

Summary

Save Lamu & 5 Others -versus- National Environmental Management Authority & Another National Environment Tribunal Appeal No. NET 196 of 2016



Photo: Natural Justice



Introduction

On 26 June, 2019, the National Environment Tribunal (NET) delivered an important judgment revoking an Environmental Impact Assessment (EIA) Licence issued to Amu Power Company Limited for the development of Kenya's first coal fired power plant - a 1050MW plant to be located on the sea shore of Kwasasi area in Lamu County.

The long awaited decision follows an appeal filed on 7 November, 2016 by Save Lamu, a community based organisation and five Lamu residents (the Appellants) representing the interests of a vibrant and diverse community that has called Lamu Island home for centuries.

The judgment vindicates the central place of community voices in decision making processes – particularly those communities that stand to be most impacted by development choices. It equally highlights key aspects of effective public participation, underscoring the importance of access to information. It also shed a spotlight on the role of the environmental regulator – the National Environmental Management Authority (NEMA) – in stewarding public participation and ensuring that environmental licences contain adequate conditions to ensure mitigation of environmental impacts.

The judgment comes at a time of global climate crisis – it is therefore welcome that it also addresses the need for adequate consideration of the climate change impacts of development decisions.

Background

Conception of the Lamu Coal Fired Power Plant Project

As part of its economic blueprint for development and industrialisation – Vision 2030 – the Government of Kenya in 2013 initiated a power generation programme in 2013 to increase the country's total effective capacity by over 5000MW by 2017. To achieve this goal, the Government tendered for the construction of a 1,050MW coal fired power plant to be constructed on the sea shore of Kwasasi in Lamu County.

The Second Respondent in the case - Amu Power Company Limited^[1] won the bid to build own and operate the proposed coal plant. It then engaged a local company – Kurrent Technologies Limited – to undertake a scoping study and prepare an Environmental Project Report; a prerequisite for the grant of an environmental licence.

Scoping and Preparation of an Environmental Project Report

Between 9 January and 25 June 2015, Kurrent Technologies held a number of consultative meetings with different groups about the proposed coal plant. These were predominantly in Lamu with a few meetings held in Nairobi. In September, 2015, Kurrent Technologies submitted its Environmental Project Report to NEMA for approval. The Appellants subsequently submitted their comments on the Project Report to NEMA in November, 2015.

A June, 2015 change in law required projects which fell within the Second Schedule of the Environmental Management and Coordination Act, 1999 (EMCA) to undergo a full Environmental and Social Impact Assessment (ESIA) Study as a prerequisite for issuance of an environmental licence. The proposed coal plant fell within the Second Schedule of the Act.

Preparation of Terms of Reference

In its letter dated 26 October, 2015, NEMA directed Amu Power to prepare Terms of Reference (TORs) for the preparation of an ESIA Study Report. NEMA specifically required Amu Power to include the following as part of the ESIA Study Report: - the project rationale and justification (with specific reference to the project site);

- detailed engineering and related drawings;
- a comprehensive analysis of project alternatives; and
- detailed and comprehensive stakeholder consultation.

The TORs were approved by NEMA in January 2016.

[1] A special purpose vehicle comprised of: Gulf Energy (a Kenyan energy firm), Centum Limited (a Kenyan energy firm) and PowerChina.

Preparation of the ESIA Study Report

Amu Power submitted its ESIA Study Report to NEMA on 14 July, 2016. NEMA in turn gave a thirty-day notice inviting the public to submit oral and written comments on the report. As required by law, NEMA published the notices in newspapers with nationwide circulation and the Kenya Gazette on various dates between 18 and 29 July, 2016. Radio announcements were also made in official and local languages on Lamu stations - *Radio Salaam and Radio Sifa*.

Preparation of the ESIA Study Report

Subsequent to the notices, Amu Power held five public consultation meetings on the ESIA Study Report in various locations in Lamu County between 8 and 11 August, 2016. Having received oral and written comments from the public, NEMA published a notice for a public hearing scheduled for 26 August, 2016 in the Daily Nation of 19 August, 2019. NEMA also engaged other Lead Agencies at a meeting held on 25 August, 2016. The lead agents at this meeting voiced concerns regarding the location, timing and short timelines given for submission of comments on the ESIA Study Report. They also raised concerns about the insufficient civic education about the proposed coal plant.

The public hearing proceeded on 26 August, 2016 and on 7 September, 2016 NEMA issued EIA Licence No. NEMA/ESIA/PSL/3798 to Amu Power. Taking issue with inadequacies in public participation as required by the law, the inadequacies in both the ESIA Study Report and eventual EIA licence and gravely concerned about the impacts of the coal plant, the Appellants lodged an appeal with the NET.

The Tribunal's Determination

The issues

Although the Appeal was based on eight grounds, the case was decided on the following six issues which were agreed by the parties to the case:

- (a) Whether the grant of the ESIA Licence by NEMA violated the Environmental (Impact Assessment & Audit) Regulations (EIA Regulations) and the Constitution of Kenya;
- (b) Whether the process leading to the preparation of the ESIA Study Report by Amu Power involved **proper and effective public participation**;
- (c) Whether Amu Power conducted a proper **analysis of project alternatives**;
- (d) Whether Amu Power conducted a proper analysis of the **economic viability of the project**;
- (e) Whether the ESIA Study Report prepared by Amu Power contains **adequate mitigation measures**; and
- (f) Whether NEMA in evaluating the mitigation measures and issuing **the ESIA licence** discharged its mandate as required by law.

Public Participation (Issues (a) and (b))

The tribunal cited the State's constitutional obligation to establish systems of environmental impact assessment, audit and monitoring under *Article 69(f) of the Constitution of Kenya* and the implementation of this obligation under *Part VI of EMCA and the EIA Regulations*. With this constitutional objective in mind, the tribunal underscored its role in ensuring strict compliance to the law, noting that it lacks the jurisdiction to waive any of the statutory and regulatory obligations required of both NEMA and project proponents. This strict adherence with the law was particularly important given that the proposed coal plant was the first in Kenya.

What constitutes effective public participation?

Referring to Principle 10 of the Rio Declaration on Environment and Development, 1992 as the foundation of public participation, the tribunal noted the importance of access to information as an enabler of informed citizen participation in decision and policy making processes. It also affirmed the minimum requirements for adequate public participation as set out in the Kenyan Constitutional Court in *Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*:

- (a) The preparation of a public participatory programme suited to the nature of the subject matter by the government;
- (b) Innovation and malleability to account for culture, logistical constraints and the subject matter to ensure that a reasonable opportunity is given to the public to know about the issues and have an adequate say;
- (c) Access to and dissemination of relevant information whatever programme of public participation is fashioned;
- (d) The need for intentional inclusivity and diversity with those to be affected being deliberately sought out and their views and concerns accorded greater weight;

- (e) a duty for government agencies to take those views into account in good faith rather than engagement in “democratic theatre so as to tick the Constitutional box”; and
- (f) The enrichment of the views of technical and public officials by views of those who will be most affected by the decision or policy at hand.

In the context of environmental licensing decisions, effective public participation would also be considered on the basis of EMCA and EIA Regulations and the legal requirements under three key stages preceding the issuance of an EIA licence: formulation of terms of reference (Regulation 11 of the EIA Regulations); preparation of the ESIA study (Regulations 16 and 17); and the post-ESIA study phase (Regulations 18 – 22).

Public participation during the ESIA Study Phase

The Appellants’ case focused on the inadequacy of public participation during the ESIA study phase. In response to this claim Amu Power referred to the consultative meetings during the scoping phase and written correspondence by the Lamu Tourist Association to the NEMA’s Director of Compliance and Enforcement in March 2016 and the Appellants’ letter to Amu Power’s Managing Director, both dated 13 March, 2016.

The tribunal acknowledged these consultative meetings but also accepted evidence that participants were given very limited time to ask questions and inadequate answers with assurances that there would be subsequent meetings to properly explain the project properly and allay the concerns raised by Lamu residents. These follow up meetings were never held. (Paragraph 45).

In rejecting the Respondents’ arguments, the tribunal further pointed to the fact that Regulation 17(2) of the EIA Regulations requires public participation after the approval of the project report. The tribunal also highlighted the inadequacy and danger of relying on these initial consultative meetings which was demonstrable from the inaccuracy of information presented by Amu Power. (Paragraph 47) In any event, in this case, the public were engaged without the benefit of the ESIA Study Report: without, for example, knowledge of the potential ecological and public health impacts alluded to in the ESIA Study Report. (Paragraph 69).

Given that the residents of Lamu had expressed an interest in having their concerns heard and addressed since January, 2015, the tribunal found the failure to hold any meetings from January 2016 to July 2016 and the preparation of the ESIA Study Report without the participation of those most affected to be “contemptuous”. Accepting that Amu Power could not address every demand and suggestion, the tribunal nevertheless held that:

“it is vital that even the most feeble of voices be heard and views considered. It is presumptuous for a proponent, like the 2nd Respondent did in this case, to proceed with the EIA study, identify impacts and then unilaterally provide for mitigation measures in complete disregard of the people of Lamu and their views.”
(Paragraph 50)

For these reasons, the tribunal concluded that public participation had been non-existent at this stage in violation of the law.

Public participation during the Post-ESIA Study Phase

The tribunal noted that the obligation of securing effective publication shifts to NEMA at this stage as set out under Regulations 20 - 22 of the EIA Regulations. (Paragraphs 51, 52, 54 and 57)

While NEMA published a thirty-day notice for the submission of public comments on the ESIA Study Report, it set different start dates for the notice period making it *“prejudicial and unfair to parties who wished to respond to these notices as they could not be sure of the last day for presentation of comments...”* Furthermore, holding the Public hearing on 26 August, 2019 and effectively denying the public the opportunity to submit comments before 29 August, 2016 – the only logical deadline given the last notice published on 29 July, 2016 – was *“procedurally unfair and made the process defective.”*

As regards the public hearing of 26 August, 2019, the tribunal noted that it was held before the deadline for submission of comments had lapsed. Moreover, on the evidence presented by the Appellants, the tribunal concluded that it fell short of the standards contemplated under the EIA Regulations as it devolved into *“a popularity contest, engulfed in an atmosphere of tension”* rather than a *“consultative meeting to explain the nature of the project and its impact as required by the regulation.”* (Paragraph 62)

There was no evidence, the tribunal concluded, that NEMA had made any attempt to conduct the public participatory process as required under the law for this stage of the process. (Paragraphs 63 and 64) This was despite the fact that NEMA owed a duty to properly supervise and ensure compliance with public participatory processes in law. In a cautionary note, the tribunal noted that it would not permit authorities to deal nonchalantly with objections raised to projects. (Paragraph 72) Devoid of real consultation, any ESIA Study Report was at best only of academic value. (Paragraph 73)

Analysis of Project Alternatives (Issue (c))

Regulation 16 (b) of the EIA Regulations require project proponents to analyse alternative project locations while *Regulations 18 (i) and (j)* also require consideration of alternative technologies and for the project proponent to give reasons for preferring the chosen technology. Amu Power should have in its ESIA Study Report therefore considered alternative locations, energy supply options, different technologies (such as sub-critical, supercritical and ultra-critical) and even the option of not proceeding with the project. (Paragraph 80)

Location Alternative

Amu Power through its EIA expert testified that it had no say in the project location since the Kwasasi site was preselected a part of the government’s wider Lamu Port South Sudan-Ethiopia-Transport (LAPSSET) corridor project. Drawing from the High Court decision in *Mohamed Ali Baadi and Others -v- the Honourable Attorney General and 7 Others*, HCCC Petition No. 22 of 2012, the tribunal affirmed the Constitutional Court’s holding that a Strategic Environmental Assessment (SEA) study should have been done on the impacts of the LAPSSET components, including the Lamu Coal Plant. In the tribunal’s view, no meaningful consideration of a location alternative could be undertaken when the basis for the choice of location of LAPSSET components had been called into question by a superior court.

Additionally, the tribunal noted that Amu Power had failed to provide detailed architectural or engineering plans of the coal plant as well as site plans. It found the sketch map provided in evidence inadequate making it impossible for the tribunal to consider the adequacy of certain mitigation measures in the absence of critical information on the distances of component parts of the coal plant from fragile ecosystems.

Amu Power argued that an analysis of alternative sites was not always practicable and relied on an earlier tribunal decision in *Jamii Bora Charitable Trust & Another -v- National Environment Management Authority & Another [2006] eKLR* for this argument. The tribunal however distinguished that case where the proponent had already invested in land for a small scale project to the coal plant case. In the case of a project like the coal plant, the developer was not in control of the site and location and the acquisition of the property remained pending leaving room for relocation depending on alternative site analysis conducted.

The tribunal concluded that only a SEA undertaken prior to the tender for the project would have properly considered location and project alternatives. In the absence of an SEA lead agencies like the Kenya Forest Service were left in difficulty given their objections to the project location.

The alternative energy, technology and 'do nothing' analyses

Although the Appellants made the case for alternative energy sources, the tribunal took the view that these arguments were more suited to arguments about the issuance of a generation licence by the energy regulator.

The tribunal found that the ESIA Study Report adequately addressed the various technology options available. As far as the do nothing option was concerned, the tribunal acknowledged that cancelling the project would remove the social and environmental impacts of the project but concluded that such an approach to development was "too simplistic and unrealistic." (Paragraphs 90 – 92)

Economic Viability of the Project (Issue (d))

Alternative Energy Supply Alternatives

The Parties made arguments on the economic viability of the project and whether this was adequately addressed in the ESIA Study Report. In the tribunal's view however, the economic viability question was a policy matter beyond its jurisdiction. (Paragraphs 93 – 98)

Adequacy of Mitigation Measures (Issue (e))

Atmospheric Emissions/ Air Quality and Ecological Impact Mitigation

In the tribunal's view, the ESIA Study Report covered various mitigation measures to address the ecological and air quality impacts. As no evidence was laid to challenge the air quality mitigation measures, the tribunal deemed them adequate.

Coal Handling and Storage

The tribunal also considered that the ESIA Study was adequate in this regard as it included dust suppression measures, dust-proof enclosures and suction systems and filters had adequately provided for mitigation for coal handling and storage. (Page 109 and 110)

Ash Yard and Ash-handling

While the ESIA Study Report appeared to provide elaborate mitigation measures to deal with the accumulation of ash in the ash yard and ash pit, the tribunal ultimately considered them inadequate.

It was noted that the ESIA Study Report acknowledged that the plant would be located on a flat plain prone to flooding. No details were however given to justify the site location. NEMA's witness also confirmed that the area was prone to tidal flooding and that this was likely to be exacerbated by climate change. NEMA's witness also admitted that a proper analysis of the ash yard had not been done because its design had not been completed by the time the report was submitted to NEMA.

In conclusion, the tribunal held that "the unclear location of the ash yard in relation to the plant and the sea shore gives rise to an inference of the ash pit being located in a highly risky area susceptible to floods." Amu Power argued that commercial uses would be found for the ash. However, the tribunal considered these claims merely speculative and the mitigation measures therefore inadequate. (Paragraphs 118 - 120)

The Coal Conveyor System and 2,000-Acre Limestone Concession Query

The Appellants had pointed out that the ESIA Study Report had omitted information on a 2,000 acre limestone quarry and 15 kilometer coal conveyer belt and coal handling berth. Amu Power admitted to the omission of actual designs for the conveyor system and berth due to uncertainties about the location at which the coal (to be imported) would be received. These, the tribunal found, were important omissions which NEMA failed to ensure were provided. (Paragraphs 122 - 123)

Thermal Effluent Mitigation

The proposed coal plant would employ a once-through cooling system which would draw water from the sea and discharge it back into the sea at a different temperature. The Appellants argued that this temperature increase was likely to be as high as 90C. Amu Power argued that by using an outfall pipe and difusser, the plant would be able to keep ambient water temperature on discharge within the World Bank Group's General EHS Guidelines and EHS Guidelines for Thermal Plants.

Climate Change Mitigation Measures

However, NEMA's witness testified that there would be a likelihood of rapid water temperature rise. He also conceded that warm waters hold less oxygen which would in turn impact marine life and impact fishing activities of Lamu residents.

The Appellants contended that the project would breach Kenya's obligations under the Paris Agreement. Amu Power argued that the Appellants had not shown how exactly it would violate these obligations. Amu Power further argued that it had provided mitigation and adaptation measures in the ESIA Study Report.

Kenya had by 27 May, 2016 enacted a Climate Change Act, 2016. Despite this fact, Amu Power's EIA expert confirmed that the ESIA Study had not accounted for this legislation in the ESIA Study Report. Despite the effects of this omission being unknown, the tribunal still considered the omission significant given the nature of the project. Applying the precautionary principle, the tribunal rejected the proponent's lack of clarity on the climate change implications of certain aspects of the project.

Adequacy of the ESIA Licence (Issue (f))

While NEMA did set conditions in the EIA licence issued, the tribunal noted that these conditions were "in generalized terms and do not appear to make mention of the matters identified by the 2nd Respondent in its mitigation proposals." For this reason, the tribunal could not establish whether NEMA had undertaken a proper evaluation by NEMA when issuing the licence. It was noted by the tribunal that licence conditions ought to be comprehensive and capable of binding project proponents to any commitments spelt out in the ESIA Study Report. For this reason, the tribunal revoked the EIA licence.

When will the Tribunal Interfere with NEMA's discretion

The tribunal observed that it would only interfere with NEMA's decision if the decision was unreasonable or violated the law. It affirmed the Privy Council's observations in *Prineas v Forestry Commission of New South Wales* 1983 49 LGRA on the concept of reasonableness when evaluating environmental impact statements. This requires such statements to be comprehensive, objective and capable alerting both decision makers and the public on effect of proposed activities on the environment and consequences for the community.

Given the lapses in the public participatory processes, the inadequacies of the ESIA Study Report and EIA licence, the tribunal revoked the licence, leaving the Respondent Amu Power with the option of conducting the ESIA Study Report afresh and in accordance with the law or otherwise appealing the tribunal's decision should it still wish to pursue the project.