REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Petition 15 of 2007

BEN KIPENO

MUTAKA OLE MPOOYA

MARTINE OLE MARIKO

KORIO OLE NAIMODU

MEITIAN MUSUKUT

MARIMA LEPERES

LESIAMON SALE…….……...…….…….PETITIONERS

Versus

ATTORNEY GENERAL …….....……..... 1ST RESPONDENT

NATIONAL ENVIRONMENTAL TRIBUNAL ….....…. 2ND RESPONDENT

KENYA TOURISM FEDERATION ……...….....…. AFFECTED PARTY

JUDGMENT

Before this court is the Petition dated 15th January 2007 which is grounded on Sections 70, 74, 77 and 82 of the Constitution. It is supported by a Verifying Affidavit of Ben Kipeno dated and filed in court on 15th January 2007 and the Petitioner's skeletal arguments and list of authorities filed in court on 5th April 2007.

In opposition, the following documents were filed:-

1) Notice of Preliminary Objection dated and filed on 12th March 2007;

2) Skeletal arguments filed in court on 7th May 2007.

The Petitioners are Ben Kipeno, Mutaka Ole Mpooya, Martin Ole Mariko, Koria Ole Naimodu, Maitian Musukut, Marima Leperes and Lesiamon Sale, Whereas the Respondents are the Hon. The Attorney

General, the National Environmental Tribunal and the Kenya Tourism Federation is the Affected party.

The Applicants were represented by Mr. Kilukumi, Advocate while Mr. Muiruri appeared on behalf of the Respondents. Mr. Ojiambo who had been on record for the Interested Parties did not file any papers nor did he appear at the hearing.

The seven Petitioners are the registered absolute owners of land parcels CIS Mara/Koiyaki/Dangunat, 295, 280, 281, 294, 296, 319 and 2001 respectively. That land was originally held as Trust land by the Narok County Council which was later adjudicated and members of the community given title deeds in respect thereof.

At the time of adjudication, the affected party never raised any objection. The land was designated as agricultural land. In 2005, the Petitioners decided to change the user of the land by having a Tented camp erected on that land for Commercial purposes. They therefore leased the land to Wasafiri Camp Ltd. who complied with the Kenya Investment Promotion Act, 2004 and certificates issued by Kenya Investment authority, National Environment Management Authority (NEMA) also issued them with a licence which had conditions that the investor had to comply with to ensure environmentally sustainable development. However, the Narok County Council and Kenya Tourist Federation filed an appeal to the 2nd Respondent against the grant of the licence by NEMA. The appeal was heard and a decision rendered on 20th December 2006 which upheld the appeal and the licence issued by NEMA was quashed, the development of the camp stopped and a full environmental impact assessment was ordered.

The Petitioners case as to what transpired before the tribunal and the effects of the tribunal's ruling are summed up in the following paragraphs of Ben Kipeno's Affidavit as follows;

"**43) that the hearing of the appeal took more than six (6) months;**

44) That the 2nd Respondent visited the site and the affected parties gave evidence together with the members of the local community fully supported the project as evidenced by a copy of their memorandum annexed hereto and marked as Ex.BK 9;

49) To make matters worse, the said week the Narok County Council through the clerk of the County Council deliberately chose to commit perjury by deceiving the 2nd Respondent that the legal user of the said properties was a breeding ground for leopards and concealed the fact that it had actually caused the land to be adjudicated for use as agricultural land and the land was held as absolute property by the Petitioners;

50) That a ruling was then given on 20th December 2006 and to our surprise, the ruling quashed the NEMA decision and directed that no further development activities should take place on this site or its environs pending preparation of a full Environment Impact Assessment Study. The ruling is silent on the issues raised by the Petitioners including the issues of abuse of the court process by Appellants;

51) That the effect of the said ruling is to deny the Petitioner a source of livelihood as stated at paragraph 31 above. As of today the Petitioners have lost revenue in excess of Kshs.6 million which is irreparable and/or irrecoverable loss;

52) That a further negative effect of the said ruling is that it discriminates against the Petitioner and takes away the Petitioner's rights to freely negotiate commercial contracts for their own gain;

53) That an additional negative effect of the said ruling is that it leaves the Petitioner in a state of bondage, if not slavery, to the parties who have instigated Narok County Council and the Kenya Tourist Federation to obstruct the project;

58) That there is also an additional negative effect of the said ruling in that, the Petitioners, unlike

other Kenyans have been discriminated against in relation to the usage and control of their private properties;

59) That this ruling in addition prevents the Petitioners from enjoying the financial benefits that accrue from the developments or improvements that we have made or our land through the above mentioned sections;

60) That the said ruling is a classic case of the rights of the small being trampled upon by the big and mighty with impunity and in this case, unfortunately with the sanction of the tribunal;

61) That their true motives are to prevent competition and maintain a monopoly in the trade."

As a result, the Petitioners allege that their rights under Ss. 27, 28 and 30 of the Registered Land Act and S.70 of the Constitution have been violated;

(a) Right to protection from inhuman treatment (S.74 of the Constitution),

(b) Right to equal protection of the law (Section 70 of the Constitution),

(c) Right to a fair and impartial hearing before any court or tribunal (S.77 (9) of the Constitution.

(d) Right to protection from discriminatory treatment (S.82 of the Constitution)

(e) Right to privacy

Consequently the Petitioners seek the following reliefs:-

a) That it be declared that the ruling in the Tribunal Appeal No. NET/01/04/2006 of 2006 delivered on 20th December 2006 deprives each of the Petitioners their rights under Ss. 70, 74, 77 and 82 of the Constitution, is not binding on the Petitioners and is null and void;

b) It be declared that each of the Petitioners is entitled to enjoyment of his private property subject to the rights and limitations there to as stipulated in the title document or deed;

c) It is declared that the project on the petitioners properties is duly licenced under the investment certificate No. 0105 dated 2nd March 2006 be implemented under the supervision of the National Environment Management Authority subject to the conditions specified in its approval contained in the letter;

d) A permanent injunction be granted to restrain any trespass or other parties from interference with the Petitioner's use and enjoyment of their said properties;

e) Costs by the Petition be provided for.

The Respondents took up three points of Preliminary Objection in reply to the Originating Summons;

1) That the Application is frivolous, vexations and an abuse of the process of the court as being made solely for the purpose of avoiding the procedure provided for in the statute, Section 130(1) of the Environmental Management Coordination Act (1999). (hereinafter referred to as EMC Act)

On this point, Mr. Muiruri submitted that no allegation of violation of the Petitioners' rights had been levelled against the 1st Respondent. That under S. 84 (1) of the Constitution, the Petitioners were required to state the incomplaint, the provision of the Constitution infringed and the manner of infringement as against them. That the 1st Respondent has been wrongly dragged to this court and that is why there was no need for the 1st Respondent to reply. For that submission Counsel relied on the Case of

Counsel further submitted that EMCA establishes a tribunal under S.125 to hear and determine appeals. S. 130 (1) then provides a right of appeal from the decision of the tribunal to the High Court. That the Petitioners having been Interested Parties in the matter, had a right of appeal to this court and that they could only invoke S.84 of the Constitution where a right lies and that has to be exercised within certain perimeters within a particular law, as held in the case of KURIA MBAE V LAND ADJUDICATION ACT HCC 257/1983. Counsel further observed that not every action against a Government Authority for which procedure is provided for under different statutes should be made subject of the jurisdiction under S. 84 of the Constitution. That Justice Nyamu in the case of RODGERS MUEMA NZIOKA V AG PETITION 613/06 held that the constitutional jurisdiction should not be trivialized but be confined to purely constitutional matters. Counsel urged that the Applicants should have pursued the procedure of appeal provided for under S.131 of the EMC Act.

(2) The 2nd point taken in the Preliminary Objection is that the Application does not raise any material that discloses a violation of the Applicant's fundamental rights. Mr. Muiruri submitted that the issue that was referred to the tribunal was whether NEMA complied with its statutory mandate when it issued an approval of the project report and that under S.129 (2) the tribunal had the jurisdiction to consider with the decision of the director on appeal or any other committee established under the Act but not under S.129 (1). That S. 129 (1) only deals with appeals arising from licensing. That the tribunal also considered the issue of the Appellants standing (locus standi) before the tribunal at paragraph 104 of their decision but never dealt with proprietary rights of the parties that appeared before it and no such right has been violated. That only Wasafiri Company would have alleged infringement of its rights but not the petitioners who can utilize their land in question within the confines of the law. That absolute ownership of land does not supplement statutory impediments or restrictions by statutes that have not been declared unconstitutional. For one to get a licence one must comply with the law under the EMC Act.

(3) The 3rd limb of the Respondent's Preliminary Objection is that the 2nd Respondent is not amenable to these proceedings by virtue of S.133 of the EMC Act. Counsel urged that the Petitioners are actually challenging the merits of the tribunal's findings for which a right of appeal is provided and immunity is provided under the Act to protect the tribunal's independence. Counsel relied on the case of **SIRROS V MOORE & OTHERS (1974) B ALL ER 776**, where a judge detained a person erroneously and the court found the plaintiff had no cause of action against the judge when the judge was acting judicially.

Mr. Kilukumi in reply urged that the 1st Respondent is enjoined to these proceedings as the principle adviser of the Government and the infringements are directed at the 2nd Respondent. Mr. Kilukumi also distinguished the case of **MUEMA** as turning on estoppel as opposed to constitutional violations and that the case of **SIRROS** dealt with personal liability.

I have now considered the Petition, the Petitioners Affidavit in support of the Petition, the skeletons arguments, some of the authorities cited and all submissions by both Counsel.

Under S.84 of the constitution, the High Court has original jurisdiction to hear and determine cases of alleged breaches or violation of fundamental rights and freedoms. That Section stipulates as follows:-

"**84**

(1) subject to subsection (6) if a person alleges that any of the provisions of S.70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The court shall have original jurisdiction-

(a) to hear and determine an Application made by a person in pursuance of Subsection (1);

(b) to determine any question arising in the case of a person which is referred to court in pursuance of subsection (3),

and may make such order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Section 70 to 83 (inclusive);

3. ……..”

The Petitioners herein allege contravention of their rights under Sections 70, 74, 77 and 82. In the case of **RASHID ODHIAMBO ALOGGOH & OTHERS V HACO INDUSTRIES CA 110/01,** the Court of Appeal held that once there is an allegation of contravention or threatened violation of ones fundamental rights, they have a right to apply to the High Court and it is upto the Applicant to prove the allegation and it is the duty of the Court to determine whether the allegations if proved, amount to contravention of constitutional provisions. It is upto the Petitioners herein to show that they have a cause of action.

Mr. Kilukumi did concede that indeed there is no allegation of contravention as against the AG as he is only enjoined to these proceedings as the legal representative of the Government. But that the 2nd Respondent being a Government body established under Section 125 of the EMC Act, 1999, with powers to hear appeals under that Act, is the body which the Petitioners allege has contravened their constitutional rights under Sections 70, 74, 77 and 82 in its ruling pursuant to the appeal that the tribunal heard and determined. It is this court’s view that the 2nd Respondent being a decision making body, this court’s jurisdiction will be limited to an inquiry into allegations of violations of fundamental rights by the tribunal, but will not deal with the merits of the tribunal’s decision as it would be tantamount to usurping the tribunal’s powers and in any event there is machinery of appeal provided under S.130 of the EMC Act which should deal with the merits of the decision. I will come back to question of appeal later on in this judgment.

According to the Respondents, this Petition discloses no cause of action. But Mr. Kilukumi submitted that the Sections that are contravened have been specified and supported by the facts contained in Ben Kipeno’s Affidavit that stand uncontroverted. I will consider each allegation as pleaded.

It was the Respondents submission that the Petitioners have not set out with a reasonable degree of precision theprovisions of the constitution allegedly infringed in relation to them and the manner of infringement. There is now a host of case law that has held that in such Applications made under the Constitutional provisions, the Applicant should state precisely what the nature of his complaint is, the provision of the constitution that has been or is likely to be infringed and the manner of infringement. In the Case of **ANARITA KARIMI NJERU V REP (No1) 1979) KLR 184** Trevelyan and Hancox JJ held –

“**We would however again stress that if a person is seeking redress from the High Court on a matter which involves reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”**

Again in, **MATIBA V AG HC MISC 666/1990** the court held,

“**An Applicant in an Application under S.84 (1) of the Constitution is obliged to state his complaint, the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. These allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the Section. It is not enough to allege**

infringement without particularizing the details and the manner of infringement."

In **CYPRIAN KUBAI VS STANLEY KANYONGA MWEMA HC MISC 612/2002**, Justice Khamoni went even further to state as follows:-

"**An Applicant moving the court by virtue of Sections 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Sections, but also to the subsection and where applicable the paragraph or subparagraph of the Section out of 71 to 83, allegedly contravened, plus the relevant act of that contravention so that the Respondent knows the nature and extent of the case to respond to enable the Respondent prepare accordingly and also to know the exact extent and nature of the case it is handling….."**

The above decisions have been applied and adopted as good law in the cases of **KBS LTD V AG (supra), RICHARD NDUATI KARIUKI V THE HON. LEONARD NDUATI KARIUKI H MISC APPLICATION 7/06** and **HC MISC. 1492/05 LENAH KOINANGE V AG** amongst many others.

The Applicant has alleged contravention of their rights as hereunder:-

S.70: equal protection of the law;

S.74: protection from inhuman treatment;

S.77: right to a fair hearing and equality before the law;

S.82: protection from discriminatory treatment.

<u>Contravention under S.70</u>

In respect of the above Section, it is the Petitioner's case that being absolute owners of the land which had been leased out for development of a camp for which NEMA had issued an Environmental Impact Assessment Report which was challenged on appeal, the effect of the ruling of the Tribunal deprives them of their rights under the Registered Land Act Cap 300, Sections 27 and 28 in contravention of S.70 of the Constitution so that the titles are rendered null and void; diluted the rights conferred by the title; adjudication is rendered invalid and the trespassers and Interested Parties are given rights to control the said land and the Petitioners cannot contract freely. I think it necessary to set out the provisions of S.70 of the Constitution. It reads:

"**S.70 (a) whereas every person in Kenya is entitled to Fundamental Rights and Freedoms of the Individual**, **that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedom of others and for the public interest, to each and all of the following, namely-**

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this chapter shall have effect for the purposes of affording protection to those rights and freedoms subject to such Limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

The above section lays down the foundation of protections under chapter V of the Constitution (Bill of Rights) in a general and summarized manner. That is the purpose of the Section. Sections 71-83 do

specifically define the said rights, the manner of protection and there are limitations set out in each section which are designed to ensure that the enjoyment of those rights and freedoms by the individual does not prejudice the rights and freedoms of others or public interest. In my understanding of the above Section, the Applicant cannot generally allege that Section 70 of the Constitution has been breached because it is a generalized Section encompassing all rights. It can only be invoked together with another Section from Sections 71 to 83. In any case, the Petitioners were not specific as to which violation is alleged under S.70 of the Constitution: In light of the decisions considered above, **ANARITA, and MATIBA CASES,** the Petitioners have not proved any violation under that Section.

Contravention under S.74

Were the Petitioners rights under S.74 of the Constitution breached? At paragraph 30 of the petition, the Petitioners pleaded that the decision of the 2nd Respondent had infringed their right to protection from inhuman and degrading treatment in that they could not improve their properties in order to earn a decent living; allowed trespassers to dictate their economic welfare and they were denied that right; that Petitioners were placed in economic bondage or servitude, reduced the status of the Petitioners to tourist objects like wildlife and denied the Petitioners freedom of contract. Section 74 of the Constitution stipulates;

"**74 (1) No person shall be subject to torture or to inhuman or degrading or other treatment.**

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December 1963."

First, I wish to note that the Petitioners did not specifically plead what they were subjected to, torture, or inhuman or degrading punishment or other treatment as specified in this section. As earlier observed, the Petitioners needed to be specific to enable the Respondents to respond adequately.

But what is inhuman and degrading treatment? The New Oxford English Dictionary on Historical Principles defines inhuman treatment as "**an action that is barbarous, brutal and criminal."** Degrading treatment is defined as "**that which brings a person in dishonour or contempt."**

In the Appeal before the Tribunal, the affected parties Narok County Council and Kenya Tourist Federation challenged the approval of an environmental impact assessment project report for a proposed development on the Petitioners pieces of land which the Petitioner had leased out. The affected parties who were aggrieved by the decision of NEMA lodged an appeal under S.129(2) of the EMC Act which appeal the tribunal is mandated to hear and determine. The tribunal performed its statutory duty as prescribed by law (EMC Act) basing its decision on facts and findings and the issues raised before it. The 2nd Respondent's action falls within the limitations under S.74 of the constitution and the 2nd Respondent cannot be deemed to have subjected the Petitioners to an economic bondage or servitude, or interfered with their freedom of contract nor were their rights to make a living from the land taken away. The Petitioners hold their titles under the Registered Land Act as pleaded and the proprietary rights conferred by S.27 of the Registered Land Act on the Petitioners are subject to overriding interests under S.30 of the same Act. Section 30 reads –

"**S. 30 unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without there being noted on the register –**

(a) ……

(b) ……

(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(d) Leases or agreements for leases for a term not exceeding two years periodic tenancies and indefinite tenancies within the meaning of Section 46;

(e) …….”

The above Section has to be read in conjunction with provisions of the EMC Act or other statutes that provide for or affect land user. Under S.58 of the EMC Act any person who undertakes development must submit a project report to the authority.

Section 58 of EMCA stipulates as follows:

“**58 (1) Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project shall, before 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 specific 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.”**

Wasafiri Ltd., who had leased the Petitioner’s land were supposed to undertake such a report and it is what was under challenge on appeal at the tribunal. The nature of the projects that require a report are listed in the second schedule of the Act (EMC Act). That schedule reads:

“**Projects to undergo Environmental Impact Assessment**

1. General

(a) an activity out of character with its surrounding;

(b) any structure of a scale not in keeping with its surrounding;

(c) major changes in land use.”

The Petitioners having leased their lands to Wasafiri Ltd., the lessees wanted to change the land use from agriculture to a Tented Camp. That change of user brought the land under the ambit of the Projects that required an Environmental Impact Assessment report and the Wasafari Ltd. had to comply with the law relating to user of the land and the EMC Act. I find and hold that the Petitioners have not been treated inhumanely or in a degrading manner and hence no breach of S.74 of the Constitution.

Contraention Under S. 77(9)

The petitioners also complain that their rights to a fair and impartial hearing before the Tribunal under S.77 (9) of the Constitution have been breached. S.77 (9) deals with due process before a civil court.

S. 77 (1) Reads:

“**S. 77 (9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”**

The above section enjoins the court or tribunal to ensure that a matter is heard within a reasonable time. At paragraph 43 of Kipeno’s Affidavit, it is deponed that the tribunal took 6 months to hear the appeal. The question is whether 6 months was unreasonable time in the circumstances. I think that question will be better answered after considering what transpired before the Tribunal. At Paragraphs 23, 25 – 29 the Petitioners pleaded that they filed written submissions, before the 2nd Respondent and set out facts which

were unchallenged but the tribunal failed to consider them and failed to hear both parties as required and despite the Petitioners informing the 2nd Respondent that the Appellants had committed perjury by giving wrong user of property and material non disclosure, the Tribunal never ruled on the said issues which should have disqualified the Respondents from being heard. The ruling of the tribunal was exhibited as annexture 'BK 12'. At paragraphs 12 and 14 of the ruling, the Tribunal indicated that it heard submissions on preliminary issues and objections on which it made a ruling on 22nd June 2006 and allowed the appeal to proceed on the basis of the 2nd Appellant's appeal. At paragraph 4 of the Tribunal's ruling, the dates on which the appeal was set down for hearing and which included a site visit are set out. There were numerous witnesses called by the parties, expert witnesses were called and submissions and "generous bundles' of documents and authorities were filed. Considering the number of parties involved, the numerous witnesses that were called and what the Tribunal referred to as "generous bundles" of materials, a hearing that took place within 6 months was in my view, heard expeditiously and therefore within a reasonable time. The record of the ruling shows that the Tribunal addressed the issues presented before it, came up with its ruling and there is totally no evidence of partiality or bias proved by the Petitioners as against the 2nd Respondent.

What would constitute a fair hearing under S.77 of the Constitution? The same can be summed up as follows:

(1) The right to equality before the law;

(2) The right to be tried by a competent, independent and impartial tribunal established by the law;

(3) The right to a fair hearing;

(4) The right to equality of arms in adversarial proceedings;

(5) The right to cross examine witnesses;

(6) The right to present ones case or defence;

(7) The right to expeditious disposal of the case.

The Applicant has failed to demonstrate that any of the above requirements was violated and the Applicant has failed to prove a violation of S.77 (9) of the Constitution. What is apparent from the Petitioner's pleadings and submissions is that they are dissatisfied with the Tribunal's ruling.

Contravention Under S.82

The Petitioners also complained of violation of S.82 of the Constitution which guarantees protection against discrimination. The Section provides as follows:-

"**S.82**

(1) subject to subsection (4) (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this Section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such

description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description

(4) ……(9)"

At paragraph 32, the Petitioner pleaded that the 2nd Respondent discriminated against them because unlike other Kenyans, the Petitioners were denied the right to enjoy their property, that their rights were given to persons who had no legal interest in the Petitioners' property and the tribunal failed to give them equal treatment.

Firstly I wish to note that the Petitioners did not specifically plead the nature of the discrimination they suffered as specified under S.82 (3) eg race, sex, creed, colour or political opinion etc. Similarly, the Petitioners have not demonstrated that they have been discriminated against at all. The Petitioners never demonstrated that Kenyans in their position had not received a similar ruling from the 2nd Respondent or that there is another person in Kenya who has been accorded special treatment in contrast to that accorded to the Petitioners. I find the Petitioners' allegation baseless. The ruling that the Tribunal gave was only in relation to the appeal before them based on the evidence adduced by all the parties before it. No violation is proved under S.82 of the Constitution.

It is the Respondents contention that the 2nd Respondent is not amenable to these proceedings by virtue of S.133 (1) of the EMC Act. The 2nd Respondent is set up under S.125 the EMC Act and S.129 empowers the 2nd Respondent to hear appeals. Under S. 133 (1) the Tribunal is granted immunity. It provides as follows:

"**S. 133 (1) The chairman or other member of the tribunal shall not be liable to be sued in a civil court for an act done by them in the discharge of their duty as members of the tribunal, whether or not within the limits of their jurisdiction, provided they, at the time in good faith, believed themselves to have jurisdiction to do or order the act complained of, and no officer of the tribunal or other person bound to execute the lawful warrants, order or other process of the tribunal shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the tribunal."**

The Respondent's Counsel urged that the tribunal had the jurisdiction to hear the appeal and no proceedings can lie against the Tribunal in Courts of law. S. 133 is similar to S.6 of the Judicature Act which gives protection to judges and Magistrates officers while acting judicially, they shall not be liable in a civil court for an act done in the discharge of judicial duty, if one acted in good faith.

Since the tribunal is immune from suits for its decisions, it is only the Attorney General, the principal legal adviser of the Government of Kenya who can be sued for any of their actions that are challenged. In the instant case, the Attorney General is sued as 1st Respondent, in his capacity as the Government Legal Adviser. Though the tribunal may be named as a Respondent, it cannot be held liable for its actions as shown above. It is the Attorney General who can be held liable. In any event, under S.130 of the EMC Act a right of appeal is allowed against the decisions of the tribunal and so the jurisdiction of the court in matters against the Tribunal would be limited to an inquiry into whether or not, it has violated any fundamental rights and freedoms or has acted with impropriety. Any issues touching on the merits of the tribunal's decision would need to be referred to appeal for determination. The court has found that there are no violations of fundamental rights disclosed in this petition.

No doubt the petitioners seem to be aggrieved by the decision of the Tribunal. There being no violation of fundamental rights disclosed, if they had any genuine grievance, their recourse should have been to the pursue an appeal under S.130 of the EMC Act. S. 130 provides

"**S.130**

(1) Any person aggrieved by a decision or order of the tribunal may within thirty days of such

decisions or order, appeal against such decision or order to the High Court."

The instant Petition does not disclose any Constitutional issues and it amounts to an abuse of the court's process. The Petitioners should have pursued their reliefs in the ordinary civil court's.

In the case of **BAHADUR (1986) LRC (CONST) 297 (from Trinidad & Tobago)** the court said:

"**The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law the proper cause is to bring the claim under that law and not under the Constitution."**

Again in the case of **HARRIKISSON V AG (1979) 3 WLR 63,** the privy council had this to say:

"**the notion that wherever there is a failure by an organ of the Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, under Section 6 (1) the mere allegation that a human right or fundamental freedom of the Applicant has been or is likely to be contravened is not of itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms"**

In the case of **RODGERS MWEMA NZIOKA V AG PET. 613/06** Justice Nyamu referred to such Applications as referred to above as trivializing the Constitutional jurisdiction.

In the instant case, the Petitioners had a remedy provided by statute – ie right of appeal under S. 130 of the EMC Act but instead the Petitioners chose to come to this court, thus abusing its process. S.84 of the Constitution can only be invoked when one has a Constitutional right that is violated. It is not meant for every contravention falling under other statutes otherwise the EMC Act or any other procedure provided under other statutes would be rendered useless if parties were to transform every Contravention into a Constitutional issue. I do adopt and endorse the holding in the **HARRIKISON CASE** as proper law and as applying to this case. The Petitioners had no constitutional rights that were infringed that could entitle them to invoke the jurisdiction under the Constitution and their Application amounts to an abuse of the court process. The upshot is, the Petition is dismissed with each party bearing their own costs.

Dated and delivered this 1st day of August 2007.

R.P.V. WENDOH

JUDGE

Read in the Presence of:

Daniel: Court Clerk

Mr. Kaluu holding brief for Mr. Kilukumi for Petitioners

Mr. Muiruri for the Respondent

R.P.V. WENDOH

JUDGE