Wa Maina (Suing on His Own Behalf and as the Chairman of Lavington Five Roads Association c/o Githara & Associates Advocates) v National Environment Management Authority & another (Environment and Land Appeal E007 of 2023) [2025] KEELC 4756 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4756 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E007 OF 2023

AA OMOLLO, J

JUNE 19, 2025

BETWEEN

NDIRANGU WA MAINA (SUING ON HIS OWN BEHALF AND AS THE CHAIRMAN OF LAVINGTON FIVE ROADS ASSOCIATION C/O GITHARA & ASSOCIATES ADVOCATES) ..... APPLICANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

WOODRIDGE CENTRE LIMITED ..... 2ND RESPONDENT

(Being an appeal from the decision of the National Environment Tribunal (NET) rendered on 21.11.2023 in Tribunal Appeal no. 36 of 2022)

JUDGMENT

1. The Chairman of Lavington Five Roads Association lodged the present appeal dated 2nd September, 2024 challenging the decision of the National Environment Tribunal rendered on 21st November, 2023. The Appellant listed the following grounds in support of the appeal;

    1. That the honourable Tribunal erred in law and fact in finding that the 2nd Respondent conducted adequate public participation before applying for and issuance of the Environmental Impact Assessment License by the 1st Respondent.

    2. That the Honourable Tribunal erred in law and in fact in failing to make failure to make a finding on the negative effects the construction of a petrol station would have on the surrounding estate.

3. That the Honourable Tribunal erred in fact when it found that the issuance of EIA License No. NEMA/EIA/PSL/21303 by the 1st Respondent to the 2nd Respondent was issued lawful and regular.

2. He went further to propose to the court to grant them the following orders;

   i. An order allowing this appeal and setting aside the judgment and decree dated 26th January, 2023.

   ii. A revocation of the Environment Impact Assessment License No. NEMA/EIA/PSL/21303.

   iii. An order for restoration of the subject property, L.R No. 3734/790 to the condition before the issuance of the EIA License.

   iv. That the Appellant does have costs of this appeal.

   v. Any further relief or orders that this Honourable Court may deem just and fit to grant in the circumstances of this case.

3. Directions were taken where parties agreed to file written submissions. The Appellant filed written submissions dated 28th January, 2025 while for the 2nd Respondent is dated 8th April, 2025. In summary, the Appellant faults the Tribunal for finding that there was public participation, participation as regards the application for the EIA license.

4. The appellant submits that the 2nd Respondent did not comply with the provisions of regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003. That the NET erroneously relied on minutes presented as annex WC – 5 yet the minutes were not signed by representatives of the Appellant because they were not a true reflection of the meeting. They added that the NET failed to contrast the minutes of this meeting with their letters dated 17th September, 2022.

5. Further, the Appellant faults the judgment for placing reliance on the questionnaires filled some of which bore no names and that they were only a handful (12 in number) thus not representative of the 154 members of the Appellant. They cited the case of R vs County Government of Kiambu ex parte Robert Gakuru & Another J.R Case No. 434 of 2015 which stated thus regarding public participation;

> " Here I must say that public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by Black's Law Dictionary 9th Edn. at page 358 as "the act of asking the advice or opinion of someone", "participation" on the other hand is defined at page 1229 thereof as "the act of taking part in something, such as partnership..." Therefore, public participation is not a mere cosmetic venture or a public relations exercise. In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in *the Constitution*. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words, the end product ought to be owned by the public. This position was appreciated in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) as hereunder:
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> "If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in

involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."

6. The Appellant also cited the case of John Kabukuru Kibicho & Another Vs C. G. of Nakuru & Others ELC Pet 13 of 2016 which held as follows;

> " 44. There is no indication that Regulation 17 above was complied with at all. It has not been suggested by the respondents, especially the 2nd respondent who is the proponent of the project, that there were any posters in strategic public places in the vicinity of the project, affixed so as to alert the public of the upcoming project during the EIA exercise. Neither was there any public advertisement in the newspaper inviting comments. Most importantly, there is no intimation of any meeting held with the surrounding community or the recording of any oral or written comments by any person who is within the vicinity of the project.
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> 45. I get the impression that the EIA report was done clandestinely and was shrouded in secrecy. I am afraid that I cannot consider the three undated and anonymous questionnaires annexed to the EIA report as being compliant to Regulation 17 above. This was no doubt a major project that was out of character with its existing environment and it was absolutely necessary for the surrounding public to be well informed of the project during the EIA exercise and for their comments to be sought and considered in the report. I find that there was a violation of Regulation 17 in the manner in which the EIA report was done."

7. The NET was also faulted for not making any finding on the negative effects the construction of a petrol station would have on the surrounding estate. In supporting this argument, the Appellant cited the case of Onyera & 8 Others (Suing on their own behalf and on Behalf of the Residents and Homeowners of Green Park Estate) v Superior Homes Kenya Limited & 3 Others; Green park Estates Management (GEMS) Limited (Interested Party) Environment & Land Petition E007 of 2023) where the court stated as follows as regards the construction of a petrol station in a residential area;

> " It is common knowledge that a petrol station presents an ever-present risk of fire which is acknowledged in the 1st Respondent's EIA study report. The 1st Respondent stated in their response that they have taken remedial measures and therefore that matter has been addressed. As the estate consists of 500 houses, the probable risk involved may not just be in regard to petitioners herein but so many other residents of the estate and those on abutting properties. The attendant air pollution and apparent risk of fire poses environmental, personal and property risks to the residents."

8. Lastly, the Appellant argues that a petrol station is a high risk project not medium risk as held by the NET. They anchored this submission on the contents of *Legal Notice No. 150 of 2016* which states that;

> "

"2) The following projects shall require submissions of environmental impact assessment study reports under section 58(2) of the *Environmental Management and Co-ordination Act*, 1999 –

High Risk Projects –

SUBPARA (2)

(a) An activity out of character with its surroundings."

9. On the other hand, the 2nd Respondent submitted that the two Environmental Impact Assessment study report parameters are different as they relate to projects of different scales. An Environmental Impact Assessment Study is done for projects that are classified under the Second Schedule of the *Environmental Management and Co-ordination Act* *Legal Notice No. 31 of 2019* as High Risk while Environmental Impact Assessment Report is submitted for projects classified therein as Low and Medium Risk category.

10. The 2nd Respondent framed the following 3 issues for determination in their submissions;

i. Whether the Tribunal erred in finding that the 2nd Respondent conducted adequate public participation.

ii. Whether the Tribunal erred in failing to find that the project would have a negative effect on the surrounding estate.

iii. Whether the Tribunal erred in finding that the license issued to the 2nd Respondent was lawful.

11. It is their argument that the second schedule was amended vide *Legal Notice No. 31 of 2019* paragraph 2 (a) which now categorise service stations" under projects requiring EIA Project Report and not Study Report. Consequently, they aver that Regulation 17 did not apply to the 2nd Respondent's project.

12. On public participation, they submit that there were consultative meetings held between the Appellant and the 2nd Respondent on 11th June, 2022 as well as the questionnaires produced at pages 266 – 279 of the supplementary record. besides these, the 2nd Respondent refers to consultation done on 27th May, 2022 and 15th June, 2022 with other stakeholders.

13. The 2nd Respondent cited the case of Sang & 5 Other vs Board of Management Kenana Secondary School & 2 Others (2024) KE ELC 4285 (KLR) which held that;

> "It is this court's view that facilitation of public participation is key in ensuring legitimacy of the law, decision or policy is reached. This court is satisfied that there was sufficient evidence that indeed public participation was conducted vide the meetings that took place on 4th and 10th September, 2018. I therefore find that the same was adequate since members of the public were afforded an opportunity to air their views in respect to the proposed construction of the Secondary School."

14. They further cited the case of Mui Coal Basin Local Community & 15 Others vs Permanet Secretary Ministry of Energy and 17 Others [2015] eKLR for the proposition that public participation does not dictate that everyone must give their views on an issue of environmental governance as to have such a standard would be to give a virtual veto power. Further, that the essence of public participation is not meant to usurp the technical role of the 1st Respondent but to enrich their views.

15. On the ground of failure by the NET to find the negative consequences of the project on its surroundings, the 2nd Respondent submitted this did not form part of the proceedings before the Tribunal hence it falls outside of what the Tribunal addressed. That if the court allows it without any prior opportunity for the parties to adduce evidence in counter undermines the principles of procedural fairness.

16. On the last point on the lawfulness of the EIA license, the 2nd Respondent submitted that the classification of projects as low, medium or high risk is not done by the Tribunal but it is transcribed by the Act. That the Appellant proceeded on misrepresentation that this was a high risk project. It also submitted that since it began operating the station in December 2024, EPRA has not issued any notice to the 2nd Respondent for breach of the *Energy Act*.

17. In conclusion, the 2nd Respondent submitted that all the 3 grounds of appeal fail and urged this court to dismiss the appeal with costs to them.

Analysis & Determination;

18. I have considered the impugned judgment visa vi the grounds of appeal and the submissions rendered for and against. From this consideration, I frame the following questions for determination of the dispute.

    a. Whether or not the 2nd Respondent's project was medium or high risk.

    b. Whether there was public participation undertaken.

    c. Whether the E.I.A licence granted is null and void

Is the project classified as high or medium risk?

19. According to the Appellant, the 2nd Respondent ought to have complied with Regulation 17 since the Project is classified as high risk as per schedule 2 of the Environment Management and Coordination Act (EMCA). On the other hand, the 2nd Respondent contends there was an amendment to the classification of projects vide legal notice 31 of 2019 which declassified service station from high risk to medium risk. That the classification of projects is not the role of the National Environment Tribunal (NET).

20. Thus the 2nd Respondent is not disputing that the second schedule to the Act initially categorized Petrol Station under high risk. I have perused the legal notice 150 of 2016 and No. 31 of 2019 published in the Kenya Gazette Supplement 62 of 30th April, 2019. The early Notice of 2016 had classified service stations as high-risk project while the recent notice of 2019 provides otherwise. It states under paragraph 2}}(9) thus;

> "Amendment of the second schedule. In exercise of the powers conferred by Section 58(4) of EMCA 1999, the Cabinet Secretary amends the second schedule by delating the undertakings specified thereunder and substituting therefore the following;
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> 1. .....
> 2. Medium Risk (9) Hydrocarbons Projects including;
>   a. Service stations
>   b. LPG filling plant and

c. Lubricant blending facilities"

21. This amendment was effected prior to the application of E.I.A License for the impugned project whose development approvals commenced in the year 2022. The Tribunal considered the issue whether the Project was classified as high risk required to comply with Regulation 17 (study report) or medium risk required to comply with Regulation 7 (project report) and concluded that the EIA license was lawfully and regularly issued by the 1st Respondent.

22. Having reviewed the amendment pointed out by the 2nd Respondent before the Tribunal and now to this court, I am persuaded to find that the impugned project is classified as medium risk. Therefore, the 2nd Respondent was only required to comply with Regulation 7 which provides for preparation of a project report. It does not matter that their paragraph (2) (f) of the 2nd Respondent statement refers to calling for comments to do a study report as that statement does not change the Regulations in place.

23. Regulation 7 of the Environmental (Impact Assessment & Audit) Regulations, 2003 does not require a project proponent to advertise. The application in the Kenya Gazette in their submissions before this court, the appellant still addressed the court on non-compliance with Regulation 17 only. In view of the amendments to the second schedule which was brought to the attention of the Appellant vide submissions before the NET, they ought to have addressed the issue of non-compliance differently in the present appeal other than relying on non-compliance with regulation 17.

Was public participation undertaken?

24. The substratum of this appeal was the ground on want of public participation. Despite the fact of the impugned project being medium risk, the 2nd Respondent was still mandated to undertake public participation since a decision that was to be made concerning their application for E.I.A would have an impact on the public and the environment. The Respondents argued that they did undertake public participation vide consultative meetings and sharing of questionnaires.

25. In the EIA report at page 45 (and found at page 49 of the supplementary record of appeal) the 2nd Respondent gives details of the public participation undertaken inter alia that a town hall meeting was held between the EIA Consultant, the developer and the LFRA Residents Association Committee members on 11th June, 2022. The 2nd Respondent avers that questionnaires were shared and as of 15th June 2022, Ten (10) stakeholders had submitted their comments in writing.

26. The Appellant admits that a meeting took place on 11th June, 2022 but they refused to sign the minutes arising thereof because according to them, the minutes did not reflect what was discussed. This meeting is referred to in paragraph 6 of the document titled "statement of appeal to the Nairobi Physical Planning Liaison Committee" as well as paragraph 13 of the supplementary affidavit sworn on 14th March, 2023.

27. I did not get opportunity to peruse the minutes of 11th June, 2022 as the record (and supplementary record) of appeal as filed did not attach them. I cannot therefore for certain say the meeting was insufficient to constitute quality in engaging the stakeholders. However, the Appellants seemed to have objection judging from their refusal to sign the minutes for not reflecting what was discussed.

28. Besides the meeting of the 11th June 2022, the 2nd Respondent stated that it distributed questionnaires for members to give their feedback on the project. The Appellant challenges the samples of questionnaires filed. First because none was given to their members; second some of the questionnaires did not have names and thirdly that the people who filled were not immediate neighbours.

29. In the supplementary affidavit of Mr. Ndirangu at paragraphs 19 & 20 deposes thus;

> " 19. That further to the objection by LFRA, I also learnt that there were similar objections by Mzima Springs, Tende Drive, Huri Close and El-molo Road residents, Muthangari Primary School St. Austin's Academy, Lavington Montessori Kingergarten and Nairobi International School, who are all neighbours to the proposed petrol station and who would be adversely affected and which objections I brought to the attention of the 1st Respondent. Annexed hereto and marked "NM 10" are copies of the said objections.
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> 20. That despite LFRA notifying the 1st Respondent of its objections, which the 1st Respondent has stated was merely for information purposes, and despite the 2nd Respondent being aware of the existence of the objections by LFRA, the 2nd Respondent choose not to submit such objections at the point of application of the EIA license and the 1st Respondent chose not to consider or in the very least invite LFRA to comment on the application of the EIA license."

30. From the foregoing pleading, it is my considered opinion that the Appellant actively engaged the relevant authorities in stating their objectives to the approval of the impugned development of a petrol station. They wrote to NEMA on 6th June 2022 as well as KURA. The list of persons identified at paragraph 19 of the Appellants Supplementary affidavit confirms stakeholder engagement by the 2nd Respondent as raising an objection is also a form of public participation. The issue is that their complaints fell on deaf ears as NEMA proceeded to grant the EIA license on 1st September, 2022.

31. In the often-cited case of Mui Coal Basin supra, the question of how public participation should be handle did arise and the learned judges had this to say;

> " From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:
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> Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:
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> "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))" (underline mine for emphasis).

32. In the case of Mui Coal P. P., lack of public participation must not be confused with failure to take views raised in objecting to the approval of a development. The Appellant cited the case of R vs County Government of Kiambu Ex parte Robert Gakuru & Another for the proposition inter alia that public participation ought to be participatory. In this case, there was participation not just by the Appellant

but the others who raised similar objections and some who lodged similar objections and the twelve (12) who filled the questionnaires.

33. Further, in the Kiambu case proposed for giving of sufficient time for public participations. In this appeal, the record indicates a meeting was held in June and some letters by the Appellant also written in to the 1st Respondent in June of 2022 before the Licence was issued in September, 2022. This means there was sufficient time between the period of raising and addressing the objections before the license was finally granted.

34. The case of John Kibicho & Another vs County Government of Nakuru & 2 Others (2016) eKLR is distinguishable to this case as regulation 17 is not applicable for the reasons earlier stated in this judgment. In regard to paragraph 55 of the judgment highlighted by the Appellant, my answer is that the Tribunal did not have jurisdiction to determine whether article 47 and 73 were breached. The Tribunal's mandate is clearly set in Section 129 and 130 of EMCA.

Conclusion:

35. The upshot of the foregoing analysis is my finding that there is no merit in this appeal and proceed to make an order dismissing it. For the reason that it borders on public interest litigation, I award no costs. Thus, the appeal is dismissed with an order that each party to bear their respective costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JUNE, 2025

A. OMOLLO

JUDGE