



Erdermann Property Limited v Safaricom Staff Pension Scheme Registered Trustees & 3 others (Civil Appeal 185 of 2017) [2023] KECA 282 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 282 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 185 OF 2017
MSA MAKHANDIA, K M'INOTI & HA OMONDI, JJA
MARCH 17, 2023**

BETWEEN

ERDERMANN PROPERTY LIMITED APPELLANT

AND

**SAFARICOM STAFF PENSION SCHEME REGISTERED TRUSTEES 1ST
RESPONDENT**

KENYA URBAN ROADS AUTHORITY 2ND RESPONDENT

MAVOKO WATER & SEWERAGE CO. LTD 3RD RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY 4TH RESPONDENT

(An appeal against the judgment of the Environment and Land Court at Machakos (Angote, J.) dated 12th May, 2017 in ELC Petition No. 4 of 2017)

JUDGMENT

1. The appellant prefers an appeal against the entire judgment of the Environment & Land Court delivered on May 12, 2017 in Machakos ELC. Petition No. 4 of 2017, which allowed the 1st respondent's the petition and declared that the approvals granted to the appellant by the 2nd - 4th respondents regarding construction of a sewer line along Quarry Road and Old Mombasa Road for the Great Wall Gardens project was illegal and tantamount to an infringement of the 1st respondent's rights under Article 40 and 47 (1) of the Constitution of Kenya. The impugned judgment also quashed the decisions by 2nd - 3rd respondents, allowing the appellant to proceed with construction of the said sewer line and granted a permanent injunction restraining the appellant from proceeding with the construction of the sewer line on the basis of the contested approvals; an order of mandamus directing the 2nd - 4th respondents to reconsider the submitted designs for the contested construction of a sewer line by the appellant, and make a decision in line with the applicable law, after full public participation



- by the 1st respondent and all other affected stake holders as provided for in law; and ordered the appellant to pay costs of the petition to the 1st respondent.
2. The background to this appeal is that the 1st respondent, Safaricom Staff Pension Scheme Registered Trustees, had sought the above orders through the petition where it stated that as the registered owner of the Lr No 337/5183 (Original No 337/974) (referred to as the suit property), it was undertaking a mixed use development, known as “Chrystal Rivers Mall” comprising residential units and a mall, and that the project was bordered on the western side by Quarry Road and on the southern side by an access road adjacent to old Mombasa road; the other immediate neighbours to the Mall being Sunset Boulevard Estate, Jam City slum, M. A. Math Charitable Trust and Amrita school, while the 1st respondent’s neighbour on the Southern side was Apex Steel Limited.
 3. It was the 1st respondent’s contention that the appellant was undertaking a project christened The Great Wall Gardens, and in November 2016 it realized that the appellant was undertaking a sub-truck sewer construction work along quarry road to connect the Great Wall Gardens to the County Sewer System.
 4. The 1st respondent lamented that the sewer works conflicted with some aspects of its project and design; blocking its access to the suit property and that the works were bound to cause a major challenge to the drainage of the road.
 5. The 1st respondent also complained that the proposed road design was not inclusive, as it did not consider other stake holders served by the Quarry Road and the access road adjacent to the old Mombasa road; that the sewer line was too close to its property; and the approvals obtained by the appellant from the 2nd- 4th respondents were issued without due process, without public participation by parties directly affected by the decision in contravention of the 1st respondent’s legitimate expectation.
 6. The 1st respondent maintained that they were entitled to protection of their right to acquire, use and occupy property as envisaged under Article 40 of the *Constitution*; that the 2nd - 4th respondents illegally approved construction of a sewer line along Quarry Road and Old Mombasa Road to the detriment of the affected parties; and that the said illegal approval limited its access to and use of its property.
 7. Further, that the failure by the respondents to abide by the procedure set out in the *Kenya Roads Act*, *Water Act*, *Urban Areas and Cities Act* and the *County Government Act*, contravened the 1st respondent’s right to fair administrative action, and violated its right to a clean and healthy environment in contravention to Article 42 as read with Articles 69 & 70 of *the Constitution*; the appellant never obtained approval to raise a Quarry Road; that neither Kenya National Highways Authority (KENHA) nor Kenya Urban Roads Authority (KURA) have applied and obtained way leave and that there was no public participation before the approvals were granted.
 8. The 1st respondent was categorical that it prepared a traffic impact study for the project and sent to KENHA for approval; the raising of the road severely restricts access to its property; and that although the 1st respondent was to lower the road level this was never done.
 9. At the Environment & Land Court, Everest Limited and Sunset Housing Limited joined the proceedings as 1st and 2nd interested parties respectively although it was the 1st interested party who filed an affidavit stating that; it owned land on which high rise apartments were being developed, and Phase 1 had already been developed and occupied; its land was serviced at the back by Quarry Road, so the ongoing sewer line construction by the appellant was obstructing access to the land and would also cause flooding to its property; it owned a sewer line which ran below the ground, designed for a maximum 1.5 meters height and its manholes would not withstand extra pressure of



- 2.8 meters; the approvals granted to the respondents did not allow the appellant to raise the sewer lines; and that the contested construction was narrowing the existing road by 40%, thus making it dangerous for pedestrians and violating its access to its property; and that it was not invited for any public participation before the approvals were given.
10. The 2nd interested party's submissions echo the 1st interested party's submissions.
 11. The appellant in response, argued that the 1st respondent's right under Article 40 was not absolute and its enjoyment being limited to the extent that it did not prejudice the rights and fundamental freedoms of others and that the appellant had not entered, occupied or trespassed on the 1st Respondent's property; that the construction of the sewer line was being undertaken on the corridor of existing roads and road reserves within specific areas; and that the approvals of the said works by the 2nd - 4th respondents and National Environment Management Authority (NEMA) was a confirmation that the sewer works had been undertaken in accordance with the Constitution; and that the sewer line would not restrict access to and use of the 1st respondent's property, or cause any major challenge to the drainage of the road.
 12. Further, that the sewer works were configured with, and constructed to rise to the level of the plans to raise Quarry Road to the height of the highway; that it had complied with the Kenya Roads Act, the Water Act, the Urban Areas and Cities Act and the Constitution; that there was public participation; and that the sewer is not for the exclusive use of The Great Wall Garden estate; the re-routing of the sewer line had been compromised by existing public infrastructure and challenges of constructing a sewer line through riparian area, that the sewer line design was found to be proper by 2nd - 4th respondents; the 2nd respondent granted approval on condition that Quarry road be raised to cater for flood levels and to be able to feed directly to the planned elevation of the highway; and the 1st respondent designed the sewer line as per specifications.
 13. It was further contended that the 1st respondent's plan for its development was based on old development plan of the area; there was access to the project though several points on Quarry Road; the minutes of the meeting the 1st respondent relied on were doctored and not signed; and the 1st respondent was advised to engage the 4th respondent to develop suitable access to its development as Mombasa Road was to be raised.
 14. The 2nd respondent maintained that the appellant sought and obtained conditional approval to erect the sewer line and; that in granting the said approval all technical and geographical aspects were taken into account; that when the 1st respondent objected, KURA scheduled a meeting where it was agreed that the appellant and the 1st respondent jointly design review for the road works and provide a compromise design agreeable to both; that while the joint report was being awaited, the appellant was to halt the works; however, the 1st respondent's representative failed to attend subsequent meetings and it was later discovered that the 1st respondent's land was on swampy terrain and that the design of its project was incompatible with the adjoining road infrastructure; and the 1st respondent's project did not have a traffic management component, so the challenges facing the 1st respondent were self-made.
 15. The 3rd respondent's case was that it gave approval on condition that the construction of the sewer line was to be in accordance with relevant laws; that the sewer line was on the way leave and did not extend to the 1st respondent's property.
 16. The 4th respondent's position was that the appellant complied with the conditions in the letter of approval, and that it was agreed between the representatives of both the appellant and the 1st respondent, that a joint team was to be formed to review the design, but instead of the team being formed the 1st respondent filed suit.



17. The trial court in its judgment and having carefully considered the parties' pleadings, testimony and evidence on record entered judgment in favour of the 1st respondent allowing the petition. The court found that the 1st respondent had locus standi to file the suit as it had exhibited a certificate of incorporation for Safaricom Staff Pension Scheme Registered Trustees, confirming that in 2016 Lr 337/974 was registered in its favour, the 1st respondent was aggrieved by the actions of the appellant in construction of the sewer line; and further that in a matter where the issue of public interest was raised it was enough for the 1st respondent to show sufficient interest, which had been demonstrated as to how the sewer line being constructed ought to be undertaken.
18. The trial court held that the 1st respondent had a right to raise environmental concerns alleging infringement of its constitutional right to a clean and healthy environment where approval was granted to the appellant to proceed with the works without due regard to the consequences on the environment.
19. The learned Judge further held that the appellant did not deny that the embankment of the sewer line along Quarry Road was to be over 1 metre above the existing road while along Old Mombasa Road the sewer line cuts across the main access to the 1st respondent's project at a height of above 1 meter above the access road level; that the approval was by the 2nd - 4th respondents and the appellant had an Environmental Impact Assessment(EIA) report, which did not address the issue of accessibility by the 1st respondent and the interested parties to their property nor the impact of raising the sewer line by 1 meter, taking into consideration that sewer lines are usually underground.
20. The court also found that the EIA report stated that the locals were informed and a questionnaire was annexed showing that (five) 5 people were interviewed and they had no objection to the works. The court further noted that the (five) 5 people interviewed were not aware that the sewer line was to be raised or that people owned houses along Quarry Road and Old Mombasa Road; and no one interviewed the 1st respondent and the interested parties considering the fact that there was a likelihood that the construction would affect access of the adjoining parcels of land; thus the parties had the legitimate expectation that the roads would remain accessible or at least to be consulted, so before the EIA report was completed, it was imperative that the parties be consulted, that the project be advertised in the local papers calling for objections which did not happen.
21. The court also found that the 2nd respondent did not critically look at the design of the sewer line before giving its approval, was there any evidence that the 2nd respondent gave approval to the appellant to raise Quarry Road to cater for flood levels and to be able to feed directly to the elevated Mombasa Road; neither the 3rd nor 4th respondents considered the negative effects the works would have on the neighbouring plots before giving approval.
22. The court further held that before the 2nd - 4th respondents gave approval there was no public participation as confirmed by the 2nd - 4th respondents' affidavits, and the affected parties ought to have been consulted as it is now a constitutional requirement for public participation.
23. For these reasons the court found that the 2nd - 4th respondents un-procedurally approved the construction of the sewer line to the detriment of the 1st and the interested parties without hearing them, and consequently, allowed the petition.
24. The appellant, aggrieved by the decision of the trial court filed its memorandum of appeal challenging the judgment on 29 grounds of appeal and prayed that the appeal be allowed and the petition be dismissed. Despite raising the 29 grounds of appeal, the appellant, in its submissions, narrowed the issues to (three) 3 thematic areas, namely: whether the trial court's conclusion was in line with



- the evidence on record; what is the standard applicable for public participation; and principles for awarding costs in public interest litigation matters.
25. On the first issue, it is the appellant's submission that in building a sub-trunk sewer line and based on the proposed design, the appellant applied for the requisite approvals from the 2nd - 4th respondents. The appellant submits that the issue before the court then was the manner of construction, which was a technical question and that it was important for the court to consider the decision-making process against the actual execution of the works before reaching the conclusion that the 1st respondent's rights were infringed. The appellant submits that the Quarry Road and Old Mombasa Road where the sewer passes is a way leave and as such the issue before the court was whether the utilization of public land affected the private property rights of the 1st respondent and interested parties; that the court disregarded this aspect, placing undue emphasis on the time taken between the application for and issuance of approval to the appellant. The appellant faults the trial court's conclusion that the process was not properly conducted based on the short time it took the authorities to grant their approvals was off; that the trial court relied on extraneous matters in considering the exercise of administrative action by the 4th respondent, basing its finding on the fact that the 4th respondent had not responded to a traffic impact study that it received in 2015; that for a specialized authority such as in this case, and in the case of construction where time is of the essence, the time taken to consider an application for works is irrelevant and does not affect the authenticity and accuracy of the approval.
 26. The appellant further submits that despite the trial court's observation that the 1st respondent was able to access its property using either Quarry Road or Old Mombasa Road and the only issue it had was mere convenience and aesthetics, which had nothing to do with violation of its rights, the trial court failed to test the allegation that the sewer line completely blocked the 1st respondent's access to its property; and that the 2nd - 4th respondents had considered all the relevant factors requisite for the approvals they granted.
 27. With regard to the standard applicable for public participation, the appellant argues that there is nothing to support the trial court's finding that the public participation conducted was not adequate, that the trial court did not enunciate the requirements of public participation needed to guide the court to determine the standard of proof in this matter, and that there was nothing to show that the appellant failed to meet the said threshold. The appellant in arguing this point relies on the case of *Legal Advice Center v County Government of Mombasa & 4 Others* [2018] eKLR which cited *Doctors for Life International v Speaker of the National Assembly & Others*, a South African case which took the position that the measure and degree of public participation that is reasonable will depend in any given case on a number of factors, including the nature and importance of legislation, the intensity of the impact on the public.
 28. The appellant thus argues that together with the respondents, they took into consideration all reasonable factors touching on the proposed sewer line; that the court should not be used to defeat social justice and economic development by people who use public participation as a tool to derive commercial advantage; and that the court erred in quashing the 2nd - 4th respondents' approval as they undertook their administrative functions as required by the law.
 29. On the principles for awarding costs in public interest litigation matters, the appellant submits that the appellant was unjustly condemned to pay costs of the petition, it being public interest litigation, and the appellant having acted with authority from the relevant authorities and within the law. That the award of cost was punitive and against the principles pronounced by the Supreme Court in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 others* [2014] eKLR. The appellants therefore pray for the appeal to be allowed.



30. The 1st respondent opposes the appeal, and submits that the appellant has failed to demonstrate errors of fact or law, that would justify this Court interfering with the contested decision.
31. The 2nd and 3rd respondents did not file any submissions. In opposing the appeal the 4th respondent submits that no reasonable degree of precision was set out in the petition, hence it did not meet the threshold set out in the case of *Anarita Karimi Njeru v Republic* (citation); no evidence was led to demonstrate that the approval was illegal or unconstitutional; there is no provision in law that gives it the mandate to consider accessibility of individual persons properties when giving approvals under section 49, as its mandate is limited to managing, developing, rehabilitating and maintaining national roads, and considering how the sewer designs were likely to interfere with the Highway.
32. Further, that there was no basis in law upon which its mandate extended to considering private designs affecting other private persons in accessing their properties, nor did the 1st respondent point out which procedures were violated to warrant the order issued against it. The 4th respondent argues that implementation of the disputed sewer line is not within its mandate, nor is it a public policy decision to be subjected to public participation; that the issue of public participation does not arise as it relates to approvals submitted to it by a private party; and public participation would only arise in relation to a decision being implemented by KENHA.
33. On the issue of right to fair lawful administrative action the 4th respondent submits that no private person can claim interest on a road reserve; the issue of fair administrative action was not pleaded; the appellant did not satisfy the threshold set out in the *Fair Administrative Actions Act*; and it is not under any obligation go out looking for parties that would be affected by such approval, as its decision to give approval is pegged on the parties present before it. It urges for dismissal of the appeal.
34. The Interested Party submits that the trial court weighed the rights and duties of parties to reach a just finding, which this Court should not interfere with.

Case Analysis

35. This being a first appeal our mandate as set out in Rule 31 of the *Court of Appeal Rules*, is to re-evaluate the evidence on the record in order to come to our own independent conclusion. This duty has been reiterated in *Abok James Odera t/a A.J. Oders & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013]eKLR. The main issues in this appeal in our view revolve around accessibility and the effect of the construction of the impugned sewer line to the affected parties; whether proper approvals were given and whether there was sufficient public participation. The 1st respondent in the appeal argues that it is entitled under Article 40 of the *constitution* to acquire, use and occupy property and that the said right is denied by the illegal and procedurally flawed actions of the public bodies concerned.
36. On the first issue, the trial court held the view that because the approvals were obtained within a few days, then it meant that KENHA and KURA did not take the time to critically look at the sewer design, its impact on the land owners and neighborhood thus rendering the parties' properties inaccessible. Certainly, what stood out was the exceptional speed at which the approvals were granted for instance an application made to KURA on 10th October, 2016 was approved on 12th October, 2016 and another request made by a letter dated 24th October, 2016; received approval on 30th November, 2016. In fact some of the approvals were granted to the appellant after they had commenced works on the sewer line.
37. However, the question we pose is this - was there a prescribed period within which the approving bodies ought to take studying the designs? It appears to us, and we concur with the appellant, that the learned Judge failed to take into consideration that the approving bodies were specialized authorities



with expertise in technical matters, and the time taken to consider an application was irrelevant, and would not necessarily affect the authenticity and accuracy of the approval. The trial court held that the approval was detrimental to the 1st respondent whose previous applications for approval had never been acted upon. It is apparent that the learned Judge considered the exercise of administrative matter by the 4th respondent, (which had no bearing to the issues before the court, namely whether; the proper procedure was followed in giving the approvals). We are therefore satisfied that the trial court erred in determining the level of compliance based on the time taken to give approvals.

38. Although the Deed Plan showed that access to the affected parties' properties was possible either by using Quarry Road on the western side, or Mombasa Road on the southern side, the trial court pointed out that the sewer line would cut across the main access to the 1st respondent's project. Some of the impact relating to access as noted by the 1st respondent was; restricted physical access to the project, the increased gradient which would lead to flooding of the Crystal Rivers Mall Project, challenges to road drainage, this particular road being prone to flooding. The approval to raise Quarry Road to cater for the flood levels and to feed directly to the elevated Mombasa Road is supported by the approval from the Water Resources Management Authority dated 19th October, 2016 and signed by Hellen Sewe which set a condition that the three (3) meter height of the flood plain be maintained to safeguard the sewer line from floods. It was thus erroneous for the trial court to make a finding that there was no approval to raise the Quarry Road. The learned Judge however acknowledged that the appellant's design had proposed U-turns to access the 1st respondent's land, but this did not sit well with the latter who maintained that such access would affect the smooth flow of traffic to its project.
39. We note that in the further affidavit sworn by Eng. Solomon Kitema, the complaint regards restricted access rather than complete blockage, and the aesthetics, describing the sewer line as an 'eye-sore', thus lending credit to the submissions that the complaint is more about inconvenience rather than denial of access. This is also confirmed by the affidavit of Richard Gitahi, a secretary to the 1st respondent, dated 17th March, 2017; in reference to what he terms as key finding in the EIA report, namely that;

“ it is not that there was no access in the first place- it is that the existing access may have to be adjusted/ designed to take into account the construction of the intended dual carriageway...”
40. It is apparent to us that the alleged infringement of the right to access their property was blown out of proportion, and the court ignored the alternative access in the appellant's design, leading to the trial court making an erroneous finding that there had been violation of the affected parties' constitutional rights.
41. The principle of public participation is a requirement in the development of processes, plans and policies for the management of the environment and Article 69 (1) d, f and g of the *Constitution* sets out the obligations towards securing the environment. Indeed, Section 3(5) of the Environmental Management and Co- ordination Act, places a duty on the National Environmental Management Agency (NEMA) to ensure that there is sufficient and credible public participation before issuing licenses. Lack of public participation is fatal and any action done without public participation where it is required invalidates the said actions and is null and void as has been held in *Doctors for Life International v The Speaker of the National Assembly and Others* (CCT12/05 [2006] ZACC 11;2006 (12) BCLR 1399 (CC);2006 (6) SA 41 (CC).
42. It cannot be gainsaid that participation of the people is now a cardinal national value and principle of governance under Article 10 of the *Constitution*. Decisions of all levels of our superior courts have affirmed the centrality of the principle of participation of the people in our national life. Article 10 of the *Constitution* has entrenched participation of the people as a national value and principle of



governance binding on all state organs, State officers, public officers and all persons whenever they discharge their public duties. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others*, [2014] eKLR, the Supreme Court observed that:

“threats to both political stability and sustainable development are nipped in the bud by public participation.”

43. Public participation has been variously described by our courts as “a major pillar, and bedrock of our democracy and good governance”, a “key guiding pillar of governance in the post-2010 constitutional order” a mechanism for making “the State, its organs and institutions accountable, thus making the country more progressive and stable”, and “the cornerstone of sustainable development.” (See *British American Tobacco Kenya v Cabinet Secretary, Ministry of Health & others*, CA No 112 of 2016, *British American Tobacco Kenya v Cabinet Secretary, Ministry of Health & others* [2019] eKLR, *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others*, (*supra*), In the Matter of the National Land Commission [2015] eKLR, and Attorney General & 3 Others v David Ndii & Others, SC.Pet. No 12 of 2021).

44. The rationale for participation of the people was stated eloquently in *Doctors for Life International v Speaker of the National Assembly and others* [2006] ZACC 11, a decision that has been cited with approvable by our Courts, including the SC.

“The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”

45. To underscore the importance of participation of the people as a constitutional edict, the Supreme Court set out elaborate guiding principle for public participation in *British American Tobacco Kenya v Cabinet Secretary, Ministry of Health & others* [2019] eKLR, which we think it is important to reproduce verbatim:

“From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.



- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
 - a) clarity of the subject matter for the public to understand;
 - b) structures and processes (medium of engagement) of participation that are clear and simple;
 - c) opportunity for balanced influence from the public in general;
 - d) commitment to the process;
 - e) inclusive and effective representation;
 - f) integrity and transparency of the process;
 - g) capacity to engage on the part of the public, including that the public must be first sensitised on the subject matter.



46. Bearing the above guidelines in mind, the evidence on record in this appeal shows that the “public participation” for the Environmental Impact Assessment for a major project that was going to affect several property owners and general members of the public was limited to interviewing only five people, namely Isaac Mutuku of Athi River Fourth Nurseries, Catherine Koki of Marino Church, Ruth Mwikali of Athi River Youth, Joseph Mwendwa of Kenani and one Everlne Mutha. For reasons that are not apparent to us, the property owners and people who were more directly affected by the project were omitted. It would thus look, with due respect, that there was a deliberate effort to engage only people and institutions that were on the face of it peripherally affected by the project. The learned Judge also noted that the 2nd and 3rd respondents readily admitted in their affidavits that they granted the appellants approvals to put up the sewer line without consulting the 1st respondent, the interested parties and other stakeholders.
47. Taking into account the centrality of participation of the people in a democratic polity and as a constitutional edict as elucidated above, we cannot escape the conclusion that there was no meaningful public participation in this case. The 2nd, 3rd and 4th respondents, in particular as public authorities could not shirk their constitutional duty to ensure meaningful and good faith participation of the people. What we see in this appeal is not genuine and honest effort to satisfy a constitutional principle, but a cosmetic public relations exercise, a bare stratagem for no other purpose but to give the impression of compliance with constitutional dictates. For a project of the magnitude involved in this appeal, we agree with the trial court that it ought to have been advertised in the dailies or through other accessible public medium, calling for comments, views and/or objections and carried out public education on the project, which was never done. That is the bare minimum required by the guidelines prescribed by the Supreme Court.
48. For the foregoing reasons, we are satisfied that there was no meaningful public participation in this case.

Issue of costs awarded.

49. It is trite law that the court has the discretion as to whether costs are payable by one party to another, the amount of costs, and when they are to be paid. This discretion must be exercised judicially and in accordance with reason and justice. The Supreme Court in *Jasbir Sing Rai & Other v Tarlochan Rai & others* [2014] eKLR observed;
- “...in the classic common law style, the courts have to proceed on a case by case basis, to identify good reasons for such departure. An examination of evolving practices on this question shows that as an example, matters in the domain of public interest litigation tend to be exempted from an award of costs...”
50. The rationale for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain. In the Environment & Land Court the 1st respondent stated that it had filed the petition on its own behalf and in the public interest, which fact was noted in Judgment.
51. This Court notes that the question to be answered is whether or not this is a public interest litigation matter. Black’s Law Dictionary defines Public Interest Litigation as a legal action initiated in a court of law for the enforcement of public interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.



52. The Court of Appeal in *Supermarine Handling Services Ltd v Kenya Revenue Authority* Civil Appeal No 85 of 2006 observed;

“costs of any action or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order... Thus where a trial court has exercised its discretion an appellate court must not interfere unless the discretion has been exercised unjudicial or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied the order is wrong...”

53. The trial court in its final orders had condemned the appellant to pay the 1st respondent’s costs, despite the same court noting that this was a public interest litigation. In light of the Supreme Court holding in the *Rai Case*, which holding binds this court, this court has no option but to find and hold that this being a public interest litigation, each party should bear their own costs.

54. Accordingly, as the appellant has succeeded in two of the issues but failed on the question of public participation, this appeal is dismissed with the order that each party bears its own costs in this Court and in the trial court. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

