Kopoa Developers Limited v Endesk Properties Limited & another (Environment and Land Appeal E002 of 2024) [2024] KEELC 3963 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3963 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E002 OF 2024

OA ANGOTE, J

MAY 16, 2024

BETWEEN

KOPOA DEVELOPERS LIMITED ..... APPELLANT

AND

ENDESK PROPERTIES LIMITED ..... 1ST RESPONDENT

DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... 2ND RESPONDENT

(Being an appeal from the judgement of the National Environment Tribunal at Nairobi delivered on 25{{^th}} January 2024 in National Environment Tribunal No. 12 of 2023)

JUDGMENT

1. By way of a Memorandum of Appeal dated 31st January 2024, the Appellant has appealed against the decision of the National Environment Tribunal dated 25th January 2024 and has sought to set it aside on the grounds that:

    a. The tribunal erred in varying Environment Impact Assessment License No. NEMA/EIA/PSL/23934 to cap the proposed development at 12 floors from the ground when this had not been prayed for.

    b. The tribunal erred in varying Environment Impact Assessment License No. NEMA/EIA/PSL/23934 to cap the proposed development at 12 floors from the ground when there was no evidence tendered on how the number of floors approved in the licence were detrimental to the environment.

    c. The Tribunal erred in ordering the appellant to demolish any construction above the 12th floor from the ground floor while the appellant had obtained

approvals from the 1st Defendant, Nairobi City County and all relevant authorities to put up 13 floors above the ground floor.

d. The Tribunal erred in holding that the appellant's proposed development contravened zoning regulations without specifying the regulations that were contravened.

e. The Tribunal erred in holding that the appellant's proposed development does not meet principles of sustainable development.

f. The Tribunal erred in holding that the proposed development as designed does not amount to sustainable use of land, as this was not pleaded and no evidence was tendered in support thereof.

g. The Tribunal erred in holding that the proposed development will contribute to negative pressure on social amenities including inter alia the sewer system, water supply and access to road when no evidence had been tendered in this regard.

h. The Tribunal erred in holding that the proposed development will contribute to negative pressure on social amenities when it had determined that there had been adequate public participation.

i. The Tribunal erred in holding that the appellant did not strictly adhere to relevant statutory provisions in conducting public participation.

j. That the Tribunal acted without jurisdiction when it directed the 1st Respondent with the assistance of police officers under the supervision of the OCS Kilimani to demolish any construction above the 12th floor, which was not pleaded.

2. In addition to the setting aside of the Tribunal's Judgement, the Appellant has sought to be awarded costs of the appeal and in the Tribunal.

3. The 1st Respondent filed a Memorandum of Cross-Appeal dated 21st February 2024, in which it has sought that the Tribunal's judgement of 25th January 2024 be varied to allow for the cancellation and revocation of the Environment Impact Assessment licence no. NEMA/EIA/PSL/23934 issued by the 2nd Respondent to the Appellant on 13th February 2023, on the grounds that:

a. The Tribunal erred in failing to cancel and revoke the Environment Impact Assessment licence no. NEMA/EIA/PSL/23934 issued by the 2nd Respondent on 13th February 2023 to the Appellant.

b. The Tribunal erred in failing to find that the EIA license issued to the Appellant is self-contradictory in the sense that it allows for the construction of a thirteen story in words and also (2 Basements, ground plus 18 floors) in brackets.

c. The Tribunal erred in failing to find that the EIA license issued by the 2nd Respondent conflicts with the Nairobi Metropolitan Services Notification of Development Permission, as the Approval only allows for thirteen suspended floors yet the license allows for both a thirteen story and an eighteen-storey floor at the same time.

d. The Tribunal erred in finding that there was adequate public participation before the issuance of the impugned EIA license. This is as it also found that the Appellant was guilty of non-compliance with parts of the mandatory regulations before issuance of a license.

4. The 1st Respondent additionally sought that the costs of this Appeal and the Tribunal be shouldered by the Appellant. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions

5. Counsel for the Appellant submitted that the orders of the Tribunal to vary the EIA License to limit the floors to 12 and the basements to two rather than three, and to demolish any construction above the 12th floor from the ground floor, were not prayed for by the Appellant before the Tribunal. Rather, it was submitted, the issue before the Tribunal was whether a case had been made on whether or not to revoke the EIA License.

6. According to Counsel, none of the parties were afforded an opportunity to submit to the Tribunal on the issue of variation of the number of the floors and that the order by the Tribunal to cap the proposed development at 12 floors and 2 basements is prejudicial and amounts to condemning the appellant unheard.

7. Counsel relied on the case of Mutiso vs Mutiso [1984] eKLR, Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR and Prime Salt Works Ltd vs Kenya Industrial Plastics Ltd [2001] E.A. 528.

8. Without prejudice, it was submitted, the Tribunal has not provided any basis for making the orders capping the proposed development at 12 floors and that in accordance with Section 58 of EMCA, in 2022, the Appellant instructed an environmental impact assessment expert to conduct an Environment Impact Assessment Study.

9. It was submitted by the Appellant's counsel that a report of the study was submitted to the 2nd Respondent in accordance with the rules; that the 2nd Respondent issued the Appellant with an EIA license to construct a thirteen (13) storey building on 13th February 2023, in accordance with Section 63 of EMCA and Regulation 24 and that the Appellant complied with the legal and regulatory requirements in obtaining the EIA License issued for the construction of thirteen floors.

10. Counsel relied on the case of Father Joseph Obanyi and Another vs Peter A. Mugoya & Another [2021] eKLR where the court held that the scope of an environmental impact assessment is extensive and far reaching.

11. Counsel for the Appellant submitted that the Tribunal misapplied the law and the arguments by the 1st Respondent's manager, Benson Namutali, who lacked training in survey work or land economics and relied on unspecified third-party information and that there was no basis for the Tribunal to vary the terms of the license.

12. It was submitted that at the date of delivery of the Judgement on 25th January 2024, the Appellant had already built two sections of the proposed development with four floors and 13 floors, and that demolition of the floors and basement floors would be impossible and would alter the structural integrity of the proposed development.

13. Counsel stated that the Tribunal found that there was substantial compliance with the relevant legal framework on public participation but added that the appellant did not strictly adhere to the relevant statutory provisions.

14. It was submitted that there was adequate public participation in accordance with Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2019, and that the 1st Respondent has not shown what prejudice, if any, it suffered by the failure to strictly comply with the legal requirement.

15. The Appellant's counsel relied on the following cases which set out the threshold of public participation: Legal Advice Centre & 2 others vs County Government of Mombasa & 4 others [2018] eKLR; Republic vs County Government of Kiambu ex parte Robert Gakuru & Another [2016] eKLR; National Association for the Financial Inclusion of the Informal Sector vs Minister for Finance & Another [2012] eKLR, and Consumer Federation of Kenya (COFEK) vs Attorney General & Others Nairobi Petition No. 11 of 2012.

16. Additionally, Counsel submitted that the Tribunal erred in holding that the Appellant's proposed development contravened zoning regulations, as this was not raised in the notice of appeal nor in the grounds of appeal filed; that the issues of physical planning are beyond the Tribunal's mandate and that the *Physical and Land Use Planning Act* 2019 provides the most appropriate forum to examine whether the Appellant was in breach of zoning regulations, and provides mechanisms to address disputes under the Act.

17. Counsel relied on the decision of the Tribunal in Tim Busienel & 2 Others vs Director General, National Environmental Management Authority & Another [2007] eKLR, cited with approval in Jane Ngonyo Muhia vs Director General, National Environmental Management Authority & Another [2017] eKLR.

18. As to the Tribunals finding following a site visit that the proposed development did not conform with the principles of sustainable development, Counsel pointed out that there was no report prepared by the Tribunal on its findings to form the basis of its conclusions and that the Tribunal did not set out the adverse environmental impact the construction of the proposed development to 13 floors will have and how the development would contribute to the negative effect of social facilities, including how the Tribunal determined that the amenities were overstretched.

19. Counsel submitted that no other expert testified during the hearing and the Tribunal was ill equipped to determine whether the proposed development was sustainable or not. Counsel relied on the Court of Appeal's decision in West Kenya Sugar Co. Ltd vs Kenya Sugar Board and Another [2014] eKLR.

20. Counsel also relied on the case of Mufrank Builders Limited vs Kiriti Women Transport and Housing Co-operative Society [2015] eKLR where the court held that a court's determination should contain a statement of the case, the points of determination, the decision and the reasons for that decision.

21. It was submitted by the Appellant's counsel that the 2nd Respondent was satisfied with the EIA report given and issued the EIA license to the Appellant in accordance with the law. It was submitted that in the EIA study report, the Appellant proposed an environmental management and monitoring plan to manage the environmental impacts associated with the life cycle of the project and that there was no basis for the argument that the sustainability of the project was not considered prior to the issuance of the license.

22. Counsel relied on the determination of the Supreme Court and the Court of Appeal in Belize in Peninsula Citizens for Sustainable Development Limited vs Department of the Environment & Placencia Marina Limited, which held that the fact that an environmental assessment does not cover

every topic does not necessarily invalidate it or require a finding that it does not substantially comply with the law.

23. The Appellant's Counsel also relied on a similar decision by the Supreme Court of South Africa in MEC for Environmental Affairs and Development Planning vs Clairson's CC (408/2012) [2013] ZASC 82 (31 May 2013).

The 1st Respondent's Submissions

24. Counsel for the 1st Respondent submitted that the Appellant has manipulated the wording of the subject matter license, and that the license contradicts itself; that while the license indicates that it is for a thirteen storey building, it is worded to mean a total number of eighteen floors, that is the thirteen floors, three basements, ground and the suspended floors and that the license does not mention three basements or the suspended floors.

25. Counsel drew the court's attention to the Appellant's failure to attach the said EIA license in the Record of Appeal filed on 31st January 2021; that the Appellant is already in breach of the existing EIA, because while the license provides for two basements, the Appellant has constructed three basements and that they are currently moving to the 15th floor.

26. Counsel submitted that the Nairobi Metropolitan Services Notification of Development Permission conflicts with the EIA License and that while the EIA license provides for construction of a thirteen story (two basements, ground plus 13 floors residential block), the NMS Notification of Approval of Development Permission provides for a residential development with 13 suspended floors and three basement parkings. Counsel submitted that it is illegal for the Appellant to operate with conflicting and questionable documents.

27. Counsel submitted that the 1st Respondent raised complaints and concerns through their response to the questionnaire issued to it, including the removal of trees and vegetation, increased surface run-off and strain on the already existing inadequate infrastructure, and that the Appellant did not hold any public participation and consultative meetings prior to EIA study, and if they were held, they were not publicized.

28. Counsel relied on the case of Communist Party of Kenya vs Nairobi Metropolitan Services & 3 Others; National Environment Management Authority & Another (Interested Parties) [2022] eKLR; Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy and 17 others [2015] eKLR and Mohamed Ali Baadi and Others vs Attorney General & 11 Others [2018] eKLR.

29. It was Counsel's submission that the Appellant's development is not in line with principles of sustainable development as it has not observed the regulation on plot density to estimated plot ratio, and that the high density of the number of apartments and parking lots cannot be allowed within a specific size of land.

30. It was submitted by the 1st Respondent that the project will severely and irredeemably breach the stability of the ground and environment within and around the site, and will alter the nature and character of the neighbourhood to the 1st Respondent's detriment.

31. It was Counsel's submission that as provided under Section 26(1) of EMCA, the Tribunal is not bound by strict rules of evidence and is clothed with the power to conduct a site visit under Rule 22(6) of the NET Procedure Rules, 2003.

32. Counsel relied on the case of Ibrahim Musa Mohamed vs Amina Hassan Suleiman & 6 Others [2018] eKLR. He also relied on the case of John Muthui & 19 others vs County Government of Kitui

& 7 Others [2020] eKLR on the elements of sustainable development. Counsel submitted that the Appellant's license should be cancelled.

The 2nd Respondent's Submissions

33. Counsel for the 2nd Respondent submitted that the Authority (NEMA) was satisfied upon review of the study report, that adequate public participation had been done for the project which is a High Risk Project, as provided under Environmental (Impact Assessment and Audit) Regulations 2003 as amended in 2016 and 2019.

34. This, according to counsel, is based on the evidence of questionnaires, public meetings, responses from the publications in the Kenya Gazette, radio station advertisements and publications in two newspapers circulating in the area of the project. It was submitted that the 1st Respondent's advocate participated in the public engagements and meetings (Appellant's Record of Appeal pg 43-49).

35. Counsel denied that the 1st Respondent was not given sufficient opportunity to air its views during the public hearing meetings because it is not practical to give every person an opportunity to verbally air their views and that the 1st Respondent could have given their views through questionnaires, email and or memoranda in response to the newsprint and radio advertisements.

36. Counsel for the 2nd Respondent relied on the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi Government & 3 Others [2013] eKLR where it was held that the forms of facilitating an appropriate public participation are infinite, and that what matters is that a reasonable opportunity is offered to members of the public to know about the issue and to have adequate say.

37. As to whether the Appellant's proposed development is in line with principles of sustainable development, Counsel submitted that the project was not out of character with the surrounding developments which are commercial and residential high rise buildings.

38. Counsel further submitted that the Tribunal did not point out evidence placed before it on how the project would contribute to negative pressure on the overstretched social amenities such as the sewer systems, water supply and access to road and that there was no expert witness called to testify on the same.

39. Counsel submitted that it conducted its licensing procedures in compliance with all statutory requirements and that the court should uphold the license granted, the same having been properly issued.

Analysis and Determination

40. The Appellant has filed this appeal against the decision of the National Environment Tribunal delivered on 25th January 2024, in National Environment Tribunal Case No. 12 of 2023.

41. In the Appeal before the Tribunal, the 1st Respondent challenged the issuance of Environment Impact Assessment License No. NEMA/EIA/PSL/23934 by NEMA, the 2nd Respondent, and sought that the license be revoked. The Tribunal issued a stop order for any construction on the suit property, L.R. No. 209/23934 Riverside Gardens Off Riverside Drive in Nairobi County, and for demolition of any floors above the 12th floor.

42. The 1st Respondent challenged the issuance of the EIA license on the grounds that it was issued in breach of zoning regulations of Nairobi County; that the development's height and density breaches the zoning regulations of the area and that there was inadequate public participation prior to the issuance of the license.

43. Further, it was the 1st Respondent's case at the Tribunal, that the project will contribute to negative pressure on the already saturated water and sewerage system, roads, cause air pollution and threaten the foundation of the existing single dwelling units; and that the mitigation measures proposed by the Appellant were unsatisfactory.

44. The 1st Respondent presented the witness statement and oral testimony of Benson Namutali in support of its case, and also filed submissions dated 2nd November 2023.

45. The Appeal was opposed by the Appellant, who presented the testimony of Eric Moses Omondi and written submissions dated 2nd November 2023. The Appellant contended that it was lawfully accorded approvals in respect of the height and densities of the development by the Nairobi Metropolitan Services dated 6th September 2022 and the National Construction Authority dated 23rd November 2022.

46. It is the Appellant's case that the 1st Respondent failed to provide particulars of the alleged breach of the right to a clean and healthy environment; that adequate public participation was undertaken; that the water, sewerage and road infrastructure are not static, and that there are policies that can address the same either on the part of the developer or the government.

47. In its Judgement dated 25th January 2024, the Tribunal entered judgement and issued the following orders:

    a. The 2nd Respondent (1st Respondent herein) is hereby directed to cap the proposed development at 12 floors from the ground. The Environmental Impact Assessment License No. NEMA/EIA/PSL/23934 issued by the 1st Respondent on the 13th day of February 2023 to the 2nd Respondent is varied accordingly.

    b. The 2nd Respondent (1st Respondent herein) is ordered to demolish any construction above the 12th floor from the ground floor in the event that the construction has exceeded the stated number of floors from the ground.

    c. The 1st Respondent (the 2nd Respondent herein) to supervise compliance with order (b) above with the assistance of Police Officers attached to the 1st Respondent (2nd Respondent herein) and the OCPD Kilimani area.

    d. Each party to bear their own costs.

48. The Appellant herein has challenged the above determination of the Tribunal on the grounds that it granted prayers that had not been pleaded, specifically that it ordered that the floors be capped at 12 from the ground floor.

49. The Appellant has further argued that the Tribunal erroneously held that the proposed development will contribute to negative pressure on social amenities when no evidence had been tendered in this regard; that it erred in finding that the development did not meet the principles of sustainable development; that it erred in finding that the development was contrary to the zoning regulations and that it further erred in finding that there was no strict compliance with the law on public participation.

50. The 1st Respondent has filed a cross-appeal and sought for the orders that the EIA license be cancelled and revoked on the grounds that the license was self-contradictory on the number of floors it permitted to be constructed; that the EIA License ran in conflict with the Nairobi Metropolitan Services

Notification of Development Permission and that the public participation conducted prior to issuance of the license was inadequate.

51. The issues for determination by this court are therefore as follows:

    a. Whether the Tribunal erred in capping the development to 12 floors, which had not been pleaded.

    b. Whether the development meets the principles of sustainable development.

    c. Whether there was adequate public participation.

    d. Whether the EIA license is self-contradictory and conflicts with the Nairobi Metropolitan Services Notification of Development Permission.

52. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated by the Court of Appeal as follows:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

53. This was similarly held in the case of China Zhongxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR, where the court further set out the standard of review for a first appellate court thus:

> " From these cases, the appropriate standard of review to be established can be stated in three complementary principles:
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> i. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
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> ii. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
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> iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

54. The Appellant herein has asserted that the Tribunal erred in granting the prayer for capping the floors at twelve, which had not been sought by the 1st Respondent in its appeal before the Tribunal.

55. The right to a fair hearing is in the cornerstone of a just judicial system. This right has been interpreted to include the principle that parties are bound by their pleadings. This ensures that in the course of trial, opposing parties are clear as to the disputed issues which they need the court or the tribunal to address. Indeed, courts and tribunals are bound by the parties' pleadings.

56. The Court of Appeal in Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others [2014] eKLR quoted with approval the decision of the Malawi Supreme

Court of Appeal in Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, in which the learned judges quoted an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal problems, at P174 whereof the author states as follows:

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

57. In advancing this argument, the court in Daniel Otieno Migore versus South Nyanza Sugar Co. Ltd [2018] eKLR, while citing the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR, stated that:

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."

58. An exception to the principle of parties being bound by their pleadings is where all the parties have addressed the unpleaded issue. In the case of Odd Jobs vs Mubea (1970) E.A 476, the then Court of Appeal of East Africa held that a Court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties.

59. The Court of Appeal also commented on the issue of the exception to the general rule on parties being bound by their pleading in the case of Ann Wairimu Wanjohi vs James Wambiru Mukabi [2021] eKLR as follows:

> " (33) We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties. In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia

(supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings."

60. In this appeal, there is no dispute that the 1st Respondent in their appeal before the Tribunal, did not seek the relief of varying the EIA license. However, under Section 129 (3)(a) of the Environment Management and Coordination Act (EMCA), it accords the Tribunal the discretion to confirm, set aside or vary the order or decision of NEMA in question.

61. In any case, from the record, the Appellant and 1st Respondent had the opportunity to address the matter of varying the license to provide for twelve floors rather than fifteen floors. The record shows that the suggestion to cap the floors at twelve was first mentioned in the 1st Respondent's response to the questionnaire of the EIA study.

62. In the response, which was filed by the 1st Respondent's advocate, Mr. Nelson Ndalila, the 1st Respondent indicated that the Appellant ought to reduce the number of floors from 15 storeys to 12 storeys to conform to the plot-density ratio of the zone.

63. This recommendation was mentioned in the witness statement sworn by Benson Namutali on 20th March 2023, wherein he reiterated the recommendation to cap the development at 12 floors, which was communicated to the Appellant.

64. In his testimony before the Tribunal, Mr. Namutali, during cross-examination by Mr. Kagiri for the Appellant, emphasised that the construction should indeed continue but should not go beyond twelve floors.

65. The Appellant addressed the issue of capping the floors to twelve in its Grounds of Opposition to the Appeal dated 10th May 2023. The Appellant averred that the 2nd Respondent's position that it would not be opposed to the development if it is to be limited to twelve floors, implied that all necessary and statutory processes were followed.

66. The Appellant's witness, Eric Moses Omondi, in his statement dated 7th June 2023 further stated that the 1st Respondent was only opposed to the construction of the development beyond the twelfth floor, and that it was not genuinely opposed to the development on grounds that the licence was wrongfully issued or that the same was faulty.

67. To this extent, the Tribunal was not in error in issuing orders to cap the proposed development to twelve floors, the parties having canvassed the issue before the Tribunal.

68. The Appellant has found fault with the Tribunal's determination that the suit property does not meet the principles of sustainable development and that it breached the zoning regulations. In the impugned judgement, the tribunal stated that the impugned development did not meet the principles of sustainable development.

69. It was the finding of the Tribunal that the proposed high number of apartments is bound to have a negative effect on the environment surrounding the project site and would create negative pressure on the already overstretched social amenities, and therefore does not amount to sustainable use of the land.

70. The 1st Respondent's case in this respect was supported by the evidence and testimony of one witness, Benson Namutali, the 1st Respondent's manager. The witness, who stated that he had no expertise or

training on matters of survey and land economics, testified that the proposed development had a plot ratio that exceeded that of the neighbouring plots and the zonal regulations.

71. In cross-examination, he stated that he came up with the plot ratio by measuring the plot size and the number of apartments sitting on it, and further, that this was information that he had obtained from a third party.

72. While rapid, irrational and unplanned development has become a reality in urban Kenya, this does not divest a litigant of the duty to offset the burden of proof that the law requires of him. In this case, the 1st Respondent did not present any expert evidence or any report from a duty bearer institution to substantiate its concerns on the impact that the number of apartments would have on the suit property, or on the social amenities. In the absence of such evidence or expert report, the 1st Respondent's case was left unsubstantiated.

73. The Tribunal relied on anecdotal testimony of a lay person on matters planning and or land surveying, who did not prove, on a balance of probability, the negative impacts that the number of apartments would have on the suit property and on the social amenities.

74. Indeed, this court has perused the Environmental Impact Assessment Report that was submitted to the 2nd Respondent in respect to the project on the suit property. The report has detailed the environmental impacts that the project will have and the mitigation measures that will be put in place to address the said impacts.

75. The environmental impacts identified in the report include air pollution; excessive noise and vibrations generation; waste generation; health and safety risks; increased water demand; increased energy demand and traffic and obstruction along the road. The mitigation measures for each of this impacts has been provided for in the report.

76. The report also identified the impact the proposed project might have on the existing services and infrastructure including increased volume of vehicles; increased loading to sewers, water supply, power supply; interference with telecoms, amongst others. All these concerns were addressed in the EIA Report.

77. The Tribunal did not interrogate, as it ought to have done, this report before holding that the proposed high number of apartments is bound to have a negative effect on the environment surrounding the project site and would create negative pressure on the already overstretched social amenities, and therefore does not amount to sustainable use of the land. Indeed, no evidence was called by the 1st Respondent to controvert the recommendations in the EAI Report that was approved by the 2nd Respondent.

78. Consequently, it is the finding of the court that the Tribunal erred in arriving at the finding that the development on the suit property did not meet the principles of sustainable development, as the same was not ably established.

79. With respect to whether the development breached zoning regulations, as correctly argued by the Appellant, it was not within the jurisdiction of the Tribunal to make such a determination, moreso considering that the same was not a term of the impugned EIA License. The issue of zoning and development permissions fall within the province of the County Government, and by extension the County Physical and Land Use Liaison Committee.

80. Any dispute that the 1st Respondent had with respect to the development permission ought to have been resolved through the mechanism set out in the *Physical and Land Use Planning Act*, which establishes the County Physical and Land Use Planning Liaison Committee.

81. In any event, no evidence was placed before the Tribunal to show the zoning regulations that were applicable, if at all, in the area under inquiry, and how the Appellant had breached the same. Indeed, this court has not been referred to any regulations on zoning which the Appellant breached while undertaking development on the suit property.

82. The Tribunal in its judgement found that while the Appellant did not fully comply with the law on public participation, adequate public participation was undertaken. Both the Appellant and the 2nd Respondent have challenged this determination. The Appellant contends that it complied with the law on the issue of public participation while the 1st Respondent argues that the public participation that was undertaken was inadequate.

83. The three-judge bench in the case of Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, stated that public participation in the area of environmental governance, at a minimum, entails the following elements or principles:

> "First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter... Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation...
>
> Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)...
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> In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.
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> Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance...A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
>
> Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme...
>
> Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

84. In considering the case above, the court in Okiya Omtata Okoiti vs Commissioner General, Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR observed that there are at least two aspects of the duty to facilitate public involvement.

85. The first is the duty to provide meaningful opportunities for public participation in the process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.

86. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations prescribes the nature of public participation that ought to be undertaken while conducting an environmental impact assessment study. It provides as follows:

> "(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.

87. The 2nd Respondent has adduced copies of the minutes of two public participation meetings held on 23rd and 24th September 2022; public notices sent out by the Appellant on 6th October 2022; copies of the Standard Newspaper advertising excerpt dated 18th October 2022; copy of the Kenya Gazette Notice dated 4th November 2022 and copies of KBC Airtime order for0 the English and Kiswahili announcements.

88. In the analysis of this evidence, the Tribunal noted that contrary to Regulation 17(2)(b), the Appellant held two public meetings instead of three and that contrary to Regulation 17(2)(a)(i), the Appellant

did not post posters at strategic public places in the vicinity of the proposed project informing the affected parties of the proposed project.

89. Further, the Tribunal noted that contrary to Regulation 17(d), the Appellant did not prove the appointment of a qualified coordinator to receive and record oral and written comments and any translations received during the public meetings, to be transmitted to NEMA and that contrary to Regulation 20, NEMA did not establish that it submitted a copy of the EIA study to the relevant lead agencies for their comments.

90. The Tribunal all the same concluded that there was adequate public participation despite non-compliance with some of the regulations on public participation. This court agrees with the finding of the Tribunal. This is especially considering that the 1st Respondent had an opportunity to raise its concerns by responding to the questionnaire by the EIA Consultant, Stalin Environment.

91. In its response, the 1st Respondent raised issues with the removal of trees and vegetation, increased surface-run-off and the strain on the existing inadequate infrastructure that will be occasioned by the proposed project. Receipt of these comments was confirmed through email on 19th October 2022 and through the testimony of the 1st Respondent's manager, in his witness statement dated 20th March 2023. The Appellant annexed the 1st Respondent's response and the email forwarding the response, dated 14th October 2022.

92. The 1st Respondent has therefore not established that it was prejudiced by the failure of the Appellant to strictly comply with the regulations. The Tribunal's finding that there was adequate public participation is therefore upheld.

93. While the 1st Respondent has in its cross-appeal challenged the Tribunal's determination on the grounds that the EIA license is self-contradictory and that the same is in conflict with the development permission, this court notes that these are fresh issues that were not argued before the trial court.

94. An appellate court has no jurisdiction to entertain a ground of appeal that was never raised in the lower courts. This principle was upheld by the Supreme Court in the case of Gitonga vs Republic [2020] KESC 61 (KLR). This court therefore cannot consider this issue on its merits.

95. In conclusion, this court has found that the 1st Respondent failed to discharge its burden of proof before the Tribunal. The Tribunal therefore erred in finding that the 1st Respondent had established its case on the required standards. The Appeal therefore succeeds and the 1st Respondent's Cross-Appeal is dismissed.

96. For those reasons, the court makes the following final orders:

    a. The National Environment Tribunal's Judgement dated 25th January 2024 is hereby set aside.

    b. The 1st Respondent's Cross-Appeal is dismissed.

    c. Each party to bear its own costs.

Dated, signed and delivered virtually in Nairobi this 16th day of May, 2024.

****

O. A. Angote

Judge

<u>In the presence of;</u>

Mr. Makori for Appellant

Ms Ndelila for 1st Respondent

No appearance for 2nd Respondent

Court Assistant - Tracy

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