Eleven Energy Ltd v Kiarie & 5 others (Environment and Land Appeal E001 of 2025) [2025] KEELC 4479 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4479 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E001 OF 2025

YM ANGIMA, J

JUNE 12, 2025

BETWEEN

ELEVEN ENERGY LTD ..... APPELLANT

AND

COLLINS KINUTHIA KIARIE ..... 1ST RESPONDENT

TIMOTHY KILUNGU MAILU ..... 2ND RESPONDENT

HASSAN MWINYI KIBWANA ..... 3RD RESPONDENT

KIBWANA MWIJUMA KIBWANA ..... 4TH RESPONDENT

JOSEPH MALUSHA ABEDI ..... 5TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 6TH RESPONDENT

(Appeal against the judgment of the National Environment Tribunal (the Tribunal) dated 14.06.2021 in Tribunal Appeal No. 28 of 2023)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment of the National Environment Tribunal (the Tribunal) dated 14.06.2021 in Tribunal Appeal No. 28 of 2023- Collins Kinuthia Kiarie and 4 Others vs Nema and Eleven Energy Ltd. The material on record shows that the Tribunal allowed the respondents' appeal against the decision of National Environment Management Authority (NEMA) to grant the appellant an Environmental Impact Assessment (EIA) licence to establish a 15000 MT LPG depot on Plot No.MN/VI/3070 located at Changamwe in Mombasa County.

B. Background

2. The material on record shows that the residents filed a notice of appeal dated 21.09.2023 before the Tribunal seeking revocation of the EIA licence on the following grounds;

   a. Failure by the 2nd respondent to carry out any or any meaningful public participation and failure by the 1st respondent to ensure that proper public participation was done before the issuance of the licence in question.

   b. Failure to access safety, security and environmental concerns before issuance of the impugned licence.

   c. Failing to consider that the project is a very high density occupation project in a neighbourhood of high density population that will cause very severe environmental degradation of the neighbourhood.

   d. Failing to consider that the project is very close to very high density residential area particularly Kibarani Village, Kipevu Village, Bahati Village, Chaani Village and Lilongwe Village which collectively hold more than 30,000 people including women, men, children, disabled and school going children. The schools that surround that area include Kibarani Primary School, New Hope Academy, Favour Academy, St. Francis Assiss school, and the larger Kibarani community which cumulatively hold not less than 3,5000 students.

   e. Failure by the respondents to consider close proximity to the ocean that will negatively impact on marine bio-diversity and the social economic activities of the fishermen along Kibarani creek in case of marine pollution.

   f. Failure by the respondents to consider that the project operations will affect air quality on micro-scale through exhaust emissions from trucks as well as fugitive emissions(leakages).

   g. Failure by the respondents to simulate potential disaster scenarios which for liquefied petroleum gas(LPG) include “boiling liquid expanding vapour explosions”(BLEVE) which may arise in such projects and the containment measures thereof. Minimum safety distance (in case of worst case of a BLEVE scenarios) to the facilities and residential areas have not been assessed. The surrounding villages of Kibarani, Kipevu, bahati, Chaani, and Lilongwe villages which collectively hold more than 30,000 people in the villages are within the BLEVE radius.

   h. Failure by the respondents to respond and/or act on several complaints by the appellants concerning the failure to incorporate overall petroleum safety standards, the hazards of the location to violations of the existing safety standards of the residents of the area has not been appreciated and no alternatives have been considered.

   i. Failure of the respondents to consider that the project will cause air and noise pollution that will adversely affect the health of the residents living near the site. The potential air pollution risks to respiratory systems increasing chances of asthma and bronchitis attacks.

3. The appellant then filed a reply to the notice of appeal and later on supported the same with witness statements and a bundle of documents in a bid to demonstrate compliance with the applicable legal framework. The appellant exhibited, inter alia, copies of minutes of a meeting which took place at a social hall, some questionnaires, evidence of payment for radio announcements and copy of a gazette notice published by NEMA.

C. Tribunal's decision

4. The record shows that upon an oral hearing of the appeal at which the concerned parties were allowed to call their witnesses, the Tribunal delivered a judgment dated 14.06.2024 allowing the appeal and nullifying the EIA licence issued to the appellant. The Tribunal found and held that there was inadequate public participation prior to the issuance of the licence in contravention of Article 10 of *the Constitution*. However, the Tribunal found that the rest of the grounds of appeal were not proved and rejected them accordingly.

D. Grounds of appeal

5. Being aggrieved by the said decision the appellant filed a memorandum of appeal dated 12.07.2024 raising the following 13 grounds;

   a. That the Tribunal erred in law in allowing the Appeal despite the 1St-5th Respondents failing to discharge their evidentiary burden of proof and as a result arrived at a wrong determination in law.

   b. That the Tribunal erred in law in cancelling and/or revoking the EIA License Number NEMA/EIA/PSL/27147 issued to the Appellant despite the 1st - 5th Respondents failing to adduce any evidence discrediting that public participation and stakeholder engagement and/or consultation was done. The Appellant's evidence on public participation was uncontroverted by the 1st – 5th respondents.

   c. That the Tribunal erred and misdirected itself in law in applying the wrong test to determine whether the Appellant and the 6th Respondent undertook adequate and/or meaningful public participation before issuance of the EIA license.

   d. That the Tribunal erred in law in failing to apply the effectiveness test to determine whether an adequate and/or meaningful public participation was undertaken by the Appellant and the 6th Respondent and as a result arrived at a perverse determination in law.

   e. That the Tribunal erred in law in failing to appreciate that public participation does not require that everyone must give their views on an issue of environmental governance.

   f. That the Tribunal erred and misdirected itself in law in revoking the EIA License Number NEMAÆIA/PSL/27147 issued to the Appellant despite evidence that the Appellant and the 6th Respondent had given reasonable opportunity to members of the public raise their concerns on the proposed project.

   g. That the Tribunal erred in law and violated the appellant's right to fair hearing guaranteed under Article 50(1)' of *the Constitution* in determining whether the Appellant had complied with Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, an issue' not pleaded by the 1St-5th 'Respondents in the notice of appeal

   h. That the Tribunal erred in law and acted without jurisdiction in cancelling and/or revoking the EIA license on the basis of an issue not before it for consideration and which was not pleaded in the Notice of Appeal dated 21st September 2023.

   i. That the Tribunal erred in law in adopting a narrow and erroneous interpretation in determining compliance with the provisions of Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations on the process of public participation.

j. That the Tribunal erred in law in cancelling and/or revoking the EIA License Number NEMAÆIMPSL/27147 issued to the Appellant without taking into account the public interest in the proposed project and the substantial amount of money incurred by the Appellant in the process leading up to the issuance of the EIA license.

k. That the Tribunal erred in law in disregarding the evidence tendered by the 6th Respondent that the Appellant had complied with all the eleven (11) requirements requested by NEMA in the letter dated 17th November 2022.

l. That the Tribunal erred in law in disregarding the evidence that the proposed project aligned with the Government's Clean Energy Policy and aimed at increasing the LPG consumption per capita from 7.5kg to 15kg per year.

m. That the Tribunal erred and misdirected itself in law in failing to consider the detailed evidence tendered by the Appellant on the stakeholder engagement, the applicable principles of law and the authorities cited to it and as a result arrived at a perverse decision in law.

6. As a result, the appellant sought the following reliefs in the appeal;

a. That the appeal be allowed with costs.

b. That the judgment of the Tribunal dated 14.06.2024 be set aside and substituted with an order dismissing the appeal dated 21.09.2023.

c. That the appellant's EIA Licence on NEMA/EIA/PSL/27147 be reinstated.

d. That the costs of the appeal be borne by the respondents

e. That the court do make such other order as it may deem fit and just.

E. Directions on the hearing of the appeal

7. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted 60 days within which to file and exchange their respective submissions on the appeal. The record shows that the appellant's submissions were filed one 14.02.2025 whereas the respondent's submissions were filed on 09.06.2025.

F. Issues for determination

8. Although the appellant raised 13 grounds in its memorandum of appeal, it condensed them into 4 issues in its written submissions. The court is, however, of the opinion that the issues may be summarized into the following issues namely;

a. Whether the Tribunal erred in law by applying the wrong test of public participation.

b. Whether the Tribunal erred in law in finding and holding that there was no adequate public participation.

c. Whether the appellant is entitled to the reliefs sought in the appeal.

d. Who shall bear of the appeal.

G. Analysis and determination

a. Whether the Tribunal erred in law by applying the wrong test of public participation

9. The court has considered the material and submissions on record on this issue. The appellant submitted that the correct test to be applied was the effectiveness test as set out in the case of Mui Coal Basin Local Community and 15 Others vs Permanent Secretary Ministry of Energy & 17 Others [2015] KEHC 473 (KLR) to determine whether or not there was meaningful public participation. It was contended that it was not necessary for every resident of the area to be personally consulted for public participation to be considered effective. The appellant faulted the Tribunal for requiring "full compliance" with all the applicable regulations, including regulation 17 of the Environmental (Impact Assessment and Audit) Regulations made under the Environmental Management and Coordination Act, 1999 (EMCA).

10. In considering whether or not there was adequate public participation, the Tribunal made reference to the test laid out by the High Court in the case of Mohamed Ali Baadi & Others vs Attorney General and 11 Others [2018] eKLR as stated thus;

> " 18. Having laid out the law and jurisprudence on public participation, the question that arises is whether there was adequate public participation before the issuance of the impugned EIA license. To that end, the Tribunal is bound by the decision of the High Court in Mohamed Ali Baadi and others v Attorney General & 11 others, supra where a Five-Judge Bench laid down the test of determining the adequacy of public participation in environmental matters. The Court held as follows:
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> > " The standard of ascertaining whether there is adequate public participation in environmental matters, in our view, is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. This means, for example, if you do not comply with the set statutory provisions, then per se there is no adequate public participation. And the question is not one of substantial compliance with statutory provisions but one of compliance." (emphasis ours)
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> 19. Based on the foregoing precedent, the Tribunal is bound to review the evidence on record against the prescribed statutory provisions on public participation to determine whether there was compliance with the same. In that regard, we note that Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 imposes an obligation on the proponents of any project in consultation with the 1st Respondent to seek views of persons who may be affected by the project. The said regulation states as follows:
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> 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 coordinator 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. The court is unable to find that the test of reasonableness applied in the Mohamed Ali Baadi case was an erroneous test as submitted by the appellant. The court finds no contradiction between the effectiveness test as envisaged in the Mui Coal Basin case and the test of reasonableness in the Mohamed Ali Baadi case. If a project proposal were to apply the reasonableness test and comply with the applicable statutory or regulatory framework governing public participation, then such public participation would be deemed effective and meaningful and would be upheld by the court. However, absent any guiding legal framework or guidelines, then the project proponent would be at liberty to fashion a suitable mode of public participation in order to achieve a similar result of meaningful and effective public participation.

12. The court is thus of the view that the Tribunal did not error in law in applying the reasonableness test. It did not even error in law in requiring the appellant to comply with the applicable regulations for public participation under EMCA and the Regulations made thereunder. To require the appellant to comply with regulation 17 was the reasonable thing to do. The Tribunal was required to ensure compliance with all applicable statutory requirements whether or not specifically cited by the respondents. The appellant could not have been taken by surprise at the hearing because the respondents' notice of appeal was clear that lack of adequate public participation was one of the grounds of appeal.

b. Whether the Tribunal erred in law in finding and holding that there was no adequate public participation

13. The court has considered the material and submissions on record on this issue. The appellant submitted that it tendered solid and uncontroverted evidence of public participation before the Tribunal. It submitted that the respondents did not discharge their evidential burden of demonstrating that there was no or no adequate public consultation. The Tribunal was thus faulted for unfairly ignoring the appellant's evidence and allowing the appeal even in the absence of evidence that there was no adequate public participation.

14. In paragraphs 24-28 of its judgment the Tribunal analyzed the evidence and material before it as follows;

> 24. That said, the Tribunal ventured to ascertain whether compliance in public participation was in full resonance with the prescribed statutory framework on public participation within the threshold long established in environmental matters. First, whereas Regulation 17(2)(b) requires the proponent of a proposed project to hold at least three public participation meetings with the affected parties for the avoidance of doubt Regulation 17 (2)(b) is fashioned as follows-
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> > "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."
> >
> > The Tribunal has been furnished with evidence by the 2nd Respondent of 2 such meetings. There is no evidence proferred in the trial and/or the documentation depicting that any such 3rd meeting in compliance with Regulation 17 (2) (b) ever took place."
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> 25. Further, no evidence was placed before the Tribunal to show compliance with Regulation 17(2)(c). Under the said regulation, the proponent of the project is required to 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. Evidence of such notices was not availed. The Tribunal notes that the 2nd Respondent's witness testified that the chief of Chaani location, would send out invites to the residents by dispatching letters to the heads of 'nyumba kumi'/ 'wazee wa mitaa', however, the Tribunal has not sighted any of such letters.
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> 26. Without prior and adequate notice of the public participation meetings, it follows that some members of the public were denied the opportunity to participate in the public participation meetings as they were not made aware of the same. This waters down the quality of public participation conducted by the Respondents.

27. In addition, no evidence was placed before the Tribunal to show that the 2nd Respondent publicized the project and its anticipated effects and benefits by 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. This is a mandatory requirement under Regulation 17(2)(a)(i)

28. Lastly, under Regulation 1 7(2)(d) the proponent of a proposed project is mandated to ensure, in consultation with the 1st Respondent that a suitably qualified coordinator 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 1st Respondent. There was no evidence placed before the Tribunal to show that such a qualified coordinator was appointed, and that he carried out his statutory duty as required."

15. The court is unable to find any fault with the Tribunal's analysis of the evidence placed before it and the conclusion reached. The analysis was well reasoned and the members of the Tribunal were perfectly entitled to reach the conclusion which they reached. There was absolutely no error of law in the decision reached. As indicated before, the Tribunal was entitled to consider the appellant's compliance with the entire applicable legal framework including the EMCA and the regulations made thereunder on public participation. Consequently, the court finds no merit in the appeal.

c. Whether the appellant is entitled to the reliefs sought in the appeal

16. The court has found that the Tribunal did not apply the wrong test for public participation. The court has also found that the Tribunal did not err in law in finding and holding that there was no evidence of adequate public participation prior to the issuance of the EIA hence to the appellant. It would thus follow that there is no merit in the appeal hence the appellant is not entitled to the reliefs sought in the appeal, or any one of them.

d. Who shall bear the costs of the appeal

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 1st – 5th respondents shall be awarded the costs of the appeal.

H. Conclusion and disposal orders

18. The upshot of the foregoing is that the court finds no merit whatsoever in the appellant's appeal. As a consequence, the appellant's appeal is hereby dismissed in its entirety with costs to the 1st – 5th respondents.

It is so ordered.

JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 12TH DAY OF JUNE, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Mbatal for the appellant

Mr. Muchiri for the 1st – 5th respondents

No appearance for the 6th respondent