



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 52 OF 2015

HOSEA KIPLAGAT1ST PLAINTIFF
ISAAC CHEBON2ND PLAINTIFF
CAROLINE J. KOMEN3RD PLAINTIFF
PAUL T. A. KANGOGO4TH PLAINTIFF
ELIMA P. ARGUT5TH PLAINTIFF
SARA J. KIPCHUMBA6TH PLAINTIFF
JUSTINE K. BEIMOK 7TH PLAINTIFF

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)1ST DEFENDANT
MUSA MULWA T/A TIONYBEI NURSING HOME & DOCTORS PLAZA2ND DEFENDANT
PHILIP CHESANG3RD DEFENDANT

J U D G M E N T

PLAINTIFFS' CASE

The plaintiffs namely *H. K., Isaack Chebon, Caroline J. Komen, Paul T. A. Kangogo, Elima P. Argut, Sara J. Kipchumba* and *Justine K. Beimok* have come to court against *National Environment Management Authority (NEMA), Musa Mulwa T/A Tionybei Nursing Home and Doctors Plaza* and *Philip Chesang* claiming that the plaintiffs are owners of Kabarnet Residents Plots No. 182, 189, 184, 187, 188, 185 and 186 Municipality and are just immediate neighbours of the 2nd Defendant who is the owner of Plot No. 183.

The 2nd Defendant purportedly obtained change of user of the plot from residential to commercial without consulting the plaintiffs in February 2014 or thereabouts and in May 2014, the 3rd defendant started to consult persons who are not neighbors to approve for him the building of a Nursing Home and Doctors Plaza within the estate, a project that is not compatible with a settlement area.

When the plaintiffs learnt about it, they complained and have since opposed the project resting with the meeting held on 15th November, 2014. The 2nd defendant colluded with the 1st and 3rd defendants and proceeded to approve the project and by 30th January, 2015, the 2nd defendant started to gather building materials and is now in the process of digging the foundation in preparation to commence the project.

The plaintiffs discovered that the 2nd defendant through the 1st defendant and on the professional advice of the 3rd defendant was granted an Environment Impact Assessment License on 8th January, 2015.

It is the contention of the plaintiffs that the project cannot meet the conditions set out in the License and the Environment Management and Co-ordination Act due to the fact that the waste management is incapable of being controlled by the 2nd defendant because the place is rocky and there is no open sewer in Kabarnet to empty the waste. The plot is very small about a quarter (¼) of an acre and incapable of accommodating a project of such a magnitude without creating conflict. The plaintiffs contend that air pollution is inevitable and that the plaintiffs' privacy shall be compromised as the Nursing home shall be open to the public. The project will devalue the area and is likely to

expose the plaintiffs and their children with risk of contracting diseases and unfamiliar and scaring noise wailing and groans associated with a healthy facility. Lastly that the location is totally unsuitable for the kind of project.

The plaintiffs state that the project does not meet the threshold set out in the Act and general reasonableness and that the subsequent advice of the 3rd defendant and approval by the 1st defendant lacks professional credence and that the approval by the 1st defendant lacks professional credence and highly compromised and the defendants shall be put to the strictest proof.

The plaintiffs state that unless the defendants are restrained by an order of this Honourable Court, the 2nd defendant shall engage in an unviable project in a residential area. The plaintiffs further state that unless the defendants are restrained by an order of this Honourable Court, the 2nd defendant shall engage in an unviable project in a residential area. Further, the plaintiffs state that the 2nd defendant is a businessman highly motivated by material gain and shall not be trusted because his initial proposal included a mortuary facility in the heart of a residential area and is likely to operate such a facility in future to the detriment of the plaintiffs.

The Plaintiffs claim against the defendants is for an order of an injunction restraining the 2nd defendant by himself, his servants, agents and / or employees from constructing gathering building materials or in any other way interfering with plot no. 183 save tor residential purpose and the 1st defendant to cancel the Environmental Impact Assessment License and further to injunct the 3rd defendant from misleading the 2nd defendant by giving a compromised professional advice.

The plaintiffs aver that there is no other suit pending and there have been no previous proceedings in any court between the plaintiffs and the defendants over the same subject matter.

Despite demand and notice of intention to sue given, the 2nd defendant is determined to proceed with construction thereby rendering the filing of this suit necessary.

The plaintiffs precisely pray for an order for **an injunction** restraining the 2nd defendant from constructing a health facility, gathering building material, digging foundation or in any other way interfering with plot No. 183 Kabarnet **and an order of an injunction** restraining the 1st defendant from authorizing or licensing or approving further construction of a health facility on plot No. 183 Kabarnet. Moreover, an order of an injunction restraining the 3rd defendant from giving professional advice to the 2nd defendant for the building of a hospital on Plot No. 183 Kabarnet or within the suit plots on the ground that the location is not suitable. Furthermore, an order that the professional advice of the 3rd defendant and the 1st defendant is compromised and cannot meet the threshold set in the Act. Lastly, a cancellation of the Environmental Impact Assessment License.

1ST DEFENDANT'S CASE

The 1st Defendant filed a statement of defence stating that he is not privy to the issue of change of user mentioned at paragraph 6 of the plaint as the same does not fall within its mandate. In denying the contents of paragraphs 7 – 9 of the plaint, the 1st defendant states that he has diligently ensured that the legal steps for processing environmental impact assessment reports were followed. Further, the 1st defendant avers that there is a distinction in procedure between processing of environmental impact assessment project reports and environmental impact assessment study reports a fact which the plaintiffs appear to be oblivious of.

The 1st defendant states that the environmental impact assessment process seeks to reduce impacts to the environment caused by human activity. The environmental impact assessment license conditions have not been breached and there is no certainty of breach. In the Response to the averments at paragraphs 11 and 12 of the plaint and even generally, the 1st defendant avers that it rendered its services professionally by reviewing and approving the environmental impact assessment project report prepared by the environmental impact assessment expert.

The 1st defendant maintains the legal position that cancellation of environmental impact assessment licenses is within the ambit of the National Environment Tribunal as the forum of 1st instance. The 1st Defendant prays that the entire suit be dismissed

THE 2ND AND 3RD DEFENDANTS' CASE

The 2nd and 3rd defendants filed a joint statement of defence stating that the 2nd defendant has gathered building material and started digging the foundation of the multimillion project as per the approvals and the specifications. The 2nd & 3rd defendants state that the 1st defendant has issued license to the 2nd defendant after much consultation with the members of the public including the plaintiffs herein and the license was issued on 8th January, 2014 as stated by the plaintiffs in paragraph 9 of the plaint.

They deny the contents of paragraph 10 and the particulars stated as from Roman (i) to (viii) and state that a detailed Environment impact assessment study Report was done and recommendations done and the 2nd defendant will abide strictly by the recommendations therein. The 2nd defendant states that the project is viable and a modern design which will cost over Kshs. 22,000,000 and the plaintiff's dissatisfaction is motivated by malice and jealousy.

The 2nd defendant herein states that the complaint by some of the plaintiffs was the issue of a mortuary facility in the initial plan but the 2nd defendant states that the mortuary wing was removed and it is well stated in condition 1.1 in the license given to the 2nd defendant. The 2nd and 3rd defendants state that they shall at the nearest opportune time raise preliminary objection on point of law on the entire suit on the ground that this Honourable Court lacks Jurisdiction to hear and determine this suit.

The 2nd and 3rd defendants' state that the orders sought by the plaintiffs are untenable cannot be granted by this Honourable Court. The 2nd & 3rd defendants pray that the plaintiffs suit be dismissed with costs.

PLAINTIFFS' EVIDENCE

When the matter came for hearing, **Sara Jerotich Kipchumba** testified that she had the opportunity to study the affidavit of the 2nd defendant and the conditions attached to the NEMA License. She had also read the Environment Impact Assessment Study Report by the expert; the 3rd defendant. It was impossible for the 2nd defendant to meet the conditions set out in the license while operating the intended project without attracting conflict. There was no enough access road for entering and turning as required. It will not be easy to get in and turn because there was no exit point. The size of the plot was 50 feet by 100 feet. It was so small to accommodate project of such magnitude. Ample parking was impossible to achieve because of space of 50 by 100 feet. Emergency response could not be guaranteed and could not handle the anticipated traffic.

She states that Kabarnet is rocky, the location is zoned residential and that children will be exposed to waste and contract diseases because disposal of waste water is impossible. There is no open sewer to empty waste. It calls for exhauster which is not readily available. The plaintiffs' complaint is that the Burning of waste will emit foul smoke to the resident to air pollution.

The condition allows the proponent to operate for one year without being required to have a license. It is a long duration that can result in conflict. According to this witness, the content of the lead expert report does not support the project. There were worrying statistics of infections associated with irresponsible disposal of waste.

It is enumerated at page 8 that it includes a mortuary among others. The proponent has not removed it despite issuance of licence. Assuming that a mortuary facility was not there, still there shall be patients dying anyway and children and residents shall be exposed to unfamiliar sight while removing such.

The facility scares away tenants from the area for fear of contracting diseases and being exposed. If the area is opened to the public, the residents shall obviously lose their privacy.

On cross examination by Mr. Gitonga learned counsel for the 1st defendant, she admits that he is not an expert witness. She states that the project was opposed by people around the area because of noise and smell. She does not know what an Environmental Audit Report is. She is not a specialist in such reports. She is not expert in but she knows that a hospital needs space. She admits that she is not an expert in hazards waste management.

On cross examination by Mr. Tarus learned counsel for 2nd and 3rd defendant, she states that her plot is 50 x 100ft and that Mulwa's plot is about half an acre. She states that Kabarnet Hospital has one entry which is the exit. Kabarnet town does not have a sewage system. Hotels in Kabarnet have septic tanks as opposed to sewage system. She knows that the 2nd defendant was told to re-design the project. The consultative meeting with the County NEMA person was not conclusive. In fact, he never attended.

The second witness **Solomon Komen** testified that he does dry cleaning business in the town of Kabarnet. He has plot No. 184 where he lives with the entire family. He has his home and other houses for his children. Musa Mulwa the 2nd defendant is a neighbour and owns plot no. 183. In respect of the hospital project, he states that there was to be a meeting on 15.11.2014 when they were expecting Mr. Ondeng who was travelling from Western part of Kenya but he never showed up. They were surprised that the 2nd defendant had been issued with a licence. He is opposed to the hospital because people would still die and the wailing would be a noise pollution.

On cross examination, he states that he is a Lab technician and not an expert in environmental matters. He states that he received a notice of the meeting from Mr. Ondeng but Mr. Ondeng never turned up. He admits that there was a meeting on 7.6.2014 where proposed project was discussed. The relative of the 2nd defendant was taking minutes and at one time the son of the 2nd defendant chased people from the meeting. In the meeting of 7.6.2014, the land expert was Mr. Kisang. The NEMA Officer was absent.

On cross examination by Mr. Tarus, he states that on his plot, he receives water three times in a week, he has a septic tank and when the septic tank is full, he uses the exhauster. He opposed the project because there is no public parking, fears dead bodies. Even if the mortuary is removed there is the fear of noise pollution.

The plaintiffs closed their case and the 1st defendant called Mr. Francis Chwanya. He is a Compliance and Enforcement Officer at NEMA. He is a Bachelor of Science holder at the University of Nairobi and Master of Environmental Studies from Nagoya University. He is qualified in Environmental Impact Assessment and Audit course from the Kenya School of Government. He has done audit of environmental systems under ISO14,000.

He is a mitigated secretary since 2002 and 2009. He testified on oath that an Environmental Audit (EA) licence was issued for a proposed Nursing Home in Kabarnet, Baringo County to one Kiptai Mulwa which license is being challenged in this case. The law requires (EMCA) that project likely to affect environment need to be subjected to an environmental impact assessment. The positive impacts should be identified and enhanced and the negative impacts are improved.

Projects are likely to have impact on the environment as they affect water, soil and air quality. According to Mr Chwanya, the law identifies two categories of E.I.A. reports thus:-

1. E.I.A. Project Report.

2. E.I.A. Study Report.

E.I.A. Project Report is the project report submitted to NEMA, where NEMA is satisfied that the project report discloses sufficient mitigation measures on impact assessment NEMA can licence. Where NEMA is not satisfied that it discloses sufficient mitigation measures then NEMA will direct the proponent to proceed to the secured land to conduct a detailed environmental impact assessment study and submit the same to NEMA.

To ensure that the issues NEMA wants amended are covered in the report NEMA ask the proponent to submit terms of reference for conducting research.

The witness states that the terms of reference would be approved once all details that NEMA requires have been covered. This project was licensed at project report level. There is a clear distinction between project report level and study report level. There are precautions for computation of the report and submission to NEMA. Issues of public participation are silent when it comes to the project report.

Under study reports, the proponent is to conduct public barazas. There is a requirement that NEMA presumes a survey of the report and completes it in the media. The requirements for 3 public barazas, advertisement in the local dailies and in the Kenya Gazette do not apply on project report.

The project was assessed at project report level and not study report level. A study report depends on the magnitude of the project. In the medical section, this was a Nursing home, a low level medical facility. It lacks the complexion of the referral level. The report is a brief on environmental impact assessment on the proposed Nursing Home/Doctors plaza on Plot No. 183 in Kabarnet Municipality, Baringo County being constructed by Musa Kiptai Mulwa. Mr. Chwaya is the author of the report dated 27.2.2015. The public participation appended to this project was adequate. However, it depends on what level they are looking at. At some stage, they received some objections.

Based on the objections made, he felt that there were some issues to be harmonized. They realized that there was inadequacy, he asked for fresh consideration to harmonize emerging issues.

He knows that fresh meetings were held including the meeting of 7.6.2014. Minutes of consultations were submitted to them. They had a look at the Minutes of Public Committee Meeting on proposed Nursing Home and Doctors Plaza heard on Saturday 7.6.2014 at the proposed site. The chair of the meeting was one Mr. Stanley Kipchumba, the area assistant chief and that the secretary was Francis Koskei. The chairman of the steering committee on public participation Baringo County. He had the environmental impact assessment project report for proposed Nursing Home/Doctors Plaza on Plot 183 in Kabarnet Municipality. Mr. Samuel Ondeng is the author of the report. He is an officer of NEMA in-charge of Baringo County. The report found that the site was ideal for the project.

The nature of complaints by the plaintiff was that this being a medical facility was out of use with the surrounding as the area was residential. There was complaint related noise, waste, water management and traffic management. There was complaint on land use as the area was zoned for residential. The way the environmental impact assessment works, NEMA is required to consult lead agencies. These are essentially government agencies.

He has a letter from the Ministry of Lands and Water Developments Department of Physical Planning, County Physical Planning office. The Physical Planning Officer had no adverse comments. He took action to remedy the complaint. They wrote to the proponent giving 3 possible options. The first one was to submit terms of reference to undertake a detailed study. The second option was for the proponent to redesign the project and subject it to fresh public participation and submit the same to NEMA. The third option was to seek an alternative site and re-submit to E.I.A. the letter is dated 11.9.2014. It was addressed to Musa Kiptai Mulwa. The spirit of the letter is captioned in the second paragraph of the letter. When they wrote the letter, there was a response vide the letter dated 26.11.2014. They received on 3.12.2014.

The proponent was saying that he had accepted to redesign the project and remove the mortuary facilities. He submitted Minutes of a commit. They have Minutes of the meeting of 15.11.2014. The Minutes are signed by Stanley Kipchumba. The chairman was Philip Chesang. The secretary was Mr. Stanley Kipchumba. The meeting was to address what NEMA had asked the proponent to do. He produced the Minutes as 1st DEC.6.

NEMA was represented at the meeting by one Linnette Cheruiyot. She is an Environment Officer based in their Baringo County Office. NEMA does not preside over such meetings. The chair is required to be someone in administration. NEMA is an observer. They issued their E.I.A. licence on 8.1.2015. He has the E.I.A. licence. The licence addressed the concerns raised by the plaintiffs. It omitted the mortuary facilities. It also spelt out specific conditions to be met by the developer. The conditions are in the licence. NEMA has the capacity to enforce the conditions. He produced the A.I.E. licence as 1st DEX.7. The institution submits annual environmental audit. Where anybody is aggrieved, he appeals to the National Environmental Tribunal. (N.E.T)

On Cross examination by Mr. Tarus, he states that he is a Compliance and Enforcement Officer with NEMA, since 2009. He is an authority in compliance and enforcement. The proponent followed the conditions required. They have no complaint from the County Government of Baringo. They got a no objection from Baringo County. Public Participation is provided for by the law. Public views are important to enable the public know the implications. Public Participation is not meant to endorse the project by the public.

In public participation, one needs to describe the project to enable the public understand it very well. The mitigation options must be outlined. The proponent must inform the people around. The procedure for calling the people are clear. It can be a town crier, notices and even *boda boda* people.

For a project report, it is not a requirement that notices be put out. As long as there are meetings, it is enough. This was a project report. It was not a big project requiring a study report. The 2nd defendant went for option No. 2 to redesign the project and that public participation

was done. It is not a requirement that a NEMA Officer calls for a meeting. A NEMA enforcement officer is not barred from calling for a meeting. The members of public can raise a complaint at any time. During an audit, condition of the public ought to be obtained. Any one aggrieved by the reports of NEMA has a right to appeal to N.E.T. The Director General has the power to cancel a licence. The Tribunal can also cancel.

On Cross examination by Kipkenei, he acknowledges that he has a background in environmental law. He is not an environmental lawyer. He has worked in NEMA since June, 2009. He worked in a Chemical Company called Tunge Chemicals in Nairobi. He also worked in Transmara. He is currently in charge of Environmental Impact Assessment section, charged with processing licences for Director General signatures. The licence in issue was issued by NEMA. The signatory of the licence is the Director of Compliance and Enforcement. The project report was reviewed by technical officers led by one Dickson Njora and secondly by himself. The 3rd proponent was Miss Oceanic Sakwa. The 2nd reviewer is the signatory of the licence, Mr. Zaphasin Ouma. They do not sit in one room to review. He has never been to the suit premises. He does not know the sketch of the area in issue. The sketch plan is annexed in the report. The size of the plot is 0.0885 Ha and the Plot Number is 183. The size is not indicated in the letter from the County. The District Surveyor, Baringo has looked at the plan. Due process requires that every agency does their part. Ample parking would be parking that would be adequate for anticipated volume of vehicles. The scope of the project is stated in the E.I.A. licence. Noise is a big environmental issue. Noise is expected but within acceptable limits to the school within the locality, church and vehicles. He has been to other Medical facilities and states that the issue of people waiting can be addressed. He referred to Victory Hospital in Umoja, Metropolitan Hospital in Buruburu. The facilities are more than 5 times the size of the contemplated hospital herein.

The Ebola is a continental disease; hence it cannot be spread in the hospital. The hospital is not likely not to affect the tenancy of the neighbouring houses. Proximity to social amenities is a plus. He read the Environment Impact Assessment report prepared by Mr. Chepsang. The Environmental Impact Assessment expert did his research. They need to give the issues raised attention. The area was checked by experts and certified that the area is okay for development. When they endorsed him to relocate or re-design, they considered the objection by the people. The key issue was land use. This was a purely residential area. NEMA went to the authority in planning thus the Physical Planner who made a report that the area use has been changed and could accommodate the changed use. NEMA does not approve change of user. If people are comfortable with a mortuary, there is no problem. Mr. Chesang prepared an environmental impact assessment project report but the title erroneously reads an environmental impact assessment study report.

The title is misleading because it is a project report. They did not publish the report or apply section 59 because this was not a study report but a project report. A project report does not need the notices and gazette and provisions as per section 59 of EMCA. Section 58(1) provides for a project report. Regulation 7 leads to what needs to be inside the project report. The study report is envisaged by part 3 of the rules. An E. I. A. study report comes after the E. I. Assessment report. The regulation came into place in 2003. The regulations are a project of EMCA. Under section 58, the process is different. The EMCA of 1999 gave a discretion to NEMA to decide whether to upscale a project to a study or to treat it as a project. There are three critical conditions thus Nature of a project, Safety and Location, proximity to sensitive environmental locations.

In this matter, they determined their findings in respect to regulation 10 of the E.I.A. and E.A. Regulations. Their evaluation was proper as they had to consult the people and Lead agencies. Their own County Director went to site. The location of the project was okay. The project was submitted in way 2014 and licensed in January, 2015.

2nd defendant, Musa Kiptai Mulwa states that he lives at Kabarnet and that he is a doctor and runs Clinics. He is a registered practitioner. He applied for change of user of his plot no 183 in Kabarnet on 20.2.2014 as the area was meant for residential use. He produced the application dated 20.2.2014 for Changing the plot to a Nursing Home. He waited for the date to expire and engaged an architect who did the drawings. The drawings went through Public Health, Physical Planning, Public Works and Common Administration. He has a letter of Ministry of Housing dated 27.4.2014. He produced it as 2nd DEX.3. He had a letter from Town Administrator, Baringo County Government. He produced it as 2nd DEX.4. He applied for an Impact Assessment Expert. The County supported the project but four people objected because of the mortuary. NEMA was represented and the chief was also represented.

He stopped the construction and forwarded the documents to NEMA. NEMA gave him a certificate. NEMA asked him to redesign the plan to remove the mortuary what he did. He removed the mortuary and wrote to NEMA that he had complied. He produced the letter requesting him to re-design. He wrote a letter of acceptance dated 26.11.2014. The size of the plot is 0.17 Ha. He produced the allotment letter dated 23.2.1996. He got the lead expert and informed him of the re-designation and he got some members to be present.

Mr. Chesang, the expert called, for a meeting and the meeting was held as scheduled. He produced the Minutes of the Meeting. They forwarded to NEMA the findings of the meeting. He was issued with the licence from NEMA. He paid for the application form for Physical Planning thus; for No. PPA(1) SSI(1). He paid Kshs.2,500. He paid building plans approved Kshs.3000. Development fees He paid Kshs.10,660. He paid Public Health Kshs.3000. He paid Kshs.3,500. Application for change of user he paid Kshs.1000. He produced the bundle of receipts and application as 2nd DEX.13(a) form, receipts 13(b), 13(c), 13(d), 13(e), 13(f). He has a letter from Public Health dated 26.5.2014 addressed to County Director, NEMA stating that he had complied and paid all dues. He produced it as 2nd DEX.14. He did engage a lead expert. He prepared an Impact Assessment report. He produced it as 2nd DEX.15. The space is ideal for the plaza as it is almost half an acre. Members of public were worried of mortuary which was removed. The plaintiffs have not developed their plots save Solomon who constructed a permanent house with a perimeter wall fence. The 2nd defendant wants to put up a modern building that will protect environment. The environment is good. He will do a septic tank. He had projected 20 million for the project. He has dug the foundation and that the materials are on the site. He still wants to construct a modern hospital. Their fears are unfounded. He will work with NEMA.

On Cross examination by Kipkenei, he states that the defendants are his neighbours and that each of them has a plot. His plot is no 183 and is 0.171ha which is almost half an acre. It is bigger than 50/100. He is relying on the allotment letter and size of the land. He does not have a certificate lease. He does not have the survey plans. The size is indicated in the allotment letter. The notice of change of user was in the newspaper and not Kenya Gazette. He did not see it in the Kenya Gazette, on 7.6.2016.

He presented the Minutes to NEMA on 7.6.2014. He approached the neighbours and gave them the forms given by an expert. The area is plain residential and there are no neighbors. There is a school and a church. He was told by NEMA to re-design the project and did the same and removed the mortuary. He had the intention to put up a modern hospital. In many hospital, there are counselors. People live next to hospitals. He had hired an expert on the issue of waste. According to his design, there is a parking space. There is no exit road but there is a road inside which is more than six metres. The area can accommodate many people depending on design of houses. He practices in a small area in the town. Formerly, there was a mortuary in the design but the community refused to have the mortuary. He removed the mortuary. They followed the rules and regulations. He had a theatre and other facilities. The area is likely to be crowded and therefore he has planned to construct upwards. There are modern ways of refuse disposal which he will adopt. The place will be sealed The property is enough for developments.

2nd DW2, Philip Kilugen Chesang, he is an Environmental Consultant and does have a licence No. 2530. He knows the 2nd defendant because he engaged him to do an E.I.A. Project report for a Nursing Home cum doctors' plaza in Kabarnet Municipality. He visited the location as usual and looked at the proposed areas and did the report. There was only one neighbour who has put up a house. The area is not developed. He ascertained the size but he relied on the document the proponent gave him. The area was 0.171 Ha. The suit land has taken 0.0855 Ha. There are two types of reports:

1. Study report.
2. Project report.

According to **Philip Kilugen Chesang**, Study report is for a project of bigger magnitude and covering a wide area. A project report is for an activity or project of lesser magnitude. A study report is applied in projects like a dam. The matter herein was a project report because it was for a smaller magnitude. Once he receives the study report, they advance the public to give their commitment. When he made the report, there is a whole chapter dedicated to environmental measures. The project has three phases.

He envisaged the noise environmental facts and gave measures to deal with that. The project envisaged a septic tank hence he factored all this. His assessment is that the hospital was ideal for the area. There are hospitals built in a similar area. Evans Hospital in Nakuru, Baraka Hospital in Nakuru and Nakuru Nursing Home.

On the issue of noise, wailing, the proponent was advised to put up a high wall. There are **acoustical** to be put to pre-empt noise pollution. When the report was submitted, there were complaints. The proponent was told to re-design and subject it for consultation. He did this through posters. They had 38 members from neighborhood. He invited them by letters and notice. They had indicated that such a project would not be accepted with a mortuary. He recommended that they exclude the mortuary. All concerns were taken care of. The project is considered viable.

On Cross examination by Gitonga, he states that this was not his first report. He was licensed in 2011. He has abided by the code of regulations. Her had not been found guilty of misconduct. The aggrieved person can go to the NET.

On Cross examination by Kipkenei, he states that there is noise containment technology. There is no total eradication of noise pollution but measures for a reduction. The title of his report is the environmental assessment study report. It was to be project report. It was a typing error to refer it a study report. It was a project report. He submitted it through form 1, which is a project report. He is guided by E.M.C.A. The study report is provided for under E.M.C.A. The project report is also provided for under E.M.C.A.

He gave statistics to work in case the waste is not controlled. The danger can occur in the village. He saw a change of user. The change of user was only for his plot. He saw the beacons.

PLAINTIFFS' SUBMISSIONS

The plaintiffs submit that they have proved on a balance of probabilities that the 2nd defendant secretly changed the user of his plot to put up a project which in their opinion is not suitable. The change of user was conducted in a manner not transparent and that there was no public participation conducted and the said change was not gazetted to afford the members of public to raise objections.

The plaintiffs submit that the 2nd defendant's project was unsuitable in that particular location. The plaintiffs submit that their facts were not addressed by NEMA. The plaintiff submit that the project was done under Impact Assessment Study as opposed to Impact Assessment Project. The project was to be assessed and an environment impact assessment study prepared in order to accommodate different views and to ensure social equity and harmony. The 1st and 2nd defendants did not comply with section 38-51 of EMCA.

The plaintiffs submit further that the power to cancel NEMA licence is vested in this court and that the power to evaluate the owners of conflict and provide remedy is vested in this court. Lastly, the plaintiffs submit that the mindset of the 2nd defendant was to make money by all means. He does not care about the welfare of other neighbouring people.

1ST DEFENDANT'S SUBMISSIONS

The 1st defendant submits that the NEMA has a statutory mandate to issue an Environment Impact Assessment Licence. The 1st defendant approaches matters regarding E.I.A. as a statutory mandate. The 3rd defendant is an expert in matters pertaining the E.I.A. and duly licenced to practice as such by the 1st defendant and thus, his professional opinion is important in assisting the 1st defendant in issuing or rejecting an E.I.A. licence. He submits that the plaintiffs are neither experts nor affiliated to a firm of experts in those matters. The expert opinion is that the plaintiffs' fears that the project will interfere with their report to a claim and healthy environment is farfetched.

The 1st defendant submits that he has exercised due diligence as provided for in EMCA in issuing the 2nd defendant with E.I.A. licence. As a creature of the statute, it can only do what the creator permit to do.

Moreover, the 1st defendant submits that NEMA has the authority and mandate to ensure and enforce compliance. On whether it was an E.I.A. Project report or E.I.A. study report, the respondent argues that the E.I.A. process environs at that 2 modes of E.I.A. report and process. According to the 1st defendant, there is a distinction between E.I.A. project report and EIA Study Report. The 2nd and 3rd defendants conducted a project report as provided for under section 58(1) of EMCA, Rule 7 and 8 of the Environment (Assessment and Audit) Regulations, 2003. The E.I.A. being NEMA EIA/PSR/2354 was submitted and agreed and steps taken in accordance with Rule 9 of the Regulations, 2003 by the 2nd and 3rd defendants subsequently, the 1st defendant satisfied itself as per Rule 4 and 10(1) and (2) of the Regulation, 2003 and the 2nd schedule of EMCA that the project as submitted in E.I.A. Project Report is not out of character with the environment and will have no significant impact on the environment and/or that the submitted report discloses sufficient mitigation measures and issued a licence in Form 3 set at in the first schedule to their regulations. The E.I.A. licence is dated 8.1.2015.

Ultimately, the 1st defendant submits that the plaintiffs have not proved their case on balance of probabilities as they are not experts on the matter touching on environment. That they did not know what an E.I.A. was and that their fears can be addressed by the NEMA. NEMA submits that the suit be dismissed with costs.

SUBMISSIONS BY THE 2ND AND 3RD DEFENDANTS

The 2nd and 3rd defendants submit that the plaintiffs never proved the allegation as stated in the plaint and their concern cannot warrant this honourable court to allow their prayers. Moreover, that the complaints raised by the plaintiffs have been taken care of by the E.I.A. report prepared by the 3rd defendant Chesang who is an expert on Environmental issues and the impact on the environment. The lead expert put down the mitigating parties.

According to the 2nd and 3rd defendants, the plaintiffs have failed to demonstrate how they will be affected by the manner the 2nd defendant will be implementing the project. The 2nd and 3rd defendants submit that the proponent (2nd defendant) called all members of public including the plaintiffs and all issues were addressed. The only issue of concern was mortuary. The 2nd defendant was advised to redesign the project and remove the mortuary which he did and the licence was given with other conditions. The space of the land is adequate for disposal of waste materials. The 2nd and 3rd defendants submit that the plaintiffs are not experts on matters of environment and on the effects to the environment.

ANALYSIS AND DETERMINATION

The plaintiffs are allottees of land vide letter of allotment issued by the Commissioner of Lands. There is no dispute that the plaintiffs own land adjacent to the 2nd defendant's land. The plaintiffs own plot numbers 182, 184, 185, 186, 187, 188 and 189 within Kabarnet whilst the plaintiff owns plot NO. 183 within the said Kabarnet town. They are neighbours.

On the 27.5.2014, the plaintiffs wrote to the Director, NEMA objecting to construction of a Nursing Home/Hospice on Plot No. 183 in Kabarnet town by one Mr. Musa Mulwa, the 2nd defendant.

It had come to the plaintiffs' knowledge that the 2nd defendant had prepared and submitted an environmental impact assessment (E.I.A.) report and annexures to Director, NEMA for consideration and approval without prior knowledge, notice, opinion and consent as immediate adjacent neighbours regarding the proposed development.

The plaintiffs complained that they had never been notified or consulted and that no questionnaires were issued to the plaintiffs. That the proposed development plan had not been availed to the plaintiffs for perusal and exercise of their constitutional right of access to information as enshrined in Article 35 of the Constitution of Kenya, 2010.

The plaintiffs registered their grave concern regarding the waste disposal and management, environmental pollution, disturbance of peace and tranquility in the residential area and other enforceable attendant risks and inconveniences posed by the proposed development.

The plaintiffs petitioned the NEMA not to issue any permit or licence to the proposed development for gross procedural impropriety on the part of the developer.

It is evident from the documentary evidence that the 2nd defendant was registered as a businessman name under Registration of Business Names Act on the 13.8.1997. He became the registered owner of plot number 183 in Kabarnet town. On the 20.2.2014, he applied for change of user of the plot from residential to a Nursing Home/Doctors Plaza.

On 27.5.2014, the County Physical Planning Officer, Baringo did not have any adverse comments on the proposed project from the Physical Planning point of view. On 25.8.2014, the Baringo County Government recommended the issuance of a building pursuant to the 2nd defendant as he had complied with the building code of regulations.

However, on the 7.6.2014, there was a consultative meeting on the proposed Tionybei Nursing Home at the proposed site plot No. 183, Kabarnet town. This meeting was attended by the area's assistant chief, negotiators and Plot owners, members of public and three officials from NEMA. The meeting found that there were no aggregate reasons as to why the project was opposed and that it was more of personal reasons and that $\frac{3}{4}$ of the members present supported the project. It was resolved that further recommendations be made by the County Director, NEMA, Baringo.

On the 11.9.2014, Francis Chwanya, for the Director General, NEMA wrote to the 2nd defendant in reply to the 2nd defendant's letter appealing against the proposal that he undertakes a study of the subject project.

The Director appears to have rejected the 2nd defendant's appeal against an environmental impact assessment E.I.A. Study Report on the grounds that there was need to harmonize the divergent views of the members of public to ensure social equity and harmony. He was advised to either submit the terms of reference for undertaking the detailed study as the previous letter or to redesign the subject to fresh stakeholders, public participation and submit the same to the authority for processing. In the alternative, he was advised to seek alternative site and re-submit a fresh E.I.A. report for the same.

On the 26th November, 2014, the 2nd defendant wrote to the Director General, through the County Director of Environment, Baringo County acknowledging receipt of the letter dated 11.9.2014 and states that he chose to re-design the project according to the demand to remove the mortuary. The mortuary was removed from the plan.

On the 31.10.2014, Mr. Philip K. Chesang, NEMA Registered Land expert invited Mr. Chebon Limo, Mr. Kangogo, a Mr. Sammy, a Mr. H. Kiplagat, Mr. Argut and the County Director of Environment, Baringo informing them that the 2nd defendant had prepared an environmental impact assessment (E.I.A.) report for the NEMA. They were identified as stakeholders and therefore were being invited to a public consultation meeting on Saturday 15.11.2014 at the proposed construction site.

On the 15.11.2014, the meeting was held and 38 members attended but there were some absent with apology. The matters arising in the meeting were that the size of the plot was small and there was no parking space. Moreover, that a mortuary was unacceptable and that the hospital would devalue their plots and that the school going children would get scared while passing by the Nursing Home. The 2nd defendant responded by stating that the Nursing Home was ½ an acre hence would have parking space. That the Nursing Home would be fenced with perimeter wall hence not easy to see activities inside and that the mortuary was omitted in the new design.

On the 8th January 2015, the NEMA issued a licence for the construction of Tionybei Nursing Home/Doctors Plaza without a mortuary facility to be located on plot No. L.R. No. 183, Kabarnet Municipality, Baringo County.

On the 19.1.2015, the County Government of Baringo gave the 2nd defendant the greenlight to proceed with the construction of the Nursing Home without a mortuary facility.

The first issue that arises is whether the change of user was properly done. I do find that the change of user from residential to a Nursing Home was advertised as required by law and therefore, was proper.

On issue of the suitability of the locality for a Nursing Home, the plaintiffs' main complaint was that the size of the plot was small and had no parking space, the facility of mortuary was unacceptable and that the project would devalue their plots and children would get scared of the hospital. The 2nd defendant's response to this reason was that the Nursing Home was developed on half an acre and that there was parking space. That it would be fenced with a block perimeter wall hence not easy to see the activities inside and that the mortuary was omitted in the new design.

Having considered the evidence on record, I do find that the plaintiffs have not satisfied this court that the medical facility is a threat to the environment. Their fear have been allayed especially by the removal of the mortuary and the erection of the perimeter wall. The plaintiffs did not call for any expert evidence to demonstrate that the building of the Nursing Home in a residential area would impact negatively on the environment or devalue their plots.

On the issue, as to whether the report was to be undertaken as Environmental Impact Assessment Study or Environmental Impact Assessment project, I do find that the relevant provision in section 58(1) of the EMCA that provides for **application for an Environmental Impact Assessment Licence**. This section stipulates: -

(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 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.

(3) The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

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(5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorized to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

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

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.

(9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.

This section should be read with Part 11 of the regulations, thus regulations 7, 8, 9 and 10 of the Environmental (Impact Assessment and Audit) regulations, 2003. These regulations provide as follows: -

7(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

(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 neighboring 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 Regulations.

8. A proponent shall submit at least ten copies of the project report to the Authority or the Authority's appointed agent in the prescribed form accompanied by the prescribed fees.

9.(1) Where the project report conforms to the requirements of regulation 7(1), the Authority shall within seven days upon receipt of the project report, submit a copy of the project report to -

(a) each of the relevant lead agencies;

(b) the relevant District Environment Committee; and

(c) where more than one district is involved, to the relevant Provincial Environment Committee, for their written comments which comments shall be submitted to the Authority within twenty-one days from the date of receipt of the project report from the Authority, or such other period as the Authority may prescribe.

(2) On receipt of the comments referred to in subparagraph (1) or where no comments have been received by the end of the period of thirty days from the date of receipt of the project report, the Authority shall proceed to determine the project report.

10(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.

(4) A proponent who is dissatisfied with the Authority's decision that an

environmental impact assessment study is required may within fourteen days of the Authority's decision appeal against the decision to the Tribunal in accordance with regulation 46.

The import of the above is that where the NEMA is satisfied that the project will have no significance on the environment or that the project report discloses sufficient mitigation measures, the authority may issue a licence in the prescribed form. But where the authority finds that the project will have significant impact on the environment and the project report discloses no sufficient mitigation measures the authority shall require the proponent undertake an environmental impact assessment study in accordance with regulations.

This court finds that though the report received by the County Director of Environment, NEMA on 12.5.2014 was titled Environmental Impact Assessment Study report for proposed construction of Nursing Home/Doctors Plaza on Plot No. 183, Kabarnet Municipality, Baringo County, the same was a project report as opposed to an Environmental Impact Assessment Study because the authority had not made its decision as at when the report was made and submitted.

I agree with Mr. Gitonga, counsel for the 1st respondent that it was only after the decision of NEMA that the proponent could undertake an environmental impact assessment study if the authority found that the project was out of character with the environment and would have a significant impact on the environment or that the submitted report did not disclose sufficient mitigation measures. In this case, the authority did not find so and therefore, the report received was a project report as opposed to an E.I.A. study report.

The report submitted having been a project report, the public participation carried out on the 7.6.2014 and 15.11.2014 at the proposed site of the Nursing Home was adequate. I do not agree with the plaintiffs that section 59 of EMCA applied as the same does not apply to a project report. The relevant section is 58(1) of EMCA. Section 58(2) is not applicable as NEMA never made a finding that the project would have a significant impact on environment.

The upshot of the above is that there was no need to comply with the provision of section 59 of the EMCA.

This court finds that there is no evidence of collusion between the 1st defendant and the 2nd defendant and that all allegations of pollution, the inadequate land and a likelihood of a waste management system is not supported by expert evidence. Moreover, the court finds that NEMA has the capacity and mandate to do an environmental audit and monitoring of the project after it is operational. This can be done under Part VII of the Act under sections 68 and 69 of the Act.

In conclusion, I do find that the plaintiffs have not proved that the 1st defendant failed to discharge its mandate and that followed the wrong procedure in issuing the impugned license. I do not find any basis in allegations by the plaintiffs that the project will impact negatively to the plaintiffs. Ultimately, the suit is dismissed with costs to the defendants. Orders accordingly.

Dated and delivered in Eldoret this 29th June, 2018.

ANTONY OMBWAYO

JUDGE