA Regulations).
- 13 Further, that the grounds of appeal raised by the Appellant raise substantial issues of law as follows:
- a. Whether flaws in the consultation processes required as part of the environmental and social impact assessment process can justify the cancellation of an environmental impact assessment (EIA) license by the National Environment Tribunal.
 - b. Whether public participation by a project proponent during the scoping phase of the ESIA process excuses the proponent from further public participatory requirements during the ESIA study phase as prescribed under Regulation 17(2) of the *Environment (Impact Assessment and Audit) Regulations*, 2003.
 - c. Whether the discretion vested in NEMA by law precludes the oversight of NEMA by the tribunal on its (that is, NEMA's) handling of technical matters.
- 14 Similarly, that the cross appeal equally raises substantial questions of law as follows: -
- a. Whether NEMA abused its discretion by failing to constitute a technical advisory committee given (i) the scale of the project (ii) its potential impacts on Lamu's unique and fragile ecosystems and (iii) the fact that it would be the first coal fired power plant in the country and East Africa.
 - b. Whether a project proponent's analysis of alternatives and preferred option as provided for under the EIA Regulations needs to be made with clear reference to the relative environmental impacts of the available options.
- 15 It was counsel's submission that these questions transcend the litigation interests of the parties and impact the rights of the people of Lamu, the coastal region, and Kenya. That the location of the project in the Lamu Archipelago is a UNESCO world heritage site inhabited by critically endangered species makes it a question of general public importance. Further that the project is USD 2 billion dollars renders it the project one of general public importance.
- 16 Similarly, that the issues impact the national values and principles of governance under Article 10 of *the Constitution* including public participation, sustainable development, and environmental protection which have not yet been settled in the Supreme Court.



- 17 Additionally, that the coal-burning power plant which is the main issue in this appeal has significant implications on climate change; a global challenge of this and future generations requiring urgent action hence the appeal raises questions about intergenerational environmental rights and heritage.
- 18 Counsel also submitted on the size of the record and cited the case of *CBC Petition Angawa V Cabinet Secretary for Basic Education Petition* E371 of 2021 where Mrima J empaneled a bench partly because parties had filed a voluminous record which would require a single judge a substantial amount of time to dispose of. That the Tribunal had also sat as a full bench instead of the ordinary quorum of three members due to the public interest in the appeal, and similarly Save Lamu invites the court to find that the matter warrants an expanded bench.
- 19 Counsel submitted that in so far as the Appellants suggests that the application is antithetical to the just disposal of the appeal, counsel relied on the case of *Martha Karua V Independent Electoral and Boundaries Commission & 3 Others* (2018) eKLR where the Court of Appeal noted that in an application of the four overriding objectives, “there should be a meticulous balance of those four objectives.” Thus it was counsel’s submission that the public interest and substantial questions of law raised in this appeal justify a delay (if any) that a bench would cause.
- 20 According to counsel, the empanelment also, meets the other three overriding objectives for just, proportionate, and accessible resolution for the following reasons. First, given that there would be no further right of appeal, it is both just and proportionate that any substantial questions of law be dealt adequately in a manner allowing for expansive discourse by more than a single judge. Second, it would also meet the accessibility requirement by ensuring the parties to a case of this significance are accorded the requisite judicial resources to substantively address substantial questions of law as provided for under *the Constitution*.
- 21 In conclusion, counsel urged the court to find and order that the appeal raises substantial questions of law which justify *the constitution* of a five-judge bench by the Chief Justice as the grant of this application would occasion no prejudice to the appellant, a fact borne out by the absence of any declaration of any such prejudice in response to the application.

Appellant’s Submissions

- 22 The Appellant opposed the application vide a Replying Affidavit sworn on 10th November 2021 by Cyrus Kirima its COO wherein he deponed that the issues in this appeal do not involve substantial questions of law to warrant the empanelment of a five judge bench. The appellant stated that the appeal centers on matters of public participation and the cancellation of the EIA License.
- 23 Counsel submitted that the issues in this appeal do not meet the threshold set out in determining whether a matter should be certified as raising substantial questions of law and cited the cases of *Hermanus Phillipus Steyn v Giovanni Gnechi-Rusco* [2013] eKLR; *Okiya Omtatah Okoiti & another v Anne Waiguru & 3 others* [2017] eKLR; *Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & amicus curiae* [2014] eKLR.
- 24 Mr. Masika further relied on the case of *Wanjiru Gikonyo v Attorney General & Another, Kajiado County Governor & 4 Others (Interested Parties)* [2020] eKLR, where the court held that the issues call for the application of constitutional and legal principles to the facts of the case at hand and that those constitutional and legal principles are already established and a single judge can apply them in the manner that a panel of judges would do.
- 25 Counsel therefore urged the court to dismiss the application with costs and allow the expeditious hearing of the appeal.



Analysis And Determination

- 26 The issue for determination is as to whether this appeal and cross – appeal raises a substantial question to warrant the referral of this case to the Chief Justice for empaneling of an uneven expanded bench. The general rule is that any single Judge of this Court has the jurisdiction and power to handle a question of law which he/she has jurisdiction over. The decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right.
- 27 The certification and referral of a matter to the Chief Justice to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions.
- 28 In the case of *Harrison Kinyanjui vs. Attorney General & Another* [2012] eKLR the court held that:
the meaning of ‘substantial question’ must take into account the provisions of *the Constitution* as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of *the Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”
- 29 The certification of a matter that raises a substantial question of law is provided for under Article 165 (4) of *the Constitution* which states that: -
Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three assigned by the Chief Justice.
- 30 In the Supreme Court of India in the case of *Chunilal v Mehta versus Century Spinning and Manufacturing Co.* AIR 1962 SC 1314 held that;
a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”
- 31 Further in the case of *National Super Alliance (NASA) v The Independent Electoral and Boundaries Commission* H.C Pet No. 328/2017 the court considered that the *Chunilal* case (Supra) offered guidelines and an insight in determining whether or not a matter raises a substantial question of law for the purposes of article 165 (4) of *the constitution*. The guidelines are as follows; -
(i) Whether, directly or indirectly, it affects substantial rights of the parties or
(ii) Whether the question is of general public importance, or



- (iii) Whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest court of the land, or
- (iv) The issue is not free from difficulty, or
- (v) It calls for a discussion for alternative view.”

32 The court further stated as follows in the *NASA* case (supra):

The court may also consider whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition. These are mere examples since the article employs the word “includes”. Accordingly, the list cannot be exhaustive and courts are at liberty to expand the grounds as occasions demand”.

33 Similarly, in the case of *Philomena Mbeti Mwilu v Director of Public Prosecution & 4 others* [2018] eKLR the court held that: -

I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent’s decision to arrest and prosecute the petitioner and the independence of the judiciary.”

34 This is an appeal and not a petition where parties can choose to tender viva voce evidence or written submissions. In the appeal the court will be dealing with the grounds in the memorandum of appeal. The appellant’s EIA licence was cancelled and wants the court to answer the question whether flaws in the consultation processes required as part of the environmental and social impact assessment process can justify the cancellation of an environmental impact assessment (EIA) license by the National Environment Tribunal and whether the public participation by a project proponent during the scoping phase of the ESIA process excuses the proponent from further public participatory requirements during the ESIA study phase as prescribed under Regulation 17(2) of the Environment (Impact Assessment and Audit) Regulations, 2003.

35 The other question is whether the discretion vested in NEMA by law precludes the oversight of NEMA by the tribunal on its handling of technical matters and further that the cross appeal also requires the court to make a determination as to whether NEMA abused its discretion by failing to constitute a technical advisory committee given (i) the scale of the project (ii) its potential impacts on Lamu’s unique and fragile ecosystems and (iii) the fact that it would be the first coal fired power plant in the country and East Africa, and whether a project proponent’s analysis of alternatives and preferred option as provided for under the EIA Regulations needs to be made with clear reference to the relative environmental impacts of the available options.



- 36 This appeal is about a cancellation of EIA license and touches on the issue of public participation which has been decided in many cases and therefore there is no substantial question of law that requires the empanelment of an expanded bench. This is a matter that can be heard by a single Judge.
- 37 The court has jurisdiction to hear and determine the issues raised in this appeal. The court must also consider how this application sits with the provisions of Article 159 (2) (b) of *the Constitution* which requires courts in exercising judicial authority to be guided by the principle that justice shall not be delayed. This principle is reiterated in the *Civil Procedure Act*, Cap 21 through Section 1A which stipulates that there should be a just, expeditious, proportionate and affordable resolution of the civil disputes.
- 38 I agree with counsel for the appellant that the Applicants have not proffered any explanation as to why they waited until the appeal was ready for hearing, before filing their application and further that at what stage did they determine that the appeal raises substantial questions of law. The court must also consider whether the application will cause delay in the conclusion of the case. The application has been brought before this court just after the parties had filed their submissions in court and the matter had been set down for hearing. Article 159(2) (b) of *the Constitution* requires expeditious adjudication of disputes.
- 39 I therefore find that this is a matter that does not raise any substantial questions of law hence it cannot be certified under Article 165(4) of *the Constitution* to warrant an expanded bench. The application is dismissed with costs. The appeal to proceed as earlier scheduled.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

