



Ken Petrogas Limited v Mohammed & 5 others (Environment and Land Appeal 001 of 2024) [2025] KEELC 857 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL 001 OF 2024**

AE DENA, J

FEBRUARY 27, 2025

BETWEEN

KEN PETROGAS LIMITED APPELLANT

AND

AHMAD KASSIM MOHAMMED 1ST RESPONDENT

SHAHASI MOHAMED SHAHASI 2ND RESPONDENT

RAPHAEL MDOE YIRO 3RD RESPONDENT

JOSEPH MALUSHA ABEDI 4TH RESPONDENT

OMAR SALIM MWAKWELI 5TH RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 6TH
RESPONDENT**

JUDGMENT

Grounds of Appeal

1. This appeal was instituted vide a Memorandum of Appeal dated 15/4/2024. The appeal is against the judgement of the National Environmental Tribunal (NET) delivered virtually on 5/4/2024 in NET Appeal No 19 of 2023. The appeal is premised upon the following grounds; -
 1. That the Honourable Tribunal erred in law and fact in finding that there was no public participation towards issuance of environmental license number NEMA/EIA/PSL/25813 application reference number NEMA/EIA/SR/2831 issued on 22nd May 2023
 2. That the Honourable Tribunal erred in law and fact by disregarding the evidence adduced in court as proof of public participation



3. That the Honourable Tribunal erred in law and fact by failing to dismiss the Notice of Appeal despite the overwhelming evidence filed by the Appellant

Prayers

2. The Appellant prays that the appeal be allowed and the court grants the following orders; -
 - i. That the judgement by the Honourable tribunal delivered virtually on 5th April 2024 be and is hereby set aside
 - ii. That the Appellant be awarded costs in National Environmental Tribunal Appeal No 19 of 2023 on a full indemnity basis as against the 1st, 2nd, 3rd, 4th and 5th Respondents
 - iii. That the Honourable court be pleased to validate Environmental Licence No. NEMA/EIA/PSL/25813 application reference No NEMA/EIA/SR/2831 issued on 22nd May 2023 to the Appellant
 - iv. That a permanent injunction restraining the 1st, 2nd, 3rd, 4th and 5th Respondents by themselves, their agents, servants, or any of them howsoever from interfering with the appellant project
 - v. That the Honourable court be pleased to issue any further appropriate order within its jurisdiction to give effect to the present reliefs and
 - vi. The appellant's costs for the appeal herein be provided for on a full indemnity basis.
3. The Appeal is supported by the 6th Respondent National Environment Management Authority herein NEMA. It is however opposed by the 1st to 5th Respondents.
4. The Appeal was disposed of by way of written submissions. Parties filed and exchanged submissions. Parties were also given an opportunity to highlight orally their written submissions on 11/11/24 where the Appellants project proponents were represented by Mr. Miller, the 1st – 5th Respondents by Ms. Julu and NEMA by Ms. Majune.

Submissions

Appellant's Submissions

5. The Appellant's submissions are dated 13th May 2024. The Appellant identifies one issue for determination Whether the constitutional and legal threshold of the requirement for public participation was met for the issuance of the impugned EIA License.
6. It is submitted that the tribunals finding that there was no public participation was based on the failure by the Appellant to provide at least one week notice of the meetings to all affected parties contrary to Regulation 17[2][c] of the Environmental [Impact Assessment and Audit] Regulations. That the Tribunal however made a finding that there was compliance with Regulation 17[2][b] for holding meetings. At paragraph 5 of the submissions, the Appellants have highlighted the Respondent's grounds of appeal at the Tribunal and state that no specific allegation was made over the lack of one weeks' notice of the meetings contrary to the provisions of 17[2][c]. That the Appellants at the Tribunal and who are the respondents herein alleged lack of meetings and not notice of the meetings. That the Tribunal therefore made an error in making a finding on the notice for the meetings when it was not an issue before it.
7. The Appellant's further submit that none of the witnesses before the Tribunal as per the witness statements made any specific allegations that they did not have notice of the meeting and hence failed



to attend the same. Given that a finding was made of the meetings having taken place, the Tribunal erred in cancelling the Appellant's EIA license on the grounds that the Appellant had not provided evidence of notice for a meeting when the same was not a ground raised for determination before it. That the appellant did not have an opportunity to respond to the issue of notice for the meetings.

8. During highlighting Mr. Miller referred to NEMAs submissions at paragraphs 9 on full EAI, 10 on appellants documents for public participation indicating Kenya Gazette, Star Newspaper and radio announcement. Counsels view was that paragraph 10 indicated sufficient notice whether 7 days or not. That paragraph 11 was on public barazas held and list of participants attached. That at paragraph 13 the area MCA indicates that the meetings held were very educative. That in view of all these it was erroneous to allege there is insufficient public participation. That a review of the Respondents submissions in the current appeal makes no reference to the fact that they had raised the issue of sufficient notice at the Tribunal. Counsel urged the judgement of the Tribunal is set aside and the license is upheld.

The 1st – 5th Respondents Submissions

9. The 1st to 5th Respondents Submissions are dated 5th November 2024 and identified one issue for determination namely, Whether the Tribunal erred in its finding that there was public participation. Referring to submissions made by the respondents at the Tribunal on the issue including the law, the procedure and case law it is reiterated the same remains good law. Agreeing with the reasoning it is submitted the Tribunal was very thorough about the issue of public participation. That the Tribunal laid a very good legal basis for its decision. The court is referred to the Supreme Court decision in Cabinet Secretary for the National Treasury and Planning & 4 Others Vs. Okoiti & 52 Others; Bhatia (amicus Curiae) (2024) KESC 63 KLR which termed public participation as a national value and principle and a constitutional backed process.
10. Listing the principles for public participation as laid down by the Supreme Court in British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Ltd Vs Cabinet Secretary for Ministry of Health & 2 Others, Kenya Tobacco Control Alliance and other Interested Parties, SC (2019) eKLR it is submitted the same echoed the principles in Mui Coal Basin Local Community & 17 Others Vs. Permanent Secretary Ministry of Energy & 15 Others (2015) eKLR espoused by the 1st -5th Respondents in the Tribunal. Rehashing the provisions of Regulation 17(2) read together with Regulation 17(1) it is submitted that publication was not done during the process of conducting an EIA. It is noted the Environmental & Social Impacts Assessment Study Report (ESIAS) did not contain any of the documents that the Appellant attached in their list of documents dated 30/01/2024. There was no Comprehensive Study Report which is a mandatory requirement where a project is High Risk. That the extent of public participation varied depending with the nature of the project. That the ESIAS report presented did not contain inter alia any detailed stakeholder plan, minutes, signed attendance forms to confirm public participation was undertaken during the process of conducting an EIA. No Notices were attached in proof that the public was indeed notified of any meeting within the area concerning the project.
11. It is contended that Regulation 17(2)(i) to (iii) on prior notices goes to the core of access to information for the persons affected to have a meaningful participation in the decision making process. That the ESIAS report failed to capture a lot of information concerning notices issued for public consultation in the manner prescribed by law rendering them ineffective and only of academic value. That what the 2nd Respondent attached in their list of documents was not submitted to NEMA before the issuance of EIA licence for it to make informed decision. Since this was not done there was no legal basis for



the upholding of the License. The same died a natural death and any consequential processes after that remain futile.

12. Ms. Julu pointed during the oral session that regulation 17 was an issue before the Tribunal as seen in ground D, D(g) & (h) and publishing notice features in h(i). That the grounds of appeal at the Tribunal were a mirror of Regulation 17(2) of the Rules and sufficiency highlighted. Reviewing some of the documents presented in the Appellants list of documents it was pointed that stakeholder engagements with other agencies and the ensuing approvals bore dates that indicated they were prepared after issuance of EIA licence and not prior.
13. The court is urged to allow the appeal in the Tribunal.

6th Respondents Submissions

14. The 6th Respondent based its submissions on two main issues
 - a. Whether the constitutional and legal threshold of the principle of public participation was met by the appellant prior to issuance of the EIA license.
 - b. Whether the order invalidating the NEMA EIA license No NEMA/EIA/PSL/25813 should be set aside
15. It is submitted that the Appellant met the constitutional and legal threshold for the principle of public participation prior to the issuance of the EIA license. That the project was subjected to a full EIA study as per the list of documents dated 30/1/2024 which includes a publication on the Kenya gazette, two publications on the star newspaper and radio announcements. The 6th Respondents further refers to the several public baraza meetings which took place on 1/11/2022,9/11/2022 and 14/11/2022. The court is invited to take a purposive interpretation of the regulations and the intention of the law as was held in Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others [2014] eKLR. That the main aim and intention of regulation 17[2][c] was to ensure effective public participation and which took place as per the evidence adduced before court. That the 6th respondent has made reference to the analysis in Mui Coal Basin Local Community & 15 Others Versus Permanent Secretary Ministry of Energy and 17 Others [2015] eKLR on the threshold to be met on public participation while undertaking environmental projects.
16. The 6th Respondent exonerates itself on the basis upon which it issued the EIA license by stating that the Appellant's were fully qualified for the same.
17. On whether the order invalidating the NEMA EIA license No NEMA/EIA/PSL/25813 should be set aside, it is submitted that the decision by the Tribunal to cancel the said license for want of sufficient public participation was punitive and draconian. The 6th respondent maintains that the 1st to 5th respondents were accorded a fair opportunity to give their comments on the projects through various forums and through the 6th respondent who displayed the projects study report on its website for over 4 months.
18. Counsel for the 6th respondent additionally stated that NEMA submitted various documents to the Tribunal to prove how the Authority went out of its way to ensure public participation. That the agencies including KPA, Water Resources Authority all tendered their approvals to NEMA. That the evidence was never contested at the Tribunal. That it was not fair to override all efforts made by the developer. That the country is in dire need of developments that will inject capital. That environmental audits will still be carried and where conditions are not met NEMA will always intervene. In conclusion the court is urged to allow the appeal by ordering that the order cancelling the EIA License be set aside.



Analysis and Determination

19. I have considered the appeal filed before the Tribunal, the responses thereto, the submissions, the present appeal and the submissions thereto. The main issues for determination are;-
1. Whether the Tribunal erred in finding that there was insufficient Public Participation before the issuance of the EIA License
 2. Whether the order invalidating the NEMA EIA license No NEMA/EIA/PSL/25813 should be set aside
 3. Costs.
20. I have perused the judgement of the National Environment Tribunal and which informs the instant appeal. From the same, it can be deduced that the Respondents herein filed an appeal dated 20/7/2023 before the Tribunal seeking to challenge the decision of the 6th Respondent to issue the Appellants herein with EIA license No NEMA/EIA/PSL/2831 for establishment of liquefied petroleum gas[LPG] storage plant. The Notice of Appeal before the Tribunal set out in its summary Grounds of appeal, 8 grounds which the Tribunal summarised at paragraph 2 and 3 of the judgement thus;-
2. 'The appeal is predicated on the grounds that the approval of the 2nd Respondent Environment Impact Assessment Study Report (EIAS Report) and the consequent issuance of the EIA license was erroneous as the same was contrary to section 63 of EMCA. It is the Appellants case that the EIA study report did not have a comprehensive analysis of projects alternatives and mitigation measures and thereby was not supposed to be approved.
 3. The appellants further challenges the EIA licence on grounds that the 2nd Respondent did not obtain approvals from the concerned authorities and stakeholders. Lastly it is the Appellants case that the Respondents did not conduct adequate public participation before issuance of the impugned EIA license.'
21. I have reviewed the grounds and agree with above summary save to add that the license was also being impugned on the basis of Section 58 of EMCA.
22. Upon considering the appeal and the grounds thereof, the replies to the appeal, witness statements and documents filed by the parties and respective submissions the Tribunal identified two issues for determination; -
1. Whether there was sufficient Public Participation before the issuance of the EIA License
 2. Whether the issuance of the EIA License was in violation of Section 58 and 63 of the EMCA.
23. On the 1st issue the Tribunal highlighted the meaning of public participation and quoted excerpts from the case of William Odhiambo Ramogi & 3 Others Vs. Attorney General & 4 others; Muslims for Human Rights & 2 Others (Interested Parties) (2020)eKLR. The Tribunal also cited Article 10 on public participation as a constitutional imperative binding all state organs, State Officers, public officers and all persons and Article 69 which imposes obligations on the state to encourage public participation in the management , protection and conservation of the environment. The Tribunal emphasized the importance of public participation and further cited the Case of Mohamed Ali Baadi



and Others Vs. Attorney General & 11 Others (2018)eKLR on the reasoning behind having public participation and two persuasive decisions from the Republic of South Africa.

24. The Tribunal was guided by the test of determining the adequacy of public participation in environmental matters laid down in Mohamed Ali Baadi and Others (supra). This is the reasonableness standard and which must include compliance with prescribed statutory provisions as to public participation. That in the absence of compliance with statutory provisions then there is no adequate public participation. That substantial compliance will not suffice.
25. Based on the holding in the case of Mohamed Ali Baadi and Others (supra) the Tribunal reviewed the evidence against the provisions of Regulation 17, 20,21,22 of the Environmental (Impact Assessment and Audit) Regulations 2003 the Tribunal noted the Appellant's herein had provided evidence of public participation in the form of minutes for meetings held on 9/11/2022,1/11/2022 and 14/11/2022. That an advertisement had further been placed in the local dailies and on a local radio station. A further advertisement had been placed in the Kenya gazette inviting members of the public to submit their comments on the proposed project. Further that the NEMA had pursuant to Regulation 20 submitted a copy of the EIA study report to the relevant lead agencies for their comments.
26. Having noted the above the Tribunal at paragraph 21 of the judgement, took the view that there was no full compliance with the provisions of Regulation 17[2][c] which provides that the proponent of the project is required to ensure that appropriate notices are sent out at least one week prior to the meetings for public participation. That no evidence in this regard was provided. The Tribunal faulted the public participation process and cancelled the license earlier issued for want of sufficient public participation. The Tribunal did not find it necessary to go into the second issue since the lack of public participation renders the EIA study report inadequate.
27. This court is sitting on appeal of the decision of NET which is a subordinate court. Section 130 of the Environment and Land Court (ELC) Act, 2011, outlines the appellate jurisdiction of the ELC and reads:-

130. Appeals to the Environment and Environment and Land Court

- (1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.
- (2)
- (3)
- (4) Upon the hearing of an appeal under this section, the Environment and Land Court may—
 - (a) confirm, set aside or vary the decision or order in question;
 - (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
 - (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
 - (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.



- (5) The decision of the Environment and Land Court on any appeal under this section shall be final.
28. The Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR, on the duty of the appellate court, stated as follows:
- We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”.
29. Based on the foregoing I will proceed to interrogate the decision of the NET. I will deal with the first issue as identified by the Tribunal that is Whether there was sufficient Public Participation before the issuance of the EIA License. In my view this will answer to whether the Tribunal erred in its finding. Regulation 17 (2) (c) of the Environmental (Impact Assessment and Audit) Regulations 2003 has come into sharp focus as it is contended by the Appellants herein was the basis of the impugned decision of the Tribunal.
30. The following are the grounds of appeal touching on public participation as raised before the NET.
- g) Failure to disclose potential risks to the residents during the public participation that amounts to material omission influencing the EIA study report and contrary to Regulation 17 (2)(a) of the Environmental (Impact Assessment and audit) Regulations 2003
 - h) Failure to ensure sufficient public participation and sufficient public awareness of the project and its effect to both the residents and marine environment by both the 1st and 2nd Respondents contrary to section 59(2) of EMCA and Regulation 17(2) of the Environmental (Impact Assessment and audit) Regulations. The 2nd Respondent failed to;-
 - i. Obtain sufficient view of persons who may be affected by the project.
 - ii. Post posters in strategic places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project.
 - iii. Publish a notice on the proposed project for two successive weeks in a newspaper with nationwide circulation.
 - iv. Make announcements on the radio in both local and official languages for at least once a week or two weeks.
 - v. Hold at least three public meetings with affected parties to explain the project and its effects and to further receive comments. There was only one public meeting held by the 2nd Respondents with residents
 - vi. Ensure a suitable qualified coordinator was appointed for purposes of the meetings, Liaising with the authority.
31. I have not listed the rest of the issues listed under h) above since they largely relate to alleged threats to the environment.
32. I will extract verbatim the provisions of section 59 of EMCA to enable a holistic reading of section 59(2) referred in the above grounds placed before the NET.
59. Publication of Environmental Impact Assessment



- (1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state—
 - (a) a summary description of the project;
 - (b) the place where the project is to be carried out;
 - (c) the place where the environmental impact assessment study, evaluation or review report may be inspected; and
 - (d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.

- (2) The Authority may, on application by any person extend the period stipulated in subparagraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.

- (3) The Authority shall ensure that its website contains a summary of the report referred to in subsection 33 Section 59 must be read together with the attendant regulations that enable the implementation of the statutory provision. This is where Regulation 17 comes into play. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003, reads thus;-
 - (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 co-ordinator 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.”

34. The NET also referred to Regulations 20,21,22 in the impugned judgement. Briefly these regulations relate to submission by NEMA of the environmental impact assessment study report to the relevant lead agencies for their comments, invitation to the public to make oral or written comments on the report and publication of the proposed project in the Gazette, public notice in newspaper for comments and radio. The nature of the content is also specified. The steps to follow after this are also highlighted should a public hearing be required. The matters to be taken into consideration by NEMA in making a decision regarding an environmental impact assessment licence under these Regulations are also outlined.
35. The court has noted the analysis on the jurisprudence and the law on public participation as well as the importance of public participation aptly highlighted by the NET. It is not in contention that public participation forms one of the National values prescribed under Article 10 of *the Constitution* of Kenya. The values and principles bind all state organs, state officers and all other persons in applying or interpreting *the Constitution*, enacting or applying any law or implementing policy decisions. This has been echoed in a number of court decisions including the case of Peter Makau Musyoka and Award of Mining Concessionary Rights to Mui Coal Basin Deposits [2015] eKLR, where the court also made the following observations regarding the significance of public participation;

We will begin, happily, by stating what is not contested by the parties: They all agree that the precepts of article 10 of our Constitution are established rights which are justiciable in Kenya. Hence, if any of the allegations made by the Petitioners is factually proven, it would lead to an appropriate relief by the court.

88. As our case law has now established, public participation is a national value that is an expression of the sovereignty of the people as articulated under article 1 of *the Constitution*. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one- indeed one of the corner stones of our new democracy.”

36. The Court of Appeal in *Legal Advice Centre & 2 Others v County Government of Mombasa & 4 Others* (2018) eKLR, highlighted the importance of public participation in the law making process as follows:

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.”

37. Such is the high pedestal upon which public participation has been raised. The bar and or standard has been set very high and the court must always guard this threshold.



38. The NET after noting that public participation was a fundamental component of the EIA process , sought to determine whether there was adequate public participation and drew guidance from the test laid down in the case of Mohamed Ali Baadi and Others Vs. Attorney General & 11 Others (2018)eKLR a five judge bench decision where the court had this to say;-

The Court concluded that the proper standard of ascertaining whether there is adequate public participation in environmental matters is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. Further, the Court concluded that failure to adhere to set statutory provisions on public participation is a per se violation of the constitutional requirement of public participation and yields an inescapable conclusion that the project which did not so comply suffered from inadequate public participation.’

39. My understanding of the above dictum is that statutory compliance is a fundamental ingredient of public participation and in its absence there is no adequate public participation. This position will become clear later in this judgement.

40. I will now revisit the statutory provision that the NET found not to have been complied with namely Regulation 17(2)(c) which I have already set out hereinbefore. The regulation requires the project proponent ‘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.

41. To ensure is to make sure and guarantee and which to me connotes it is obligatory. The Concise Oxford English Dictionary 12th Edition page 475 defines to ensure as ‘ make certain that (something) will occur or be so’. Regulation 17(2) which introduces the rest of the requirements in regulation 17 is couched in mandatory terms by the use of the word shall thus - (2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall. There is actually no room to skip a step and which resonates with the dictum in Mohamed Ali Baadi (supra). The above requirement of 1 week notice prior to the meetings to me does not form part of the other notices and cannot be argued to be subsumed therein.

42. The NET noted that no evidence of such notice was proffered. I have perused the entire record presented before court and I have not seen such specific notice/s. The Appellant in the present appeal does not deny that such evidence was not presented. Nowhere in the submissions is the court referred to any such document or notice in the list of documents presented at the Tribunal. Mr. Miller for the project proponent main argument is that this was not a matter in issue at the NET. I must respectfully disagree for the reason that ground h) which I have extracted verbatim elsewhere in this judgement refers to Regulation 17(2) and failure to ensure sufficient public participation. In any case Regulation 17(2) as I have already observed introduces the rest of the sub regulations making them mandatory and therefore 17(2)(c) cannot be read in isolation.

43. I think the Tribunal was correct in arriving at the finding that there was partial compliance to the statutory provisions to the extent that some of the provisions were complied with but since there was no full statutory compliance the public participation was rendered inadequate.

44. It is noteworthy that at paragraph 23 the NET also identified non compliance with Regulation 17(2) (d) as it relates to appointment of a suitably qualified coordinator. How else is an appointment made? Is it not by a letter accompanied with the requisite credentials. I have perused the record of Appeal and I have found no such proof. It is therefore incorrect - to state the basis of the entire decision was on noncompliance with the 7 days notice.



45. For me the regulations and the Act clearly spell out the processes and the trajectory of such process, apportion obligations and what is to be done. I can call them a checklist where one would be checking each milestone and step before they move to the next. There is no excuse for not complying when every step has been set out with obvious clarity and to achieve a specific objective.
46. Substantial compliance appears to be the argument by both the project proponent and NEMA in the present appeal. The Tribunal noted that it is not about substantial compliance and I agree. The law is the law. Both the constitutional and legal threshold are to be complied with. In the Mohamed Ali Badi Case (supra) the court stated further thus:-
239. In the circumstances of this case which involves a mega infrastructural project, we are led to the holding that the Respondents and the 3rd Interested Party had no alternative but to strictly adhere to, and comply with, the provisions of both the Constitution and the EMCA. Accordingly, we find that the public were not adequately involved as required.
47. The big question that seems to emanate from the Appellants in the current Appeal is whether the Tribunal was right in cancelling the License. Ms. Majune for NEMA submitted that the efforts deployed by the project proponent should not be overridden. From the judgement the Tribunals verdict was that ‘the lack of sufficient public participation renders the EIA study report inadequate and proceeded to cancel the EIA License. It is trite that nothing can come out of an illegality see the case of *McJoy vs Africa co. Ltd* (1961) 3 ALL ER 1169 AT 1172. As long as there was no full legal compliance the court cannot sanitize the process. It is therefore my finding that the Tribunal did not err in cancelling the Licence.
48. I note that the Tribunal did not find it necessary to delve into the 2nd issue which would have gone into the details of the sufficiency of the reports and the qualitative aspects of the reports supplied by the project proponents. Having agreed with the decision of the Tribunal I will reiterate that in view of the finding that there was inadequate public participation for want of full statutory compliance it follows therefore that there must be compliance before the rest of the issues can be considered. I will therefore not delve into the rest of the issues.
49. The upshot of the foregoing is that the judgement of the Tribunal delivered virtually on 5th April 2024 is hereby upheld.
50. As to costs of this appeal I’m aware by dint of Section 27 of the Civil Procedure Act costs follow the event. However the same are at the discretion of the court. I will order that each party to this appeal bears its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS THIS 27TH DAY OF FEBRUARY 2025.

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HON. A.E DENA

JUDGE

27/2/2025

