



REPUBLIC OF KENYA



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Ola Energy Kenya Limited v Nyiro & 5 others (Environment and Land Appeal E33 of 2023) [2024] KEELC 5609 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5609 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E33 OF 2023**

NA MATHEKA, J

JULY 24, 2024

BETWEEN

OLA ENERGY KENYA LIMITED APPELLANT

AND

RAPHAEL MWANDOE NYIRO 1ST RESPONDENT

ATHMAN MZEE HAJI 2ND RESPONDENT

OSBORN AMULIODO SENA 3RD RESPONDENT

MWIMA KOMORO MORRIS 4TH RESPONDENT

BRIAN OTIENO OMONDI 5TH RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 6TH
RESPONDENT**

*(Appeal from the Judgment of the Honourable Tribunal, in Mombasa
N.E.T. Appeal No. 19 of 2021, delivered on 19th October 2022,)*

JUDGMENT

1. This is an appeal from the Judgment of the Honourable Tribunal, in Mombasa NET Appeal No. 19 of 2021, delivered on 19th October 2022, founded on the following grounds.
 1. That the learned Chairperson and Members of the Tribunal erred in law and in fact in holding that the National Environmental Management Authority (NEMA) was at fault in granting the Environmental Impact Assessment License to the Appellant without subjecting the proposed project to a fresh ESIA Study Report having in mind the totality of the material and evidence presented before the Tribunal.



2. That the learned Chairperson and the Tribunal Members erred in law and in fact in tiling to take into account as a relevant factor that in granting EIA license, the National Environment Management Authority established a Multi-Agency Team for the review and consideration of the recommendations made in the Environmental Social Impact Assessment (ESIA) Report, which approach was over and above the statutory obligations required to be met before the grant of such Licenses as a consequence of which the Tribunal made the erroneous decision of canceling the said License.
 3. That the learned Chairperson and Members of the Tribunal erred in law and in fact in introducing irrelevant factors in their evaluation of the considerations made by the Authority in granting the ETA License for implementing the project on the proposed location and in holding that such factors ought to have been considered in the ESTA Report thus leading to erroneous findings and eventually upholding the Appeal and cancelling the License.
 4. That the learned Chairperson and Members of the Tribunal erred in law in the manner in which they made appraisal to the totality of the evidence and material availed to NEMA prior to the grant of the impugned License while considering the ESIA Report prepared by the Appellant's Consultant and in arriving at its finding/holding that the recommendation in the ESIA Report was not arrived at "organically" and objectively.
 5. That the learned Chairperson and Members of the Tribunal erred in law in the manner in which they made appraisal to the substantive content of the ESIA Report and the evidence presented before them in arriving at the holding/finding that the ESIA Study Report did not adequately frame and address the environmental and human health safety risks of the proposed project as that particular holding/finding was not supported by any evidence.
 6. That the learned Chairperson and Members of the Tribunal Members erred in fact and in law in failing to adequately consider the evidence, submissions and precedents presented by the Appellant in support of the safety consideration on the basis of which a specific design technology was provided for the proposed project. Thus, the Tribunal erred by failing to either distinguish the persuasive and authoritative precedents or in any other way discount the probative value of the evidence offered by the Appellant in arriving at the decision the License.
2. The Appellant pray for orders;
- a. That this appeal against the Judgment of the learned Chairperson and the Members of the National Environmental Tribunal, in Mombasa NETA No 19 of 2021, delivered on 19th October, 2022 be varied and/or set aside.
 - b. That the decision of the National Environmental Management Authority made on 31st May, 2021 granting an ELA License to the Appellant be confirmed.
 - c. That the ETA License issued on 31st May 2021 to the Appellant be re-instated.
 - d. That the Appellant be awarded costs of this Appeals.
 - e. That this Honourable Court grants any other or further relief that it deems fit or just.
3. Having considered the pleadings and the rival submissions and the case precedents cited the court has found the following issues for determination:
- i. Whether the tribunal properly applied the evidence and law in revoking the Environmental Impact Assessment Report dated 31st May 2021?



- ii. What appropriate orders can this court issue?
4. Section 58 of the *Environmental Management and Co-ordination Act* provides the procedure for application of the Environmental Impact Assessment license as follows;
- (1). Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
 - (2). The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.
 - (3). The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.
 - (4). The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.
 - (5). Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee.
 - (6). The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorized to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.
 - (7). Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.
 - (8). The Director-General shall respond to the applications for environmental impact assessment license within three months.
 - (9). Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.”



5. In *Douglas Onyancha Omboga & 3 others vs Joseph Karanja Wamugi & 4 others* (2019) eKLR the court stated the following;

The Projects requiring an Environmental Impact Assessment (EIA) Project Report are categorized as low and medium risk projects while those that require an Environmental Impact Assessment (EIA) Study Report are categorized as “High Risk Projects.”

6. This therefore means that in this case involving expansion of the Liquefied Petroleum Gas Terminal of the appellant is by all definitions of a highrisk project. I also refer to the holding of the court in *Douglas Onyancha Omboga & 3 others vs Joseph Karanja Wamugi & 4 others* (2019) eKLR where it states;

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

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

7. The applicable method for the study when granting EIA licenses for LPG terminals will be governed by the Environment Impact Assessment Study under part III of the *Environmental (Impact Assessment and Audit) Regulations*. One of the requirements is public participation provided under regulation 17 which is one of the issues correctly framed by the tribunal. Counsel for the appellant argued that the appellant ‘dedicated itself to extensive public participation to identify the concerns of the residents in the surrounding project’ and referred to pages 262, 263 and 264 of the record of appeal Vol 1. In the tribunal’s judgment the tribunal stated that the respondents witnesses were informed that public participation was being conducted but were only allowed to tick boxes without an option of giving their views and in the same breadth the appellants vehemently averred that they considered views from village elders of settlements in close proximity to the proposed project, officers of the National Government (Including Assistant Chief and County Commissioner), public barazas were held together as well as engagement with groups of potentially affected persons and finally a gazette notice (page 395 of the record of appeal Vol 1) inviting the public to give their oral and written comments on their ESIA study report.
8. The pictures in the Environmental Impact and Assessment Report compiled by Mr. Sanjay Gandhi on 15th December 2020 has evidence of pictures alleged to have been taken during the public barazas and minutes were annexed (pages 417-428 of the record of appeal Vol 1). Article 69 (1) (d) of the *Constitution* provides that the State shall encourage public participation in the management, protection and conservation of the environment. Section 18 of the *Environment and Land Court Act* Cap provides that in exercise of its jurisdiction, this court shall be guided by the principles of sustainable development, including the principle of public participation in the development of



policies, plans and processes for management of the environment and land. The tribunal cited Principle 10 of the *Rio Declaration on Environment and Development* (1992) which states as follows:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process...”

9. The conflicting information between the appellant and the respondents on how the public barazas were being conducted leaves the court with no choice but to rely on the proceedings where this court notes that there is no testimony of box ticking as held by the tribunal. Further, the respondent’s only witness was not present in the barazas and could therefore not have been aware and any information he had on them would simply be hearsay. It is the court’s opinion that public participation was properly held.
10. The other considerations when conducting the EIA study report are provided in regulation 16 and this is where the said ESIA report comes in. The tribunal held that the report did not adequately address the environmental and human health and safety risks. In their argument counsel for the appellant relied on section 63 of the *Environment Management and Coordination Act* CAP 387 which provides that the 6th respondent ought to issue the EIA license to facilitate development and not discourage it. They argued that the appellant relied on the criteria from the British Health and Safety Executive Document HSE 2001 which assess the tolerability of the risk of harm to the workforce and the public in the event of a fire or explosion disaster and the outcome was that the risk is both tolerable and as low as reasonably practical. Further, counsel argued that the report had concluded that mitigation measures would make events such as fires, gas leaks and explosions improbable and in the event they occur they would cause minimal, short term damage to persons and the environment over a radius of upto one kilometer. However, counsel for the respondents raised concerns on the inaccessibility of response and rescue teams in accessing the adjacent residential areas. Counsel also raised the issues of noise pollution and other risks.
11. I rely on *National Environment Management Authority & Another v Gerick Kenya Limited* (2016) eKLR, where Mutungi J, held as follows;

In this matter we have a situation where we have competing interest. On the one hand we have the public interest where the Community needs protection against potential harm to the environment through contamination or pollution, and on the other hand, we have the defendant’s private commercial interest where the defendant wishes to develop the site for commercial gain. Where in a case such as the instant one, the public interest as the public interest is pitied against private interest, the public interest overrides the private interest is for the good of the wider public as opposed to the narrow private interest. The public interest no doubt outweighs the private individual interest.”
12. Furthermore, I find that the appellant has not addressed the letter by HAKI Africa dated 19th July 2021 where it has raised several issues such as the distance of the proposed expansion to the neighbouring community. The court appreciates the appellants initiative in engaging a multi-agency team before the grant of the said EIA License which is an option under section 61 of the *Environment Management and Coordination Act* and regulation 5 of the *Environmental (Impact Assessment and Audit) Regulations* but the parties to be affected will not be the multi-agency team but the people of the ground and it is apparent that they were not satisfied with the ESIA report. Simply put the respondents are not satisfied by the report. It is probable that the appellant found it easier to prefer



an appeal than lodging a fresh ESIA report but the court cannot be aloof to the happenings of the fire explosion of February this year where an LPG plant at Embakasi plant exploded killing innocent Kenyans. Although the said LPG plant had allegedly been illegally constructed and different from the circumstances herein I prefer to use the precautionary principle and disallow the appeal.

13. It is the court's humble opinion that there may be no problem in expanding the LPG marine terminal but let the respondents herein and NGO or community groups be involved in the decision making process. Let the public participations be properly captured or even video recorded to avoid a situation like this again. I also refer to the precedent used by the tribunal i.e *Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition No. 305 of 2012 as well as engaging the Kenya Civil Society Platform on Oil and Gas.
14. In the upshot the appeal is dismissed. The general rule is that costs follow the event unless there is a good reason to depart from the general rule. See section 27 of the *Civil Procedure Act* CAP 21 hence the costs of the appeal be borne by the appellants.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

