



Watamu Hospital Limited v ATC Kenya Operations Limited; National Environment Management Authority (Interested Party) (Environment & Land Case 28 of 2022) [2025] KEELC 408 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 28 OF 2022
FM NJOROGE, J
FEBRUARY 6, 2025**

BETWEEN

WATAMU HOSPITAL LIMITED PLAINTIFF

AND

ATC KENYA OPERATIONS LIMITED DEFENDANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

RULING

The Application

1. The defendant filed a Notice of Motion dated 26th January 2024 in which it sought the following orders:
 1. Spent
 2. That this Honourable court be pleased to stay the hearing and determination of this suit pending a report by the Interested Party on the level of compliance with the environmental laws and/or regulations on the telecommunication mast constructed on Land Parcel Number Gede/Kirepwe/B/80 originally Gede /Kirepwe/B/216 belonging to the Defendant.
 3. That the cost of this application be provided for.
2. The application is supported by the sworn affidavit of Lee Gachari. The basis of the defendant's application is that it has complied with the law and related regulations and therefore the suit is



overtaken by events. In the supporting affidavit the deponent avers that the applicant has already been issued with an EIA licence by NEMA.

Defendant's Response.

3. The application is opposed by the Plaintiff who filed a replying affidavit of its director, one Eugene Valentine Erulu dated 3rd June 2024. The deponent states that at the inception of the suit project he inquired from NCA Malindi Office and was informed that the said office had not issued the applicant any approvals or licences for the project; that on 30/4/2022 the applicant attempted to carry out an Environmental Impact Assessment as an afterthought and made further attempts to acquire a licence from NEMA in order to claim compliance while at the same time continuing with the project implementation to completion and the same happened despite a suspension of works order from the NCA and the closing of the site by NEMA; that the EIA was issued long after the completion and commissioning of the project, and the BTS is still in use to date; that the allegations that the defendant has complied with the law is therefore unfounded and important issues as to the legality of the said licence arise, including doubt as to its authenticity, which issues this court is able to determine.

Determination.

4. The present suit was filed on 26/4/22. It sought prayers as follows:
 - a. A declaration that the defendant's actions are in contravention of the plaintiff's right to clean and healthy environment;
 - b. A permanent injunction do issue restraining the defendant either by its employees, agents, hirelings and or servants from continuing construction of the telecommunication mast on parcel number Gede/Kirepwe B/ 80 originally Gede /Kirepwe B/ 216;
 - c. An order of mandatory injunction requiring the defendant either by its employee's servants, hirelings, and /or agents or anyone of them to dismantle /demolish the said illegal structure and any other developments including the foundation made by the defendant on the parcel of land as described above;
 - d. General damages for violation of the plaintiff's right to a clean and safe environment;
 - e. Any other relief this court may deem fit and expedient to grant;
 - f. Cost of this suit.
5. It would appear from that plaint that even as at the date of its filing in the plaintiff's opinion it was entitled to damages among other orders as against the defendant for failure to comply with the law. What has been brought up in the replying affidavit is the information that the project was implemented despite a stop order from NEMA and a suspension of works order from the NCA. These are matters of evidence that will feature at the hearing of the main suit.
6. Neither has the report proposed by the applicant is been attached to the application nor is there any indication as to when it will be ready, if at all. If no EIA Report was submitted or EIA Licence issued prior to the project implementation as per Section 58 EMCA, it is not known what kind of a report is intended to be availed to court, or under what law the defendant expects it. That notwithstanding, the provisions of Section 58 of EMCA require certain actions on the part of a project proponent prior to engaging in project implementation. Section 58 of the Act reads as follows:

58. Application for an Environmental Impact Assessment Licence



- (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
- (2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority.” (emphasis mine.)

7. That is the law. I do not find any permissive language in Section 58 of EMCA. It demands strict compliance with it on the part of a project proponent prior to project implementation. Evidently, the filing of the report proposed by the applicant may not then, in view of the cited provisions, cure the defendant’s liability for torts and other violations of the law that occurred prior to its preparation unless he can demonstrate otherwise and it is pointless to wait for it.

8. There is another reason for the court to frown on the application before it. This court also hardly thinks it auspicious for environmental law practice or jurisprudence in this republic, if the description of events by the plaintiff is correct, to give the general impression to all defendants to environmental litigation that they are at liberty, when their projects have been impugned, to hasten the pace of their implementation to completion during the pendency of litigation only to claim later on that the plaintiffs’ claims are overtaken by events. That would run counter to the precautionary principle espoused in EMCA in Section 3(5) when it states as follows:

- (5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development—
 - (a)
 - ... (f) the pre-cautionary principle.”

9. Besides, if the subject project required an Environmental Impact Assessment (EIA) Study Report and an EIA Licence as stipulated under Section 58 of the Environmental Management and Co-ordination Act before its commencement as per the 2nd schedule of the EMCA, and stop orders issued by the government agencies for lack of compliance with the law have been filed in the court record, or an implicit admission by the defendant as to non-compliance, it is hardly proper for this court to even contemplate any order compelling the plaintiff to await any other report before prosecution of its claim. Further, Article 10 of the Constitution provides as follows:

10. National values and principles of governance
 - (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
 - (2) The national values and principles of governance include—



- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.”

10 Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations provides as follows:

17. Public participation

- (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 co-ordinator 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.”

11. Thus, environmental governance institutions are mandated to consider sustainable development and public participation in the EIA process. The legal basis for environmental stakeholder involvement is Article 10 of *the Constitution* and section 58 EMCA as read with Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations. Thus public participation is both a legal and a constitutional right per se and it is an appropriate issue for trial as to whether acquisition of an EIA licence after the completion of a project is in contravention of Article 10 and regulation 17, or whether it absolves the project proponent from liability for non-compliance with the public participation principle before project implementation.



Conclusion

12. The upshot of the foregoing is that this court finds that the application dated 26/1/2024 lacks merit and it is hereby dismissed with costs to the plaintiff only.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

