REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL CASE NO. 75 OF 2018

OKIYA OMTATAH OKOITI.....APPELLANT

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

KENYA WILDLIFE SERVICE.....3RD RESPONDENT

KENYA RAILWAYS CORPORATION.....4TH RESPONDENT

CHINA ROAD & BRIDGE

CORPORATION (KENYA).....5TH RESPONDENT

MINISTRY OF TRANSPORT

AND INFRASTRUCTURE.....6TH RESPONDENT

MINISTRY OF ENVIRONMENT

& NATURAL RESOURCES.....7TH RESPONDENT

THE HON ATTORNEY GENERAL.....8TH RESPONDENT

HABITAT PLANNERS TEAM.....9TH RESPONDENT

KENYA COALITION FOR WILDLIFE

CONSERVATION & MANAGEMENT.....10TH RESPONDENT

(Being an appeal from the Judgment of the National Environment Tribunal rendered on 7th December 2018, in Tribunal Appeal No NET/200/2017)

BETWEEN

OKIYA OMTATAH OKOITI.....1ST APPELLANT

KENYA COALITION FOR WILDLIFE

CONSERVATION & MANAGEMENT.....2ND APPELLANT

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY .....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

KENYA WILDLIFE SERVICE.....3RD RESPONDENT

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THE HON ATTORNEY GENERAL.....8TH RESPONDENT

HABITAT PLANNERS TEAM.....9TH RESPONDENT

JUDGMENT

Introduction

1. The dispute in this appeal revolves around the Environmental Impact Assessment Licence [the EIA Licence] relating to Phase 2A of the Standard Gauge Railway (SGR) Project, extending from Nairobi South Railway Station through the Nairobi National Park (**the NNP**) to Naivasha Industrial Park, and ultimately, to Enoosupukia, a distance of approximately 120 Km. On 13/12/2016, the National Environment Management Authority (**the 1st respondent**) issued to the Kenya Railways Corporation (**the 4th respondent**) Environmental Impact Assessment Licence No NEMA/AIA/PSL/4099 (**the EIA Licence**), authorising the construction of the said railway line. Aggrieved by the decision, Mr Okiya Omtatah Okoiti (**the appellant**) through a notice of appeal bearing his name together with the name of the 10th respondent [Kenya Coalition for Wildlife Conservation & Management] challenged the said decision by the 1st respondent in the National Environment Tribunal (**the Tribunal**) under Section 129 (2), (3) and (4) of the Environmental Management and Co-ordination Act (**the EMCA**). The notice of appeal listed the following as respondents in the appeal:

i. National Environment Management Authority – 1st Respondent

ii. National Land Commission – 2nd Respondent

iii. Kenya Wildlife Service – 3rd Respondent

iv. Kenya Railways Corporation – 4th Respondent

v. China Road & Bridge Corporation (Kenya) – 5th Respondent

vi. Ministry of Transport and Infrastructure – 6th Respondent

vii. Ministry of Environment & Natural Resources – 7th Respondent

viii. The Hon. Attorney General – 8th Respondent

ix. Habitat Planners Team – 9th Respondent

2. He sought the following verbatim reliefs in the Tribunal:

a) Orders certifying that the appeal is urgent and should be heard on priority basis;

b) A declaration that the ESIA report for the SGR Phase 2A Project is incomplete and incompetent, hence, the license should not have been issued

c) Orders quashing the incomplete and incompetent ESIA report for the SGR Phase 2A

d) Orders issuing a prohibitory injunction restraining the respondents and other parties involved, their agents, employees and/or representatives, from in any way or howsoever commencing and/or continuing with operations and/or construction of Phase 2A of the SGR Project pursuant to the impugned Environmental Impact Assessment Licence No NEMA/EIA/PSL/4099

(Application Reference no NEMA /EIA/SR/821).

e) Orders quashing the Environmental Impact Assessments License No NEMA/EIA/PSL/4099 (Application Reference no NEMA /EIA/SR/821).

f) Orders that the respondents follow due process for acquiring a license, including, by conducting competent environmental and social impact assessments of the project.

g) Orders that Action Plan (RAP) for the SGR Phase 2A Project be conducted in the affected areas, including Mombasa, Busia, and Malaba Towns, as the condition precedent to conducting ESIA studies.

h) Orders that all the possible routes for the SGR through Nairobi be subjected to scientific studies for purposes of identifying the most suitable.

i) Orders that studies be conducted in Mombasa, Busia and Malaba towns to ascertain the social impacts of the proposed dry port at Naivasha on the existing public infrastructure and business that depend on transportation of cargo.

j) Orders for the restoration of the environment by mitigating any damage caused by the work done so far in the construction of the Project.

k) Orders that the SGR should by-pass the Nairobi National Park, and should be implemented in strict compliance with the law.

l) A declaration that no ESIA licence be issued for Phase 2A of the SGR Project without following due process, which includes consulting and getting the approval of stakeholders

m) Costs of this appeal

n) Any other just and equitable relief as this honourable Tribunal may deem appropriate

3. In summary, the gist of the appellant's appeal in the Tribunal was that the EIA Licence granted to the 4th respondent authorizing the construction of Phase 2A of the SGR was based on an incomplete and incompetent ESIA Study Report. He further contended that there was no adequate public participation prior to the issuance of the EIA Licence.

4. The Tribunal conducted trial by taking *viva voce* evidence from witnesses. The appellant testified at the Tribunal but did not call any witness. Attempts by Kenya Coalition for Wildlife Conservation and Management to lead evidence at the Tribunal were disallowed by the Tribunal on the ground that they had not presented an appeal as required by the law. The Tribunal noted that although they were named as the 2nd appellant in the notice of appeal, they did not sign the notice of appeal, hence there was only one appellant, Okiya Omtatah Okoiti. The record of appeal shows that soon after the appellant finished testifying on 27/3/2018, he left the trial venue to go and deal with Petition No 24 of 2018 in the High Court. The record of appeal further shows that after the appellant lost his bid to obtain an order of stay of proceedings at the Tribunal, he elected not to participate in the proceedings. Besides failing to lead evidence by other witnesses, the appellant did not cross-examine the respondents' witnesses during trial. Further, he did not substantively canvass the appeal at the Tribunal through submissions.

5. Ultimately, the Tribunal rendered a judgment dated 7/12/2018 in which it made the following findings: (i) there was sufficient public participation in the preparation of the Environment Impact Assessment Report which formed the basis for the grant of the impugned Licence; (ii) the construction of the SGR through the Nairobi National Park (the NPP) without excision or change of boundaries of the Park did not require parliamentary approval under Article 71 of the Constitution; (iii) the Environmental Impact Assessment Report which informed the grant of the impugned EIA Licence was sufficient; and (iv) sufficient mitigation measures were provided for the identified impacts of the SGR Phase 2A Project. Consequently, the Tribunal dismissed the appeal for lack of merit. Costs of the appeal were awarded to the respondents.

Present Appeal

6. Aggrieved by the said judgment of the Tribunal dated 7/12/2018, the appellant brought this appeal through a memorandum of appeal dated 21/12/2018. He listed the following grounds of appeal;

1) That due to its irregular composition contrary to the law, the Tribunal lacked the requisite expertise prescribed by Parliament under Section 125 of the EMCA, and which was required to determine Tribunal Appeal No NET/200/2017.

2) That the Tribunal was biased

3) That the Tribunal deliberately and selectively preoccupied itself with procedural technicalities to frustrate the appeal at the expense of the constitutional imperative under Article 159 (2) (d) that "justice shall be administered without undue regard to procedural technicalities".

4) That the Tribunal deliberately ignored and/or misapplied the law.

5) That the Tribunal ignored material facts including that:

a) All the alternative routes for the SGR to exit Nairobi City were not subjected to any scientific studies;

b) The dry port at Naivasha is an integral part of the project but no studies on its impact had been conducted;

c) No justification was given for routing the SGR through the City of Nairobi

d) Pursuant to Gazette Notice Number 12526 published at pages 6563 to 6571 of the Kenya Gazettee Vol. CXIX No 190 of 22nd December, 2017 the Government was to acquire 41, 3090 Ha of LR 10758 – Nairobi National Park, on behalf of Kenya Railways Corporation for the construction of the Standard Gauge Railway (Phase 2A).

6) That the Tribunal ignored the fact that the impugned project was approved in the absence of, and without any reference to, a management plan for the Nairobi National Park, contrary to mandatory provisions of the Law.

7) That the Tribunal failed to visit the sites affected by the impugned project, resulting in erroneous findings of law and fact.

8) That the Tribunal ignored the fact that the project was on going while the appeal was pending and in contempt of the subsisting stop orders, thereby exposing the environment to the risk of irreversible harm and setting the stage for a fait accompli.

9) That the Tribunal never addressed the risk of irreversible harm to the environment, and disregarded constitutional imperatives including:

a) The national value of sustainable development in Article 10;

b) Sound conservation and protection of ecologically sensitive areas in Article 60;

c) The public trust doctrine in Article 62;

d) Sustainable management and conservation of the environment and natural resources in article 69; and

e) The need for ratification by Parliament of agreement relating to natural resources in Article 71

10) That the Tribunal never addressed the risk of irreversible harm and ignored the national principles and values under Article 10 of the Constitution, including sustainable development.

11) That the Tribunal ignored the fact that the appeal was filed in public interest

12) That the entire decision of the Tribunal is unconstitutional and, therefore invalid, null and void.

7. The appellant prayed that the appeal be allowed; the impugned judgment of the Tribunal be set aside; **NET Case No 200 of 2017** be allowed; and costs of the proceedings at the Tribunal and in this appeal be awarded to the appellant. The appeal was canvassed through written submissions dated 7/7/2019. The 3rd, 4th, 5th and 9th respondents opposed the appeal through written submissions. The 10th respondents supported the appeal but did not say anything else in his document titled "The Respondent's Submissions", dated 2/12/2020. The other respondents did not submit on the appeal.

Appellant's Submissions

8. Through his written submissions dated 7/7/2019, the appellant identified the following as the nine (ix) issues falling for determination in this appeal:

i. Whether the Tribunal was irregularly composed due to its lack of requisite expertise prescribed by Parliament under Section 125 of the EMCA

ii. Whether the Tribunal was biased

iii. Whether the Tribunal ignored material facts.

iv. Whether the Tribunal ignored and/or misapplied the law

v. Whether the Tribunal never addressed the risk of irreversible harm to the environment

vi. Whether the SGR Phase 2A Project was not procedurally done

vii. Whether the Tribunal ignored the fact that the appeal was filed in public interest

viii. Whether costs of this appeal and the proceedings at the Tribunal should be awarded to the appellant

ix. Whether the Award delivered by the National Environment Tribunal in respect of Tribunal Appeal No NET/200/2017 should be set aside.

9. On whether the Tribunal was irregularly composed due to lack of requisite expertise prescribed by Parliament under **Section 125** of the **EMCA**, the appellant submitted that the Tribunal did not have a chairperson appointed under **Section 125 (1) (a) of the EMCA**; the Tribunal did not have a lawyer with professional qualifications in environmental law appointed under **Section 125 (a) (c)** of the **EMCA;** and the Tribunal did not have three persons with demonstrated competence in environmental matters as required under **Section 125(1) (d)** of the **EMCA** . The appellant argued that only one member of the Tribunal, Dr David Kariuki Muigua, was properly appointed and that all the other members of the Tribunal [Mohammed Balala, Christine Mwikali Kipsang, Andrew Bahati Mwamuye, and Waithaka Ngaruiya] did not satisfy the statutory criteria set under **Section 125** of the **EMCA**. The appellant argued that the law required the Cabinet Secretary to appoint as chairman, a person nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the High Court. He contended that Mr Balala was not qualified to be appointed as chairman because he did not have qualifications in environmental law. He added that the other three members of the Tribunal did not have demonstrated competence in environmental matters hence they were holding office illegally. The appellant urged the court to find that the Tribunal was unlawfully and unconstitutionally constituted, and lacked the competence required to adjudicate the dispute in **Appeal No NET/200/2017.**

10. On whether the Tribunal was biased, the appellant submitted that, notwithstanding the fact that at the time of hearing **Appeal No NET/200/2017,** the Tribunal was aware that he had filed a constitutional petition challenging its suitability to hear and determine the matter before it, it proceeded to hear the matter. Citing the decision of the **Supreme Court of Canada** in **R V S (R.D), 1997] 3 SCR 484**, the appellant argued that having filed a petition against the four members of the Tribunal, the Tribunal could not meet the thresholds of fairness, independence and impartiality set out in Article 50 of the Constitution. Further, the appellant accused the Chairman of the Tribunal of "standing in the way of justice". He added that the Tribunal's bias was further demonstrated in the manner it treated his witnesses and their evidence.

11. On whether the EIA Study Report was incomplete and incompetent, the appellant submitted that the EIA Study Report that was used to issue the EIA Licence for the SGR Phase 2A Project did not address the project's impact on the people, their property, and the environment along the corridor from the Port of Mombasa to the Great Lakes Region and to South Sudan. He added that failure to address the above issues had resulted in many conflicts relating to the transfer of imported containerized cargo from road to rail transit to the dry port in Naivasha.

12. On whether the Tribunal ignored material facts, the appellant submitted that the Tribunal made fundamental errors of material facts which had a direct influence on its findings and its final judgment. He faulted the Tribunal for ignoring the fact that the project was ongoing while the appeal was pending before it and in contempt of the subsisting stop orders, thereby exposing the environment to the risk of irreversible harm and setting the stage for a *fact accompli*. He added that the Tribunal ignored the fact that all the alternative routes for the SGR to exit Nairobi City were not subjected to any scientific study. He added that the Tribunal ignored the fact that the SGR Phase 2A Project was approved without any reference to a management plan for the NNP, contrary to the mandatory provisions of the law. He further submitted that the Tribunal ignored the fact that the dry port of Naivasha had not been subjected to any environmental impact assessment study. Further, he argued that the Tribunal ignored the fact that no justification was given for routing the SGR Phase 2A Project through the City of Nairobi and thereby necessitating its exit through the NNP. The appellant added that the Tribunal ignored the fact that the Government had published Gazette Notice No 12526 indicating that it intended to acquire 41.30390 hectares of the NNP for the construction of the impugned Project and that this fact was not captured in the EIA Report and the EIA Licence.

13. Further the appellant faulted the Tribunal for ignoring to address the following issues: (i) the contention that the EIA licence was not issued procedurally; (ii) the contention that the EIA report was incomplete and incompetent; (iii) the contention that there was no public participation before the EIA Licence was issued; (iv) the allegation that the project would adversely affect the environment ,wildlife and the community living around the NNP and also the livelihoods on the transport corridor from Mombasa to the Great Lakes Region and to South Sudan. He added that the Tribunal failed to address issues touching on public participation. Lastly, he faulted the Tribunal for failing to make a site visit to the project area when requested to do so.

14. On whether the Tribunal ignored and/or misapplied the law, the appellant submitted that the Tribunal misapplied the law by relying on extraneous matters, conjectures, suppositions and theories instead of relying on the evidence adduced before it. He added that the Tribunal erred in law and refused/or ignored to appreciate that **Section 129(4)** granted an automatic stay of any action once an appeal was filed at the Tribunal. He added that it was the duty of the Tribunal to ensure that the *status quo* was maintained.

15. On whether the Tribunal addressed the risk of irreversible harm to the environment, the appellant submitted that the Tribunal failed to address the risk of irreversible harm to the environment and failed to uphold constitutional imperatives relating to: (a) the national value of sustainable development under **Article 10**; (b) sound conservation and protection of ecologically sensitive areas in **Article 60**; (c) public trust doctrine in **Article 62;** (d) sustainable management and conservation of the environment and national resources in **Article 69**; and (e) the need for ratification by Parliament of all agreements relating to natural resources in **Article 71**.

16. On whether the SGR Phase 2A Project was procedurally done, the appellant submitted that the entire process of conceptionalization and implementation of the Project was irredeemably flawed. He added that the proponents of the Project proceeded in complete disregard of basic constitutional principles and statutory law and in contempt of the people of Kenya. He argued that the Project suffered from the

following infirmities: (i) the EIA Report was incomplete, incompetent and inadequately done; (ii) the EIA Licence was irregularly awarded based on an incomplete and incompetent EIA Study Report; (iii) the Strategic Environmental Assessment (SEA) was not done at the commencement of the Project as legally required; (iv) the SEA was not properly done to adequately account for all public policies, plans, programmes and impacts of the Project; (v) works started on the project before the EIA Licence was issued contrary to the law; and (vi) the proponents of the Projects failed to facilitate adequate public participation as required by the Constitution and the EMCA.

17. On whether the Tribunal ignored the fact that the appeal was filed in public interest, the appellant submitted that the Tribunal erred both in law and in fact and failed to take into account the issue of public litigation which is a cornerstone of the Constitution of Kenya 2010. The appellant contended that the Tribunal failed to take into account that there was no personal benefit for the appellant and that the appellant was questioning the Constitutional and legal validity of the EIA Licence in the public interest.

18. On whether the Tribunal's Judgment in **NET/200/2017** should be set aside, the appellant submitted that there was a proper basis for setting aside the Tribunal's Judgment and urged the court to do so. On costs of this appeal, the appellant urged the court to award him the costs and in the unlikely event that the appeal is unsuccessful, parties should bear their respective costs because this appeal was brought in the public interest. Lastly, the appellant urged the court to grant appropriate reliefs that it deems just to grant to uphold and protect the Constitution.

3rd Respondent's Submissions.

19. The 3rd respondent filed written submissions dated 25/1/2021 through the firm of *Hamilton, Harrison & Mathews*. Counsel for the 3rd respondent identified the following as the five (5) issues falling for determination in this appeal: (i) Whether there is a competent appeal before the court; (ii) Whether the Tribunal was properly constituted; (iii) Whether the Tribunal was biased; (iv) Whether the Tribunal pre-occupied itself with procedural technicalities; and (v) Whether the decision of the Tribunal should be disturbed.

20. On the first identified issue, counsel submitted that there was no competent appeal before this court because the appellant had failed to extract and attach the order or decree against which he was appealing. Citing the High Court decision in **Nancy Wamunyu Gichobi v Jane Wawira Gichobi [2018] eKLR** and the minority finding in the Court of Appeal case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**

21. On whether the Tribunal was properly constituted, counsel for the 3rd respondent submitted that the appellant first filed **Nairobi High Court Petition No 361 of 2018; Okiya Omtata Okoiti v The Judicial Service Commission & others,** challenging the constitution of the Tribunal. He added that the appellant subsequently filed an application seeking recusal of the Tribunal on account of the said case. The said application was dismissed for non-appearance and the appellant abandoned the matter. Counsel contended that allowing the appellant to canvass the same issue before this court was tantamount to allowing him to resurrect the dismissed application. Counsel added that in any event, the Tribunal was properly constituted.

22. On whether the Tribunal was biased, counsel submitted that there was no evidence of bias. Counsel added that the allegation that the matter proceeded on 27/3/2018 in the absence of the appellant was baseless because the appellant excused himself from the proceedings and left to go and attend to another matter in the High Court. Counsel added that there was no evidence of bias in any of the incidences cited by the appellant.

23. On whether the Tribunal pre-occupied itself with procedural technicalities, counsel submitted that the Tribunal properly took oral evidence from the parties and rendered a proper determination based on the evidence presented before it. Counsel added that **Section 129** requires every person aggrieved by a decision of NEMA to file an appeal in the Tribunal in the manner prescribed by the Tribunal. He added that **Rule 4(4)** required every appellant to sign a notice of appeal either in person or through their representative. Counsel submitted that the appeal before the Tribunal had been signed and filed by the appellant alone hence the Tribunal properly upheld the objection to the attempt by the Kenya Coalition for Wildlife Conservation and Management to lead evidence in the appeal. Counsel argued that failure to present a properly signed appeal was not a mere technicality but a matter which went to the root of the appeal.

24. On whether the decision of the Tribunal ought to be disturbed, counsel submitted that in determining the appeal, the Tribunal was required to inquire into whether the right procedure was followed in issuing the EIA Licence and specifically to establish whether: (i) there was public participation and stakeholder involvement in the process leading to the approval of the route for the SGR; (ii) Parliamentary approval was required under **Article 71** of the **Constitution**; (iii) the EIA report was sufficient; and (iv) any mitigation measures were provided for the identified impacts of the project. Counsel argued that all the matters which the Tribunal needed to investigate were addressed by the Tribunal and based on the evidence before it, the Tribunal rendered a considered judgment. Counsel submitted that there was no bases for disturbing the findings of the Tribunal. Lastly, counsel urged the court to dismiss the appeal for lack of merit.

4th & 9th Respondents' Submissions

25. The 4th and 9th respondents filed written submissions dated 2/2/2021 through the firm of *Mwaniki Gachoka & Co Advocates*. Counsel for the 4th and 9th respondents identified the following as the four issues falling for determination in the appeal: (i) Whether there is a competent appeal before this court; (ii) Whether the Tribunal was properly constituted to hear and determine the appeal; (iii) Whether the Tribunal was biased and whether it pro-occupied itself with procedural technicalities; and (iv) Whether the Tribunal's decision to dismiss the appeal was merited.

26. On whether there is a competent appeal before this court, counsel submitted that the appellant's failure to include the decree or order appealed from in the record of appeal was a fatal breach of **Rules 40** and **41** of this Court's Practice Directions as read together with **Order 42 rule 13(4) (f)** of the **Civil Procedure Rules.** Counsel contended that any record of appeal without an order or decree is defective, incomplete and incompetent.

27. On whether the Tribunal was properly constituted to determine the Appeal, counsel submitted that the ground focusing on the composition of the Tribunal was a new issue that was not canvassed before or determined by the Tribunal. Counsel added that the appellant having failed to prosecute the application he filed in the Tribunal to ventilate the grievance relating to the appointment of members of the Tribunal, it would be improper to allow him to raise the issue as a ground of appeal in this court. Counsel added that the competence of the individual members of the Tribunal could not be determined in this appeal because they were not parties to the appeal. Lastly, counsel submitted that the issue relating to the constitution of the Tribunal was the subject of adjudication in **High Court Petition No 361** of **2018: Okiya Omtatah Okoiti v The Judicial Service Commission.**

28. On whether the Tribunal was biased and whether it pre-occupied itself with procedural technicalities, counsel submitted that a claim of bias ought to be substantiated by material facts which a fair minded observer, upon examining them, can come to the conclusion of bias. Counsel added that the allegation that the Tribunal proceeded with the matter in his absence were unfounded and baseless because the appellant had informed the Tribunal that he wanted to make a few remarks and close his case and having closed his case, he excused himself to go to the High Court to deal with a different case. Counsel added that the Tribunal's decision to uphold the objection to the attempt by the Kenya Coalition for Wildlife Conservation and Management to lead evidence without a proper appeal was a considered decision made after hearing all the parties.

29. On whether the Tribunal's decision to dismiss the appeal was merited, counsel submitted that the Tribunal heard the parties and properly determined the matter on the basis of evidence adduced and the applicable law. Lastly, counsel submitted that the decision of the Tribunal was merited both in fact and on the law and should not be disturbed.

5th Respondent's Submissions.

30. The 5th respondent filed written submissions dated 12/1/2021 through the firm of *Ndegwa & Sitonik Advocates*. Counsel for the 5th respondent identified the following as the four (4) issues falling for determination in this appeal: (i) Whether this court had jurisdiction to determine whether the Tribunal was unlawfully or irregularly constituted; (ii) Whether the Tribunal was biased; (ii) Whether the EIA Study Report was incompetent and incomplete; and (iv) Whether Phase 2A of the SGR will cause irreparable harm to the environment.

31. On whether this court has jurisdiction to determine whether the Tribunal was unlawfully or irregularly constituted, counsel for the 5th respondent submitted that this court lacks jurisdiction to entertain the issue because the issue was never raised, argued or determined by the Tribunal. Counsel added that the ground of appeal raised by the appellant before the Tribunal were well captured in the notice of appeal. Citing the Court of Appeal decision in **Chairman, Kenya Veterinary Association Central Region v Renson Maina Kimindi [2013] eKLR,** counsel urged the court to reject the ground of appeal focusing on the qualifications of members of the Tribunal. Lastly counsel submitted that the appellant had not presented evidence before this court to demonstrate that members of the Tribunal were unqualified. On whether the Tribunal was biased, counsel submitted that the allegations of bias were baseless and had not been proved

32. On whether the EIA study was incompetent and incomplete, counsel submitted that all matters which the appellant raised focusing on this issue were interrogated by the Tribunal and the Tribunal came to a proper finding that there was no merit in them. Counsel urged the court to dismiss the appeal.

Analysis & Determination.

33. I have carefully gone through the three huge volumes constituting the record of appeal in this matter. I have considered the itemized grounds of appeal and the parties' respective submissions. Similarly, I have considered the relevant constitutional provisions, legal frameworks, and the prevailing jurisprudence on the issues falling for determination in this appeal. The appellant raised twelve (12) grounds of appeal in the memorandum of appeal dated 21/12/2018. In his subsequent written submissions, he itemized nine (9) issues which he invited the court to determine in this appeal. On part of the respondents, besides responding to the grounds of appeal itemized in the memorandum of appeal, they challenged the competence of this appeal on the ground that the decree/order relating to the impugned judgment was not included in the record of appeal. I will therefore dispose the issue relating to the competence of this appeal first. I will thereafer, if necessary, sequentially analyse the grounds of appeal in the order in which they were itemized in the memorandum of appeal.

34. Urging the court to dismiss the appeal, the respondents contended that failure to include a copy of the relevant order or decree in the record of appeal was fatal to the appeal. The objection was premised on **Order 42 rule 13(4) (f)** of the **Civil Procedure Rules**. The framework in **Order 42 rule 13(4)** generally itemizes the documents which should be included in the record of appeal before the appeal is admitted for hearing. Subrule 4(f) itemizes the following documents:

> ***"(f) the judgment, order or decree appealed from, and where appropriate, the order (if any) giving leave to appeal"***

35. The record of appeal in this appeal contains a copy of the judgment at page 11. The judgment is duly signed by members of the Tribunal. In the circumstances, it is my view that the requirements of **Order 42 rule 13 (4) (f)** are properly satisfied because a copy of the judgment was included in the record of appeal. The contention that this appeal is fatally defective is accordingly rejected. Having found that the record of appeal is proper, I now turn to the merits of the appeal.

36. As a first appellate court, the mandate of this court is to exhaustively re-appraise and re-evaluate the evidence on record and come to its own independent conclusions. A first appellate court would normally not interfere with a finding of fact by a trial court or a trial tribunal unless it is based on no evidence or on a misapprehension of the evidence or the trial court/tribunal is shown to have acted on wrong principles in reaching the findings it did. It is to be borne in mind that the Tribunal had the singular advantage of seeing and assessing the demeanor of the witnesses who appeared before it.

37. Secondly, it is to be borne in mind that the present appeal arises from a judgment of the Tribunal rendered in exercise of its jurisdiction under **Section 129** of the **Environmental Management and Co-ordination**

Act [the EMCA]. That jurisdiction is restricted to hearing and determining appeals against decisions made by the **National Environment Management Authority [NEMA].**

38. Thirdly, it must similarly be borne in mind that the appellate jurisdiction of this court in relation to this appeal is defined under **Article 162 (2) (b)** of the Constitution as read together with Section 13 of the Environment and Land Court Act and **Section 130** of the **EMCA**.

39. The first ground of appeal is that due to irregular composition, contrary to the law, the Tribunal lacked the requisite expertise prescribed by Parliament under **Section 125** of the **EMCA**, which was required to determine **Tribunal Appeal No NET/200/2017**. I understand the appellant to be questioning the qualifications of the people who were appointed to the Tribunal by the Cabinet Secretary. The appointments were made by the Cabinet Secretary in exercise of ministerial powers under **Section 125** of the **EMCA**. Can the appointments be properly challenged on the platform of an appeal under Section 130 of the EMCA? Put differently, does this court have jurisdiction to entertain a dispute relating to the qualifications of persons appointed as members of the Tribunal under **Section 125** of the **EMCA** on the platform of an appeal under **Section 130** of the **EMCA?**.

40. My answer to the above questions is in the negative. First, this court is seized of an appeal under **Section 130** of the **EMCA**. The appeal arises from a decision of the Tribunal made in exercise of its jurisdiction under **Section 129** of the **EMCA**. The jurisdiction of the Tribunal under **Section 129** of the **EMCA** is limited to hearing and determining appeals against decisions made by NEMA within the framework of the EMCA. It therefore follows that when exercising appellate jurisdiction under **Section 130** of the **EMCA**, the mandate of this court is limited to re-appraising and re-evaluating the evidence presented to the Tribunal and examining the relevant law in relation to the impugned decisions of NEMA as set out under **Section 129** of the **EMCA.** The appellate jurisdiction of this court does not include reviewing ministerial decisions made under **Section 125 of the EMCA**

41. Secondly, the jurisdictional mandate of this court is defined by the constitutional framework in **Article 162 (2) (b)** of the Constitution as read together with **Section 13** of the **Environment and Land Court Act** and any other statutory framework which confers specific jurisdiction on the court, such as Part XII of the EMCA. That jurisdiction, in my view, does not include reviewing ministerial appointments such as those contemplated under **Section 125** of the **EMCA.**

42. It is observed from the record of appeal that the appellant initiated proceedings in the High Court, questioning the qualifications of persons appointed to the Tribunal and challenging their appointments. He was perfectly in order to initiate appropriate proceedings in the appropriate court. In my view, appropriate action in the appropriate court is the proper forum where to ventilate grievances relating to the qualifications of the persons appointed to the Tribunal by the Cabinet Secretary. An appeal under **Section 129 or 130** of the **EMCA** is not the proper forum for challenging ministerial appointments.

43. Thirdly, even if this court had jurisdiction to entertain a dispute relating to the qualifications of persons appointed as members of the Tribunal, those persons are not parties to this appeal. This court cannot, in the circumstances, purport to make pronouncements touching on their suitability or otherwise to be members of the Tribunal without them being made parties to the relevant proceedings.

44. I have said what I consider to be enough to dispose this ground of appeal. My finding on this ground of appeal is that this court and this appeal are not the appropriate platform for ventilating grievances relating to the qualifications of members of the Tribunal. The ground of appeal is rejected.

45. The second ground of appeal is that the Tribunal was biased. The appellant imputed bias on part of the Tribunal on the following grounds: (i) that notwithstanding the fact that the Tribunal was aware that the appellant had filed a constitutional petition challenging the suitability of members of the Tribunal, the Tribunal went ahead to dispose the appeal before it; (ii) the Tribunal disregarded the fact that the appellant had appealed against its decision to uphold objection to the attempt by Kenya Coalition for Wildlife Conservation and Management to lead evidence in the appeal; (iii) Mr Balala, a member of the Tribunal stood in the way of justice and instead of guiding the litigants as well as the Tribunal, he went ahead on 9/5/2018 to argue for the respondents that "*Omtatah disowned another advocate when one of the hearing he stepped out*"; and (iv) that bias was demonstrated in the manner in which the Tribunal treated the appellants' witnesses and their evidence. I have considered each of the grounds upon which the appellant is imputing bias on part of the Tribunal. I will analyse them in the order in which they have been itemized in the preceding paragraph.

46. It is now an established principle of law that the test for alleged judicial bias is objective and the facts constituting bias must be specifically alleged and established [see (i) **R V Mwalulu & 8 others [2015] IKLR and** (ii) **Kaplana H Rawal v Judicial Service Commission & 2 others (2016) eKLR].**

47. Firstly, bias is imputed by the appellant on account of the Tribunal's disposal of the appeal notwithstanding the fact that the appellant had challenged their appointment to the Tribunal. My understanding of our civil procedure regime is that if the appellant desired to procure a stay of proceedings in the Tribunal subsequent to filing a petition in the High Court challenging the appointment of members of the Tribunal, the appropriate redress mechanism available to him was to seek an order staying proceedings in the matter before the Tribunal. There is no evidence that a stay order was sought, obtained, served and ignored by the Tribunal. Secondly, it is not lost to the court that the Tribunal was seized of a dispute relating to EIA licensing of a development project involving substantial public money and third party service providers such as contractors. It is also not lost to the court that filing of an appeal in the Tribunal attracted an automatic stay of the challenged decision of NEMA. In the circumstances, it would be irrational for a litigant to stay put and expect the Tribunal to keep the proceedings in abeyance without a proper stay order. In my view, in the absence of an order of stay of proceedings, the Tribunal properly disposed the appeal that was before it.

48. The same procedure of seeking an order of stay of proceeding, from the superior court is what the appellant should have done in relation to the appeal which he lodged against the Tribunal's decision to uphold the objection against the 10th appellant's attempt to lead evidence. There is similarly no evidence that a stay order was obtained from the superior court, served, and ignored by the Tribunal.

49. The third ground upon which bias is imputed is that Mr Balala stood in the way of justice and instead of guiding the litigants as well as

the Tribunal, he went ahead on 9/5/2018 to argue the case for the respondents. I have looked at the entire record of proceedings of the Tribunal. There is no evidence that Mr Balala took a partisan position and canvassed the respondents' case at the Tribunal. The impugned remarks were made when an advocate by the Mboko, made presentations on behalf of the appellant without filing a notice of appointment of advocates. In the absence of a notice of appointment of advocate, Mr Balala properly expressly caution on the fact that it was improper as it was possible for the advocate purporting to represent the appellant to be subsequently disowned. I see no proper basis for inferring bias on the basis of the impugned remark.

50. The last ground upon which the appellant imputes bias on part of the Tribunal is that the Tribunal did not treat his witnesses properly. It is clear from the proceedings of 27/3/2018 that upon finishing to give his testimony, the appellant informed the Tribunal that he did not have any witness. It was his position that given the nature of the appeal, he was relying on the witnesses of the 10th respondent (Kenya Coalition for Wildlife Conservation and Management). It is therefore incorrect for the appellant to allege that "his witnesses" were improperly handled. Secondly, if the 10th respondent was aggrieved by the decision of the Tribunal, they had a legitimate right to lodge an appeal against it and to have it overturned. They did not do that. Without saying much, I do not think this ground has been established as a proper basis for imputing bias.

51. The totality of the foregoing is that the appellant has not satisfied the objective test for judicial bias on part of the Tribunal. This ground of appeal is therefore not proved.

52. The third ground of appeal is that the Tribunal deliberately and selectively pre-occupied itself with procedural technicalities to frustrate the appeal at the expense of the constitutional imperative under **Article 159(2) (d)** of the **Constitution.** The appellant specifically faulted the Tribunal for upholding the objection to the 10th respondent's attempt to lead evidence. First, the record of appeal shows that the appellant challenged that particular decision through a different appeal file in this court. The appellant has not told the court the outcome of that particular appeal. Secondly, rule 4 (4) of the National Environment Tribunal Rules of Procedure requires that every appeal presented to the Tribunal be signed by the appellant. The notice of appeal before the NET was expressed as drawn and filed by Okiya Omtatah Okoiti alone. It however, listed the 10th respondent as a second appellant. The 10th respondent did not sign the notice of appeal as required under **rule 4. (4).** In the circumstances, I do not think the Tribunal deliberately and selectively pre-occupied itself with procedural technicalities when it held that what was before it was an appeal by the appellant alone and that in the absence of a signed notice of appeal by the 10th respondent, the 10th respondent did not have an appeal and had no right to lead evidence as an appellant in the appeal before it.

53. The Supreme Court of Kenya underscored the centrality of rules of procedure in the orderly administration of justice in the case of **Telcom Kenya Limited v John Ochanda & 996 Others [2015] eKLR** in the following words:

> ***"It is this court's position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the court will consider the relevant circumstances surrounding a particular case, and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant, but are the handmaiden of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution…"***

54. Secondly, nothing prevented the appellant from applying to present, as his own witnesses, those witnesses whom the 10th respondent had lined up but had failed to present due to the fact that they did not present a signed appeal. He elected to leave the trial venue to go and deal with a different case in the High Court. In the circumstances, I find no merit in this ground of appeal.

55. The fourth ground of appeal is that the Tribunal deliberately ignored and/or misapplied the law. The appellant contended that the Tribunal misapplied the law by substantially relying on extraneous matters, conjectures, suppositions, and theories to make determinations and/or judgment rather than relying on the evidence adduced before it. Secondly, the appellant contended that the Tribunal erred in law and refused and/or ignored to appreciate the fact that **Section 129 (4**) of the **EMCA** stipulated that there would be an automatic stay order in respect of any challenged decision once an appeal is filed.

56. I have considered the above two limbs of this specific ground of appeal. I have also considered the judgment of the Tribunal in its entirety. The Tribunal set out the parties' respective cases and thereafter outlined the key issues that fell for determination in the appeal. It thereafter analysed the issues sequentially, setting out the evidence, the relevant legal frameworks, and the applicable jurisprudence to the best of its ability. On his part, the appellant abandoned the appeal by failing to fully participate in the trial. He failed to cross-examine defence witnesses. He also failed to canvass his appeal before the Tribunal through appropriate submissions. All that the Tribunal had from him was the notice of appeal and the brief oral evidence which he tendered before leaving the trial venue.

57. Faulting the Tribunal on the ground that it failed to appreciate that Section 129(4) grants an automatic stay in relation to NEMA decisions is without proper basis because it was the duty of the appellant to extract the order, serve it, initiate compliance enforcement proceedings, and where necessary prosecute the proceedings. The duty of the Tribunal was to adjudicate the dispute before it. In the circumstances, and taking into account the judgment of the Tribunal, as a whole, I do not discern a proper basis for contending that the Tribunal ignored and or misapplied the law. [second ground].

58. Ground numbers 5, 6, 8, 9, 10 and 12 fault the Tribunal for ignoring material facts, legal frameworks and constitutional imperatives. The appellant submitted on them under issue numbers (iii) and (v). I will analyse them together. The appellant contended that the Tribunal ignored the fact that the project was ongoing while the appeal was pending in court and in contempt of the subsisting stop order. He added that the Tribunal ignored the fact that all the alternative routes for the SGR to exit Nairobi City were not subjected to any scientific study. He further contended that the Tribunal ignored the fact that the impugned project was approved in the absence of and without any reference to a management plan for the NNP.

59. The appellant added that the Tribunal ignored the following material facts: (i) that even though the dry port of Naivasha was an integral part of the project, no studies on its impact on the host environment and on the transport corridor from Mombasa to the Great Lakes Region and to South Sudan was done; (ii) that no justification was given for routing the SGR through the City of Nairobi and; (iii) that the

Government had published a notice intimating its intention to acquire 41;3090 hectares out of NNP. I have looked at the judgment of the Tribunal. All the material issues that were raised in the appeal before it were fully addressed by the Tribunal under the four issues that were framed by the Tribunal at pages 12 and 13 of its judgment. Broad issue number (iii) covered five sub-issues. The contention that the Tribunal did not address the issues raised in the appeal is incorrect. I find no merit in the six grounds of appeal.

60. The appellant faulted the Tribunal for failing to visit the sites affected by the impugned project. I have looked at the record of the Tribunal. There is no evidence of any motion by the appellant asking the Tribunal to visit the sites affected by the SGR. On its own motion, the Tribunal found it necessary to visit Tsavo National Park through which SGR Phase 1 cuts, to see the effects of the railway on the park and its impact on the wildlife crossing under the underpasses. In the absence of any application inviting the Tribunal to visit a particular site, and in the absence of participation by the appellant, the Tribunal did the best that it could. There is therefore no proper basis for faulting it.

61. I have also noted that the constitutional issues which the appellant raised such as parliamentary ratification under **Article 71** were fully addressed by the Tribunal. I entirely agree with the Tribunal on its finding to the effect that the parliamentary approval alluded to by the appellant was not necessary. I am also satisfied that the Tribunal considered the issue relating to the EIA Study Report and I fully agree with its findings.

62. The totality of the foregoing is that I find no merit in the above grounds of appeal focusing on the substantive findings of the Tribunal.

63. I however find merit in the ground that the Tribunal failed to appreciate the fact that the appeal was filed in the public interest [Ground No 11]. **Article 69 (1) (d)** enjoins the state to encourage public participation in the management and conservation of the environment. Article 70 confer locus in every citizen to initiate court proceedings to protect the environment. Lastly, **Article 22** confers in the citizens the right to institute court proceedings to enforce any of the rights in the bill of rights. In my view, it was within the constitutional framework in **Articles 22, 69** and **70** of the Constitution that the appellant objected to the licence granted to the 4th respondent. There was no evidence of any anticipated personal gain by the appellant out of the litigation. It was a litigation initiated for the general good of the public. Had the Tribunal taken this aspect into account, the order relating to costs of the appeal would not have been made against the appellant.

64. Consequently, I would disturb the disposal limb of the Tribunal that relates to costs and substitute it with an order that parties bear their respective costs of the appeal in the Tribunal. For the same reason, I will order that parties to this appeal do bear their respective costs.

Summary of Findings & Disposal Orders

65. In the ultimate, this appeal fails on all the grounds except ground number 11 which relates to the fact that the appeal before the Tribunal was filed in the public interest, hence the Tribunal should not have condemned the appellant to pay costs of the appeal. Consequently, I make the following disposal orders in the present appeal:

> ***a) Save as set out in disposal order number (b) below, the appeal herein is declined for lack of merit***
>
> ***b) The order of the National Environment Tribunal made in its judgment dated 7/12/2018 in Appeal No NET/200/2017 awarding the respondents therein costs of the appeal is set aside and is substituted with the order that parties shall bear their respective costs of Tribunal Appeal No NET/200/2017.***
>
> c) ***Parties to the present appeal, Nairobi ELC Appeal No 75 of 2018, shall similarly bear their respective costs of the appeal***.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Ochieng for the 3rd Respondent

Mr Ondego for the 5th Respondent

Mr Muturi for the 4th and 9th Respondents

Court Assistant: June Nafula