



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC PETITION NO. 4 OF 2018**

**(FORMERLY NAIROBI PETITION NO. 52 OF 2016)**

**VENERABLE PROFESSOR NDUNGU IKENYE**

**(Suing for and on behalf of aggrieved residents of**

**Maki and Jogoo Estates within Thika).....PETITIONERS**

**VERSUS**

**KENYA TOWERS LIMITED.....1<sup>ST</sup> RESPONDENT**

**MAGDALINE WAMBUI WARUI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Petitioners brought this Petition dated 25<sup>th</sup> January 2016, against the Respondents herein and sought for the following declarations

- a) *A declaratory order do issue to the effect that the Respondents are obligated under sections 58 and 59 of the Environment Management and Co-ordination Act as read together with regulation 17 of the Environment (Impact Assessment and Audit) regulations 2003 to publish the project report, subject it to adequate public participation and consultation prior to submission of an Environment Impact Assessment study report to the National Environment Management Authority.*
- b) *A declaratory order do issue to the effect that upon submission of an Environment Management Authority under regulation 20, 21 and 22 of the Environment impact Assessment and Audit) regulation 2003 there is a requirement that it shall be subject to further participation and publication through print and radio announcements of nationwide circulation to enable the public make their comments on the proposed environment project.*
- c) *A declaratory order do issue to the effect that the respondents jointly and severally in failing to accord the Petitioners an adequate chance to participate in making their comments pertaining to the project leading to the construction of a base transceiver station on L.R.15046/68 Maki Estate, Thika violated their right to public participation under Article 10(2)(a) of the Constitution as read with Sections 3(3),58,59 of the Environment Management & Coordination Act as further read with regulations 17,20 and 21 of the Environment(Impact Assessment and Audit) Regulation 2003.*
- d) *An order of Certiorari do issue to bring to this Court any approvals or license issued by the National Environment Management Authority authorizing the construction of a transceiver base station on L.R 15046/68, Maki Estate, Thika and consequently they are quashed for violating the right to public participation.*
- e) *An order of prohibition do issue barring the Respondents jointly and severally from undertaking any further construction, development, excavation, renovation, erection or any other related works with a view of installation of any equipment for purposes of improvement of telecommunication network the general public on L.R 15046/68 Makai Estate Thika without conducting adequate public participation and further in strict compliance with the mandatory provisions of the Environment Management Coordination Act and the attendant regulations.*
- f) *Costs of this petition be provided for*
- g) *Such other orders or directions that the Honorable Court shall deem fit to issue.*

It was the Petitioners averment that they are residents of **Maki & Jogoo Estates within Thika Township**, who have been aggrieved by the

Respondents jointly and severally. They also averred that the 1<sup>st</sup> Respondent, a body corporate contracted by **Airtel Kenya Co. Ltd** to construct a **base transceiver station** on the 2<sup>nd</sup> Respondent's property known as **L.R No. 15046/68**, after entering into a contract. Further that the 1<sup>st</sup> Respondent begun developing or constructing a base transceiver station on the said property owned by the 2<sup>nd</sup> Respondent, which property is situate within **Maki Estate** where all the Petitioners resides in a gated Estate.

The Petitioners further contended that though **Section 58** of the **Environment Management & Coordination Act(EMCA)** require that a proponent of such a project is mandated in law to obtain approval or a permit from **National Environment Management Authority(NEMA)**, the Petitioners were never consulted when such approval or authority was sought. Further that no assessment or study of such report was submitted to the **Authority** as per the guidelines. Again, the Environment Impact Assessment study report was never published in two Newspapers circulating in the area and announcements made over the radio detailing the summary of the project as required by **Section 59 of Environment Management & Coordination Act (EMCA)**. They also contended that though the Petitioners were allowed **60 days** to submit oral or written comments on the Environment Impact Assessment report, the same was never adhered to.

It was also their contention that though Environment Impact Assessment and Audit Regulations 2003, **National Environment Management Authority (NEMA)** was mandated to be transparent, accountable and objective while dealing with the Application for an Environmental Impact Assessment (EIA), the said regulation was not followed. The Petitioners further contended that **Regulation 4** of the said regulations require a proponent to any project to undertake an Environment Impact Assessment, while conforming to **Regulation 7**, the same was not done. Further the social, cultural economic and legal consideration detailing mitigation measures to be taken during and after the implementation of the project as provided by **Regulation 16** were never taken into account

Further that the proponent failed to adhere to the provisions of **Article 10 of the Constitution**, which provides that in ensuring public participation as per **Regulation 17(1)** by failing to seek views of the persons who may be affected by the project.

Therefore, the Petitioners contended that by flouting the mandatory provisions and by being side-lined on the project works intended to be carried out on the suit property, they were denied fundamental right of participation as they were denied an opportunity to give their comments, views or objections whereas they reside within the locality of the property and are likely to be adversely affected by the works that has been commenced by the Respondents jointly and severally.

Further that failure to abide by the mandatory provisions of Environmental laws went against the National Values and principles of governance as provided by **Article 10(2) of the Constitution**, which is binding on the Respondents jointly and severally. It was their further contention that the project may have adverse effects of the locality or vicinity and thus transparency, inclusivity, participation, accountability and democratic process was required as per the requirement of sustainable development.

Further that the effort by the Petitioners to acquire information from the 2<sup>nd</sup> Respondent over the project has been faced with threats through their Advocate vide a letter dated **22<sup>nd</sup> December 2015**, who threatened legal action if the project is not halted. It was the Petitioners concerns that the erection or construction of trans-receiver base station is likely to emit radioactive emissions from the transmitter or other electronic or telecommunication equipment being built on the property. That since there was no adequate, open and inclusive public participation undertaken before the project was undertaken to protect the interest of the would be affected persons, their legitimate expectations was thwarted. Further even if the Respondents were issued with the license of the County Government of **Kiambu**, such issuance was irregular and unreasonably obtained since the suit property is situated in **Muranga County**.

They further contended that though the 2<sup>nd</sup> Respondent has a lawful duty to deal with private property as desired, there is a moral duty to accord respect to the interest of other persons in instances such an act would affect other third parties. Therefore, the Petitioners have commenced an action in exercising their right under **Article 22** of the Constitution in recognition of their right to **clean and healthy environment** and also a right to **public participation** in the development of policies, plans and processes for the management of Environment as recognised by **Section 3 of Environment Management & Co-ordination Act (EMCA)**.

The Petition is contested by the 2<sup>nd</sup> Respondent only who filed a Replying Affidavit through one **Chris Taracha**, the project manager on **6<sup>th</sup> September 2018**, who averred that the 1<sup>st</sup> Respondent is licensed under a Network facilities provider **Tier 2 No. TL/NFP/T2/0025** by the Communication Authority to construct, install and operate electronic communication system in Kenya. That the base trans-receiver station constructed on **L.R No. 15046/68** Thika situated at **Maki Estate** is one such electronic communication system. He attached a copy of the license as **annexture CH1**. He admitted that the 1<sup>st</sup> Respondent has leased the **base trans-receiver** station to various telecommunication providers including **Airtel Kenya Limited**. It was his further admission that the 1<sup>st</sup> Respondent entered into an agreement with the 2<sup>nd</sup> Respondent for the lease of the part of the premises on the suit property for the purpose of installation and maintenance of 43 telecommunication equipment including the base trans-receiver station and he attached the letter of offer as **annexture CH2**. It was his contention that he has been advised by the 1<sup>st</sup> Respondent's Advocate on record that **legal Notice No. 150 of 2016**, issued on **16<sup>th</sup> June 2016**, the 2<sup>nd</sup> Schedule of **Environment Management Coordination Act** provide that projects for telecommunication infrastructure which the project in this suit is one, are not to undergo an Environmental Impact Assessment study report as provided under **Section 58(1) of Environment Management Coordination Act**. That only high risk projects that require the submission of a full **Environment Impact Assessment study** report as provided under section **58(2) of Environment Management Coordination Act (EMCA)** and the classification of projects under **Legal Notice No. 150 of 2016**.

The deponent further contended that **Section 58(1) of Environment Management & Coordination Act** requires that a proponent of a project is to prepare a project report for consideration by **National Environment Management Authority (NEMA)** and which does not require further publication. Further that this project report is separate and distinct from an **Environment Impact Assessment** study report provided under section **58(2) of Environment Management Coordination Act (EMCA)**, and that would require publication in the Kenya Gazette and in Daily Newspapers within the area and announcements over the radio. He further contended that the **60 days period** for submissions of the public's comments on **Environment Impact Assessment, report** is in relation to a study report rather than a project report as is distinguished between section **58(1) and 58(2) of the Environment Management Coordination Act**.

It was also contended that **Regulation 16 of Environmental (Impact Assessment and Audit) Regulations 2003**, relates to an Environmental Impact Assessment study report and in the instance, the 1<sup>st</sup> Respondent which was approved by National Environment Management Authority.

He also deposed that though public participation is a requirement under **Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003**, the same is in relation to an Environmental Impact Assessment study report rather than a project report.

He further deposed that in relation to the instant project, a project report was lodged with National Environmental Management Authority by one **Eston Murithii** sometimes on **27<sup>th</sup> August 2015** and the views of those affected by the project were collected and included in the project report as a bundle of filled questionnaires that upon review of the project report and satisfaction with it, **National Environmental Management Authority (NEMA)** issued an Environment Impact Assessment licence in **8<sup>th</sup> October 2015**, under licence No. **NEMA/EIA/PSL/2393** subject to the conditions attached to it.

It was further contended that the 1<sup>st</sup> Respondent on **3<sup>rd</sup> September 2015**, through the 2<sup>nd</sup> Respondent applied for an extension of user of the suit property to the County Government of Kiambu in accordance with the terms of the **Physical Planning Act, Cap 286 Laws of Kenya**. That the extension of user was related to the inclusion of the base trans-receiver station on the suit property. It was also contended that there was no objection received by the County Government of **Kiambu** to the application for extension of user and on **25<sup>th</sup> September 2015**, the County Government of Kiambu being satisfied that there were no objections to the application for extension of time issued approval for the project to extend the use of the suit property to include the **base trans receiver station**.

The Deponent averred that the 1<sup>st</sup> Respondent lodged its project report in accordance with the laid views of the members of general public that were likely to be affected by the project which were sourced and included in the project report without any legal obligation to do so.

It was contended that there were no health concerns arising from the base trans-receiver station under the project and in any event, the said issues have been sufficiently mitigated against as noted in the project report. It was further contended that the project falls within **Kiambu County** and not **Muranga County** and if the same fell in **Muranga County**, then **Kiambu County** Government would have properly directed the 1<sup>st</sup> Respondent to **Muranga County**. It was further contended that the issue of demarcation between the two counties cannot formulate a Constitutional cause of action. Therefore the 1<sup>st</sup> Respondent contended that the project proffered no adverse effect to the public and any such effects have been adequately mitigated against as provided in the project report. Further, the 1<sup>st</sup> Respondent denied any breach of the Constitutional right to a clean and healthy environment by the project and contended that the requirement for public participation was complied with before the commencement of the project.

The 1<sup>st</sup> Respondent further contended that the Petition herein is without merit and should be dismissed with costs.

The Petition was canvassed by way of written submissions. The Petitioners filed their submissions on **5<sup>th</sup> March 2019** and submitted that the **base trans-receiver station** is harmful to the surrounding environment in which the Petitioners inhabit and that the said project is harmful to their health. They reiterated that the construction of the said **base trans-receiver station** was undertaken with concealment and improper procedures in obtaining **Environment Impact Assessment license**. It was further submitted that the impugned act by the Respondents have grave ramifications on the environment and ultimately the health of the people inhabiting the said neighbourhood, the Petitioners included.

That there was need to involve the people living in the neighbourhood, the Petitioners included given hazardous nature of the project. However, the same was not done. It was also submitted that the Respondents sought approval of the project from **National Environment Management Authority** in secrecy without involving the Petitioners, whose health the project was going to affect gravely. The Respondents therefore failed to carry out public participation in their purported Environment Impact Assessment. It was further submitted that the Respondents and National Environment Management Authority acted in blatant breach of the rules of Natural Justice which breach is also contrary to **Regulation 19 of the Environment Impact Assessment and Audit Regulations 2003**, as well as **section 58(7) of the Environment Management & Coordination Act**. Therefore, there was failure by the Respondents and the Government agency to accord the residents of **Maki Estate** their right to be heard. Further that embarking on a project deemed harmful by the neighbouring residents is also tantamount to disregarding their right to own property under **Article 40 of the Constitution** as the said residents are unable to enjoy ownership of their property. They also submitted that corporate profit cannot and should not triumph over the lives of human beings.

The Petitioners relied on the case of **Sam Odera & 3 Others....Vs... NEMA& Another (2006) eklr where Nyamu J** stated that;

*“principle 10 of the RIO DECLARATION states that environmental issues are best handled with participation of concerned citizens at the relevant level.....that public participation is aimed at achieving firstly the right to a fair hearing before decisions on environment are made or imposed on people.”*

The Petitioners also submitted that under **Regulation 17**, Environment Impact Assessment Report requires a thorough assessment of the Environment including calling for public participation to enable the people likely to be affected by the proposed project to give their views regarding the proposed project. It was further submitted that under **Article 42 of the Constitution 2010**, the Petitioners are entitled to clean and healthy environment.

The Petitioners further submitted that they have a legitimate concerns that the proposed **base trans-receiver** will be harmful to their health and their well being as the said station is bound to cause emissions of electromagnetic waves and hence the Petitioners right under **Article 42** of the Constitution will have been violated and / or infringed. Therefore, the Petitioners have sought the intervention of this Court to safeguard their rights. They urged the Court to declare the process leading to the authorization of the project being undertaken by the 1<sup>st</sup> Respondent as being improper and unlawful for failure to adhere to the laid down procedures and the law as envisaged by **Environment Management & Coordination Act, 2013 Regulations** and the **Constitution 2010**.

The 1<sup>st</sup> Respondent filed its submissions on 27<sup>th</sup> February 2019, and denied having breached the Petitioners' Constitutional right to clean and healthy environment.

It was submitted that the Petition herein is defective as the Petitioners failed to set out the particularity of the right allegedly infringed by the Respondents. They relied on the case of **Amos Kiumo & 19 others...Vs... the Cabinet Secretary, Ministry of Interior & Coordination of National Government(2014) eKLR where** the Court held that;

***“ If a person is seeking redress from the High Court on a matter which involves reference to the Constitution, it is important(if only to ensure that justice is done to his case that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”***

It was also submitted that though the Petitioners have alleged that their constitutional right to clean and healthy environment has been infringed, there was no explanation about how exactly that right had been infringed upon by the 1<sup>st</sup> Respondent's project. It relied on the **Court of Appeal Case No. 191 of 2014;Bethwell Allan Omondi Okal...Vs... Telkom(K) Ltd(founder)29 Others (2017) eKLR**, where the court held;

***“ This level of precision is demanded more so in constitutional Petitions where violations of fundamental rights and freedoms have been alleged.....It is not enough to mention perceived violations of the constitution in generalities as the appellant has done in his Petition.....on that scale alone, the appellant petition was for dismissal.”***

Further the 1<sup>st</sup> Respondent submitted that the manner in which the Petition is framed places the burden upon the Respondents and this Court to frame issues on behalf of the Petitioners. That the 1<sup>st</sup> Respondent is not fully aware of the allegations against it in order to unequivocally address them. For this it relied on the **Civil Appeal No. 290 of 2012 - Mumo Matemu...Vs... Trusted Society of Human Rights Alliance & 5 others(2013) eKLR where the Court in making reference to the case of Though...Vs...Hodsworth (1876) 3Cq.D 637 held ;**

***“ The whole object of pleadings is to bring the parties to an issue and the meaning of the cause came on for that what real point to be discussed and decided was infact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expenses and delay especially as regards the amount of testimony required on either side at the hearing.”***

That it was not enough to allege that provisions of statute have been infringed but the Petitioners were obligated to further establish how such infringement has resulted in their Constitutional rights.

Further the 1<sup>st</sup> Respondent submitted that all the procedural regulations were adhered to and public participation was done. Reliance was placed in the **Civil Case No. 42 of 2014-Nairobi Metropolitan PSV Saccos Union Ltd & 25 others...Vs... County of Nairobi Government & 3 others (2014) eKLR**, where the Court held that;

***“It cannot be expected of the lawmaker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law maker and taken into account in formulating the regulations;”***

It was also submitted that since the 1<sup>st</sup> Respondent had established that a portion of community surrounding the project was consulted, then the concept of public participation before the commencement of the project had been satisfied. Further that on health concerns raised by the Petitioners, the project report came to the conclusion that there was no potentially significant adverse impact which the project was likely to inflict on the environment in its locality that could not adequately be mitigated. Therefore, it was their further submissions that there is no evidence of any health hazard arising from the project that would establish that the Petitioners' Constitutional right to a safe and healthy environment had been infringed. Further that the 1<sup>st</sup> Respondent fully complied with all the legal requirement regarding Environment Impact Assessment project report prior to issuance of the Environment Impact Assessment licence for the project.

On whether the Petitioners are entitled to any of the reliefs sought, the 1<sup>st</sup> Respondent submitted that having been shown that it complied with the provisions of EMCA, before the commencement of the project, and with the conditions set out in the development permissions and Environment Impact Assessment Hence after the commencement of the project, then the Petitioners Constitutional rights have not been violated and their plea is without basis. The 1<sup>st</sup> Respondent prayed for dismissal of the Petition with costs to the 1<sup>st</sup> Respondent.

The court has now carefully considered the Petition, the affidavit in support, the Replying Affidavit by the 1<sup>st</sup> Respondent, the annexures thereto and the written submissions. The court too has considered the applicable law and finds that the issues for determination are;

- 1. Whether this Petition is totally defective***
- 2. Whether the report submitted by the 1<sup>st</sup> Respondent is a project report or an Environment Impact Assessment study report.***
- 3. If so Whether the Right Procedures were followed***
- 4. Whether the petitioners are entitled to the orders sought***

***1. Whether this Petition is totally defective***

It has been submitted by the 1<sup>st</sup> Respondent that the Petition is defective as it does not set out the rights that have allegedly been infringed and how the said rights have been infringed and therefore it was not aware of the allegations that it ought to have responded to. In the case of **Daniel Chacha Muriri ....Vs...Attorney General [2012] eKLR** the Court held that;

***“It is now trite law that for a contravention of a fundamental right to exist and be enforceable, certain requirements must be met. As was enunciated in the celebrated case of Anarita Karimi Njeru –vs- Republic (No. 1) 1979 KLR 154, it was held: “... We would again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to this case), that he should set out with reasonable degree of precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed***

***It is the petitioner’s duty to specify and demonstrate with particularity the constitutional rights which have been violated, in what manner and by whom. He must also frame the reliefs he is seeking from the court.”***

The question that the Court must then determine is whether the Petitioners have specified and demonstrated with particularity the Constitutional rights that they alleged to have been infringed on and the manner in which they allege that they have been infringed on. It is the Petitioners’ Contention that the Respondents have disregarded their right to own property under **Article 40** of the Constitution as they are unable to enjoy ownership of their properties by virtue of allowing harmful emissions in their surrounding. Further the Petitioners have also alleged that the Respondents have violated their rights to a clean and healthy environment as guaranteed by **Article 42** of the Constitution as the **base trans receiver station** is bound to cause emissions of electromagnetic waves. It has been their contention that they were not consulted before the project was undertaken and therefore public participation was not put into consideration as required by **Article 10 (2) of the Constitution**.

It is clear that the Petition has specified what constitutional rights the Petitioners believe have been violated, in what manner and by whom. The merit on whether the rights were indeed violated by the said acts is a matter to be determined by the Court. It is the Court’s considered view therefore that the Petition is not defective

## **2. Whether the report submitted by the 1<sup>st</sup> Respondent is a project report or an Environment Impact Assessment study report.**

**Section 58** of the Environmental Management & Coordination Act provides as follows;

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

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

Further regulation 7 of the **Environment (Impact Assessment and Audit Regulations) regulations 2003** provides as follows;

***(1) A proponent shall prepare a project report stating -***

***(a) the nature of the project;***

***(b) the location of the project including the physical area that may be affected by the project's activities;***

***(c) the activities that shall be undertaken during the project construction, operation and decommissioning phases;***

***(d) the design of the project;***

***(e) the materials to be used, products and by-products, including waste to be generated by the project and the methods of their disposal;***

***(f) the potential environmental impacts of the project and the mitigation measures to be taken during and after implementation of the project;***

***(g) an action plan for the prevention and management of possible accidents during the project cycle;***

***(h) a plan to ensure the health and safety of the workers and neighbouring communities;***

***(i) the economic and socio-cultural impacts to the local community and the nation in general;***

***(j) the project budget; and***

*(k) any other information the Authority may require.*

*(2) In preparing a project report under this regulation, the proponent shall pay particular attention to the issues specified in the Second Schedule to these Regulations.*

*(3) A project report shall be prepared by an environmental impact assessment expert registered as such under these Regulation*

*(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.*

Regulation 10 of the Environmental (Impact Assessment and Audit) Regulations 2003 provides;

*“(1) On determination of the project report, the decision of the Authority, together with the reasons thereof, shall be communicated to the proponent within forty-five days of the submission of the project report.*

*(2) Where the Authority is satisfied that the project will have no significant impact on the environment, or that the project report discloses sufficient mitigation measures, the Authority may issue a licence in Form 3 set out in the First Schedule to these Regulations.*

*(3) If the Authority finds that the project will have a significant impact on the environment, and the project report discloses no sufficient mitigation measures, the Authority shall require that the proponent undertake an environmental impact assessment study in accordance with these Regulations*

From the above provisions of law, it is clear that there are two types of reports that a proponent seeking approval from the **National Environment Management Authority (NEMA)** should prepare. That according to **Section 58(1)**, a proponent seeking approval from the authority should prepare a project report. Further under **Section 58(2)** it is also required that the proponent should prepare an Environment Impact assessment study. However, the process through which the two reports are prepared is contained in the **Environmental Impact (Assessment and Audit) Regulations, 2003**. It is clear that a proponent will first prepare a project report as envisaged under section **58(1)** of **EMCA** that the report would then go through the Authority and if the Authority is satisfied that the project report discloses sufficient mitigation measures, then the Authority will issue a license. Under **Regulation 10(3)**, it is further required that if the **Authority** finds that the project will have a significant impact on the **environment**, it is then that that the Authority will require the proponent to undertake an **Environment Impact Assessment Study** as envisaged in Section 58(2) of Environment Management & Coordination Act.

The Petitioners have alleged that the Respondents undertook an Environment Impact Assessment Study as envisaged by Section **58(2)** and that this has been confirmed by the report that they presented to the National Environment Management Authority, However the 1<sup>st</sup> Respondent has averred that what they presented was a project report. This Court has seen annexure **CH3** which vide a letter dated **27<sup>th</sup> August 2015**, the National Environment Management Authority wrote a letter to the 1<sup>st</sup> Respondent referenced **“ACKNOWLEDGEMENT OF ENVIRONMENTAL IMPACT ASSESMENT PROJECT REPORT”** Further the document certified on **5<sup>th</sup> August 2015**, has also been titled as an **Environmental Impact Assessment Project Report**. From the provisions of **Regulation 10(3)**, it is required that only when the **Authority** finds that the project has a significant impact that is when it would be required that the proponent undertakes an Environment Impact study. In this case, there is no evidence that the 1<sup>st</sup> Respondent was required to undertake an Environmental Impact study. From the evidence adduced in Court, it is not in doubt that when the 1<sup>st</sup> Respondent presented its project report, the same was allowed and that there was no requirement that it prepares the Environmental Impact Assessment study as envisaged by **section 58(2)** of the Environment Management & Coordination Act.

**Section 58(7) of Environment Management Coordination Act (EMCA)** requires that the Environment Impact Assessment shall be conducted in accordance with the Environmental Impact Assessment guidelines and procedures issued under the Act. This Court therefore finds and holds that what was prepared and presented by the 1<sup>st</sup> Respondent was a project report and not an Environmental Impact Assessment study.

### **3. If so, Whether the Right Procedures were followed**

As already held above by the Court, what was prepared and presented to the Authority was a **project report** as envisaged under **section 58(1) and not 58(2)**. The requirement under this Section as read together with **Regulation 10(2)** is to the effect that if the Authority is satisfied that the project will not have a significant impact, it would then issue a license. It is only when the Authority finds that the project has a significant impact, that it will require the proponent to undertake an Environment Impact Study.

The Petitioners have contended that the views of the **stakeholders** were not considered. However, the Court having perused the project report, it is clear that questionnaires were attached and the views of various stakeholders were considered. Further the Petitioners have also averred that the publication of the said report was never undertaken and the said project published in the two dailies. **Section 59 of EMCA** provides that;

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

*(a) a summary description of the project; (b) the place where the project is to be carried out;*

(c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and

(d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.

Further Regulation 17 (1) provides;

**“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.”**

From the above provisions of law, it is then not in doubt that the said process is only required when an **Environmental Impact Assessment study** is being undertaken in accordance with **section 58(2)**. In this instant case, the report being prepared having been a project report, this Court is satisfied that the procedures were not required of it.

The Petitioners have also averred that the Respondents did not seek for the right approvals as the Approvals were sought from the **Kiambu County Government** and not **Muranga County Government** where the suit property lies. In their Petition, the Petitioners have described themselves as residents of **Maki** and **Jogoo Estates** within Thika Town. The Court will take Judicial Notice that Thika Town is in **Kiambu County** and the suit property being located in the Maki Estate within Thika Town, and in the absence of any evidence to controvert the said facts, it is the Court’s considered view that the suit property is located in Thika town which is in **Kiambu County**, the approvals were therefore properly sought in Kiambu County.

#### **4. Whether the petitioners are entitled to the orders sought**

In their Petition, the Petitioners have sought for several declarations, being that the Respondents were obligated to subject the report to public participation as envisaged under **Regulation 17**, that the same is to be subjected to public participation and that in failing to give the Petitioners adequate chance to participate in making their comments, the Respondents breached their right to public participation under **Article 10(2) (a) of the Constitution 2010**. Further that the approvals and license authorizing the construction be quashed and an order be issued barring the Respondents from conducting further construction.

As already held above by this Court, the project report that was presented by the Respondents required that the same be presented to the Authority upon which the Authority may grant the license and if dissatisfied, it may require the proponents to prepare an Environmental Impact assessment study which will then undergo the requirements as required under **Section 59 of EMCA** and **Regulations 17 of the Environmental (Impact Assessment & Audit Regulations) 2003**. It is therefore the Court’s considered view that the Petitioners have failed to prove that the Respondents did not follow the procedure and that public participation was put into consideration and therefore their prayers as sought are not merited.

**Section 27 of the Civil Procedure Act** gives the Court discretion to award Costs. It is not in doubt that costs always follow the events. In this instant case, the Petitioners have failed to prove their case on the required standard of balance of probabilities and therefore the Respondents are the successful parties. Given that the 1<sup>st</sup> Respondent was the only one that contested the suit. The Court finds that only the 1<sup>st</sup> Respondent is entitled to costs of the suit.

Having carefully considered the facts of this case, the affidavits filed by both parties, the rival submissions herein and the relevant provisions of law, and authorities cited, the Court finds that the Petitioners have not proved their case on the required standard and Consequently the Petition herein is **not merited** and the same is dismissed entirely with costs to the 1<sup>st</sup> Respondent

It is so ordered.

**Dated, signed and Delivered at Thika this 28<sup>th</sup> day of May 2020**

**L. GACHERU**

**JUDGE**

**28/5/2020**

**Jackline - Court Assistant**

#### **ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of :**

**Kanyi Kiruchi Advocates for the Petitioners**

**Coulson Harney LLP for the 1<sup>st</sup> Respondent**

**No consent for the 2<sup>nd</sup> Respondent**

**L. GACHERU**

**JUDGE**

**28/5/2020**