REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 265 OF 2010

1. MBOLE NZOMO ANTHONY
2. VERONICAH GITAHI …….. …….. PLAINTIFFS
3. JAMES KAHASO
4. COSMAS MBINDYO

-VERSUS-

1. SHREEJI ENTERPRISES LIMITED
2. SHREEJI CHEMICALS LIMITED
3. GIRIDHAR RAO DEFENDANTS
4. MUNICIPAL COUNCIL OF MOMBASA
5. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

RULING

As many as five different applications were filed by different parties, against the background of the plaint dated **3rd August, 2010** and filed on **5th August, 2010**. The first of these was the plaintiffs' Chamber Summons, also dated **3rd August, 2010** and filed on **5th August, 2010**, brought under Orders **XXXIX** (rules 1, 2, 3) and I (rule 8) of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The main prayer of the plaintiffs was that:

"a temporary prohibitory injunction [be issued] against the 4th and 5th defendants … by themselves, their servants and/or agents …… issuing a change of user and/or Environment Impact Licence respectively for Plot No. MN/V/548 to the 1st, 2nd and 3rd defendants by themselves, their proxy companies, servants and/or agents, for use in [the] manufacture of sodium silicate or manufacture of any other chemical

product, or any other user that violates the plaintiffs' right to a clean and healthy environment, pending the hearing and determination of this application and/or suit".

The grounds for this application were set out in detail, and supported by 1st plaintiff's 26-paragraph affidavit of **3rd August, 2010.** The grounds may be set out, for the most material part, as follows:

*(i) the 1st, 2nd and 3rd defendants had in the month of **July, 2010** initiated the construction of a sodium silicate manufacturing plant in a heavily populated residential area of Miritini;*

(ii) sodium silicate is poisonous to humans; and manufacturing it in the middle of the plaintiffs' residential neighbourhood will injure the plaintiffs' health and will violate their right to a clean and health environment through —

· *air pollution by emission of sulphur dioxide;*

· *water pollution by surface run-off, with swift deposits being washed off to water-bodies consumed by humans and animals;*

· *poor food production, as vegetation traps silica dust, causing retarded plant growth;*

· *animal and human poisoning through storage of silica in the bodies caused by consumption of the poisoned vegetation;*

(iii) there have been objections to the establishment of the chemical manufacturing factory by the District Physical Planning Officer; District Public Health Officer; and the Director of Town Planning;

(iv) unless restrained, the defendants will cause irreversible injury to the plaintiffs' bodily health and the environment;

(v) operation by 1st, 2nd and 3rd applicants of a sodium silicate manufacturing plant is unlawful because —

· *sodium silicate manufacturing is heavy industrial user, to be undertaken on land specifically designated for **heavy industry** under the Physical Planning Act;*

· *the suit property is designated for **light industry**, under the Physical Planning Act;*

· *1st, 2nd and 3rd defendants have not obtained any or any valid change-of-user in respect of the suit property;*

· *locating heavy industry at a place approved for light industry without change of user is unlawful and is a criminal offence under s. 30(1) and (2) of the Physical Planning Act;*

· *the 1st, 2nd and 3rd defendants have not obtained an Environmental Impact Licence as required under s. 58 of the Environmental Management and Co-ordination Act;*

· *operating a chemical manufacturing plant is an activity requiring a licence under s. 58 of the Environmental Management and Co-ordination Act;*

· *so locating the manufacturing plant without the required licence is unlawful and an offence under Regulation 45(1) of the Environmental Impact Assessment and Audit Regulations, as read with s. 144 of the Environmental Management and Co-ordination Act;*

· *already, 2nd and 3rd defendants have been charged with the offence of commencing a project*

without approval, contrary to Regulation 45(1) of the Environmental Impact Assessment and Audit Regulations, in ***Criminal Case No. 983 of 2010*** *at the Chief Magistrate's Court at Mombasa;*

(vi) the defendants have violated the plaintiff's right to a clean and healthy environment enshrined in Section 3 of the Environmental Management and co-ordination Act;

(vii) the 4th and 5th defendants are about to issue unlawfully a purported change of user, to provide cover for the heavy industry intended by 1st, 2nd and 3rd defendants, without adhering to the procedures prescribed by the Physical Planning Act and the Environmental Management and Co-ordination Act;

(viii) any such purported change of user will defeat the stated parliamentary intention, and will be an abuse of the statutory process and so, illegal, null and void;

(ix) unless the 1st, 2nd, 3rd, 4th and 5th defendants are restrained by the Court, the plaintiffs and the residents of Miritini are bound to suffer irreparable harm in their health and their environment.

The next set of applications were the three Notices of Motion by 1st, 2nd and 3rd defendants, dated **1st September, 2010** and brought under ss. 1A & 3A of the Civil Procedure Act, and Orders **VI** (Rule 13(1) (b), (c) & (d)) and **XXXIX** (Rule 4) of the Civil Procedure Rules. These applications are substantially similar, their main prayers being —

(i) that the injunctive orders made herein on ***3rd August, 2010*** *be discharged and/or set aside;*

(ii) that, in the alternative, the interim injunction issued herein be varied to impose a term that the plaintiffs do adequately secure the defendants for any damages they may sustain in the event it is found that the ex parte order was wrongly obtained.

The supporting grounds, in brief, are as follows:

(a) the ex parte orders of injunction obtained herein on ***3rd August, 2010*** *were obtained wrongfully and upon a material non-disclosure of facts;*

(b) the Court has no jurisdiction to restrain a statutory body from carrying out its prescribed functions;

(c) the Court has no original jurisdiction under the Environmental Management and Co-ordination Act, and can only exercise its powers as an appellate Court from the decision of the Environment Court;

(d) no material has been placed before this Court to warrant the exercise of a discretion in favour of the plaintiffs by granting ***ex parte*** *injunctive relief unconditionally;*

(e) the 2nd defendant has suffered and continues to suffer irreparable loss and damage occasioned by delays wrought by the plaintiffs wrongfully obtaining ***ex parte*** *restraining orders.*

In the same package of **1st September, 2010** applications are the 1st and 3rd defendants' Notices of Motion, which, similarly, seek the discharge of the interim orders of **3rd August, 2010** but go further to seek the striking out of the suit, as against 1st and 3rd defendants. It is stated, in the grounds, that *"the plaintiffs do not and cannot have any cause of action as against [1st and 3rd defendants] given that [they are] not involved in the construction or implementation of any sodium silicate plant in Mombasa"*; and it is urged that the suit is in each of these cases *"scandalous, frivolous and vexatious and an abuse of the process of [the] Court and ….. likely to embarrass, prejudice or delay the fair trial of the action*". It is contended that the *ex parte* orders of injunction in respect of the two defendants were obtained wrongfully and upon a material non-disclosure of facts.

The fifth application before the Court was the Plaintiff's Notice of Motion of **6th October, 2010**. This

application was expressed to be brought under Articles 35(1) [concerned with right to information], 47 [concerned with responsive administrative action], 165(6) & 7 [concerned with the High Court's supervisory remit over lower Courts], 10(2) (c) [concerned with transparency and good governance], and 73(1) (a) [conveying the idea of the public office as a trust in the name of the people] of the **Constitution of Kenya, 2010**; Order VIII, rule 2 (2) of the Civil Procedure Rules; and s. 51 of the Physical Planning Act, 1996.

The main prayers in this application are set out as follows:

(1) "one **Tubmun Otieno** as the Town Clerk of the 4th defendant ….. [to] supply the applicant with copies of the documents listed hereinbelow, being documents/information required by the applicants for [the] protection of their rights as pleaded in the plaint, in that the said documents established that the purported Development Permission dated **27th July, 2010** allegedly issued by the 4th defendant is invalid for being issued illegally and irregularly and in violation of the Physical Planning Act —

(a) application for change of user/development permission allegedly submitted by 2nd respondent on **14th June, 2010** and the supporting documentation;

(b) application by 2nd respondent for change of user/development permission upon which the deponent published the public notice carried by **The Standard** newspaper of **2nd June, 2010**;

(c) official receipts for each and every payment made by 2nd defendant for each application at each stage;

(d) letters if any, by 4th defendant Municipal Council inviting comments from the statutory …… authorities and in particular, 4th defendant's letters to the District Medical Officer of Health, the Directorate of Public Health, the District Physical Planning Office or any other … authorities;

(e) comments if any received from the aforesaid statutory ….. authorities;

(f) purported Minute No. 15/2010(c)and the entire minutes of the alleged meeting of 4th defendant held on **26th July, 2010";**

(2) "separately [the Court] be pleased to order the said **Tubmun Otieno** to attend Court on such day as the Court may appoint, to be cross-examined on his affidavit sworn on **24th August, 2010** and in particular, the validity of the purported Development Permission … under the Physical Planning Act, 1996 (Act No. 6 of 1996)";

(3) "the Court [do] give such directions as it will deem fit on the validity/admissibility in evidence, or otherwise, of the purported Development Permission issued by 4th defendant to 2nd respondent upon the information/documents as will be supplied by Mr. **Tubmun Otieno**."

The supporting grounds are that Mr. **Tubmun Otieno** has sworn that 4th defendant did issue Development Permission/change-of-user for the suit property to 2nd defendant on **27th July, 2010**; yet the purported Development Permission/Change of User has been **disowned** by (i) the Provincial Director of Public Health and Sanitation Services, Coast – by a letter dated **30th September, 2010**; (ii) the District Physical Planning Officer (by letter dated **24th September, 2010**); (iii) the District Medical Officer of Health (by letter dated **1st October, 2010**).

It is stated that the purported change-of-user being introduced by **Mr. Tubmun Otieno** *"cannot be genuine [as] it purports to be an approval of 2nd defendant's application submitted on **14th June, 2010** yet the same **Tubmun Otieno** had published a notice of proposed Change of User on **2nd June, 2010** over the same property"*. To the proposed change of user, there were documented objections by the statutory authorities with *locus* to make comment on the same: the District Physical Planning Officer; the District

Public Health Officer; the Director of Town Planning — and their objections were received **well before** 4th defendant purported to issue the Development Permission.

The 1st plaintiff has sworn an affidavit of significant length, making depositions on the application and its grounds.

Learned counsel, **Mr. Ndegwa** submitted that the plaintiffs had moved to Court to protect their right to a clean and healthy environment, as provided for in s. 3 of the Environmental Management and Co-ordination Act, and Article 42 of the Constitution of Kenya, 2010; counsel urged that the Court derived its jurisdiction to provide such protection from Art. 70 of the Constitution and from s. 3 (3) of the Environmental Management and Co-ordination Act. Counsel submitted that the 1st, 2nd and 3rd defendants are causing harm to the Miritini environment by setting up a sodium silicate factory: and so both the Municipal Council of Mombasa (4th defendant) and the National Environment Management Authority (5th defendant) should be restrained from licensing the projected activities of the first three defendants. It was urged that the 4th and 5th defendants were acting unlawfully by purporting to issue change-of-user and environmental impact licences to 1st, 2nd and 3rd defendants — contrary to the Physical Planning Act and the Environmental Management and Co-ordination Act. Counsel relied on Article 69(g) of the Constitution, which provides that the State shall *"eliminate processes* and activities that are likely to endanger the environment".

Mr. Ndegwa submitted that his clients' constitutional and statutory rights were threatened by the activities of the defendants: their residential area, Miritini, which is a densely-populated neighbourhood, was intended as the location for the intended sodium silicate factory, and it was not in dispute that certain by-products of that manufacturing process are harmful to human beings, animals and plants.

Counsel urged as evidence of the illegality of the defendant's acts, the fact that 2nd and 3rd defendants have been arraigned in Court on charges of commencing a project without an approval from the National Environmental Management Authority, contrary to Regulation 45(1) of the Environmental Impact Assessment and Audit Regulations (**Criminal Case No. 983 of 2010**, Chief Magistrate's Court, Mombasa). It is precisely the same chemical factory, which was the subject of the charge, that is the subject of the proceedings herein.

Counsel urged that 3rd defendant, a director of 1st and 2nd defendants, had admitted the pertinent facts in his affidavit of **31st August, 2010** (annexed to 2nd defendant's Notice of Motion of **1st September, 2010**), at paragraph 12:

"THAT the civil works at the property (limited to certain minimal excavation works to ready the site) were commenced on the strength of the recommendations for approval of the District Environmental Office, Mombasa … but were immediately halted when the National Environmental Management Authority objected to this with the intention that this would re-commence once the Environmental Impact Licence was granted."

Counsel submitted that it was an *"admitted fact"* that the works in question had been commenced as early as **April, 2010**, but were later stopped by the National Environmental Management Authority (NEMA) (5th defendant).

The question that preoccupied counsel was, whether the *"limited works"* of **April, 2010** *"is injuring the plaintiffs' rights to a healthy environment"*. He submitted that it was clear from the letter by the District Public Health Officer: that sodium silicate has long-term impacts on human beings and animals; there will be an inhaling of sulphur dioxide by human beings; surface run-off will percolate the dust, and gain access into water bodies; this will end up in the human food chain, and will cause a disease known as **silicosis**; even the workers will be exposed to the health hazards; the silica dust will be trapped by vegetation, and will be consumed by animals.

Such, **Mr. Ndegwa** urged, was vital evidence emanating from the medical department of the Municipal Council of Mombasa; and that this was supported by the District Physical Planning Officer who recommended that the factory project be relocated to the outskirts of the Municipality.

Counsel submitted that since all the relevant technical departments had objected to the location of the project at Miritini, it would be an illegality if the Town Clerk of Mombasa Municipality purported to give approval for the industrial project.

Counsel submitted that if the 1st, 2nd and 3rd respondents were allowed to go on with the manufacturing project, this would cause serious injury to the lives of the residents of Miritini, and this kind of harm was not compensable in damages: hence the plaintiff cannot wait for it to happen.

Learned counsel submitted that the plaintiffs were not seeking to stop 4th and 5th defendants from carrying out their duties, but they were asking that these defendants be held to their obligations of complying with the law, in conducting their functions.

Learned counsel, **Mr. Khagram** for 1st, 2nd and 3rd defendants submitted that the plaintiffs had given no evidence to show that 1st defendant, Shreeji Enterprises Limited, was engaged in the construction of a sodium silicate factory at the suit premises; the true position, it was urged, is that the industrial plant was on lease to **2nd defendant,** Shreeji Chemicals Ltd.

Counsel remarked the content of the depositions by **Mukhasa Giridhar Rao** (3rd defendant) regarding the status of the industrial project which he attributed solely to **2nd defendant**; counsel, on the basis of **Rao's** affidavit of **31st August, 2010**, denied *"the allegation that 2nd defendant has, since **July, 2010**, unlawfully been [constructing] or continued to construct a sodium silicate manufacturing plant on L.R. No. MN/V/548 in a residential-cum-light industrial area in Miritini"* (paragraph 3); **Mukhasa Giridhar Rao** (paragraph 4) had deposed that: *"It is apparent that the objections lodged by the plaintiffs were deliberated upon and the Town Planning Committee at its meeting held on **26th July, 2010** approved 1st defendant's application for change of user"*.

So a notable sphere of contest between the parties emerges here: **was there** lawful authority, in the shape of approved change-of-user, for 2nd defendant to proceed with the industrial project? Would the statutory bodies giving such approval, be acting within the **statutory terms of their mandate?** Or would an **illegality** be involved, in the granting of such approval? In any event, would an argument in that regard be a matter for this Court, or would it belong to a different jurisdiction?

Mukhasa Giridhar Rao speaking in the belief of truth in his Advocate's advice, thus avers (paragraph 5 of the affidavit of **31st August, 2010**):

"… this Honourable Court has no jurisdiction to hear and determine the issues as regards the complaint on the application for change of user and the subsequent approval thereof on *26th July, 2010* …; this …. Court's jurisdiction is limited to hearing appeals emanating from the decisions of a national liaison committee …."

Counsel submitted that 2nd defendant was the party concerned with the industrial development; and so the suit against 1st and 3rd defendants was frivolous and vexatious, and particularly so in view of the fact all the plaintiffs except 1st plaintiff, have now formally withdrawn their suits against the defendants. Counsel contested the *bona fides* of the remaining plaintiff, **Mbole Nzomo Anthony**, as this suitor had not given his specific address in the pleadings, merely saying it's Miritini. Over this address and identity issue, **Mr. Khagram** urged that there was no case herein regarding the protection of the **environment**; in his words:

"So the 1st plaintiff is concealing his true identity; he is dishonest in [not] disclosing his address;

this plaintiff is not concerned with a clean environment; he is driven by unknown, mysterious forces. He doesn't say how close he lives to the *locus in quo*. In a matter of this nature, the opponent of the project must come out clean".

Learned counsel submitted that the Environmental Impact Assessment Report on the proposed project had shown that a relocation of the industrial project elsewhere was not a viable option, and had indicated the potential uses of sodium silicate which was the intended product; and counsel urged that since this chemical was also used in the preservation of foodstuff, it could not be as dangerous or as poisonous as alleged by the plaintiff.

Counsel contested the plaintiff's contention that the complaint on concerns of environment had not been the subject of public hearings; the Environmental Impact Assessment report shows that such hearings took place and even the plaintiff had attended. Counsel also noted the statement in the said report, that *"all the mitigation measures had been set up"*, in respect of the proposed project.

The 3rd defendant, in his affidavit of **31st August, 2010** depones that the proposed industrial project is not by any means a novelty in Kenya or in the Coastal Area; in his words (paragraph 13):

"I am aware that there are similar plants operating within the environs of the proposed project site and within Coast Province or Athi River … including those belonging to Athi River Mining Limited, Central Glass Limited, Eastern Chemical Industries Limited, and Milly Glass Works Limited where no cases of the nature of the complaints now raised have been brought to the fore."

Mr. Khagram urged that *"if the effects are as harmful as claimed, we are certain [those other manufacturing plants] would have shut down."*
On **jurisdiction,** counsel submitted that all complaints of the kind now in Court, ought to be taken before the Environment Tribunal.

Under the Environmental Management and Co-ordination Act, 1999 (Act No. 8 of 1999) (s. 125), the National Environmental Tribunal is set up; s. 126 thereof provides for the proceedings of the Tribunal, thus:

"(2) The Tribunal shall, upon an appeal made to it in writing by any party or a referral made to it by the Authority on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make decisions thereon, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the Authority or any relevant committee thereof, as the case may be".

The basis for invocation of the jurisdiction of the Tribunal is laid out in S. 129(2) of the Act:

"Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the tribunal in accordance with such procedures as may be established by the Tribunal for that purpose."

The Tribunal upon hearing the matter in question and determining it, may (s. 129(3) —

(a) "confirm, set aside or vary the order or decision in question";

(b) "exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought;" or

(c) "make such order, including an order for costs, as it may deem just".

Section 129(4) makes an important provision that is highly relevant in the present instance, regarding the conservation of the *locus in quo* pending determination of the matter by the Tribunal:

"Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined".

Although, quite clearly, the Environment Tribunal is the custodian of vital decision-making based on expertise and evidence (and this, judicial notice is to be taken, is the main distinction between it and the ordinary process of conflict-resolution), there is an opening for any litigious issues emanating therefrom, to come to the law courts. Section 130(1) of the Act provides that:

"Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court".

Learned counsel, **Mr. Khagram** urged that the complaint brought before this Court is on an environmental question, and should in the first place have gone before the Environment Tribunal; and that insofar as no question has been brought before that tribunal, the High Court's jurisdiction was being invoked improperly. Were this Court to proceed and decide the question, counsel urged, the plaintiffs' undoubted right of appeal would have been compromised, if such determination turned out to be against the plaintiffs. Counsel asked that the entire suit be struck out. Counsel relied on judicial decisions. In **Nakumatt Holdings Ltd. Vs. National Environmental Management Authority**, 1KLR (E&L) 668 [**Mutungi, J**.] it was thus held:

"The High Court is not granted power, under Section 130(1) and (2) of the Environmental Management and Co-ordination Act, 1999 to issue injunctions or stay of execution of the ruling, orders and/or directions of the National Environmental Tribunal …"

In **Bogonko v. National Environmental Management Authority**, 1KLR (E & L) 772 [**Wendo, J**.), the Court thus held:

"An order of prohibition to stop the respondents from interfering with the applicant's project would not be granted in light of the provisions of the Act. Under s. 69(1) of the Act, National Environmental Management Authority, in consultation with other lead agencies, is charged with the duty of monitoring all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impact or operation of any projects or activity with a view to determining its immediate and long-term effects on the environment. The Court could not, therefore, curb NEMA's powers given by statute."

Mr. Khagram submitted that NEMA should be let free, to discharge its statutory mandate; and that the suit herein be struck out for want of jurisdiction.

Learned counsel **Mr. Ligunya**, who represented NEMA (5th defendant), indicated that he was in agreement with the defendants in their several applications, and he adopted the submissions made by **Mr. Khagram**. Counsel urged that all the complaints made by the plaintiffs, regarding NEMA's role in the matter, were based more on apprehension than on concrete evidence. Bare apprehension by the plaintiff, counsel submitted, was no basis for injunctive relief. By the evidence, counsel submitted, NEMA had published Notice No. 4050 in **Kenya Gazette** Vol. CXII, No. 38 on **16th April, 2010** giving details on the proposed project, and inviting public hearings, which duly took place at the *locus in quo* and which were duly recorded in minutes. Thereafter, NEMA did not issue a licence, on account of the Court's restraint orders; but, by statute, NEMA was not debarred from carrying out its other duties. Counsel submitted that an injunction against NEMA arising from the plaintiffs' mere apprehension, would tend to defeat the statutory purpose for which that entity was established. **Mr. Ligunya** submitted that a proper remedy for the plaintiffs could only be as against the project proponent — but not against entities in charge of auxiliary functions; and that the tests for injunctive relief, on the principles set out in **Giella v. Cassman Brown** [1973] E.A. 358, were not met in this instance *vis-à-vis* 5th defendant.

Learned counsel **Mr. Lumatete**, for 4th defendant, urged that this matter had improperly been brought to the High Court: *"whenever an environmental issue arises, and a party is dissatisfied with the decision of*

the Environmental Authority, the first stop is the Environmental Tribunal; Parliament provided for this, because environmental issues are scientific in nature; when parties want to canvas their positions on environment, scientific issues are likely, and expert witnesses are likely to be called; therefore, the proper place for these witnesses to state their case and for the relevant arguments, is the Tribunal … The Tribunal, by [virtue] of its composition, is able to arrive at a proper judgment. An appeal to this Court would have the benefit of the work already done at the Tribunal".

Mr. Lumatete submitted that the High Court, at this stage, lacks jurisdiction in the matter.

By contrast, **Mr. Ndegwa** in his response, urged that *"no amount of interpretation can remove the jurisdiction given to the High Court by virtue of s. 3(1) of the Act"*. The said s. 3(1) thus provides:

"Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment".

For that general argument, counsel cited also Article 70 of the Constitution, which thus provides:

"(1) a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter"

On the plain terms of the foregoing provisions, learned counsel urged that *"the aggrieved is to come to **Court**, not to the Tribunal; so, the issue of going to the **Tribunal** does not arise at all."*

Mr. Ndegwa submitted that the proper jurisdiction for this matter must be the forum of the High Court: because *"the plaintiff is complaining about 4th and 5th defendants abusing their powers, not exercising these powers in accordance with the law"*. Counsel cited the decision in **Bogonko v. National Environment Management Authority** (2006) [**Wendo, J**.] in aid of the submission that the High Court has the jurisdiction to stop a body such as 5th defendant, or 4th defendant, from abusing its powers.

On the role of 1st defendant in the suit, counsel submitted that it is precisely this defendant who has obtained change of user of the suit land (on **27th July, 2010**). Counsel submitted that the suit against 3rd defendant was properly brought, on the basis of s. 145(1) of the Environmental Management and Co-ordination Act, 1999 (Act No. 8 of 1999) which thus provides:

"When an offence against this Act is committed by a body corporate, the body corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act, shall be guilty of an offence."

Counsel noted, in this respect, that 3rd defendant had already been charged with the commission of an offence, by virtue of the foregoing provision.

Learned counsel submitted that the suit be heard and determined in the broad spirit of the Constitution (Articles 42 and 70), and of the Environmental Management and Co-ordination Act, s. 3 [which is on *"entitlement to a clean and healthy environment"*].

The chain of applications in this matter has raised a number of issues, the most significant of which relate to the **jurisdiction** of the Court, both in relation to the applications, and to the suit itself. It is now well settled that a Court before which a jurisdictional question is raised, has its very first item of agenda set out: to decide that question; and it is by that decision, that the court determines whether it may lawfully hear and resolve other issues.

As already recorded in this Ruling, the subject of the suit and the applications is, whether or not the

first three defendants are to be permitted to construct a sodium silicate manufacturing plant in the Miritini area of Mombasa, in view of the likely environmental impacts. The said defendants are anxious to execute their project, in respect of which they aver they have invested colossal amounts of resources already; the 4th and 5th defendants hold the key, in relation to the requisite approvals, and the plaintiffs seek to have them restrained against giving permission.

Does the question fall to the jurisdiction of the High Court, in the first place? The 1st, 2nd and 3rd defendants deny it; but the plaintiffs have no doubts that the question falls to the jurisdiction of the High Court. *"Jurisdiction"*, so far as is relevant, is thus defined in **Black's Law Dictionary**, 8th edition (2004) [at page 868]:

"A court's jurisdiction to adjudicate claims and proceedings related to a claim that is properly before the court."

Learned counsel, **Mr. Ndegwa** has submitted that the High Court's jurisdiction is not only wide enough to cover the plaintiffs' claim, but the broad-spirited terms of the **Constitution of Kenya, 2010** and of the **Environmental Management and Co-ordination Act,** 1999 (Act No. 8 of 1999) (notably Section 3(1) thereof) have placed this Court at the centre of all rights turning on the environment. The plaintiffs have the right, counsel urged, to move the Court any time *"rights to environment"* were threatened, or violated.

Such a position was contested by counsel for the defendants, who invoked certain specific provisions of the Environmental Management and Co-ordination Act; a National Environmental Tribunal is set up under s. 125 of the Act to give a first consideration to disputed claims regarding the environment. The membership of this Tribunal is as follows:

(a) a chairman nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a Judge of the High Court;

(b) an advocate of the High Court of Kenya nominated by the Law Society of Kenya;

(c) a lawyer with professional qualifications in environmental law, appointed by the Minister;

(d) two persons who have demonstrated exemplary academic competence in the field of environmental management, appointed by the Minister.

The Tribunal is not bound by the rules of evidence set out in the Evidence Act (Cap. 80, Laws of Kenya), and its task is to *"inquire into the matter [referred to it] and [to] make an award, give directions, make orders or make decisions thereon, and every award, direction, order or decision made shall be notified by the Tribunal to the parties concerned, the [National Environmental Management] Authority or any relevant committee thereof, as the case may be"*.

There is no doubt that the National Environmental Tribunal was conceived as a vital agency for the determination of environmental claims, as s. 129(4) of the Act provides that the Tribunal's orders hold the *status quo* on the ground, in any case in which a party has appealed to the High Court on the relevant questions — until the High Court will have pronounced its decision.

Mr. Khagram submitted that, insofar as the matter now brought before this Court is an environmental question, it ought in the first place to have been placed before the National Environmental Tribunal, and, at this stage, the High Court lacks jurisdiction.

The essential point which emerged from other counsel, **Mr. Lumatete** for 4th defendant, and **Mr. Ligunya** for 5th defendant, is that the subject matter brought before this Court is of a scientific nature, which, in the first place, calls for **research solutions** that the Court, by its design, will not readily come by. The objectivity of such a statement is not doubted by this Court; and I believe it to be a relevant factor

in defining **jurisdiction**, as a basis for resolving certain kinds of disputes.

Though, on a general plane, **Mr. Ndegwa** is, with respect, right in attributing a wide jurisdiction to the High Court, in the light of the provisions of the Constitution and the Environmental Management and Co-ordination Act, the specific subject of the environmental damage likely to flow from a sodium silicate factory established in Miritini, properly belongs, **in the first place**, to the jurisdiction of the National Environmental Tribunal, and only in the second place does the matter fall to the High Court's appellate jurisdiction. So complex are the environmental issues involved, routine issuance of injunctive orders by the High Court may miss the knowledge-base regarding realities at the *locus in quo*. Given the binding design of Court orders, it is undesirable that these should be made without a full understanding of reality.

(1) The plaintiffs' application by Chamber Summons dated *3rd August, 2010* is disallowed.

(2) The plaintiffs' application by Notice of Motion dated *6th October, 2010* is disallowed.

(3) The plaintiffs shall bear the costs of the said applications of *3rd August, 2010* and *6th October, 2010*.

(4) As prayed in 1st defendant's Notice of Motion of *1st September 2010*, 2nd defendant's Notice of Motion of *1st September, 2010* and 3rd defendant's Notice of Motion of *1st September, 2010*, the orders made on *3rd August, 2010* are hereby discharged.

(5) The plaintiffs shall bear the costs of the said three Notices of Motion of *1st September, 2010*.

(6) The plaintiffs' suit dated *3rd August, 2010* is hereby struck out, with costs to the defendants.

(7) The plaintiffs have the liberty to re-commence their cause before the National Environmental Tribunal, within 30 days of the date hereof.

***(8)* Pending action in accordance with Order No. (7) herein, the *status quo* shall be maintained at the *locus in quo*.**

DATED and **DELIVERED** at **MOMBASA** this **18th** day of **March, 2011.**

J.B. OJWANG
JUDGE

Coram: Ojwang, J.
Court Clerk: Ibrahim
For the Plaintiffs: Mr. Ndegwa
For 1st, 2nd & 3rd Defendants: Mr. Khagram
For 4th Defendant: Mr. Lumatete
For 5th Defendant: Mr. Ligunya