REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA
MISC. CIVIL APPLICATION NO. 617 OF 2003

IN THE MATTER OF: AN APPLICATION BY

1. WAA SHIP GABBAGE COLLECTOR

2. BAKRIZ HOLDINGS LIMITED

3. MWOWAKO SHIPPING AGENCIES

4. ALIYAT INVESTMENTS LIMITED

5. SUBIRA SHIPPING

6. KABURU & SONS SHIP CONT

7. SORICO ENTERPRICES

8. NGALA MARINE

9. SCORPION SHIPPING AGENT

10. BINA FREIGHTERS

11. WINYO KENYA LIMITED

12. LE WALS AGENCIES

13. BLUE CAT PORT SERVICES

14. SAJIMULE FREIGHTERS

15. MOHAMED BOAT SERVICE

16. HAMZA BOAT SERVICE

(ALL HEREINAFTER REFERRED TO AS "SLUDGE REMOVERS" FOR EASE OF REFERENCE) FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

A N D

IN THE MATTER OF: KENYA PORTS AUTHORITY CAP 391, LAWS OF KENYA

A N D

IN THE MATTER OF: NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

A N D

IN ACCORDANCE WITH ORDER LIII RULES 1, 2, 3 AND 4 OF THE CIVIL PROCEDURERULES

REPUBLIC …… APPLICANT

- Versus -

1. MINISTER FOR TRANSPORT & COMMUNICATIONS, MR. JOHN MICHUKI

2. KENYA PORTS AUTHORITY

3. NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY …… RESPONDENTS

A N D

1. EAST AFRICAN MARINE ENVIRONMENTAL

2. MANAGEMENT CO. LTD.

3. MATS INTERNATIONAL …… INTERESTED PARTIES

EX-PARTE: WAA SHIP GABAGE COLLECTOR & 15 OTHERS

R U L I N G

By their Notice of Motion dated the 24th October 2003, brought under Order 53 Rules 3 and 4 of the Civil Procedure Rules, the Law Reform Act Cap 26 and Section 3A of the Civil Procedure Act, the 16 Ex-parte Applicants (the Applicants) have sought the Judicial Review orders of Certiorari and Prohibition. In paragraph 1 thereof they have sought an order of Certiorari to bring to this court Kenya Gazette No. 6332 of 10th September 2003 issued by the first Respondent, Hon. John Michuki, Minister for Transport and Communications (the Minister), the letters dated the 20th August and 30th September 2003 issued by the second Respondent, Kenya Ports Authority (KPA) and the letter dated the 8th September 2003 issued by the third Respondent, National Environment Management Authority (NEMA), which notice and letters, according to the Applicants, have appointed East African Marine Environmental Management Company Limited and Mats International (the Interested Parties) "as the only companies that can undertake sludge removal works and which letters and notice have thereby declared the operations of the Ex-parte Applicants in sludge removal works as unlawful

> …" In paragraph 2 they have sought an order of "Prohibition to prohibit the Respondents from proceeding on with their intentions expressed in the aforesaid Notice and Letters"

. The application is supported by the verifying affidavit of ALI SALIM MOHAMED the proprietor of Waa Ship Garbage Collectors, one of the Applicants, and the statement both filed on the 3rd October

2003 in support of the Chamber Summons for leave.

In the verifying affidavit Mr. Mohamed has averred that the Applicants have for about 15 years been contracted by ship owners to remove sludge from ships docking at the port of Mombasa. They have done that professionally without any pollution to the environment and that is why KPA has renewed their licences year after year. By appointing the Interested Parties as the only sludge removers, he said, KPA and NEMA (the Respondents) have not only ruined their businesses but have also affected the lives of their about 3000 employees. The Applicants claim that that is against the declared policy of the Narc Government of creating 500,000 jobs per year. It is further averred that the decisions of the Respondents appointing the Interested Parties as the only sludge removers are dictating to the ship owners as to who to contract with thereby interfering with private contracting rights of business organizations. They have no right, it is further averred, to do that. NEMA having not complained of any pollution of the environment by any of the Applicants, it was further averred, the Respondents had no ground for terminating their services without even giving them a hearing contrary to the rules of natural justice. The decisions, they said, are most unreasonable as they have the effect of favouring one party thereby creating unemployment.

In response KPA and the Interested Parties caused replying affidavits to be filed on their behalf.

Captain Twalib Khamis, the Harbour Master of KPA, swore the replying affidavit on behalf of KPA. He averred that KPA is a statutory body created by the Kenya Ports Authority Act, Chapter 391 of the Laws of Kenya, (the KPA Act). Under that Act, KPA is mandated and obliged not only to provide and operate but also to regulate, maintain, control and improve the facilities, amenities and services to persons making use of prescribed ports including the port of Mombasa. He further stated that in the exercise of its powers and discharge of its duties KPA is empowered under the Act to enter into any agreement with any person for the performance or provision by that person of any of the services or facilities which it may perform or provide.

Captain Khamis further stated that Kenya is a signatory to, and has ratified, the International Convention for Prevention of pollution from ships, 1973, as modified by the protocol of 1978 relating thereto or, in short, MARPOL 73/78. Regulation 12 of Annex 1 to MARPOL 73/78 obliges the Government of Kenya to provide, at ports where ships which have oily residues to discharge dock, facilities for the reception of such residues and oily mixtures. To enable Kenya to perform her obligations and exercise her rights under MARPOL 73/78 and other international conventions and agreements, Parliament enacted the Environmental Management and Coordination Act of 1999 (the Environmental Act). As a parastatal and one of the lead agencies under the Environmental Act, he said, KPA has an obligation to take positive measures to implement the letter and spirit of the Environmental Act and any other legislation or regulation geared towards the management and protection of the environment. Under the Environmental Act NEMA has been established and charged with the responsibility of supervising and coordinating all environmental management activities being undertaken by agencies such as KPA and in that respect NEMA has been working closely with KPA. The Environmental Act, Captain Khamis further stated, prohibits pollution of the environment and requires that any operator wishing to discharge effluents and other pollutants into the sewage and or environment has to install an appropriate plant for the reception and treatment of such effluents and be licensed by NEMA. Studies carried out by NEMA and KPA in conjunction with International Maritime Organization, an institution of the United Nations, have established that sludge and other wastes from ships have been discharged into the mangrove swamps around Mombasa and have caused serious damage to mangrove plantations. Realising the need to provide the port of Mombasa with a reception facility such as is contemplated by Regulation 12 of Annex 1 to MARPOL 73/78, he said, KPA advertised both in the local and international press a pre-qualification notice inviting firms competent and experienced in waste and collection management to give proposals that would comply with the Environmental Act, MARPOL 73/78 and other related laws and international treaties. In the local press the advertisement was carried in the Daily Nation Newspaper of the 29th November 2001. Following that advertisement the Interested Parties submitted a comprehensive proposal but none of the 16 Applicants presented or submitted expressions of interest. After tender the Interested Parties were picked and KPA entered into concession agreements with them on the 28th June 2002. The Interested Parties were thereafter authorized by NEMA to operate the facility. He stated that the

concession agreements with the Interetsed Parties are non-exclusive and that the Applicants can always apply to KPA for a similar agreement.

Captain Khamis concluded that the Gazette notice and the letters complained of do not contain any decision capable of being quashed by an order of certiorari, that judicial review does not lie in respect of contractual relations and that to grant the orders sought the court will be sanctioning operations by the Applicants in contravention of the Environmental Act.Khalid A.M. Al-Nahdy, the Managing Director of the first Interested Party in his replying affidavit sworn on behalf of the Interested Parties echoed the averments contained in Captain Khamis's affidavit as summarized above and added that the first Interested Party is a liability company incorporated in Kenya and established for the purposes of providing environmental services for the Port of Mombasa and specializes in offering comprehensive solutions in waste handling and management through the provision of efficient waste reception and treatment plant. He further stated that the reception and treatment of waste from the port involves a long and complex process of receiving the waste such as sludge from ships at their reception tanks followed by the process of sorting, screening, decanting and centrifuging. The end products are clean oil which is used for other purposes like in furnaces and engines, water which can be used for irrigation and solids that can be turned into fertilizer.

Mr. Al-Nahdy further deposed that the first Interested Party's plant established at a cost of over Kshs. 400 million was conceived and developed with a view to providing a reception facility to receive oil based waste from ships calling at the Port of Mombasa in compliance with the provisions of Regulation 12 of Annex 1 to MARPOL 73/78 and the provisions of the Environmental Act which have outlawed environmental pollution through reckless collection and disposal of waste such as sludge, garbage, hazardous substances and other pollutants from ships. Pursuant to the invitation published by KPA in the Daily Nation Newspaper of 29th November 2001, he said, the Interested Parties submitted a comprehensive proposal for a Waste Collection/Handling System. The proposal was also presented to the Kenya Ships Association who were satisfied that it conformed to international standards. Their proposal and tender were accepted and on the 28th June 2002 the Interested Parties entered into two concession agreements with KPA relating to the collection and management of waste from the Port of Mombasa and thereafter obtained the necessary authority from NEMA to commence operations.

In the light of the foregoing, Mr. Al-Nahdy further averred, the Applicants argument that the tender was awarded to the Interested Parties contrary to the rules of natural justice does not hold any water as the Applicants did not tender for or show interest in the contract. Their application is therefore not only misconceived but also malicious and brought in bad faith to frustrate the Interested Parties. The contract between KPA and the interested parties is non-exclusive and the Applicants are therefore at liberty to contract with KPA to provide the same services.

In response to paragraph 10 of the verifying Affidavit, Mr. Al-Nahdy further stated that the same is misleading. The power to decide who carried sludge rests with the KPA and not the ship owners and that KPA can only enter into agreements for removal and management of sludge from ships with operators who are duly certified and authorized by NEMA in accordance with the Environmental Act. The Applicants having not been so authorized by NEMA, he said, should not be allowed to interfere in any way with the operations of the Interested Parties. He further stated that the stay order they have obtained in this matter has already caused the Interested Parties enormous loss. In response to the replying affidavits Mr. Ali Salim Mohamed swore and filed a further affidavit on behalf of the Applicants in which he vehemently denied that any of the Applicants has ever discharged sludge into mangrove swamps or any other area. He annexed to that affidavit a newspaper cutting which he said shows that it is KPA which allowed oil to spill into the mangrove swamp in September or October 2003 and that in 1991 KPA's fork lift knocked the oil tankers belonging to the Kenya Power & Lighting Company Limited resulting in a massive oil spillage into the environment. He explained in detail how the Applicant removed sludge from ships without any spillage to their respective premises from where it is sold to companies like Bamburi Cement who use it. None of them has ever been charged for let alone warned of polluting the environment. To the contrary they have been given letters of commendation by NEMA.

Regarding the Interested Parties Mr. Mohamed stated that unlike the Applicants they have no

experience in handling sludge. While admitting that MARPOL 73/78 requires Kenya to ensure that sludge from ships is directed to and received into an authorized reception facility with appropriate certificates issued, he said that that responsibility lies with the Government. It should not be delegated to a private company like the Interested Parties. He also said that as advised by the International Maritime Organization the Government or KPA should have developed the reception facility instead of abdicating that responsibility to the Interested Parties to make super normal profits. MARPOL 73/78 having not been domesticated, he further averred, KPA has no powers to enter into agreements like the ones it has entered into with the Interested Parties. He concluded that the Applicants were not aware of the tender issued by KPA leading to the concession agreements as it was carried only once in the Daily Nation Newspapers.

Counsel for the parties made long submissions along the lines of the averments contained in their respective clients' affidavits. They quoted several authorities and raised several legal points. I will deal with those submissions and legal points when considering each of them.

The first legal point that falls for consideration is the one raised by Mr. Gitau counsel for the Interested Parties. He urged that by virtue of Section 8 of the Law Reform Act the Kenyan courts are required to apply the law applicable in England on Judicial Review at any particular time. He argued that the current law in England requires an applicant for judicial review to first give notice to the proposed respondents to rectify the situation complained of before taking legal action. He cited the **Principles of Judicial Review by De Smith pages 584 and 585 as well as the English Civil Procedure Rules at pages 2048 to 2050** as authority for that proposition and urged me to dismiss the application for non compliance with that requiremt. He did not provide the relevant pages of De Smith's book. I have, however, read the English Civil Procedure Rules on the point. My understanding of the requirement that notice first be given is that it is intended to identify and crystallize the issue or issues in dispute to minimize costs. In situations where it is not practicable to give the notice the rules allow immediate action to be taken without giving notice. In my judgment therefore failure to give notice before action is not fatal. If however the court is of the view that, in the circumstances of the case, notice should have been given and perhaps the matter resolved out of court it may penalize the applicant by an order of costs or imposition of any sanction.

Mr. Okello, learned State Counsel, representing the Minister for Transport and Communications and Mr. Gitau submitted that the Applicants' Notice of Motion is fatally defective because it is not properly intituled. Citing the cases of M**ohamed Ahmed Vs Republic [1957] EA 523 and Farmers Bus Service & Others -Vs- The Transport Licensing Appeals Tribunal [1959] EA 77**9 they argued that the Notice of Motion should be brought in the name of the Republic Versus the Statutory Authority or Authorities as Respondents, Ex-parte the Applicants. They submitted that the heading as it is in starting with the names of the Applicants is a complete muddle and should be struck out. They also referred to the E**nglish Practice Direction (Administrative Court: Establishment), [2000] 1 W.L.R. 1654 at page 1655 and Civil Procedure of England, (2003 Vol.1 Sweet & Maxwell pages 1354 and 1355**. Mr. Okello, in particular, argued that the motion should not have shown the Republic as the Applicant and the Minister of Transport and Communications as Respondent as that is making the Republic both the Applicant and Respondent.

With respect Mr. Okello misunderstood the authority in Farmers Bus Service (supra). Pursuant to the direction given in that case the heading of the application at leave stage should have been:

"In the Matter of an Application by (the Applicants for leave to apply for orders of

Certiorari and Prohibition

And

In the Matter of Kenya Ports Authority Act

And

I**n the Matter of the National Environmental Management and Co-ordination Act 1999"**

And after leave had been granted the Notice of Motion should then have been intituled

"Republic …… Applicant

Versus

Minister for Transport & Communications,

Hon The. John Michuki

The Kenya Ports Authority

The National Environmental

Management Authority ……. Respondent

And

East African Marine Environmental

Management Co. Ltd.

Mats International …… Interested Parties

Ex-Parte: Waa Ship Garbage Collectors & 15 Others"

By naming the Minister as one of the Respondents, in my view, is not making the Republic the Applicant and Respondent at the same time. How else could the Minister be brought into the matter if there is a complaint against him? It is common knowledge that once the application has been brought in the name of the Republic the person who urges it is the Ex-parte Applicant and not the Attorney General. If one of the Government departments like the subordinate court or a ministry is named as a respondent the Attorney General appears for that department.

The rational for bringing the application in the name of the Republic stems from English Law. In the English system the origin of Judicial Review arose from the immunity given to the judicial officers in the discharge of their judicial duties. Public policy demanded that no judge should be harassed by the thought that: "if I do this or that, I may be sued by this or that prisoner or this or that litigant". Rather than subject a judge or inferior tribunal to influences of that kind the law provided that no litigant or prisoner could bring an action against a judicial officer for anything done by him in his judicial capacity. But that did not mean that nothing could be done by any one. An unjust judge of an inferior tribunal was not to be free from control. Although he did not owe a duty to a prisoner or litigant he did owe a duty to the state and the state could call upon him to account. In the old times in England the King was regarded as the state and the state as the King. It was for the King to call upon any judge of an inferior tribunal to account for his actions whenever a complaint was raised. The King did this by the prerogative writ of certiorari. The very words "prerogative writ" showed that it was issued by the royal authority of the King. No subject could issue it on his own. He had no right to issue it as that could amount to an action by an individual against a judge or a judicial officer. All that the subject was required to do was to inform the Kings judges, the Kings Bench, of his complaint. He could tell them about the unjust judge of the inferior court and the King's judges, if satisfied, would then authorize the issue of a writ in the Kings name. The very titles showed that. They were intituled Republic Vs ABC Ex-parte XYZ. The title showed that XYZ had made an ex-parte application to the Kings judges, the King's Bench, and the King's judges had given leave for the proceedings to be brought in the King's name against the inferior court or tribunal. The present day equivalent in Kenya is the application for leave to apply for orders of judicial review. The notice to the Registrar who is supposed to pass a copy to the Attorney General is information to the state

of the intended application.

Reverting to the matter before me the heading of both the application at leave stage and the consequent Notice of Motion is as stated in the title to this ruling. I agree with Messrs Okello and Gitau that it is a muddle. The titles for the chamber summons application for leave and the subsequent Notice of Motion should have been different as shown above. But does that mean that the heading of this Notice of Motion as is headed makes it fatally defective? I have studied the authorities in both cases of Mohamed Ahmed Vs Republic and Farmers Bus Service (supra). In the first case the notice of appeal was intituled:-

"Mohamed Ahmed …… Applicant

and

Crown ……. Respondent

(Appeal from the Order of the High Court of Uganda at Kampala (Honourable Chief Justice Mckisack) dated the 11th June 1957".

It was held that, as the application had to be brought in the name of the Crown, the heading made the Crown both the Applicant and Respondent. The appeal was dismissed on other grounds and not on the ground of its format. In the Farmers Bus Service case leave was given to amend the notice of appeal and other documents of appeal. In neither of the cases was it held that the erroneous heading of the application made it fatally defective.

In this case, inspite of the muddle, the title shows the Republic as the Applicant and the Minister, KPA and NEMA as the Respondents. The lower part of the title starting with Republic as the Applicant should have been at the top as stated in the heading I have shown above. I do not think that the mix up has caused the Respondents and Interested Parties any prejudice nor does it make it fatally defective. Accordingly I overrule the point raise by Messrs Okello and Gitau on the format of the Notice of Motion.

The other point taken by Mr. Gitau on the competence of the Notice of Motion is that the same is not supported by an affidavit as required by Rule 7(1) of Order 53. That Rule states:-

> "7**(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the court".**

In this case the Applicants seek to have Gazette Notice No. 6332 of 10th September 2003 and the letters of 20th August 2003, 30th September 2003 and 8th September 2003 copies of all of which are annexed to the verifying affidavit filed at leave stage. The Applicants have stated in the Notice of Motion that it is supported by that verifying affidavit. I do not find anything wrong with that, least of all that failure to file another verifying affidavit with copies of the same documents along with the Notice of Motion makes it defective. In fact, if I may add, the rule does not state that the Notice of Motion should be "supported" by a verifying affidavit. In my understanding what the rule requires is the filing of the impugned order or document verified by affidavit.

In the case of the **Republic of Kenya Vs The District Co-operative Officer Meru Ex-parte Simon G. Ithira & Others HC Mis. App. No. 990 of 1995** it was held that the provisions of Order 53 Rule 7 are mandatory. I entirely agree with that. However in that case we are not told whether or not there was before court a verifying affidavit or a copy of the decision sought to be quashed. As I have already stated copies of the documents or alleged decisions sought to be quashed in this matter with a verifying affidavit are already before the court in this same file. I therefore do not find any merit in the point raised in this respect and the same is also overruled. Having disposed off the preliminary points I now come to the

main issues raised in this matter. As I have already stated this Notice of Motion seeks to bring up to the High Court and quash Legal Notice No. 6332 of 10th September 2003 and the letters dated 8th September 2003, 20th August 2003 and 30th September 2003.

As there are points raised on the actual prayers in this Notice of Motion I think it is appropriate that I should set them out in extenso. The Ex-parte Applicants pray for orders:-

> **"1] THAT the Ex-parte Applicants be granted orders of Certiorari to bring before this Honourable Court Kenya Gazette Notice No. 6332 of 10th September, 2003 issued by the 1st Respondent Hon. John Michuki, Minister for Transport and Communications and also bring before this Honourable Court the letters dated 20th August, and 30th September, 2003 issued by the 2nd Respondent [Kenya Ports Authority] and letter dated 8th September, 2003 issued by the 3rd Respondent [National Environment Management Authority] which said Notice and letters have appointed the Interested Parties as the only companies that can undertake sludge removal works and which letters and Notice have thereby declared the operations of the Ex-parte Applicants in sludge removal works as unlawful and to have the said Notice and letters declared as unlawful, illegal and of no legal consequence and therefore null and void.**

2] THAT the Ex-parte Applicants be granted Orders of Prohibition to prohibit the said Respondents from proceeding on with their intentions expressed in the aforesaid Notice and Letters".

Mr. Gikandi, learned counsel for the Applicants, strongly submitted that the Gazette Notice reports of an agreement which purports to enforce MARPOL 73/78. Citing the authority in the cases of **East African Community Vs Republic [1970] EA 457 and Watson Vs Department of Trade [1989] 3 ALL ER 52**3 he argued that MARPOL 73/78 not being part of the municipal law of Kenya by being domesticated none of the Respondents had the legal capacity to enter into any agreement purporting to enforce it. According to him whether or not the Applicants participated in the tender process resulting in the appointment of the Interested Parties as the only sludge removers from the port of Mombasa is immaterial. The concession agreements being based on MARPOL 73/78, he said, the whole process is wrong footed and must be quashed. He added that the Minister should not even have reported on the agreements.

Mr. Gikandi further argued that Section 55 of the Environmental Act authorizes the Minister responsible for matters of Environment to declare any part of the coast to be a protected Coastal Zone. That has not been done and NEMA had therefore no legal basis for issuing the letter dated 8th September 2003 and the same should also be quashed. He further submitted that although Section 12 of the KPA Act authorizes KPA to regulate the Port and enter into agreements with other parties it can only enter into agreements authorized by law. The concession agreements have not been authorized by any law and hence have no legal authority, he concluded. On their part counsel for the Respondents and the Interested Parties equally strongly opposed the application. All the three counsel submitted that the Gazette Notice and the three letters did not contain any decision capable of being quashed by an order of certiorari. Mr. Okello submitted that although the Applicant's counsel's submissions challenged the concession agreements the Notice of Motion does not seek to quash the agreements and on the authority of the Court of Appeal decision in Kenya National Examination Council Vs Republic Ex-parte Geoffrey G. Njoroge & Others Civil Appeal No. 266 of 1996 this court cannot grant any relief not prayed for in the application. Messrs Swaleh and Gitau submitted that KPA is empowered under the KPA Act and specifically under section 12 thereof not only to provide, control and regulate services and activities at the Port but also to enter into agreements like the concession agreements it entered into with the Interested Parties. Mr. Gitau added that in entering into the agreements, KPA, as one of the lead agencies, is implementing the Environmental Act. According to him the concession agreements were entered into under the provisions of the KPA Act, the Environmental Act and Legal Notice No. 159 of 10th September 2003.

Before I deal with these rival submissions, I would like to set out the criteria upon which a decision can be amenable to the judicial review order of certiorari. The Court of Appeal in Municipal Council of

Mombasa Vs Republic, Ex-parte Umoja Consultants Limited Civil Appeal No. 185 of 2001 while considering the scope of judicial review as a whole stated:-

> "**As the court has repeatedly said judicial review is concerned with the decision making process, not with the merits of the decision itself. … The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who made the decision have the power i.e. jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the questions a court having a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider, [for] acting as an appeal court over the decider would involve going into the merits of the decision itself such as whether there was or was not sufficient evidence to support the decision and that, as we have said, it is not the province of judicial review"**

As regards certiorari with which we are here concerned, the uses to which it can be put include to secure an impartial trial, in instances where bias is alleged in the court; to review excess of jurisdiction; to challenge an ultra vires act; to quash a judicial decision arrived at in breach of natural justice and to correct errors of law on the face of the record. In none of these cases should the court entertain an appeal and it is not empowered to substitute its own discretion or decision for that of the court or other body whose act is being reviewed.

The above are the criteria applicable when considering the decisions of inferior courts which are always under a duty to act judicially and statutory tribunals which have a duty to act judicially or quasi judicially. However when dealing with the decisions of statutory bodies, like KPA and NEMA in this case, which are not always under a duty to act judicially, different considerations come into play. Their decisions are amenable to judicial review if they are judicial or quasijudicial. If they are purely administrative or executive decisions they are not amenable to judicial review unless they are contrary to law, or they have taken into account matters that they ought not to have taken into account or conversely they have failed to take into account matters that they ought to have taken into account. Their decisions can also be quashed if they are so unreasonable that no reasonable tribunal or body would have come to such decisions. As to when a decision is purely administrative or executive it all depends on the facts and circumstances of each case.

It is not necessary that a body or an authority should be a court in the strict sense of the word for it to act judicially. An administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of, or are not in accordance with the practice of a court of law. If in order to arrive at its decision the body concerned has to consider proposals and objections and consider evidence or if at some stage in its proceedings leading upto its decision there was something in the nature of a law suit before it, then it would be under a duty to act judicially. If, on the other hand, an administrative body in arriving at its decision has nothing before it like a law suit and its decision is arrived at by considering matters of policy then it is not under a duty to act judicially.

With these in mind I now wish to consider the impugned documents.

The first point for determination then is whether or not the Gazette Notice and the letters contain decisions capable of being quashed by certiorari. I will deal with each of them separately and where necessary set out the relevant parts.

Gazette Notice No. 6332 of 10th September 2003 was issued by the Minister. In the first paragraph it states:-

> **"It is notified for the information of the general public and the port users in particular, that Kenya Ports Authority … entered into an agreement with Messrs East African Marine and Environmental Management Company Limited … on the 28th June 2002".**

The other paragraphs state what East African Marine and Environmental Company Limited will do how it will do it and what it will charge.

Clearly this is not the Minister's decision. The decision was that of KPA which had been taken earlier, on the 28th June 2002, when it entered in the agreements with East African Marine and Environmental Management Company Limited. The Gazette Notice was a mere report by the Minister for the consumption of the general public and the port users in particular. Being a report it is in my view not capable of being quashed by an order of certiorari.

Mr. Gikandi submitted that the Gazette Notice should be quashed together with the agreements it refers to. That, however, is not one of the prayers in the Applicants' application. I have already set out herein above the prayers and they are quite clear. That being so I agree with Mr. Okello that I cannot, in this application, order the quashing of the concession agreements. See Kenya National Examination Council Vs Republic Ex-parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 C.A. (unreported). It then follows that even if the Gazette Notice was capable of being quashed by certiorari and I quash it, that will still leave the agreements intact.

The next documents I want to consider are the two letters dated 20th August 2003 and 30th September 2003 from KPA. The first letter dated the 20th August 2003 is addressed to M/s Mwowako Shipping Agencies. It states that:-

"LICENSING OF COMMERICAL OPERATIONS IN PORT SLUDGE COLLECTION LICENSES CALENDAR YEAR 2003 In accordance with the condition that was attached to the issuance of the sludge collection licence to yourselves, you are hereby given notice to cease operations within three months from today, 18th August 2003. That is to say you shall cease operating on Wednesday 19th November 2003.

This decision has been made following the commencement of operations by M/s Mats International. This firm has the mandate to manage waste in the entire port area and shall in the near future move into the area of garbage collection and disposal. When this happens, all holders of garbage collectors licences shall be duly notified.

For any further explanation, please contact the undersigned" This letter in my view contains the decision of KPA to terminate the licence issued to M/s Mwowako Shipping Agencies with effect from the 19th November 2003. It stated that "This decision has been made following the commencement of operations by M/s Mats International", which had "the mandate to manage waste in the entire port area …". It is a decision which affects the rights of people, in this case the applicant to whom it is addressed. But as to whether or not it is amenable to judicial review remains to be seen.

The letter dated 30th September 2003 was addressed to the same firm. It is a reminder of the earlier one reproduced above which reiterated that that firm's contract would end on Wednesday the 19th November 2003. It advised the firm to continue operating alongside M/s East African Marine & Environmental Management Company until that date. It also advised the firm to contact the Authority (KPA) in the event that the firm needed further clarification in the matter. It does not, in my view, contain a decision capable of being quashed by certiorari.

Whether or not certiorari should issue to quash the first letter of 20th August 2003 brings me to the second point raised in this matter. That is, whether or not KPA had the legal capacity to enter into the concession agreements with the Interested Parties and terminate the Applicants' licences. Mr. Gikandi submitted that it did not have any such powers as the agreements were based on MARPOL 73/78 which has not been domesticated and made the municipal law of Kenya and that the decision was made against the rules of natural justice.

KPA is a creature of statute - the KPA Act, Cap 391 of the Laws of Kenya. It is established by Section 3 of that Act. Section 12 of the Act spells out the powers of KPA. It states:-

"12(1) The Authority shall have powers:-

(i) to maintain, operate, improve and regulate the ports set out in the second schedule …….

(ii) to provide such amentities or facilities for persons making use of the services performed or the facilities provided by the Authority as may appear to the Board necessary or desirable.

(2) Subject to this Act, the powers conferred by subsection (1) shall include all such powers as are necessary or advantageous and proper for the purposes of the Authority and in particular, without prejudice to the generality of the foregoing, shall include power …….

(j) to prohibit, control or regulate:-

(i) the use by any person of the services performed, or facilities provided, by the Authority; or

(ii) the presence of any person, ship, vehicle or goods within any port or on any premises occupied by the authority ……..

(n) to enter into agreements with any person -

(i) for the supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary or desirable for the purposes of the Authority;

(ii) for the performance or provision by that person of any of the services or the facilities which may be performed by the Authority; ……

The ports in the Second Schedule referred to in Section 12(1)(a) include the port of Mombasa.

These provisions are self explanatory and require no elucidation. KPA has power "to maintain, operate, improve and regulate the ports" including the port of Mombasa. It has power to provide "amenities or facilitates" to those using the ports "as may appear to the Board (the Board of KPA) necessary or desirable". It has also power "to prohibit, control or regulate" entry into the port by any person. The Applicants cannot therefore be heard to claim that KPA has no powers to stop them from going into the port to contract with ship owners directly. If it did not have those powers the port of Mombasa would be like a market place and totally chaotic.

Pursuant to Section 12(1)(h) KPA is obligated to provide amenities or facilities for use by persons calling at the port. If it is not able to provide them, it has power under paragraph (n) of sub-section (2) of that Section to contract with any other person for the provision of those amenities or facilities.

It is common knowledge that there are many international ships calling at the port of Mombasa. These are the ships from which the Applicant have, as they said for the last 15 years or so, been collecting sludge and other waste. Due to the growing concern about the pollution of the environment international treaties, conventions and regulations have been made requiring, inter alia, that all ships should discharge all waste and in particular sludge generated in the course of their journeys to acceptable reception facilities at the ports where they call and obtain certificates that they have done so. Failing to do that their monitoring agencies will accuse them of discharging it into the sea and have them blacklisted. During the hearing of this application the court visited the port of Mombasa and went into one of the ships that docked there. Its captain showed us a book containing a record of the ports where it had discharged sludge and the quantities discharged at each port. He also showed us certificates issued by those ports verifying those discharges.

In his affidavit sworn and filed on the 23rd October 2003 Captain Twalib Khamis, the Harbour Master of KPA, stated that out of studies carried out by KPA and NEMA in conjunction with the International Maritime Organization, and institution of the United Nations, a serious need was identified for providing

the port of Mombasa with a reception facility in accordance with the international regulations and in particular Regulation 12 of Annex 1 to the MARPOL 73/78. In my view there is nothing wrong with that. The Port of Mombasa is an international one. As it allows international ships to dock there it has no choice but to comply with international standard otherwise it will be blacklisted and isolated. Apparently because KPA was not able or did not want to provide such reception facility it entered into the concession agreements with the Interested Parties to provide it. As I have already stated KPA had powers under Section 12(2)(n) to enter into such agreements. In my judgment therefore reference to MARPOL 73/78 does not make any difference. An agreement made pursuant to and under the provisions of the law of Kenya does not become illegal simply because it incidentally complies with and or makes reference to an international treaty or convention which has not been domesticated and made the municipal law of Kenya.

I now turn to the letter from NEMA dated 8th September 2003. It is addressed to the Manager WAA Ship G. Collector. It states:-

"**REF: PROHIBITION OF DISCHARGING OF OIL OR MATERIAL CONTAINING OIL (OIL SLUDGE) INTO THE ENVIRONMENT** It has come to the notice of this office that all firms handling … oil sludge and other waste especially from the port have been disposing these waste in such a manner that causes pollution to the environment as there was no facilities for appropriate discharge. This has been the case for a long time.

I am very glad to inform these firms that our problems have been solved and now there is facility which is to be used for the disposal of oil containing liquids. The EAM Environment Oil Receptor Facility has facilities and capacity to recycle the oil sludge in an environment friendly manner. This will ensure the EMCA 99 [Environmental Management and Co-ordination Act] stipulation of a clean and healthy environment for all persons in Kenya.

I therefore would like to implore you to use this facility for the discharge [of] oil sludge. I also wish to remind you that the discharge or disposal of oil or oil containing material such as oil sludge is an offence. This is stated in the EMCA 99 in Section 93 subsection 1 to 3 that quotes;"

The letter then proceeds to quote Section 93 of the Environmental Act 1999 and continues:- "this is addition to the fine not exceeding five hundred thousand shillings as is stipulated in section 142(1((c) which will be charged upon conviction.

Let us use this facility to ensure a clean and healthy environment for all"

. Does this letter have a decision capable of being quashed by an order of certiorari? If it has did NEMA have legal authority to make the decision?

In my view the letter is just reporting what the NEMA office had discovered. That is that "all firms handling sludge and other waste especially from the port" had been discharging it recklessly thus polluting the environment. That was because there was no facility for appropriate discharge. The letter then informed the firms that a reception facility had been developed capable of recycling oil sludge in an environment friendly manner in compliance with the Environmental Act and implored that firm to use that facility to avoid polluting the environment. It ended by warning the firm that it is an offence under Section 93 of the Environmental Act to pollute the environment and informed it of the sentence it would suffer if it contravened the provisions of that Act.

I hold that the letter has no decision capable of being quashed by certiorari. If, however, I am wrong in this and it is found that the letter has such decision, did NEMA have legal power or authority to make such decision?

Captain Twalib Khamis in his said affidavit stated that Kenya is a signatory to MARPOL 73/78. Regulation 12 of Annex 1 thereof obliges the Government of Kenya, as other signatories, to provide, at the ports where ships that have oil residues to discharge, facilities for such residues and oily mixtures

from the ships. He further stated that to enable Kenya perform her obligations, as it has a port where ships call, and exercise her rights under MARPOL 73/78 and other international conventional conventions, treaties and agreements, in addition to other legislation geared towards establishing institutional frameworks for the proper management of the environment, Parliament enacted the Environmental Management and Cordination Act, 1999. NEMA is established under Section 7 of that Act and Section 9 sets out NEMA's objects and functions. The primary object is stated by Section 9(1) in the following terms:- "9(1) The object and purpose for which the Authority [NEMA] is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment".

Among its other functions NEMA is to co-ordinate the various environmental management activities being undertaken by the lead agencies and promote proper management of the environment for the improvement of the quality of life in Kenya. It is also required under Section 9 to advise the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party. Section 87 of the Act is particularly relevant to this application. It provides that:-

> "87(1) No person shall discharge or dispose of any waste whether generated within or outside Kenya, in such manner as to cause pollution to the environment or ill health to any person.
>
> (2) No person shall transport any waste other than -
>
> (a) in accordance with a valid licence to transport wastes issued by the Authority; and
>
> (b) to a waste disposal site established in accordance with a licence issued by the Authority".
>
> (**3) No person shall operate a waste disposal site or plant without a licence issued by the Authority".**

Section 88(1) requires any person intending to transport wastes or to operate a waste disposal site or plant, prior to transporting or to commencing with the operation of waste disposal site or plant, to apply to the Authority in writing for the grant of an appropriate licence. Section 89 provides that:-

> **"Any person who, at the commencement of this Act, owns or operates a waste disposal site or plant … shall apply to the Authority for a licence under this part, within six months after the commencement of this Act".**

And Section 93(1) also provides that:-

> "**No person shall discharge any hazardous substance, chemical, oil or mixture containing oil into any waters or any other segments of the environment contrary to the provisions of this Act or any regulation thereunder".**

From these provisions and others in the Environmental Act it is, in my view, manifest that NEMA is empowered under the Act to control and regulate all acts, and I may add even omissions, that are polluting or likely to pollute the environment. As I have said if its impugned letter of 8th September 2003 has any decision which can be quashed by certiorari NEMA had authority under the Act and was perfectly entitled to make the decision or give the advice and warning it gave in that letter.

With regard to MARPOL 73/78, which Mr. Gikandi harped on, Section 9(2)(g) of the Environmental Act requires NEMA to:- "**advise the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party;"**

In my view this Section gives NEMA authority to take appropriate steps to implement the provisions of regional and international conventions treaties and agreements to which Kenya is a party, like MARPOL

73/78, where local circumstances demand or allow. It follows therefore that if ships calling at the Port of Mombasa are under the international instruments like MARPOL 73/78 required to discharge sludge to an acceptable reception facility, NEMA and the lead agencies (defined in the Environmental Act as including parastatals) are obligated to ensure that that is done.

For these reasons I reject the Applicants contention that KPA and NEMA had no legal authority to issue the letters dated the 20th August 2003 and 8th September 2003 respectively. In the same vein I also reject their contention that KPA had no authority to enter into the concession agreements with the Interested Parties.

What I need to decide now is whether or not in making the decisions contained in those letters and entering into the concession agreements KPA and NEMA exceeded their authority or breached the rules of natural justice.

In the English case of **Republic Vs Furnished Houses Rent Tribunal Ex-parte Kendal Hotels Ltd. [1947] ALLER 44**8 it was held that certiorari is a very special remedy. When it is sought in order to bring up and quash the decision of a judicial tribunal the question which has to be considered is whether or not the tribunal acted within its jurisdiction. If it is exercising the powers with which it has been entrusted by an Act of Parliament whether or not it misconstrues the Act or it rejects evidence or decides a matter without evidence or misdirects itself in some way, that is not a matter for certiorari. It was also decided in the case of Republic Vs Minister of Health, [1938] ALLER 32 that misconstruing a section of an Act is not acting without jurisdiction.

In the celebrated case of Associated Provincial Picture Houses Limited Vs Wednesbury Corporation [1947] 1 KB 223, in which the court enunciated what later came to be known as the Wednesbury principles, it was held that where a local authority is empowered under an Act of Parliament to act or decide on some matter the court can only intervene in three situations. The first situation is where it has acted out of jurisdiction. The second one is where it has taken into account matters it ought not to have taken into account or failed to take into account matters it ought to have taken into account. The third and last one is where it has made a decision that "is so unreasonable that no reasonable authority could ever come to it" (page 230). This is what Lord Diplock described in Council of Civil Service Unions Vs Minister for Civil Service [1985 AC 374 as "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

Did the said decisions of KPA and NEMA breach any of these principles? As I have already stated, the two had legislative authoritive to make them and they did not exceed that authority. They therefore acted within their jurisdiction. Did they take any matter into consideration that they ought not to have taken in consideration? Other than the allegation by Mr. Gikandi that they applied MARPOL 73/78, the Applicants never made any allegation of any matter having been taken into account which was not supposed to be taken into account or that the Respondents failed to take into account any matter that they should have taken into account.

I have already stated that the Environmental Act obliged NEMA and the lead agencies to implement regional and international conventions in preservation of the environment and that the MARPOL 73/78 requirements which they took into account are matters which were already provided for in that Act. So they cannot be faulted in this respect. The decisions can also not be said to be in any way unreasonable. I therefore find that neither KPA nor NEMA flouted any of the Wednesbury principles. To the contrary they acted within them.

What about the principles of natural justice? The Applicants also complained that they were condemned unheard. But they did not specify in what respect they were so condemned. If it is in the award of the tender to and the subsequent contract with the Interested Parties as the only sludge collectors from the port, the Respondents' explanation is simple. When it was realized that the port of Mombasa required an acceptable reception facility and KPA was not in a position or did not want to develop one it advertised and invited those interested to submit proposals. The Applicants did not submit any proposals

but the Interested Parties did. After due consideration the Interested Parties were awarded the tender to develop the facility and subsequently KPA entered into the concession agreements with them. That none of the 16 applicants saw the advertisement in the Daily Nation of 29th November 2001 inviting proposals sounds rather incredible and unacceptable. Having not submitted proposals they cannot be heard to complain that they were condemned unheard when they did not show any interest in the tender. I find that the rules of natural justice were not in any way violated and reject the Applicants complaint in this regard.

I have already found that the KPA letter of 20th August 2003 contained a decision which withdrew or terminated the license of the Applicant to whom it was addressed. Is it amenable to judicial review?

As already stated KPA has authority under the KPA Act to inter alia regulate entry into the port. It must be having its criteria when considering applications for entry permits or licenses. Being one of the lead agencies under the Environmental Act it must have considered the requirements under that Act that any applicant was supposed to meet in order to be licensed to collect sludge from the port. It had not received any proposals from any of the Applicants to develop an acceptable reception facility. Under the Environmental Act, section 87(2) transporters of sludge and other waste like the applicants are required to obtain a licence from NEMA. The Applicants have not. They have not said that they have an acceptable and licensed receiption facility to which they wish to discharge sludge and waste collected from ships. Considering these factors it must have decided that the Applicants were not suitable firms to be licensed to continue collecting sludge. To arrive at that decision KPA did not require to consider any evidence or proposals and objections. Its decision contained in its letter of 20th August 2003 was therefore a purely administrative decision not amenable to the judicial review order of certiorari. **See Franklin & Others Vs Minister for Town and County Planning [1974] 2 ALLER 289, Republic Vs Metropolitan Police Commissioner, Ex-parte Parker [1953] 2 ALLER 717 and Republic Vs The Rent Court of the Company of Waterman and Lightermen of the River Thames (1897) 1 QB 659.**

If, however, the Applicants had submitted their proposals pursuant to the Advertisement of 29th November 2001 or objected to the Interested Parties' proposals then the KPA decision to award the tender to the Interested Parties could have been judicial or quasi-judicial and amenable to judicial review order of certiorari.

This being the view I hold in this matter it is not necessary for me to consider the other legal points raised and authorities cited.

In a nutshell I hold that the Gazette Notice No. 6332 of 10th September 2003 issued by the Minister of Transport and Communications, the letter from KPA dated the 30th September 2003 and the letter from NEMA dated 8th September 2003 have no decisions capable of being quashed by certiorari. The letter from KPA dated 20th August 2003 has a decision terminating the licence of the Applicant to whom it is addressed but the same is a purely administrative decision not amenable to certiorari.

The Applicants' second prayer was for an order of prohibition. Prohibition lies not only for excess of or absence of jurisdiction but also for a departure from the rules of natural justice. For the reasons given above the Respondents did not exceed their jurisdiction and they did not flout the rules of natural justice. The Applicants plea for prohibition also fails.

The upshot of all the above is that the application fails in its entirety and the same is accordingly dismissed with costs.

DATED this 11th day of June 2004.

D.K. Maraga

Ag. JUDGE