



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 102 OF 2017

Formerly ELC No. 211 of 2016 (Nairobi)

DOUGLAS ONYANCHA OMBOGA.....1ST PETITIONER

MATHEW MBABU.....2ND PETITIONER

COLLINS SERONEY ODHIAMBO.....3RD PETITIONER

JOHN OCHIENG OBONDI.....4TH PETITIONER

VERSUS

JOSEPH KARANJA WAMUGI.....1ST RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND RESPONDENT

KENYA TOWERS LIMITED.....3RD RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA....4TH RESPONDENT

PEMAN CONSULTANTS LIMITED.....5TH RESPONDENT

JUDGMENT

1. In their Petition dated 4th March, 2016, which was amended on 24th August, 2016, the Petitioners averred that the 1st Respondent was at all material times the registered owner of land known as Mavoko Town Block 49/52 situated within Maisha Bora Crescent in Utawala Estate (*the suit land*); that the Petitioners are the registered proprietors of the neighbouring parcels of land known as Mavoko Town Block 49/42, 43, 39, 40, 44, 53, 5 and 3 and that the Petitioners learnt that the 1st Respondent was planning to erect on the suit land a telecommunication tower/mast for a mobile phone service provider.

2. It is the Petitioners' case that on 22nd December, 2015, they signed a Petition objecting to the construction of the telecommunication mast on the suit land because they had not been consulted and that they were not involved in any Environmental Impact Assessments or other approvals for the said project.

3. The Petitioners averred that the telecommunication tower stands at 30 meters and does not meet the specifications stated in the Environmental Impact Assessment Project Report and that the base of the tower affects and limits the user of the other adjoining parcels of land.

4. The Petitioners finally averred that their right to quiet use and enjoyment of their land has been tampered by the said project; that their right to a clean and healthy environment devoid of radiations and radioactive substances, noise and generator fumes has been curtailed and that a declaration should issue that the Respondents are in breach of their rights.

5. In response to the Petition, the 1st Respondent deponed that he is the lawful owner of the suit land; that he granted a lease of the suit land to the lessees who were to utilize it as they wished and that he is not the one who undertook the developments on the suit land. The 1st Respondent finally deponed that the Petitioners have not disclosed how their constitutional rights have been breached by him and that the

Petition should be dismissed with costs being awarded to him.

6. The 2nd Respondent's Deputy Director, Compliance and Enforcement, deponed that on 18th August, 2015, the 2nd Respondent was furnished with an Environmental Impact Assessment (E.I.A) Project Report by the 5th Respondent; that vide its letter dated 20th August, 2015, the 2nd Respondent sought for the views of lead Agencies on the proposed project who never responded to the letter and that after being satisfied that the 5th Respondent's proposed project had met all legal requirements for issuing an Environmental Impact Assessment Licence, the 2nd Respondent issued an Environmental Impact Assessment Licence for the project subject to various conditions that were to be met by the proponent.

7. The 2nd Respondent's Director deponed that after they received a complaint from one of the Petitioners stating that they had not been consulted on the project, they wrote to the proponent advising them to hold consultations with the complainant and to cease all construction on site; that the 2nd Respondent has never received from the proponent the progress of the consultation and that the stop order of 22nd February, 2016 is still intact.

8. It is the 2nd Respondent's case that it followed all the laid down rules and procedures before issuing the Environmental Impact Assessment Licence to the 3rd Respondent and that the Petition should be struck out.

9. The 3rd Respondent's Project Manager deponed that it is a leading Telkom Tower Company in Africa; that it has entered into an Agreement with Airtel Kenya Limited to acquire and build towers to manage passive infrastructure in the country and that in the year 2014, the 3rd Respondent sought to have a base transceiver station within Mavoko Municipality, Machakos County erected.

10. The 3rd Respondent's Project Manager deponed that the 3rd Respondent engaged the 5th Respondent to conduct a survey of the area to determine the best location for the base transceiver station; that the suit land was identified as the best location to construct the transceiver station and that the 5th Respondent lodged an Environmental Impact Assessment (E.I.A) Project Report dated 18th August, 2015 with the 2nd Respondent in respect of the proposed project.

11. The 3rd Respondent's manager finally deponed that the 3rd Respondent conducted an extensive public consultation exercise before the commencement of the construction of the project; that the 3rd Respondent has a Network Facilities Provider Tier 2 Licence granted to it by the 4th Respondent and that the construction of the base transceiver station has been completed and leased to Airtel Kenya limited.

12. The 3rd Respondent's manager finally deponed that there are no health concerns arising from the base transceiver station and that the 3rd Respondent has strictly abided by the terms, tenor and regulations of the Environmental Management and Co-ordination Act (EMCA) as relates to the construction of the base transceiver station on the suit property; that the base transceiver station is an important component in the mobile telephony network within Machakos and that the project site has an off set of about 1.5m between the boundary wall and the neighbouring properties, with the actual tower being about 6 meters from the boundary wall as approved by the County Government of Machakos.

13. The 4th Respondent's Director, Licensing Compliance and Standards deponed that the procedure of licensing telecommunication system in Kenya is provided for in the Kenya Information and Communication (*Licensing and Quality of Service*) Regulations 2010 enacted by Legal Notice No. 71/2010 and that the 4th Respondent places the responsibility of obtaining approvals from other government agencies and local authorities.

14. It is the 4th Respondent's case that it did not issue to the 3rd Respondent with a telecommunication licence as alleged by the Petitioners; that the 4th Respondent is not involved in the actual installation and operation of telecommunications systems and that there is no evidence to show that the 4th Respondent acted unconstitutionally.

15. The Managing Director of the 5th Respondent deponed that the 5th Respondent is duly registered by the 2nd Respondent as an Environment Impact Assessment Entity; that in August 2015, the 5th Respondent was commissioned by Kenya Towers Limited, who had the intention of putting on the suit land a new Greenfield Global System for mobile communications station at Utawala Maisha Bora area, to conduct an Environmental Impact Assessment of the proposed project and that the 5th Respondent embarked on the process, including obtaining of approvals for the change of user of the suit land.

16. It is the deposition of the 5th Respondent's Director that the County Government of Machakos approved the intended development project by the 3rd Respondent and that after carrying out comprehensive field study, the 5th Respondent prepared an Environmental Impact Assessment Project Report; that it submitted to the 2nd Respondent the said Report which was accepted and that an Environmental Impact Assessment Licence was duly issued by the 2nd Respondent.

17. The 5th Respondent's case is that the Environmental Impact Assessment Project Report shows that the Electromagnetic Frequencies (EMF) will only be generated from the antennas installed on top of the masts, which is an area not accessible to the public; that the Non-ionizing Radiation levels emission from the proposed project are less than those given by the International Commission on Non-ionizing Radiation Protection (ICNIRP) and that the Radio frequency emissions from the proposed project are environmentally friendly because the main beams are not directed to sensitive areas.

18. The 5th Respondent's Director finally deponed that after the 2nd Respondent issued to the 3rd Respondent with an Environmental Impact Assessment Licence, the 5th Respondent's representative met and had a consultative session with the Petitioners on 9th January, 2016; that all

the issues raised by the Petitioners were well covered in the project report and in the conditions in the Environmental Impact Assessment Licence and that in any event, it is the National Environment Tribunal that is vested with jurisdiction to hear Appeals from any person aggrieved by the approval of the 2nd Respondent of an Environmental Impact Assessment Project Report and issuance of an Environmental Impact Assessment Licence.

19. The Petition proceeded by way of written submissions. The Petitioners' advocate submitted that the mast that was put on the suit land was done without the participation of the public; that the tower is a health hazard and a breach of their constitutional right to have a safe and healthy environment and that construction of the mast was unlawful.

20. The 1st Respondent's advocate submitted that the Petition is devoid of an Affidavit or documents in support of the allegations therein and that the Petition should be struck out on that ground alone.

21. The 1st Respondent's counsel submitted that the Petitioners have not demonstrated how their right to a clean and healthy environment will be violated with the erection of the mast on the suit land; that the 1st Respondent did not have any role in the erection of the mast and that any adverse orders should be as against the 3rd and 5th Respondents.

22. The 2nd Respondent's counsel submitted that the Petitioners have failed to establish a nexus between the 2nd Respondent's statutory duty and the alleged violation of their rights to a clean and healthy environment; that the process leading to the issuance of an Environmental Impact Assessment (E.I.A) Licence by the 2nd Respondent was duly followed and that the issuance of an Environmental Impact Assessment (E.I.A) Licence by the 2nd Respondent can only be challenged at the National Environmental Tribunal.

23. The 2nd Respondent's counsel finally submitted that after reviewing the project report submitted by the 3rd Respondent, it was satisfied that the project did not pose any risk to the environment and that the Petition should be dismissed with costs.

24. The 3rd Respondent's advocate submitted that the impugned project did not cause any significant adverse effect on the environment; that the 2nd Respondent did not require the 3rd Respondent to conduct an Environmental Impact Assessment Study and that the 2nd Respondent complied with the provisions of Environmental Management and Co-ordination Act (EMCA).

25. Counsel submitted that there was no obligation upon the 3rd Respondent under the law to publish the projects' Project Report; that the 5th Respondent, on behalf of the 3rd Respondent, conducted an extensive public consultations on 9th to 13th August, 2015 with the owners of the adjoining plots and that there is no potentially significant adverse impacts which the project was likely to inflict on the environment.

26. The submissions by the 5th Respondent's counsel are similar to the submissions by the 2nd and 3rd Respondents which I have summarized above.

27. Contrary to the submissions by the 1st Respondent's advocate, the Petition dated 4th March, 2016 is supported by the Affidavit of the 3rd Respondent.

28. It is not in dispute that the Petitioners are the registered proprietors of the parcels of land surrounding parcel of land known as Mavoko Town Block 49/52 (*the suit land*) on which the 3rd Respondent has erected a base transceiver station which it has leased to Airtel Kenya Limited. According to the Petitioners, they were never consulted before the 3rd Respondent was issued with an Environmental Impact Assessment (E.I.A) Licence to put up a telecommunication mast in their neighbourhood. On learning about the construction of the said mast, the Petitioners did a letter dated 22nd December, 2015 to Airtel Kenya Limited. In the first letter, the Petitioners informed Airtel Kenya Limited as follows:-

i. The site is not secured and appropriate signage's displayed as per the National Construction Authority and Urban Planning requirements.

ii. In the gated community in which this is being put up, not a single home owner was or has been involved in an Environmental Impact Assessment if at all this was carried out, gazetted and approved.

iii. There is adverse repercussions on the adjacent plot owners on land use options considering the small size of the plots and the mast area dimensions viz-a-viz the plot in which is being erected."

29. The above letter did not elicit any response from Airtel Kenya until 5th January, 2016 when Airtel informed the Petitioners that the mast they were referring to did not belong to Airtel Networks Kenya Limited.

30. It would appear that the complaints by the Petitioners eventually reached the 5th Respondent who, vide their letter dated 11th January, 2015 (2016), informed the Petitioners that they were the consultants who prepared the Environmental Impact Assessment (E.I.A) Project Report. In the said letter, the 5th Defendant stated as follows:

"On the issue of public participation, following the meeting we had with you, we identified several members of the association who were consulted. We however acknowledge that we ought to have gotten comments from the association. Indeed, it is possible that some of the property owners consulted are not members of the association as out of the 87 plots within the scheme the association has only 25 members."

31. In the same letter, the 5th Respondent informed the Petitioners that they had identified a population to be affected by the project within a radius of 700m around GSM location and had a sample size of 15 people.

32. In response to the letter by the 5th Respondent, the Petitioners stated in their letter that it is only one member of their Association who had filled the questionnaire.

33. The requirement for an Environmental Impact Assessment is provided for under Sections 58 of the Environmental Management and Co-ordination Act, 1999 (EMCA). The Act requires that any proponent of a project specified in the second Schedule to the EMCA is to submit a project report. The Act further requires that other projects as specified under the second Schedule should undergo a full Environmental Impact Assessment Study.

34. The 3rd Respondent has argued that it was only required to submit an Environmental Impact Assessment Project Report and not an Environmental Impact Assessment Study Report; that Regulation 7(1) (a) - (k) of the Environmental (*Impact Assessment and Audit*) Regulations, 2003 provides for what is to be included in such a report and that none of these requirements specify that the views of the public must have been sought before the presentation of the project report to the 2nd Respondent.

35. Legal Notice No. 150 of 2016 has categorized “*Telecommunication infrastructures*” amongst the projects that require an Environmental Impact Assessment (E.I.A) Project Report and not an Environmental Impact Assessment (E.I.A) Study Report. The Projects requiring an Environmental Impact Assessment (E.I.A) Project Report are categorized as low and medium risk projects while those that require an Environmental Impact Assessment (E.I.A) Study Report are categorized as “*High Risk Projects*.”

36. Unlike Environmental Impact Assessment (E.I.A) Project Reports, all Environmental Impact Assessment (E.I.A) Study Reports are supposed to be published in the Gazette and in at least two Newspapers circulating in the area of the project. As stated above, the construction of “*telecommunication infrastructure*” does not fall in this category, unless the NEMA finds that the project will have a significant impact on the environment, in which case it will require that the proponent undertakes an Environmental Impact Assessment Study.

37. The evidence before me shows that the Authority, after reviewing the project report submitted to it by the 3rd Respondent, was satisfied that the project did not pose any high risk to the environment. Indeed, no evidence to the contrary has been adduced by the Petitioners, including the allegations of radiation emanating from the telecommunication mast.

38. That being the position, the only question that the court ought to interrogate is whether the Petitioners should have been consulted before the issuance of a licence by the 2nd Respondent. Article 69 (1) (d) of the Constitution provides that the State shall encourage public participation in the management, protection and conservation of the environment. Section 18 of the Environment and Land Court Act provides that in exercise of its jurisdiction, this court shall be guided by the principles of sustainable development, including the principle of public participation in the development of policies, plans and processes for management of the environment and land.

39. The Rio Declaration on Environment and Development (1992), at Principle 10 provides that environmental issues are best handled with participation of all concerned citizens, at the relevant level.

40. Environmental Impact Assessment (E.I.A) Project Reports and Environmental Impact Assessment (E.I.A) Study Reports are tools for environmental management. The Environmental Impact Assessment (E.I.A) exists to help to ensure that in designing and undertaking developments, environmental considerations are taken into account and integrated in the entire process. In the case of *Kwanza Estates Limited vs. Kenya Wildlife Services, (2013) eKLR*, this court held as follows:

“Environmental Impact Assessment (E.I.A) is a tool that helps those involved in decision making concerning development programmes or projects to make their decisions based on knowledge of the likely impacts that will be caused on the environment... The Projects that are potentially subject to Environmental Impact Assessment (E.I.A) are specified in the second Schedule of EMCA and they include an activity out of character with its surrounding, any structure of a scale not in keeping with its surrounding and change in land use...”

41. The 5th Respondent’s Director deponed that they carried out “*a comprehensive field study by use of questionnaires and partly through interviews which were conducted between 9th August, 2015 to 13th August, 2013.*” The filled questionnaires have been attached on the Environmental Impact Assessment Project Report that was submitted to the 2nd Respondent.

42. The forms that were filled by the stakeholders required one to indicate his name and his house number and or organization. I have perused the nine (9) questionnaires that the 5th Respondent has exhibited. None of the forms shows “*house No*” or the “*L.R. Number*” of the people who were interviewed by the 5th Respondent. Indeed, the forms goes along way to support the Petitioners’ contention that all the house owners who were likely to be affected by the project were never consulted by the 5th Respondent. Indeed, as admitted by the 5th Respondent, none of the people who were interviewed were members of the Maisha Bora Association.

43. The construction of a telecommunication mast by the 3rd Respondent within a residential area was a project that was out of character with its surrounding, and needed, not only an Environmental Impact Assessment (E.I.A), but also public participation.

44. Procedural rights by individuals who are likely to be affected by a project which is out of character with its surrounding are critical in realizing the right to a clean and healthy environment. Indeed, the failure to involve the public in environmental decisions or to provide access to environmental information is a violation of environmental rights of individuals.

45. The Petitioners in this matter are the immediate neighbours of the suit land where the telecommunication mast has been erected by the 3rd Respondent. However, the Petitioners were neither consulted before the said telecommunication mast was put up, nor given information on the impact of the project on the environment.

46. Despite the Objections that the Petitioners raised after learning about the project, and despite the 2nd Respondent stopping the project until public participation is conducted, the 3rd Respondent was hell bent on proceeding with the project, which was contrary to the provisions of the law. Indeed, as was held by Munyao J. in the case of *Ken Kasinga vs. David Kiplagat & 5 others, Petition No. 50 of 2013 (Nakuru)*, where there is non-compliance of the procedure for protecting the environment, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment.

47. The Petitioners' claim therefore succeeds on the ground that they were never involved in the project before or after the Environmental Impact Assessment (E.I.A) Licence was issued to the 3rd Respondent. I therefore make the following specific orders:

a. A declaration be and is hereby issued that the 3rd Respondent is in breach of the Petitioners' fundamental right to a clean and healthy environment.

b. Judicial review orders of mandamus are hereby issued compelling the 3rd Respondent to remove the telecommunication tower (base transceiver station) built on parcel of land known as Mavoko Town Block 49 (Kimbo)/52 within thirty (30) days of this Judgment.

c. The 3rd Respondent to pay to the Petitioners the costs of the Petition.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE