



Shah & 3 others v National Environmental Management Authority & another (Environment & Planning Appeal E013 of 2024) [2024] KEELC 13411 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & PLANNING APPEAL E013 OF 2024
AA OMOLLO, J
NOVEMBER 21, 2024**

BETWEEN

**SULBHA BHUPENDRAKUMAR SHAH 1ST APPELLANT
SHAH KAUSHIK LALJI KARAMSHI 2ND APPELLANT
RASHMIKANT TEJPAR SHAH 3RD APPELLANT
SHAH ANJANA RASHMIKANT 4TH APPELLANT**

AND

**THE NATIONAL ENVIRONMENTAL MANAGEMENT
AUTHORITY RESPONDENT**

AND

SHALIN SURESH THAKRAR DEFENDANT

*(Being an appeal from the whole of the judgement of the NET
delivered on the 19th February, 2024 in NET Appeal No 29 of 2022)*

JUDGMENT

1. This appeal is against the determination by the National Environment Tribunal (NET) delivered on 19th February, 2024 in NET APPEAL No. 29 of 2022. Vide a memorandum of appeal dated 13th June, 2024, the Appellants raised the following grounds of appeal;
 1. That the Honourable National Environment Tribunal erred in fact and in law in holding that there was sufficient public participation before issuance of EIA License No. NEMA/EIA/[PSL/20842](#) to the 2nd Respondent.



2. That the Honourable National Environment Tribunal erred in fact and in law by holding that the Respondents satisfactorily addressed the concerns raised by the Appellants regarding the dangers that the proposed project pose to their properties.
 3. That on the whole, the National Environment Tribunal failed to apply its mind properly to the facts before it and failed to hold the scales of justice evenly in the circumstances.
2. The Appellants urged that the appeal be allowed and the following reliefs be granted;
- a. The appeal herein be allowed and the whole judgment of the National Environment Tribunal on the 19th February 2024 be set aside.
 - b. The decision of the 1st Respondent and its decision makers to grant the 2nd Respondent with an EIA License be set aside and the License issued to the 2nd Respondent herein on the 2nd August 2022 be revoked.
 - c. The Honourable Court do make any further and/or other orders to give further directions as it may deem fit in the circumstances.
 - d. The Appellant be awarded the costs of this Appeal.
3. In its judgment, the NET cited several laws that discusses the principle of public participation. In regard to this case they gave their analysis in paragraph 17 – 20 which I quote as follows;
- “ 17. The 2nd Respondent’s bundle of documents contains questionnaires, 12 in number, filled out by persons the 2nd Respondent indicates are the immediate neighbours of the proponent’s project.
 18. Questionnaires filled out by the Appellants are annexed to the 2nd Respondent’s bundle of documents. The Appellants do not dispute filing out the questionnaires. Their case is that their objections were not considered. Could this be the case? We hold a different view.
 19. The concerns raised in the questionnaires revolve around solid waste, water and drainage, dust, noise and vibration, health and safety and the risk of houses collapsing. These concerns are addressed on pages 8 and 9 of the Project Report submitted by the 2nd Respondent to the 1st Respondent. The Appellants have not demonstrated the inadequacy of the mitigation measures as proposed by the 2nd Respondents.
 20. It is the Appellants’ submissions that the persons who offered support for the project are not the immediate neighbours of the project site. Absent evidence supporting this assertion, the Tribunal lacks the tools to ascertain this averment.”
4. This is a first appeal and in accordance with the law, I am allowed to review the evidence tendered before the NET and determine whether their decision was made in error. I am guided by the Court of Appeal in the case of *Selle & Another versus Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 which held thus;
- “...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..."

5. A first appellate Court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for re-hearing both on questions of facts and the law (see Santosh Hazari vs. Purushotam Tiwori – deceased (2001) 3 SCC 179).

The Case before the Tribunal:

6. The Appellant had filed an appeal dated 26th August, 2022 listing the following grounds;
 - a. The 1st Respondent erred in law by issuing a license to the 2nd Respondent to construct multiple dwelling units on Plot LR No. 1870/1/519 without taking into consideration the Appellants' objection to the change of user of the aforesaid property from single dwelling unit to multiple dwelling units which objection was served upon the 1st Respondent on the 26th April, 2022.
 - b. The 1st Respondent erred in law by issuing a license to the 2nd Respondent to construct multiple dwelling units on Plot LR No. 1870/1/519 without taking into consideration the adverse physical danger that the said construction may have on the Appellants' properties which are adjacent to the 2nd Respondent's aforesaid property.
 - c. The 1st Respondent erred in law by approving a project that poses the following physical dangers to the Appellants' properties:-
 - i. The 2nd Respondent's property shares a wall with the 3rd and 4th Appellant's property and as such they are apprehensive that demolition of the subject property so as to effect the change of user shall interfere with stability of their property and/or even lead to his house collapsing.
 - ii. The Appellants' properties are single dwelling units with no columns and beams and no supporting structures and as such they are apprehensive that changing the user of the 2nd Respondent's property to multiple dwelling units may cause the building to strain under the weight causing it to collapse hence endangering the Appellants' units which are adjacent to it.
 - iii. The Appellants' properties are located in a gated community with a total of two flats and four Maisonettes in which all the houses are single dwelling residential houses and as such the Appellants are apprehensive that the change of user of the subject property which is adjacent to their Properties may interfere with their privacy and quiet enjoyment of their properties.
 - iv. The entrance to the Maisonettes owned by the Appellants is only one which is also the entrance to the 2nd Respondent's Property. With the change of user of the 2nd Respondent's Property to multiple dwelling units the same will be compromised leading to insecurity, risk to children as the same also acts as their playing area and higher vehicular traffic.
 - v. Given the size of the 2nd Respondent's property, in order to construct multiple dwelling units on the same, there will need to be extensive evacuation thereof. Given the close proximity with the other Maisonettes belonging to the Appellants and the fact that the



2nd Respondent's property shares a wall with one of the Maisonettes, the change of user will lead to a disaster with a higher possibility of loss of property and/or even death.

- vi. The 2nd Respondent bought the Property knowing very well the user then and he did in fact represented to the Vendor then that he intended to have I Property used by his son as a residence and nothing more.
 - vii. The 2nd Respondent does have apartments next to the subject Property to within a different entry which he uses as serviced Apartments/hotel. Should he therefore be allowed to proceed with the development, he will definite convert it into a hotel to the detriment of the Appellants herein.
 - d. From the foregoing it is clear that the license issued to the 2nd Respondent by the 1st Respondent herein shall lead to a development that is our of character and not keeping with the surrounding of the area where the Property is located.
 - e. The license issued to the 2nd Respondent herein by the 1st Respondent is in contravention of the Appellants' enjoyment of their constitutional rights to a clean and healthy environment and as such the same should be revoked.
 - f. The Appellants have no objection to the development to single dwelling units on the 2nd Respondent's property a project that would enhance both the character of the surrounding on the value of existing neighbouring investments.
7. The 1st Respondent filed 27 grounds in reply to the grounds of Appeal inter alia;
1. That on the 1st July, 2022, the Authority received from the 2nd Respondent, ten (10) copies of the Environment Impact Assessment Project Report No. NEMA/NRB/PR/5/1/17385(33695), prepared by Wilfred M. Murigi, individual EIA/EA Expert, NEMA registration No. 497, for the proposed construction of a five (5) level residential apartments building comprising twelve (12) one-bedroom serviced apartments, four (4) two-bedroom serviced apartments units, swimming pool and other associated facilities, on Plot L.R No. 1870/1/519, located off General Mathenge Drive, Westlands area, Westlands Sub-County, Nairobi County (Annexed herewith and marked "NEMA 1" is a copy of the acknowledgement letter dated 1st July, 2022).
 2. That the Authority proceeded to contact the relevant lead agencies/committees in accordance with EMCA, requesting for their views/comments which would assist the Authority to make an informed decision in reviewing the submitted EIA project report (Annexed herewith and marked "NEMA 2" is the letter to the lead agencies dated 4th July, 2022).
 3. That in response to paragraph 1 of the Appellants' Grounds of dissatisfaction as contained in the Notice of Appeal, the 1st Respondent denies the allegation that the 1st Respondent did not take into account the Appellants' objection to the Change of User of the proposed project, served upon it on 26th April 2022. The 1st Respondent avers that it is the prerogative of the Nairobi County Government to issue, suspend or cancel the Change of User permit and the letter of 26th April, 2022 addressed to the Director General, Nairobi Metropolitan Services was merely for information purposes on the part of the 1st Respondent, in case the County Government decided to cancel the issued Change of User Permit. The Appellants have not produced any evidence to show that the Change of User permit from the County Government was ever cancelled or withdrawn. It is thus our position that calling upon the 1st Respondent to cancel its EIA license or decline to issue the same on the basis of the said letter would be akin



to asking NEMA to usurp the powers of the County Government in deciding the validity of the Change of User permits

4. In addition, the Appellant's allegation that the proposed multiple dwelling units will lead to insecurity is akin to insinuating that the anticipated tenants of the 1st Respondent will be persons with questionable moral character, a serious allegation that the Appellants have not produced any supporting evidence.
5. In further response to the allegations of physical danger, the 1st Respondent avers that the EIA license has sufficient conditions that put into consideration the alleged fears on the property of the Appellants.
8. Together with their grounds, the 1st Respondent filed documentary evidence which included a site visit project report, the NEMA license issued to the 2nd Respondent with the attendant conditions, and report of the EIA expert on the objections raised dated 26th July, 2022.
9. The 2nd Respondent also filed grounds opposing the appeal before the NET. He pleaded thus;
 1. The plots owned by the Appellants and the 2nd Respondent is accessed off of General Mathenge road, and boarder the Promenade, which is a 6 story building comprising mixed use development with retail on ground floor and offices on upper floors to the West, and to the East, sharing a boundary with the 2nd Respondent's plot, is the multi-story Progressive Park Hotel, which has its access from Mwanzi road.
 2. The 2nd Respondent avers that the issuance of the EIA License No. NEMA/EIA/[PSI/20842](#) was above board, having taken into consideration the Appellants' view as is demonstrated in their pleadings and the Environmental Impact Assessment Comprehensive Project Report, dated 30th July, 2022, submitted to the 1st Respondent, in compliance with Section 58 of the [Environmental Management and Co-ordination Act](#), 1999.
 3. The Appellants respective concerns regarding the project were taken into consideration by the Respondents as is demonstrated herein. Their concerns are captured in their respective Consultation and Public Participation questionnaires as follows;
 - i. 1st Appellant – In the consultation and Public Participation questionnaire dated 16/6/2022, the 1st Appellant indicates his concerns in the project as being its impact on solid waste, waste water, dust, noise and vibration, health and safety, drainage, and objects to the project on grounds that it will damage their house, but states that the project proponents should “enhance security and consider mitigating where possible to the acceptable minimum levels.
 - ii. 2nd Appellant – in the Consultation and Public Participation questionnaire dated 11/6/2022, the 2nd Appellant indicates his concerns in the project as being its impact on solid waste, waste water, dust, noise and vibration, health and safety, drainage and objects to the project on grounds that it will damage their house, but states that the project proponents should “enhance security, and consider mitigating where possible to the acceptable minimum levels.
10. In arguing that the concerns of the Appellants were addressed the 2nd Respondent pleaded inter alia;
 - i. The EIA Project Report acknowledges increase in solid waste during and after project completion, and has addressed the same at page 9 as follows; during the construction phase,



the contractor shall put in place effective waste disposal systems. Wastes such excavated soil and debris will be recycled or properly disposed of by backfilling or dumping in approved grounds.

- ii. The EIA Project Report states at page 9 that; to cater for storm water drainage, well-designed concrete inverted channel drains shall be provided to harmonize management of the resulting surface water within the site. The drains shall effectively channel storm water into the area drainage systems. Storm water runoff will be greatly reduced through rainwater harvesting from the roof catchments and the drains will be regularly maintained.
 - iii. The EIA Project Report states at page 8 that, the proponent shall ensure soil compaction and watering of loose soils on all unpaved access roads, parking areas and staging areas and construction materials, at the construction sites to minimize air pollution and erosion by the agents of soil erosion ie, Water, animal and wind.
11. Besides the pleadings, parties also filed written witness statements and submissions. For these, I will make references to where relevant in the body of this judgment.

Analysis and Determination:

12. Following my re-evaluation of the appeal, the evidence and the submissions rendered, I frame the following questions for determination:
- a. Whether or not there is a proper appeal filed in this court
 - b. Whether or not there was sufficient public participation within the law.
 - c. What orders ought to issue
13. In his submissions dated 8th August 2024 filed against this appeal, the 2nd Respondent submitted that the Appellant has not filed a memorandum of appeal as is required under order 42 rule 1 of the Civil Procedure Rules, 2010. I perused the record of appeal and found a memorandum of appeal dated 13th June, 2024 and a notice of appeal dated 22nd February, 2024. The appeals to this court from the subordinate courts and respective tribunals ought to be filed within a period of 30 days from the date of delivery of the impugned decision (section 130 of EMCA).
14. The Appellant urged the court not to strike out the notice of appeal citing decisions inter alia, Nancy Wanjiru Ngahu versus Jane Wambui and 2 others (2013) Eklr for the proposition that striking out pleadings is a draconian measure that should be exercised with caution.
15. Appeals to this court is by way of memo of appeal which would then list the grounds of appeal. In this case, the Appellants filed a notice of appeal only within the 30 days period and yet the filing of notice of appeal only lies with appeals to the Court of appeal. The memo of appeal dated 13th June 2024 was filed out of time and without leave. The conclusion I reach is that there is no valid appeal before this court.
16. Despite the finding that there is no valid appeal, I will proceed to consider the appeal on its merit in the event my finding is wrong. The Appellants aver that the NET erred in holding there was sufficient public participation before issuing the EIA license. The Appellant in their submissions before the NET stated that;

“During the hearing and as per the documents filed before the Honourable Tribunal it was evident that the appellants being the immediate neighbours of the proposed site did oppose the project and even wrote to the 1st Respondent a letter dated 26th April, 2022 expressing their discontent. Further in the questionnaires produced by the 2nd Respondent in evidence, the Appellants herein objected to the proposed development and expressed the reasons for



their said objections. Despite the aforesaid objections, the 1st Respondent proceeded to issue the 2nd Respondent with an EIA license while disregarding the views of the appellants as to the risks of the project.”

17. The appellants concluded that despite raising objections, to the project and highlighting their fears on the possible risks, their views were ignored by the Respondents. Therefore, in their opinion there was insufficient public consultation and participation before issuance of the EIA license to the 2nd Respondent. The objectives of public participation are to provide inter alia the opportunity for communication between agencies making the decision and the public. It enables those affected to influence the decision, enhance democratic capacity (interest articulation, communication and cooperation) and in EIA, fulfil an educative function. That it aims at identifying effective, socially acceptable strategies to mitigate impacts and identify opportunities (see scholarly article by A.N. Gucker, et al., Public Participation in E.I.A.: Why, Who and How. www.elsevier.com).
18. Article 10 (2)(a) of *the Constitution* 2010 embraces democracy and public participation as part of the national values. EMCA recognises the right to public participation while undertaking environmental impact assessment and has highlighted the procedure under the Environmental (Impact Assessment & Audit) *Regulations of 2003*. In the case of Mohamed Ali Baadi and others Vs. Attorney General & 11 Others (2018) eKLR it was held that;

“The standard of ascertaining whether there is adequate public participation in environmental matters, in our view, is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation. This means, for example, if you do not comply with the set statutory provisions, then per se there is no adequate public participation. And, the question is not one of substantial compliance with statutory provisions but one of compliance.”
19. From the pleadings and submissions, the Appellants contend that their objections were not addressed. It is my considered view that there is a difference between engaging public participation and the decision maker not giving feedback to the persons likely to be affected by the project. The 1st Respondent partially gave feedback when they replied to the Appellants letter dated 26th April, 2022 which letter was an objection to the grant of change of User licence. The 1st Respondent stated in their letter thus;

“We have been notified and will take note of the information contained in your letter in the instance that the Nairobi County Government Department of Physical Planning requests the Authority’s recommendation on this particular change of user application. Kindly keep the Authority informed on the progress of the same.”
20. Under the Physical Planning and Land Use Act of 2019, the dealings on Change of User application is a preserve of the Physical Planning Department of the respective County Government. Hence the 1st Respondent could not make any determination on the complaint and they requested the Appellants to keep them posted on the outcome on how the Nairobi County Government responded to their complaint. It did not come out from the proceedings before the NET whether or not the change of user license was cancelled.
21. The Appellants confirm filling questionnaires but they asserted that the 2nd Respondent did not hold 3 public meetings with affected parties to explain the project to them. On their part, the 2nd Respondent argued that they did not have to be subjected to the standards of environmental impact assessment study in a project that only requires a comprehensive project report. This averment brings to question



the nature of public participation that was to be undertaken on a project titled “proposed serviced apartments.”

22. In legal notice No. 31 of 30th April, 2019, an amendment was done to the second schedule (of EMCA) and the following are listed as Medium Risk Projects; under paragraph 2(1) Urban Development including:

a. Establishment of multi-dwelling housing developing of not exceeding one hundred units.

23. The 2nd Respondent’s project was described as a 5 – level floors comprising 16 units which means it is falling under the category of medium risk. Section 58(1) of EMCA provides;

“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.” (underline mine for emphasis).

24. Regulation 7 (1) list the contents of a project report. Once the Authority (1st Respondent) receives the project report, it shall share a copy thereof with;

a. The relevant lead agencies

b. The relevant District Environment Committee.

For their written comments within 21 days of receipt of the project report or such other period as the Authority may prescribe.

25. Thus, based on the Regulations and the classification of the impugned project, the 2nd Respondent was not required to hold public meetings as set out in regulation 17(2) and as submitted by the Appellants. Consequently, the decision of the NET was not made in error as the Respondents. The case of Safaricom B.T.S Mast Residents of New Valley & Another Vs. Director General NEMA & Another (2020) eKLR cited is distinguishable for the reason that this was a medium risk project

26. The Appellants argued that their issues were never addressed. In the case of Thuranira & 3 others versus Attorney General and 2 Others; Registrar of Political Parties & 3 Others (Interested Parties) (2022)KEHC, a three judge bench of the High court had this to say;

“22. Components of meaningful public participation included the following:

a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that were 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 had to be first sensitized on the subject matter.”

27. The appeal does not bring out which of the components set out above was not met. The 1st Respondent in its submissions before the Tribunal said the issues were addressed at paragraph 3.1.9 of their submissions. It stated that;

“ 3. 1.9. Honourable Chair, we also submit that seeing that the area in question is now a mixed development zone, and the Nairobi County Government (who were notably never included as a party herein, seeing that they are in charge of issuing and/or approving change of user application) issued the change of user bearing this in mind. In addition, pursuant to the submitted EIA project report, and following a site visit by NEMA County Environmental officers (see the 1st Respondent’s bundle of documents Marked “NEMA 3” which is a copy of the Site Visit Report dated 1st August, 2022), the proposed project was certified as not being out of character with the surrounding as the proponents had also sought and obtained approval by the Nairobi County, City Planning Committee for change of use from single dwelling unit to multi dwelling units (Apartments).”

28. Also their concerns were addressed as pleaded paragraph 12 – 39 in the grounds filed by the 2nd Respondent in opposition to the appeal. One of the documents produced was a report dated 26th July 2022 by Wilfred Murigi who was the EIA Lead expert of the 2nd Respondent addressed to the 1st Respondent. The report opened by stating that some of the Respondents raised objections to the proposed project for various reasons. The report identified areas of contention and the mitigation measures they intended to apply.

29. For instance, on the safety of the boundary walls which is one of the issues raised by the Appellants, the 2nd Respondent stated that they were going to leave a safe distance between the proposed development and the neighbouring building. As per the article by A.N. Glucker, et al (20120 cited above, one of the purpose of public participation is to identify socially acceptable strategies to mitigate impact. The 2nd Respondent provided its share of mitigation measures while I have not read in the proceedings any proposals by the Appellants. I hold that it is not enough to state public participation is not sufficient when no alternatives are offered.

30. Again, the Appellants took issue that the structural engineer’s report was prepared post the issuance of the licence. This is true going by the date of that report. However, there is mention of action from the engineer in the EIA Lead expert and Condition 4.2 of the EIA license required of the proponent to ensure that construction works and the entire project is supervised by registered and practising engineering and project architects. These are mitigation measures which were for the benefit of the Appellants and the surrounding environment.

31. In light of the foregoing analysis, I find that the Appellants were provided with opportunity to present their views and their objections were duly noted and reacted to. Hence the argument that there was no sufficient public participation before the EIA licence was issued is unmerited. The NET came to a right conclusion that the Respondents engagement with the Appellants was within the law. As stated earlier, the appeal was also not properly lodged to this court.



32. For the twin reasons of no proper appeal filed and if is proper, the grounds were found to be without merit, I dismiss this appeal. Balancing the inconvenience caused to the 2nd Respondent and the right to bring a suit to protect the environmental rights I do award half costs to the 2nd Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST NOVEMBER, 2024

A. OMOLLO

JUDGE

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