REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

MISCELLANEOUS APPLICATION 111 OF 2008

REPUBLIC ……..……APPLICANT

V E R S U S

THE NATIONAL ENVIRONMENTAL TRIBUNAL…….....RESPONDENT

KENYA TOURISM FEDERATION ……1ST INTERESTED PARTY

MANAGEMENT AUTHORITY (NEMA) ……..…2ND INTERESTED PARTY

EX PARTE

1. **OL KEJU RONKAI LIMITED**

2. **EMUNY MARA CAMP LIMITED**

R U L I N G

Following leave, the *ex parte* Applicants filed this motion under **Order 53 rules 3** and 4 of the **Civil Procedure Rules** and **sections 8 (2)** and **9** of the **Law Reform Act (Cap. 26)** seeking orders of Prohibition, Certiorari and Mandamus in the following terms:-

a) an order of Prohibition prohibiting the Respondent from taking cognizance of, entertaining, hearing, conducting, proceeding with and/or determining the purported Tribunal Appeal No. NET 30/2008 being Kenya Tourism Federation –Vs- National Environmental Management Authority (NEMA), Ol Keju Ronkai Limited and Emuny Mara Camp Limited or any other purported Appeal in variation, substitution, subtraction, addition, akin to or identical thereto;

b) an order of Certiorari removing to this Court for the purposes of being quashed the proceedings before the National Environmental Tribunal at Nairobi in the purported Tribunal Appeal No. Net 30/2008 being Kenya Tourism Federation –Vs- National Environmental Management Authority (NEMA), Ol Keju Ronkai Limited and Emuny Mara Camp Limited together with the Ruling delivered therein on 4th December, 2008; and

c) an order of Mandamus compelling the Respondent to comply with and give effect to this court's is binding decision in Miscellaneous Application Number 391 of 2006 being Republic –Vs- National Environmental Tribunal and Three Others *ex parte* Overlook Management Ltd and Silversand Camping Site Limited.

There are facts of this case which are not in dispute. The first *ex parte* Applicant is the lawful proprietor of Land Reference Number 27424 containing by measurement about 13.09 Hectares and situated in the Masai Mara Game Reserve within Narok District. The *ex parte* Applicants are developing thereon a tourist tented camp site at the estimated cost of KShs. 500 million. To be able to do this they applied for and obtained all the necessary licences, authorizations and approvals which included setting aside; gazettement and allotment of the land; grant of leasehold interest by the Local Authority and the Ministry of Lands; and project authorization and approval by the Narok County Council and the Ministry of Tourism and Wildlife. That process took over 6 years. In seeking to comply with the requirements of the Environmental Management and Coordination Act (EMCA), they applied for an Environmental Impact Assessment (EIA) licence and submitted to the National Environmental Management Authority (NEMA) an Environmental Impact Assessment Study Report which NEMA found to have satisfactorily addressed the potential environmental impacts on the proposed development and duly issued the EIA licence on 14th January, 2008. NEMA had invited public comments on the proposed development through paid up advertisements in the local dailies. It had constituted a Technical Advisory Committee comprising an expert from Kenya Wildlife Services (KWS) and the Senior Warden Masai Mara Game Reserve, among other sector experts, who had submitted Recommendations on 13th December, 2006 advising that the project should be approved.

Upon the receipt of the EIA licence, the *ex parte* Applicants, in compliance with **section 129 (1)** of **EMCA**, did not commence the proposed development until after the expiry of 60 days. This was to allow for any aggrieved persons to appeal the decisions of NEMA. No appeal was filed and therefore the work of development commenced.

On 29th September, 2008 the 1st Interested Party went to the National Environmental Tribunal (the Respondent) and filed Appeal **No. NET 30/2008** being **Kenya Tourism Federation –Vs- National Environmental Management Authority (NEMA), Ol Keju Rongai Limited** and **Emuny Rongai Limited** and **Emuny Mara Camp Limited**. In it the 1st Interested Party sought, among other things, to stop the *ex parte* Applicants from continuing with the development of the project and to cancel and/or revoke the EIA Licence issued for the project. It is notable that the 1st Interested Party had neither objected to the issuance of the EIA Licence to the *ex parte* Applicants nor appealed against the issuance of the same within the statutory period as provided for by EMCA. The complaint by the 1st Interested Party was that it had on 14th July, 2008 written a letter to the Standards and Enforcement Review Committee of NEMA over this licence seeking its revocation on the basis that:

a) the site earmarked for the development was an ecologically sensitive area and known habitat for the endangered Black Rhino, and
b) the construction was continuing on a site not approved by the Narok County Council.

The 1st Interested Party had not received any response to the letter. It was expected that the Standards and Enforcement Review Committee to which the letter had been written would investigate the complaint before advising NEMA to cancel, revoke or suspend, the EIA Licence.

The *ex parte* Applicants and NEMA (2nd Interested Party) raised a preliminary objection to the Appeal on basis that in so far as there was no decision by NEMA, its Officers or Committees on the complaint by the 1st Interested Party there was no legal basis for the Appeal and therefore the Respondent lacked jurisdiction to entertain the Appeal. The 2nd Interested Party pleaded that it had not received any advice from The Standards and Enforcement Review Committee (SERC) to revoke, cancel or suspend the EIA Licence and therefore the Appeal was premature and/or misconceived and that the Respondent lacked jurisdiction to entertain it. The other preliminary point raised was that the Appeal had been filed out of time under **section 129 of EMCA** and **Rule 4(2)** of the **National Environmental Procedure Rules** of **2003** and the Respondent had no jurisdiction to entertain it. The last point raised was that the 1st Interested Party was not a party to the EIA processes in respect of the development of this project, or a complaint to the Public Complaints Committee on Environment (PCC) and could not therefore appeal to the Respondent. The *ex parte* Applicants and the 2nd Interested Party submitted that the only avenue open to the 1st Interested Party was to file a suit to the High Court under **section 3(3)** of **EMCA**.

Arguments were received by the Respondent on these objections. The Respondent, in its Ruling delivered on 4th December, 2008, found all the objections were lacking basis in law and overruled the objections. The Respondent found it had jurisdiction to hear and determine the appeal.

It should be noted that in the course of that hearing the 2nd Interested Party's counsel Mr. Ng'ang'a had sought to rely on the High Courtdecision **in In the Matter of an Application by Overlook Management Limited and Silver Sand Camping Site Limited for Judicial Review and Orders of Certiorari and Prohibition and In the Matter of the National Environment Tribunal at Nairobi, Tribunal Appeal No. NET/06/2005 Republic –Vs- Nema & Others Misc. Application No. 391 of 2006 at Nairobi** in which Justice Emukule had found that where a party had not participated in the whole of the EAI study process and the process of issuing the EIA Licence in question, it was not a party aggrieved by NEMA, having not appeared or made representations before NEMA, and was therefore a stranger lacking *locus standi* to appeal. Its only recourse was to file a case under **section 3** of **EMCA**, the High Court had found.

The Respondent herein found that **section 126 (2)** of EMCA allowed for an appeal by **"any party"** who had

environmental concerns arising out of the decision of NEMA and its organs, and this did not restrict it to only those persons who had participated in the EIA or EIA study process. The *ex parte* Applicants want an Order of Mandamus to issue against the Respondent to comply with and give effect to the High Court decision above referred to which was on the interpretation of **sections 3 (3), 126** and **129** of **EMCA**. There is no dispute that the Respondent is an entity that falls under supervision by the High Court and therefore bound by decisions of the High Court. We shall revert to this issue later.

Having resolved the objections, the Respondent is set to hear the Appeal. This is what forced the *ex parte* Applicants to come before this Court with the present application. They were represented by Prof. Mumma. Mr. Mutua was for the Respondent, Mr. Murugara for the 1st Interested Party and Mr. Ng'ang'a for the 2nd Interested Party. The Respondent and the 1st Interested Party opposed the motion whereas the 2nd Interested Party supported it.

The first issue that this court has to deal with is whether it has jurisdiction to entertain the present motion. When we listened to Mr. Mutua and Mr. Marugara, and having considered their written submissions, their contention was that this Court lacked jurisdiction to hear and determine the motion. Their contention was based on two grounds. First, that the issues raised by the *ex parte* Applicants basically go to the merits of the Respondent's Ruling, in which case the remedy available to them was to be found under **section 130** of **EMCA**. This is the remedy of appeal. They cannot question, it was submitted, the merits of the decision by the Respondent by way of judicial review. Reliance was placed by counsel on the decisions in **Republic –Vs- Kidula & Others [2003] LLR 427 HCK; Speaker of The National Assembly –Vs- Karume [1990-1994] EA 546; Republic –Vs- Birmingham City Council, *ex parte* Ferrero Limited [1993] 3 All ER 530; Halisbury's Laws of England, 4th Edition, 2001 Reissue, Vol. (1) and Administrative Law, 6th Ediction, by Wade**. In **Kidula's case** the Applicant was not claiming that the Chief Magistrate who made the impugned ruling had no jurisdiction to hear and determine the application or that she refused to give him a hearing. He was complaining about the merits of the decision. The High Court found that the Applicant ought to have appealed the ruling and not seek judical review. In **Karume's case** there was an application for a stay of the orders of the High Court granting the Respondent leave to apply for an order of Certiorari in order to quash a declaration by the Speaker to the effect that Kiambaa parliamentary seat was vacant. The Court of Appeal stated as follows:-

> **"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that Order LIII of the Civil Procedure Rules cannot oust clear constitution and statutory provisions."**

It is clear that the Court of Appeal had not been addressed substantially on the matter and therefore the view expressed was preliminary. In **Birmingham City Council** case it was held that where there was an alternative remedy provided by Parliament in form of statutory appeal procedure, it was only exceptionally that judicial review would be granted.

The Respondent and the 1st Interested Party are saying that **section 130** of **EMCA** provides an alternative remedy of appeal and the *ex parte* Applicants should not be before this Court. They urged that the Respondent was asked to determine the issue of jurisdiction, which it decided it had. If the *ex parte* Applicants felt aggrieved they should have approached the High Court by way of appeal.

The response by Prof. Mumma was that the powers of the Respondent were limited by EMCA in its **section 129 (2)** and where there was no decision of NEMA, its Committees or Director General there cannot be basis of an appeal. He went on that the Respondent, in deciding it had jurisdiction to hear and determine the appeal had acted *ultravires*, hence this motion. He relied on the decision in **Kenya National Examinations Council –Vs- Republic *Ex-parte* Geoffrey G. Njoroge & 9 Others, Civil Appeal No. 266** of **1996** at **Nairobi** in which the Court held as follows:-

> **"As a creature of statute the council can only do that which its creator (the Act) and the Rules made thereunder permit it to do. If it were to purport to do anything outside that which the Act and the Rules permit it to do, then like all public bodies created by the Parliament, it would become amenable to the supervisory jurisdiction of the High Court, which, for simplicity is now called 'Judicial Review'".**

Counsel further relied on the English decision in **Bunbury –Vs- Fuller (1853), 9 Exch. III** which was cited with approval in **Re Ripon (Highfield) Housing Order, 1938. Applications of White and Collins, [1973] 3 All ER 548**. It was held as follows:-

> **"….it is general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within jurisdiction and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court. Then, to take the simplest case suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it but the party charged contends that it arose in another hundred, this is clearly a collateral**

matter independent of the merits. On its being presented the judge must not only immediately forbear to proceed, but must inquire into the preliminary fact and for the time decide it, and either proceed or not with the principal subject matter as he finds on that point; but this decision must be open to question, and if he was improperly either forbone or proceeded in the main matter in consequence or an error on this, the Court of Queens Bench will issue its mandamus or prohibition to correct the mistake,"

Regarding whether the *ex parte* Applicants ought to have appealed instead of seeking judicial review, Prof. Mumma brought to the attention of the Court the decision of the High Court at Mombasa in **Republic –Vs- The Chief Magistrate's Court Mombasa and Another *Ex parte* Abdo Mohamed Bahajj & Company Limited & Another, Misc. Civil Suit No. 264** of **1997** in which the Court relied on the Court of Appeal decision in **C.A NAI. 97/98** citing its earlier decision in **David Mugo** t/a **Manyatta Auctioneers –Vs- Republic CA 265/97 (UR)** wherein it was held as follows:-

"the remedy of judicial review is available, in appropriate cases, even where there is an alternative remedy. In his judgment in this case, Chesoni C.J. said:-

"with respect to the learned judge the existence of an alternative remedy is no bar to the granting of an order of certiorari. The correct view, in this matter, is that expressed by Lord Parker C.J., in the English case of R. –V- Criminal Injuries Compensation Board Ex. P. Lain [1967] 2 Q.B. 864 when he said:-

"the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time, being extended to meet challenging conditions ….. We have reached the position where the armbit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it was a duty to act judicially."

"The learned Judge was at pains to limit the parameters of certiorari. That was unnecessary. So long as orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation of such a body to act judicially, the limits of judicial review orders shall continue extending so as to meet the changing conditions and demands affecting administrative decisions."

We have considered all these submissions. We recognize that under **section 130 (1)** of **EMCA**:

"Any person aggrieved by a decision or order of the Tribunal may; within 30 days of such decision or order, appeal against such decision or order to the High Court."

The *ex parte* Applicants had the choice to approach the High Court by way of appeal. In fact, when the appeal was filed and before it was heard, they had the choice to go to the High Court to challenge the jurisdiction of the Respondent. They instead raised it there and when they lost they came for judicial review. Our main concern is that the Respondent has powers conferred to it by **section 129 (1)** of **EMCA**. Parliament has deliberately limited the powers of the body. The Respondent is a public body having legal authority to determine questions legally referred to it and affecting the rights of subjects who have come before it. Where it is alleged that it acted without jurisdiction or in excess of jurisdiction or that it has not obeyed the rules of natural justice in relation to the matter in question, a court of judicial review is immediately invited. There must be a reason why Parliament chose to limit the Respondent's powers. As a creature of EMCA it cannot purport to do anything outside the Act. If it does it becomes amenable to the supervisory jurisdiction of the High Court.

It does not matter that the *ex parte* Applicants can appeal the decision made. In the circumstances of the case, and given that the Respondent is yet to hear and determine the main appeal, the most convenient, beneficial and effective remedy would be judicial review. The principle of law in **Birmingham's case** has been overtaken by the Court of Appeal's case in **Manyatta Auctioneers Case** on whether the availability of an alternative remedy precludes an applicant from seeking judicial review. As long as the *ex parte* Applicants are saying that the Respondent is hearing an appeal in respect of which it has no powers in law to do, the jurisdiction of this court in its supervisory function has been properly invoked.

The second issue regarding jurisdiction that bothered the Respondent and 1st Interested Party was that this court is being asked to determine the applicability of the decision by Justice Emukule to the appeal and its facts. They argue this court cannot do this without discussing the merits of the appeal or decision on jurisdiction under the purview of judicial review. On this point we agree with the Respondent and the 1st Interested Party. We appreciate that the Respondent is an inferior tribunal to the High Court. It is bound by the decisions of the High court. However, when a decision of the High Court is brought to the attention of the Respondent, it alone should decide whether the decision is on the point or can be distinguished given the facts of the case. In short, we are not interested in the merits of the decision of the Respondent, or the appeal pending before it. We may certainly be interested if the Respondent reaches a wrong decision as to the extent of its powers. When the *ex parte* Applicants prayed that we issue an order by Mandamus to compel the Respondent to comply with the decision of Justice Emukule we were taken aback as we could not deal with the request without discussing the merits of the decision and appeal.

Regarding the scope and efficacy of Mandamus, it is settled that the order of Mandamus will compel the performance of a public duty which is imposed on a person or a body of persons by a statute and where the person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed (**Kenya National Examination Council –Vs- R *Ex parte* Geoffrey Githenji Njoroge & 9 Others (above)).** Where a general duty is imposed, Mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on which the obligation is laid, Mandamus cannot command the duty in question to be carried out in a specific way.

The question that we have to decide is whether the Respondent has jurisdiction to hear and determine the appeal before it. **Section 125 (1)** of **EMCA** established the Respondent. **Section 129 (1)** confers its powers. It will hear appeals regarding:

(a) a refusal to grant a licence or to the transfer of a licence, issued under the Act or Regulations;

(b) the imposition of any condition, limitation or restriction on the licence;

(c) the revocation, suspension or variation of the licence;

(d) the amount of money required to pay as a fee; and the

(e) imposition against an environmental restoration order or environmental improvement order by the Authority.

The aggrieved party is required to appeal within 60 days after the occurrence of the event against which he is dissatisfied. Under **section 129 (2)** it is provided as follows:-

> **"Unless otherwise expressly provided in this Act, where the 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."**

There is no dispute that the 1st Interested Party did not participate in the EIA study process for the development in question, in NEMA's process of approval of the development or complaint to the PCC. It cannot be said that it was aggrieved by this entire process which led to the issuance of the licence as it did not participate in it and no decision was made against it that would have led to a challenge by way of appeal to the Respondent. There is no way one can read **section 129** of **EMCA** to make the 1st Interested Party **"an aggrieved Party"**.

Secondly, the licence that the 1st Interested Party sought to challenge was issued on 14th January, 2008. The letter of complaint by the 1st Interested Party was written on 14th July, 2008. This was long after the 60 days allowed for appeal, even assuming the Party could appeal. The appeal was filed well outside the statutory period.

Thirdly, the letter of 14th July, 2008, it is not in dispute, was not responded to. The Respondent was informed that the 2nd Interested Party had not received advise from SERC to revoke, cancel or suspend the EIA licence. Under **section 129** of **EMCA** a party can only be aggrieved by a decision. Until a decision is made one cannot know which way it may go. When the 1st Interested Party went to the Respondent on appeal he was saying that the 2nd Interested Party had failed to revoke or suspend the licence granted to the *ex parte* Applicants as requested by the 1st Interested Party by their letter dated 14th July, 2008. There was no communication of a decision of the 2nd Interested Party, or its organs. It is appreciated that the 1st Interested Party, and more specifically SERC, was under statutory duty to act on the letter. If the 1st Interested Party felt aggrieved that SERC had failed to act as required by law to do, then an order Mandamus should have been sought in the High Court to compel SERC to act on the letter.

In short, the Respondent had no jurisdiction to hear the appeal that the 1st Interested Party filed before it. The 1st Interested Party lacked the *locus standi* to approach the Respondent by way of an appeal, or at all. If the 1st Interested Party had any grievance the doors were open to him under **section 3(3)** of **EMCA** to approach the High Court for a remedy.

In conclusion, we find that the Respondent acted illegally when it purported to assume a jurisdiction which was not vested in it. It acted *ultra vires*. The appeal No. NET/30/2008 and the decision reached on 4th December, 2008 were a nullity and we hereby remove them into this court by order of Certiorari and quash them. We also issue an order of Prohibition prohibiting the Respondent from entertaining, hearing and/or determining the appeal NET 30/2008. Lastly, we order that the costs of the motion be borne by the 1st Interested Party.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2010

A. MBOGHOLI MSAGHA

JUDGE

HANNAH M. OKWENGU
J U D G E

A. O. MUCHELULE
J U D G E