



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 82 OF 2016

REPUBLIC.....APPLICANT

AND

THE NATIONAL ENVIRONMENTAL TRIBUNAL.....RESPONDENT

SOUTH COAST RESIDENTS ASSOCIATION.....1ST INTERESTED PARTY

KWALE COUNTY NATURAL RESOURCE NETWORK.....2ND INTERESTED PARTY

LIKONI AND SOUTH MAINLAND RESIDENTS ASSOCIATION.....3RD INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4TH INTERESTED PARTY

EX PARTE CHINA ROAD AND BRIDGE CORPORATION

JUDGEMENT

Introduction

1. By a Notice of Motion dated 22nd February, 2016, the ex parte applicant herein, **China Road and Bridge Corporation**, seeks the following orders:
 - a. **An Order of Certiorari removing to this Honourable Court for purposes of being quashed the proceedings before the National Environmental Tribunal at Nairobi in the Tribunal Appeal No. NET 152/2015; SOUTH COAST RESIDENT’S ASSOCIATION & 2 OTHERS –VS- NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA) & CHINA ROAD & BRIDGE CORPORATION together with the unsigned ruling delivered therein on the 22nd day of January 2016.**
 - b. **An Order of *Prohibition* prohibiting the implementation of the ruling of the National**

Environmental Tribunal at Nairobi as delivered on 22nd January 2016 in the Tribunal Appeal No. NET 152/2015; SOUTH COAST RESIDENT’S ASSOCIATION & 2 OTHERS – VS- NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA) & CHINA ROAD & BRIDGE CORPORATION.

c. **The cost of this application be in favour of the ex parte applicant.**

Applicant’s Case

2. According to the ex parte applicant, **China Road & Bridge Corporation**, it is a state-owned company of the People’s Republic of China and has engaged in numerous projects internationally, including in Kenya over many decades and has therefore established itself as one of the leading contractors internationally with a reputation for the high quality of its work. In this case, it was averred that the Applicant executed two commercial contracts with the Kenya Railways Corporation: for civil works and for supply and installation of facilities and rolling stock for the Standard Gauge Railway from Mombasa to Nairobi (hereinafter the SGR project) at the combined cost of Kshs.327Billion, making the SGR the largest infrastructure project in the East African region. It was contended that the SGR is a major regional infrastructure project comprising a high speed freight and commuter railway connecting the port of Mombasa in Kenya to Kampala, Uganda and then to Kigali Rwanda.
3. In the Applicant’s view, the development of the SGR will bring great many benefits to the Kenya which include the following:
 - i. Reduction of the cost of transportation in the country and the region making Kenya an attractive investment destination and competitive in the region;
 - ii. Protection of the environment through reduced carbon emission arising from vehicular movement;
 - iii. Acceleration of industrialization through easier and cheaper transport and the establishment of new industries to service the new railway;
 - iv. Increment of the annual GDP growth by at least 1.5% during construction and subsequently during operation;
 - v. Positioning the port of Mombasa as the transport and logistical entry port of choice for the Region. The port of Mombasa which is part of the Northern Corridor is currently in competition with the Central Corridor which runs from the port of Dar Es Salaam and in future will be serviced through Bagamoyo in Tanzania;
 - vi. Reduction of congestion at Mombasa Port securing more efficiency and making more attractive as the port as the preferred coastal facility in the region;
 - vii. Reduction of wear and tear on Kenya roads which increases the cost of maintenance;
 - viii. Reduction of road travel time from Mombasa to Nairobi and vice versa;
 - ix. Enhancement of freight security compared to road transport;
 - x. Enhancement of prospects for the development of a free port and Export Processing Zones along the railway line;
 - xi. Creation of at least 60 new jobs per kilometre of track during construction period;
 - xii. Creation of demand for large quantities of local inputs such as steel, cement, aggregates, electricity generation and electricity transmission pylons and cables, roofing materials, glass, etc.;
 - xiii. Creation of jobs for an estimated 3000 engineers and high technology technicians during construction who will be available for local and regional railway development after construction of the Mombasa – Nairobi segment of the SGR;
 - xiv. Triggering the creation of 30,000 direct job opportunities for Kenyans as among others general workers, technicians, operators and drivers, to name a few as well indirect jobs generated by suppliers and subcontractors;; and
 - xv. Reduction of the number of heavy trucks on the road and so reduce accident incidents making the roads safer for human traffic.
 - xvi. Providing a cheaper and safer alternative means of transport for tourists to the Tsavo National Parks and coastal parts of Kenya, hence promoting tourism section in the Country.
4. It was contended that as part of the SGR Project a cargo terminal will be constructed at Port Reitz, Mombasa in an area that adjoins the Port of Mombasa which new terminal will be the main

Railway Container Terminal and Marshaling Yard for the SGR line (hereinafter the Port Reitz Container Terminal). Further the construction of the proposed main Railway Container Terminal and Marshaling Yard at Port Reitz requires a generally flat terrain and due to the topographical nature of the area at Port Reitz, the optimal solution is to reclaim part of the area on which the terminal is to be constructed from the sea. It was averred that the reclamation work is located at Port Reitz in Mombasa, whose designation mileage is DK0+000-DK2+800, with a full length of 2.8kilometers which Port is to be constructed partly on dry land and partly by reclaiming 5.4 hectares from the Indian Ocean at Port Reitz. In order to reclaim the designated 5.4 hectares from the sea, it was averred that the Applicant requires to harvest sea sand from a location whose geological structure is similar to the designated container terminal at Port Reitz and following field surveys and consultations, the government of Kenya through its various concerned organs and corporations has determined and agreed that the sand harvesting should be undertaken along a strip of 400 metres to 1 kilometre offshore Indian Ocean from Likoni through Waa to Tiwi shorelines, being the same area and location at which the Kenya Ports Authority with financing from the Government of Japan is currently harvesting sand for the reclamation of part of the sea to construct the Terminal II for the Port of Mombasa. According to the applicant, the technologies used in terms of reclamation of the sea are a replica of those used for the construction of the Second Container Terminal of the Mombasa Port (hereinafter the Terminal II) for Kenya Ports Authority and the two facilities will be interdependent. It was disclosed that the reclamation works for the Port Reitz Container Terminal will require an estimated $800,000\text{m}^3$ (0.0008km^3) of sand to be used as backfilling material and that the sand harvested from the proposed shorelines will be transported from the sand harvesting areas through the Terminal II (financed through Japan International Cooperation Agency) to Port Reitz where it will be offloaded and used solely for the purposes of sea reclamation to construct the said main Railway Container Terminal and Marshaling Yard at Port Reitz. According to the applicant, the sand harvesting area measures a total of 13.69km^2 and is divided into two large areas: Area No. 1 measuring 8.59 km^2 and Area No. 2 measuring 5.10 km^2 . The actual sand harvesting area measures 6km^2 . Therefore, the mean sand harvesting depth is $0.0008\text{-}0.00013\text{km}$ (0.13m). However due to the wide sand harvesting area the amount of sand harvested per unit area is minimal and will quickly be replenished by the action of the waves.

5. To the applicant, sand harvesting from the identified sea shoreline is the optimal solution for the sea reclamation works since the sand is from the same marine ecosystem from which sand is currently being harvested for the Terminal II and there will be insignificant negative impact on the marine environment and aquatic life of the area. It was the applicant's position that it considered the option of harvesting sand from inland and transporting it to the port area for the construction but upon environmental analysis it was concluded that the sand obtained from inland would pose significant negative impacts on the marine aquatic life due to impurities and low quality hence leading to high pollution levels. It was therefore concluded that the prudent, environmentally and ecologically sustainable approach would be to use sand harvested at the designated sea shoreline. Besides, the harvested sand would be replenished and compensated for from open sea by the movement of the sea water under the influence of the ocean tides.
6. It was the applicant's case that sand harvesting at the sea shoreline is not a new activity in Kenya or in the world as it has been done in other countries for similar projects involving sea reclamation with minimal negative effects on the marine environment and aquatic life. It asserted that indeed at the same site there is currently ongoing sand harvesting on a significantly larger scale for purposes of constructing the Kenya Ports Authority, Terminal II Project which has not caused any notable disturbance to the marine environment and aquatic life.
7. It was averred that the Government of Kenya, through Kenya Railways Corporation carried out an Environmental Impact Assessment (EIA) Study for the entire SGR project in the year 2012 which study incorporated public participation and was carried out in full compliance with the provisions of the ***Environmental Management and Coordination Act, 1999 (EMCA)***. Pursuant to Regulation 21 of the ***Environmental (Impact Assessment and Audit) Regulations***, the EIA Study Report was submitted to NEMA who then advertised the same for public participation at page 24 of the ***Standard Newspaper*** of 6th of November 2012 and page 25 of the ***Standard Newspaper*** of 13th of November 2012. Further to the above newspaper advertisement, the EIA Study Report was

- equally gazetted on 9th November 2012 in the Kenya Gazette VIDE Gazette Notice No. 16224.
8. The applicant therefore contended that from the said gazette notice and the newspaper advertisement, it is clear that the NEMA lawfully and procedurally invited members of the public to submit oral or written comments on the proposed project with a view to assist NEMA in its decision making process with respect to the project. In addition to the foregoing, Africa Waste & Environment Management Centre, (which carried out the EIA study on behalf of the Kenya Railways Corporation through its EIA Lead Environmental Consultant, **Prof. J.K. Kibwage**), held various meetings in all the areas through which the SGR railway line is scheduled to pass through including but not limited to Kwale County. NEMA also received comments from the members of public and duly considered the same, the environmental soundness of the subject SGR Railway line project and upon being satisfied that all the environmental concerns have were sufficiently addressed by Corporation, issued the Corporation with an Environmental Impact Assessment License in 2013 and amended on 12th February 2014.
 9. It was the applicant's case that the construction of the proposed main Railway Container Terminal and Marshaling Yard at Port Reitz is just a portion of the SGR project and falls within the EIA Licence issued thereto and that prior to the commencement of the construction of the proposed main Railway Container Terminal and Marshaling Yard at Port Reitz, the Applicant caused to be prepared a further Project Report for the sand harvesting which report was prepared by EIA experts namely Africa Waste and Environment Management Centre (AWEMAC). Consequently the 2nd Respondent submitted its application for EIA License alongside the *Environmental and Social Impact Assessment Project Report for the Proposed Offshore Sea Sand Harvesting from Off Likoni to North of Tiwi in South Coast of the Indian Ocean for Construction of the Port Reitz Cargo Terminal of the Mombasa – Nairobi Standard Gauge Railway Project* (hereinafter the EIA Project Report). It was added that the Environmental baseline information and potential impacts of the project were duly considered and provided in Chapters 3, Chapter 5 and 6 of the EIA Project report and that the potential impacts are also listed and mitigated in Chapter 7 and the Environmental Management/Monitoring Plan in Chapter 9 of the EIA Project Report. Following the preparation of the EIA project report, the Applicant duly applied for an EIA licence and upon due consideration of the application, the 1st Respondent issued the Applicant with an EIA licence for the proposed activity.
 10. According to the applicant, the decision to issue the EIA Licence without the requirement for a full EIA Study took into account the following factors:
 - a. the fact that the location of the proposed sand harvesting lies within the area of currently ongoing sand harvesting for Terminal II which is being undertaken for the Port of Mombasa;
 - b. the numerous EIA licences were already issued for the SGR project, of which this activity is an integral part; and
 - c. the comments received from relevant government agencies and stakeholders following stakeholder consultations which comments were taken on board and included as conditions to the EIA licence.
 - d. NEMA engaged all the lead agencies concerned with the sea environment and aquatic life including the Kenya Marine and Fisheries Research Institute (KEMFRI), Kenya Maritime Authority, etc. all of which raised no objection to the proposed sand harvesting project.
 - e. In addition to the foregoing, Africa Waste & Environment Management Centre, held various meetings in the said areas of Waa, Ngombeni and Tiwi where the subject sand harvesting was to take place and met the residents therein including the members of the 1st, 2nd and 3rd Interested Parties who did not register any objection to the project.
 11. It was therefore the applicant's position that the above EIA was issued by NEMA upon consideration of all possible environmental concerns which may arise from the subject project and duly provided for sufficient mitigation measures thereof. To the applicant, it proposes to carry out the sea sand harvesting along the designated strip of 0.4 – 1km offshore in the Indian Ocean from Likoni through Waa to Tiwi in strict compliance with conditions entailed in the Environmental Impact Assessment License issued by the National Environmental Management Authority (NEMA) and in order to effectively carry out the sand harvesting activity the 2nd Respondent has already mobilized ships and equipment including a suction sand barge and two new belt conveyor

barges which has been brought in from the People's Republic of China, as the kind of equipment and facilities required for the proposed activity are not available in Kenya. Further, the EIA Licence has entrenched conditions which are binding upon the Applicant and that the sand harvesting conditions number 2.1 to 2.19 in the EIA Licence adequately address the concerns of the Appellants. The applicant averred that it is committed to implementing the mitigation measures to address any potential environmental and social impacts of the proposed sand harvesting, which include:

- a. consulting with the concerned parties, including the Kwale County Government;
- b. compensating the fishermen and women for the loss of income during the sand harvesting activity; and
- c. ensuring that no sand harvesting activity is carried out in environmentally sensitive areas such as the KWS marine park and in areas of tourist activity.

12. However, according to the applicant, on 2nd July 2015 and prior to the commencement of the sand harvesting process, the 1st and 2nd Interested Parties acting maliciously and in bad faith, mischievously filed a purported Tribunal Appeal No. NET/152/2015 between the 1st & 2nd Interested Parties and the Applicant herein, seeking to *inter alia* permanently stop the Applicant's from continuing with the proposed sand harvesting project and to cancel and/or revoke the Applicant's EIA License despite the fact that the 1st Interested Party had never objected to the issuance of the EIA license to the Applicants as provided for in law. The 1st and 2nd Interested Parties purported to file the Appeal herein despite the fact that they had neither raised any objection to the sand harvesting project herein nor were they parties who were before NEMA and were aggrieved by a decision of NEMA given against them as required by law. In the applicant's view, the 1st and Interested Parties filed the said malicious Appeal for the sole purpose and intention of curtailing the SGR project through an order of *status quo* which is statutorily available to legitimate Appellants before the 1st Respondent, but not to the 1st and 2nd Interested Parties who were not legitimate Appellants before the 1st Respondent but only moved there to frustrate the project for their own selfish interest. In the said appeal No. NET/152/2015 it was contended, the 1st and 2nd Interested Parties raised unmerited allegations which had already been addressed by the NEMA and the Applicant and some of which were already prescribed as conditions to the EIA Licence as a ground to support the purported Appeal.

13. In the applicant's opinion, the said appeal was mala fide and in bad faith in the sense that:

- i. It was filed irregularly with the principal objective to vex and frustrate the Applicants and, to impose heavy costs and delay on them, with a view to arm twisting the Applicants into abandoning the SGR project.
- ii. It was filed despite full awareness of the fact that the Applicants have complied with all the legal requirements governing the proposed development and have obtained all the necessary approvals, authorizations and licenses.
- iii. It was filed with intention to irregularly and unlawfully take advantage of section 129(4) of *EMCA* to halt the Applicants' proposed sand harvesting process and the development of the main Railway Container Terminal and Marshaling Yard at Port Reitz.
- iv. It was lodged with full awareness that only the High Court of Kenya has the jurisdiction to entertain the issues raised therein.
- v. It falsely alleged that the proposed sand harvesting will affect tourists yet being fully aware that the proposed sand harvesting activity will take place far away from any tourist hotels and therefore will not affect any tourist activity in Diani beach area or Diani-Chale Marine Reserve. Indeed there is no hotel along the designated sand harvesting area and Diani beach is more than five (5) kilometres further south from the proposed sand harvesting site and a similar distance will be kept from Diani-Chale Marine Reserve as recommended by the Kenya Wildlife Service.
- vi. It ignored the conditions of the EIA Licence and purported to raise issues which are already provided for as conditions for the EIA Licence i.e.:-
 - a. The concern relating to the marine ecosystem services and their supporting role to fisheries, livelihood and shoreline activities were adequately addressed through the conditions which are entrenched in the EIA License.

- b. The turbidity and turbid area shall be minimal in the process of construction. Sea water flows towards the direction of the deep sea with the ocean currents. This implies that it is not possible for the turbid sea water to spread to the South coastal areas as alleged by the 1st and 2nd Interested Parties.
- c. The Applicant intends to utilize environmentally friendly machinery during the sand harvesting activity. This is sand suction hoses in whose end point is a reinforced strainer mesh set up hence larger rocks and coral reefs shall not be sucked in. The 2nd Respondent therefore reaffirms that the sea sand harvesting activity will not damage the original sea bed geology because this technology for harvesting sand has been proven internationally.
- d. The actual working area occupied by the belt conveyor barge and the suction sand barge will be limited, and the actual operation area is an average of 30 metres depth in the sea. There would be some minimal effects to the fishing activities near the sand harvesting and to cushion the fishermen from any economic loss during the sand harvesting process.
- e. The Applicant has in good faith commenced constructive consultations with the fishermen and the County Government of Kwale with a view to agree on a suitable compensation formula for the affected fishermen.
- f. Any domestic sewage and solid waste from the crew on the sand suction barge will be centrally collected by a qualified company and taken back to the land for safe disposal.
- g. The Appellant has also put in place measures to ensure that ballast water from the sand harvesting barges and other sewage contaminated with petroleum is confined within the vessel and collected by a qualified company for recycling and/or safe disposal. The Applicant has strictly forbidden washing of oil, discharge of waste oil or bottom oil into the sand harvesting area.
- h. Since November, 2014 the Applicant has held wide and exhaustive consultations with other State agencies namely National Environment Management Authority (NEMA), Kenya Marine Authority (KMA), Kenya Wildlife Service (KWS), Kenya Navy, Kenya Marine and Fisheries Research Institute (KEMFRI) and the consultations has established and created a common understanding that the sand harvesting activity will be carried out with no undue negative effects to the marine environment and aquatic life.
- i. Hydrodynamic models using most recent data show that sediment plume dispersion is higher during the SE Monsoon winds as compared to the NE Monsoon period and at no time does turbidity exceed acceptable limits (10 mg/l) towards the critical habitats. The direction of the currents is also northward and will not have negative impacts in the areas towards Diani and Chale.
- j. Environmental monitoring by Government agencies will be undertaken to ensure minimal impacts occur.
- n. According to the applicant, in furtherance of their malice, mischief and bad faith, the 1st and 2nd Interested Parties have maliciously misrepresented that the subject sand harvesting, if not stopped will negatively affect the marine ecosystem and that there is no enough sand in the area, yet being fully aware that KEMFRI has carried out extensive research in the marine ecosystem for the area and determined that the same will not be affected by the sand harvesting and further that there have been previous sand harvesting in the area which has had no effect whatsoever on the marine environment and that there is sufficient sand in the subject area.
- o. It was averred that pursuant to the filing and service of the said Appeal, all the parties filed their responses thereto and 1st Respondent Tribunal despite being fully aware that it lacked the requisite jurisdiction to hear, entertain and determine the purported Appeal, engaged in shambolic, irregular and unlawful process of hearing of the purported Appeal despite protests by the Applicants. To the applicant, the Respondent is a statutory body established under section 125 of **EMCA** with the sole mandate to operate as an appellate body over the decisions of NEMA, the Director General NEMA and the Committees under NEMA hence its appellate jurisdiction ought to and/or should only be invoked by a person who is aggrieved by a decision of NEMA, the Director General NEMA and the Committees under NEMA, as expressed in section 129. Further the Respondent Tribunal can in law only entertain such Appeals as provided for by **EMCA** and not matters over which section 3 of **EMCA** and Article 70 of the Constitution has given exclusive jurisdiction to the High Court of Kenya, which is also mandated by section 130 of **EMCA** to operate as the final Appellate body over the decisions of the Respondent Tribunal.
- p. It was further contended that the Respondent Tribunal as designed under **EMCA** must only entertain, hear and determine appeals from persons with *locus standi* before it, and these are

persons who have been before the Authority, a committee of the Authority, or the Director General and are aggrieved by a decision of either the Authority, a committee thereof, or the Director General.

- q. According to the applicant, therefore, in purporting to hear the Appeal, the Respondent Tribunal denied the Applicant a fair hearing and breached the rules of natural justice by engaging in a shambolic hearing process wherein members of the Tribunal would from time to time fail to appear for the hearing and alternate.
- r. The Applicant disclosed that the Respondent Tribunal is currently made up of four members, but any three including the Chairman would form a quorum for the business of the Tribunal as provided by section 128 of **EMCA**. It is the rule of law, according to it, that the Respondent Tribunal in hearing and considering matters before it will not alternate its member's composition during the hearing of the matter so as to guarantee consistency and a fair trial with a view of ensuring that the members are fully seized of the issues in dispute.
- s. In this case it was averred that **Prof Ojienda** missed several hearings and did not hear a substantial portion of the evidence adduced while **Prof Situma** did not hear the evidence of the EIA expert, a key witness of the ex parte Applicant and a second witness of the ex parte Applicant because he was absent due to bereavement. Despite the fact that these two members of the Tribunal missed several sittings and did not hear the evidence of key witnesses of the ex parte Applicant three members of the Tribunal (including **Prof Situma**) participated in making the decision against the ex parte Applicant and **Prof Ojienda** who did not hear much of the evidence and apparently (according to the replying Affidavit) did not participate in making the decision nevertheless appended his signature to the Ruling because "*it is a practice.*" In the applicant's view, the procedure and practice adopted by the Tribunal in conducting this hearing and making the decision clearly demonstrates that the some of the Tribunal members did not apply their minds to the dispute before them which procedural irregularity vitiates the ruling of the Tribunal. The applicant then set out in tabular form the record of the attendances of the members of the Tribunal which according to it supported its case that the Tribunal members did not sit as a Tribunal consistently throughout the duration of the hearings but that different members sat on different dates and thus the composition of the Tribunal changed from time to time.
- t. The Applicant asserted that on perusal of the copy of the written ruling which was availed to its Advocates it believe that page 10 in which paragraph 7 appears was introduced into the ruling irregularly as is shown by the fact that the Chair of the Tribunal did not sign that page (along with other pages 2 to 9 all of which seem to have been initialled by some unknown person) whereas she signed each of the remaining pages of the ruling.
- u. According to the Applicant, it is a trite principle of law that a judicial or quasi-judicial organ ought to deal only with the case presented to it by the parties but contrary to this principle in the course of the proceedings the Tribunal, of its own motion, repeatedly inquired about the availability of sand at the proposed sand harvesting site even though this matter had not formed part of the case filed by the Appellants with the consequence that the ex parte Applicant had not lined up witnesses on the issue. Because of this incessant inquiry, the ex parte Applicant arranged for evidence and a witness (**Eng Michael Okumu**, an officer with the Kenya Ports Authority) to testify on the issue which witness travelled from Mombasa to give evidence but on 12th October 2015, the day he came the Tribunal abruptly adjourned the proceedings without hearing him and explained that one of the Tribunal members needed to go and attend to an emergency. Thereafter, the witness travelled on official duty out of the country and when he came back the ex parte Applicant sought to have him testify and he again travelled from Mombasa on 17th November 2015 to do so but the Tribunal declined to him allegedly on the basis that his evidence of little value to the Tribunal as the matter of sand volumes had been adequately addressed. However, in its ruling the Tribunal stated that there had been no assessment to confirm that there does exist enough sand in the area which was a clear evidence of a denial of the right to a fair hearing because the Tribunal by its own actions and decisions denied the ex parte Applicant a fair opportunity to present a witness who could have provided the required evidence.
- v. In the Applicant's view, jurisdiction of the Respondent Tribunal to hear and determine appeals before it flows from the law and the Tribunal cannot acquire jurisdiction merely because no objection was raised by a party during the proceedings in the subject appeal under review and the Tribunal itself should *suo motto* have declined to exercise jurisdiction in the circumstances of this

case.

- w. It was therefore contended that in purporting to conduct the subject proceedings and the hearing of the purported NET. APPEAL NO. 152 OF 2015, the Respondent Tribunal not only acted outside its statutory jurisdiction but also breached the salient mandatory requirements of Article 47 and 50 of the Constitution by conducting the proceedings in a biased, casual and irregular manner in breach of the rules of natural justice as highlighted herebelow:
- a. The Respondent carried out a site visit on 10th September 2015, wherein only three (3) of its members were present, neither party was heard during the site visit nor did the Respondent Tribunal raise any query thereof other than on the procedure and the method to be used in the proposed sand harvesting. Contrary to the foregoing, the Respondent at paragraph 7 on page 10 of its impugned ruling purports to have made adverse findings and observations against the Applicant during the said site visit which adverse findings and observations were used to determine the Applicant's case without affording the Applicant any hearing on the same and/or raising the same at any instance during the hearing with the result that the Applicant was completely denied a hearing and/or explanation on the Respondents alleged observations and findings at the said paragraph 7 of the impugned Ruling.
 - b. During the purported hearings of the subject Appeal, the Respondent Tribunal which is currently comprised of four (4) members would invariably alternate its members at its own convenience with the result that all the Applicants witnesses were heard by either 3 or 4 Tribunal members as differently constituted from time to time.
 - c. Save for the Chairperson, the Tribunal membership which heard the purported Appeal kept on changing and alternating with the result that none of the other three members consistently and procedurally heard the purported Appeal to the end.
 - d. As a result of the above, the Applicant was occasioned a great miscarriage of justice as the members of the Tribunal due to their tight schedules and other engagements were completely unable to comprehend the purported Appeal since none of them other than the chair heard all the witnesses in the matter.
 - e. Save for the Chairperson, none of the other Tribunal members heard the whole of the Applicants case in the Tribunal as each member only heard a section thereof.
 - f. At the hearing of the purported Appeal, the Respondent Tribunal declined to hear one of the Applicant's main expert witness who had travelled all the way from Mombasa on two occasions to testify on the availability of sand in the proposed harvesting site under guise that the Respondent Tribunal already had sufficient evidence on availability of the sand in the proposed area yet at paragraph 109 at page 58 of its impugned decision, the Respondent alleges that it had no evidence on the availability of sand in the proposed area.
 - g. The Respondent Tribunal purported to give a determination in the matter, which determination was purportedly made by all the four (4) members of the Respondent Tribunal despite the fact that the four (4) members did not fully hear the Applicants case and as such their decision was either based on hearsay or segments of the evidence which they heard and in exclusion of other material evidence which were given in the matter and when the particular members were absent.
 - h. On 22nd January 2016, the Chairperson read the impugned purported ruling/determination of the Tribunal in the matter, which determination was not signed by any of the Tribunal members at the time of its delivery and what was read to the parties on that day substantially differs with the signed hard copy of the ruling as furnished to the Applicant on 8th February 2016 after a gruelling effort to obtain a copy thereof.
 - i. Despite the impugned ruling/determination having been read on 22nd January 2016, the same was unsigned and not available until the 8th of February 2016. The ruling itself was read in the absence of all the Tribunal members other than the chair and without a quorum as required by section 128 of *EMCA*. The unsigned ruling was only read by the Chairperson who then told the parties that some members were out of the Country, while others had other engagements elsewhere.
 - j. The Tribunal bungled the hearing of the purported Appeal and denied the Applicants a fair trial as guaranteed in law and by the constitution and in contravention of Article 47 and 50 of the Constitution.
 - k. A brief consideration of the impugned decision would readily confirm that the same is wholly biased as against the Applicant and is premised on unproven allegations which allegations though

sufficiently addressed by the Applicant, the Respondent deliberately elected to ignore all the expert evidence tabled before it with the pre-conceived intention of finding against the Applicant.

24. According to the applicant, in a situation in which the Chair of the Tribunal is delivering the Ruling in the absence of the other members the written Ruling ought to have been already duly signed by all the Tribunal members who were in agreement with it and dated before the Chair could deliver it but in this case there was no written ruling at the time the Chair delivered the ruling in the absence of the other members.
25. According to the Applicant, in breach of its legitimate expectation that the Tribunal would rely on only the evidence adduced before it and which was duly recorded the Tribunal proceeded to base its Ruling on matters which do not appear on the record and which were purely speculative and had no justification in fact or law. Further, paragraph 7 of the Tribunal's written Ruling is a lengthy write up of what the Tribunal members allegedly witnessed during the site visit made on 10th September 2015 in which the Tribunal claims falsely to have witnessed the ex parte Applicant's vessel "scooping" sand from under the water, along with pebbles, stones, fragments or corals, sponges, sea organisms of various kind, certain kinds of vegetation, which may be sea weeds and water and so on. However, the entire write up does not appear anywhere in the Tribunal's records of the proceedings which record was reproduced in the Respondent's further replying affidavit and therefore the entire write up which forms part of the Tribunal's ruling was introduced into the proceedings by the Tribunal itself and used to judge the ex parte Applicant adversely without the ex parte Applicant having been given an opportunity to comment on the allegations therein. Further one of the Tribunal members who participated in making the decision against the ex parte Applicant and signed the ruling did not attend the site visit and therefore could not possibly have witnessed the sand allegedly being "scooped" by the ex parte Applicant's vessel as is falsely claimed in paragraph 7 of the Ruling.
26. It was contended that the Respondent's deliberate decision to only rely on the 1st and 2nd Interested Parties baseless allegations as a means of justifying the application of the precautionary principle without considering and weighing the totality of the expert evidence tabled before it was deliberately designed to deprive the Applicant of a fair hearing. To the applicant, in the decision as read by the Respondent Tribunal on 22nd January 2016, the Tribunal demonstrated utmost biasness as against the Applicant which bias led to the eschewed decision as read thereto.
27. It was asserted that the said irregular decision as delivered by the Respondent Tribunal was delivered outside the Respondent's statutory jurisdiction as set out in section 129 of **EMCA** and has the effect of scuttling and wholly paralyzing the ongoing construction of the Standard Gauge Railway project which is a regional project of great importance and has 60% of the actual works completed. In addition, in making the impugned decision, the Respondent took into consideration irrelevant matters not raised before it and instead refused and/or declined to consider the expert evidence tendered which readily demonstrated that the proposed sand harvesting had not adverse environmental impacts.
28. To the applicant, the above *ultra vires* and irregular decision of the Respondent Tribunal has the effect of demeaning the Constitution and destabilizing NEMA's operations and rendering all its environmental procedures, processes and requirements unnecessary and irrelevant. Further, in hearing the purported Appeal herein and delivering its decision under the obtaining circumstances, the Respondent Tribunal acted *ultra vires*, in contravention of the Constitution and in excess of its jurisdiction, unfairly and in bad faith in proceeding to entertain and hear the purported Tribunal Appeal No. 152/2015 by asking Parties to appear before it to argue the issue of costs.
29. To the applicant, the Government of Kenya through the Kenya Railways Corporation has committed huge amounts of money for the development of the SGR project and will suffer unconscionable damages as result of the Respondent Tribunals irregular and unlawful acts.
30. The 4th Interested Party being a statutory Authority and having regularly, lawfully and with the strict adherence to the provisions of **EMCA**, issued an EIA License to the Applicant, the Applicant has the lawful and legitimate expectation that the said EIA license can only be challenged and/or cancelled within the law.
31. It was therefore asserted that the actions of the Respondent, are unconstitutional, unreasonable, based on extraneous considerations, arbitrary, *ultra vires* and in excess of jurisdiction conferred on it by law on the grounds *inter alia* that:

- a. The Respondent Tribunal is a statutory tribunal established as an Appellate Tribunal by an Act of Parliament which prescribes its special jurisdiction as outlined under Section 129 of **EMCA** and in compliance with Article 169 of the Constitution.
- b. The Appellants in the purported Tribunal Appeal No. NET 152/2015 lacked the requisite *locus standi* before the Respondent Tribunal and are not persons who have been before the Authority, a committee of the Authority, or the Director General and/or is aggrieved by a decision of either the Authority, a committee thereof, or the Director General.
- c. Article 162(2)(b) clearly sets out the Environmental and Land Court as the Court to deal with environmental concerns and it is the said Court and the High Court of Kenya under Article 165 of the Constitution which have the jurisdiction to enforce environmental rights of Kenyan Citizens.
- d. NEMA had not made a decision against the 1st, 2nd and 3rd Interested Parties capable of forming the basis for an appeal under section 129 of **EMCA**.

32. The applicant therefore held the view that the Respondent's actions are unconstitutional, unlawful, arbitrary, malicious, capricious, based on wrong interpretation of the law, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations, against the Applicants lawful, legitimate and rightful expectation and taken in breach of the rules of natural justice.

33. It was submitted on behalf of the applicant by its learned counsel, **Prof. Mumma**, that the Tribunal manifestly contravened the Applicant's right to a fair hearing and legitimate expectations. To the applicant, the right to a fair hearing is both a procedural and substantive requirement of the law entrenched in the rules of natural justice and the Constitution and the Tribunal has a peremptory obligation to observe and give effect to it whenever it takes cognizance of and conducts proceedings in appeals before it. In this respect the applicant relied on **Halsbury's Laws of England**, 4th Edition Volume 1 (1) at paragraph 107 where it is stated that:

A person or body determining a dispute between parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement to the contrary.

34. On the issue of the change in quorum, it was submitted that the Applicant was as a result denied a fair hearing and rules of natural justice were breached by the Tribunal as two of the members of the Tribunal were completely unable to fully comprehend the totality of the evidence adduced since they did not hear all the witnesses in the matter and that the Tribunal also in effect proceeded without quorum as required by its governing statute.

35. On the issue of consideration of irrelevant matters, it was submitted that the Tribunal carried out a site visit on 10th September 2015, wherein only three (3) of its members were present. Neither party was heard during the site visit and no evidence was recorded. In breach of the ex parte Applicant's legitimate expectation that only matters which appear in the record of the Tribunal's proceedings would be used in the determination of the appeal, at paragraph 7 on page 10 of its impugned Ruling the Respondent Tribunal bases its decision against the ex parte Applicant on matters it claims to have observed during the site visit which matters do not form part of the record of the Tribunal's proceedings. Accordingly, adverse findings and observations were used to determine the Applicant's case without affording the Applicant any hearing on the same and/or raising the same at any instance during the hearing with the result that the Applicant was completely denied a hearing and/or explanation on the Respondent's alleged observations and findings at the said paragraph 7 page 10 of the impugned Ruling.

36. It was further submitted that it is trite law that a Tribunal must only proceed to adjudicate upon the dispute before it as presented by the appellant and it is not open to a tribunal to take up the case and itself begin to construct the appeal and flesh out the appellant's case, as the Respondent Tribunal did in this particular case where it considered for example the issue of the sand volumes which had not formed part of the appeal as filed by the Appellants. In assuming the role of the appellant and making up the appellant's case, the Respondent tribunal breached the ex parte Applicant legitimate expectations that a judicial body should not descend into the arena of litigation but ought to remain neutral in order to hold the balance evenly between the parties before it. This would therefore enable the opposite party a fair chance to address the issues raised for adjudication before the tribunal and not those raised by the tribunal in the course of

- proceedings as was done by the Respondent Tribunal during the hearing of the purported appeal.
37. It was submitted that not only did the Tribunal itself introduce the issue of sand volumes into the appeal, it proceeded to deny the ex parte Applicant a fair opportunity to respond to the issue. The matter of sand volumes was raised by the Respondent Tribunal itself which sought to know whether there was adequate sand to be harvested. In response the ex parte Applicant identified a witness to come and give evidence on the matter but the Respondent Tribunal declined to hear the Applicant's main expert witness who had travelled all the way from Mombasa on two occasions to testify on the availability of sand in the proposed harvesting site. To the applicant, in declining to hear the witness the Tribunal maintained (as shown by the record of proceedings) that it already had sufficient evidence on availability of the sand in the proposed area yet at paragraph 109 at page 58 of its impugned decision, the Respondent Tribunal alleges that it had no evidence on the availability of sand in the proposed area. This is a manifest breach of the Ex Parte Applicant's right to a fair hearing which entitles the Applicant to be given a fair opportunity to controvert any issues raised against it.
38. According to the applicant, the Respondent Tribunal's decision is illegal as the same was made without requisite jurisdiction and on the basis of a flawed hearing and decision making process. The applicant referred to the replying affidavit in which according to it, the Tribunal admitted at paragraph 19 that the Ruling was prepared by three (3) members who sat consistently in the Tribunal's hearing and that it was a practice that if a member participates in the proceedings, he/she will sign the Ruling delivered by the Tribunal, which is why **Professor Ojienda** signed the Ruling, even though he took part in only some of the proceedings. To the applicant, this admission is in itself unlawful and unconstitutional and demonstrates the unlawfulness of the impugned decision herein as the admission demonstrates that the Tribunal grants members who did not hear a matter before the Tribunal the liberty to participate in the decision making process and sign decisions which they neither prepared nor participated in their preparation. To the applicant, it is against sound judicial practice which requires that only persons who participate in the hearing and preparation of the decision are lawfully permitted to sign the same. We humbly submit that based on the above admission by the Chair Lady, this Application ought to succeed.
39. The applicant submitted that the *National Environment Tribunal Procedure Rules, 2003* (hereinafter "Tribunal Rules, 2003) govern the procedure of the Tribunal and nowhere in the Rules is a Tribunal member who has not fully participated in the hearing permitted to sign a Ruling of the Tribunal. And submitted that the purpose of the rule is to ensure that only a member who has fully participated in the hearing of an appeal should sit in making a decision and the decision thereon should be signed only by those who fully participated in the hearing. It was submitted that it was not in dispute that both **Prof. Situma** and **Prof. Ojienda**, being members of the Respondent Tribunal were for legitimate reasons absent on a number of occasions during the hearing and for instance **Prof. Situma** for sound reasons did not hear the evidence of the EIA expert, **Prof Jacob Kibwage** and two other witnesses, yet he fully participated in preparing the Ruling in the purported appeal. The applicant submitted that members who only sat through the hearing of part of the evidence in the appeal could not lawfully proceed to participate in preparing the Tribunal's decision. In support of this submission, reliance was placed on *Halsbury's Laws of England* Vol 1(1), 4th Edn at para. 110 and contended that as such members are precluded from participating in the making of the decision of the Tribunal, three members of the Tribunal did not sit consistently through the hearing of the purported appeal and taking into account the rule of natural justice propounded hereinabove it is the case that only one member of the Tribunal could legally and procedurally be permitted to participate in preparing the Ruling. Therefore the Tribunal lacked quorum, contrary to the law governing its proceedings, and its proceedings in the appeal are therefore a nullity. This position was based on the fact that section 128(1) of *EMCA* stipulates the quorum for hearing and determining a matter before the Tribunal to be the Chairman and two members of the Tribunal.
40. It was further submitted that the written ruling is on the face of it riddled with irregularities which render it an Illegality. Contrary to its own rules of procedure, the Chairman did not sign the ruling. Instead an unknown person imposed an electronic impression of the Chair's signature on the ruling. While appreciating that it can be argued that the impression is an electronic signature, it was contended that the impression does not satisfy the mandatory conditions of validity of an electronic signature to qualify for legal recognition as entrenched in the *Kenya Information and*

Communications Act under which section 83 provides:-

Where any law provides that information or any other matter shall be authenticated by affixing a signature or that any document shall be signed or bear the signature of any person, then, notwithstanding anything contained in that law, such requirement shall be deemed to have been satisfied if such information is authenticated by means of an advanced electronic signature affixed in such manner as may be prescribed by the Minister.

41. According to the applicant, an “advanced electronic signature” is defined as follows in section 2 of the same Act:

“advanced electronic signature” means an electronic signature which meets all the following requirements—

(a) is uniquely linked to the signatory;

(b) is capable of identifying the signatory;

(c) it is created using means that the signatory can maintain under his sole control; and

(d) it is linked to the data to which it relates in such a manner that any subsequent change to the data is detectable.

42. Based on the foregoing and on **Ferdinand Indangasi Musee & Another vs. Republic [2013] eKLR**, it was submitted that the Court of Appeal held that a judgment which had not been duly signed by all the judges who prepared it was a nullity.

43. The Court was invited to take note of pages 2 – 10 of the Ruling which bears a signature/initial which is manifestly different from that of the Chairperson who signed at the bottom of pages 1 and 11 – 67 of the Ruling hence calling into question the integrity of the impugned Ruling. The applicant’s view was that the practice of authors of documents signing consistently on each page of the document has usually served the purpose of preventing third parties from inserting contents which are not part of the original document. Therefore, the only logical conclusion on the contents of pages 2 –10 is that they were inserted separately from the rest of the Ruling. Furthermore, it was submitted, the Tribunal departed from the Rules of Procedure governing the Tribunal in decision making. The consequence of such departure and or variation from the rules of procedure has been aptly pronounced by the Court of Appeal in the case of **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited [2001] eKLR**.

44. It was submitted that having departed from its Rules of Procedure the Respondent Tribunal proceedings and the decision therefrom is a nullity.

45. According to the applicant, the Tribunal lacked the requisite jurisdiction to hear and determine the purported Tribunal Appeal No. NET 152/2015. To reinforce the point the applicant relied on **Halsbury’s Laws of England**, 4th edition at para. 74 where it is stated that:

The Courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully. Such a body will not act lawfully if it acts ultra vires or outside the limits of its jurisdiction... A body will lack jurisdiction in the narrow sense if it has no power to adjudicate upon the dispute, or to make the kind of decision or order in question; it will lack jurisdiction in the wide sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a manner which is procedurally irregular...

46. The same author in Vol. 1(1), 4th edition at para. 75 states that:

An inferior court, administrative tribunal or other public decision making body will lack jurisdiction and act ultra vires in the narrow sense where it has no power to adjudicate upon the dispute or to make the kind of decision or order in question...A public body

purporting to exercise statutory powers will also act without such jurisdiction or vires where its act or decision lies outside the ambit of the enabling power by reason of the parties, the subject matter, or the geographic area in which the subject matter arose.

47. It was submitted that the Respondent Tribunal is a statutory body established under section 125 of **EMCA** with the sole mandate to operate as an administrative Tribunal to act as an appellate body over the decisions of NEMA, the Director General NEMA and the Committees under NEMA. The appellate jurisdiction of the Tribunal, it was submitted, is expressly set out at section 129 of **EMCA** and under subsection (2) the Tribunal has the jurisdiction to hear appeals arising from the decisions of the Director-General, the Authority or Committee of the Authority. However, **EMCA** only mandates the Tribunal to make regulations regarding its own procedures as opposed to attempting to confer upon itself jurisdiction to hear matters that it is not specifically mandated to adjudicate upon by the enabling statute, **EMCA**. The applicant relied on **Black's Law Dictionary** 8th Edition at Pg 105 which defines an "appeal" in the following terms:-

A proceeding undertaken to have a decision reconsidered by a higher Authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal.

48. It was therefore the applicant's position that based on the foregoing, the Tribunal is in the circumstances the higher administrative authority established by **EMCA** to reconsider the decisions of the Director-General, the Authority or Committee of the Authority in respect to parties who had appeared before those bodies. To it, the Appellate jurisdiction of the Respondent Tribunal is therefore only limited to the reconsideration of the decisions of the Director-General, the Authority or Committee of the Authority as provided under the Act and as such that jurisdiction is only availed once the Director-General, the Authority or Committee of the Authority has had the occasion of receiving hearing parties and made a decision, which decision has aggrieved one party or all parties. Accordingly, it was contended that the Appellants in the purported Tribunal Appeal No. NET 152/2015 lack the requisite *locus standi* before the Respondent Tribunal and are not persons who have been before the Authority, a committee of the Authority, or the Director General and/or is aggrieved by a decision of either the Authority, a committee thereof, or the Director General.

49. **Black's Law Dictionary** 8th Edition at Pg 436, it was further submitted, defines a "decision" as:

A judicial or agency determination after consideration of the facts and the law...

50. Based on that definition it was contended that it is trite that the agencies in question and for the purposes of the dispute herein and the jurisdiction of the Respondent Tribunal can only be the Director-General, the Authority or Committee of the Authority. These entities must of necessity make a determination on a matter/issue between disputing parties after considering the facts and the law before the Tribunal can in law be said to have jurisdiction to reconsider such a decision as provided by section 129(2) of **EMCA** reproduced hereinabove. It was therefore the applicant's assertion that from the foregoing, it is clear that a party must first submit a matter to the Director-General, the Authority or a Committee of the Authority for determination and if such a party is aggrieved by the said determination, then he or she can proceed to lodge an appeal against the said decision to the Respondent Tribunal. Therefore for the 1st and 2nd Interested Parties herein to found a legitimate appeal before the Respondent Tribunal against the decision of the 4th Interested Party (NEMA), the statutory provisions of **EMCA** mandatorily requires such party (the 1st, 2nd and 3rd Interested Parties) to first submit their matters and or concerns to the Director-General of NEMA, the Authority (NEMA) or Committee of the Authority and upon a determination/decision being made by NEMA, which aggrieves him then he can elect to proceed and appeal to the Tribunal. In this case, the 1st and 2nd Interested Parties must first submit their concerns to NEMA, which will then make a decision *after considering the facts and the law* as submitted by the 1st and 2nd Interested Parties and if the 1st and 2nd Interested Parties are aggrieved by the decision then they can appeal to the Respondent Tribunal under section 129 of **EMCA**. To the applicants the 1st

- and 2nd Interested Parties are therefore precluded by law from directly approaching the Tribunal without first having submitted their complaints and/or concerns for a consideration and determination by NEMA and in the absence of such a determination by NEMA with respect to a concern and/or an issue raised by the 1st and 2nd Interested Parties, the Tribunal as established has no mandate/jurisdiction to take cognizance of, consider and determine a concern/issue directly submitted to it in the first instance.
51. The applicant adopted the view that the Tribunal as established under sections 125 and 129 of *EMCA* is strictly an Appellate Tribunal with appellate jurisdiction and lacks original jurisdiction to hear and determine any matters before it since it is not the first port of call by any person as compared to the Rent Tribunal and/or the Business Premises Tribunal established under section 11 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 of the Laws of Kenya. In support of this position the applicant relied on **Miscellaneous Application Number 391 of 2006; Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited.**
52. It was submitted that **Emukule, J's** decision in the above matter aptly addressed the provisions of sections 3(3), (5), 108, 109, 110, 111, 112 and 129 of *EMCA* which provisions are necessary in determining the jurisdiction of the Respondent Tribunal and the Court was conclude that whereas the provisions of sections 3(3), 111(1) and 112(1) of the Act allow the whole world to approach or move the court on grounds specified in those provisions, section 129(1) or (2) allow only a person or persons aggrieved by a decision of the Authority (NEMA), a committee of the Authority), or its Director General to move the Respondent Tribunal, and not the world at large.
53. Further support for this position was sought from the decision of a full bench of three judges of this Honourable Court in Nairobi Judicial Review Miscellaneous Application Number 111 of 2008; **Republic -vs- National Environmental Tribunal & 3 Others Ex-Parte Ol Keju Ronkai Ltd & Another** and **Republic vs. National Environmental Tribunal & 2 Others ex-parte Athi Water Services Board [2015] eKLR.**
54. According to the applicant, the Tribunal has refused and or neglected to give effect to the numerous binding statutory interpretations of this Honourable court and in particular **Republic -vs- National Environmental Tribunal & 3 Others Ex-Parte Ol Keju Ronkai Ltd & Another** (supra), **Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited** (supra) and **Republic vs. National Environmental Tribunal & 2 Others ex-parte Athi Water Services Board** (supra).
55. Jurisdiction, according to the applicant, may be lost where wrong parties are before the Tribunal and for this submission the applicant relied on *Halsbury's Laws of England* Vol. 1(1), 4thEdn at para. 75 as well as **Anisminic Ltd -vs- Foreign Compensation Commission [1969] 2 AC 147.**
56. This issue was therefore concluded by the submission that the Tribunal erred in law as discussed above in *inter alia* misinterpreting the provisions of section 3(3) and 129 of *EMCA* in holding that the Respondent Tribunal can entertain hear and determine appeal from the entire world provided that one alleges breach of environment rights under Article 42 and 70 of the Constitution and as such the decision was delivered outside its jurisdiction and the same ought to be quashed and the Respondent Tribunal prohibited from proceeding with the purported Appeal.
57. To the applicant, it is trite law that a statutory body such as the Tribunal cannot get its jurisdiction by the consent of the parties before it. Therefore no argument can be made that the parties did not object and therefore the Tribunal was right to exercise jurisdiction. Further estoppel cannot operate against the provisions of a statute law hence the Applicant cannot be estopped from raising the jurisdictional issue at this stage and the applicant relied on **Republic vs. The Public Procurement Complaints, Review and Appeals Board & another ex parte Kenya Airports Authority [2005] eKLR.**
58. The applicant therefore urged this Court to allow Notice of Motion Application herein with costs.

Respondent's Case

59. In opposition to the Application the Respondent herein, **The National Environmental Tribunal**, (hereinafter referred to as "the Tribunal") contended that it is a statutory body established under section 125 of *Environmental Management and Coordination Act*, hereinafter, referred to as *EMCA*, with the mandate of acting as an appellate body over the decisions of NEMA, the Director

- General of NEMA and committees under NEMA. According to it, by a Notice of Appeal filed in the Tribunal on the 2nd July 2015, the 1st, 2nd, & 3rd interested parties appealed against NEMA's grant to the Applicant, of an Environmental Impact Assessment (EIA) License to carry on harvesting of 800,000 cubic meters of sand at an estimated depth of 19-50 metres in a strip of 0.4-1.0 Km offshore in the Indian Ocean, from Likoni Through Waa to Tiwi areas in the south Coast Kwale County on the grounds which are contained in the Tribunal's Ruling dated 22 January 2016.
60. The Tribunal contended that it had the requisite jurisdiction to hear, entertain and determine the Appeal as lodged by virtue of section 129(2) of **EMCA**, which grants the Tribunal jurisdiction to hear appeals from potentially affected persons who were not party to the issuance of an EIA licence, but who wished to challenge the decision of NEMA in issuing the EIA on the basis of potential impacts of the activity upon their livelihoods and environment-related rights. Further, the jurisdiction of the Tribunal to hear the Appeal is in compliance with Article 70(1) of the Constitution which provides that any person alleging that a right to a clean and Healthy Environment is being or is likely to be denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect of the same matter, as the 1st, 2nd & 3rd Interested parties did in this matter by way of lodging an appeal with the Tribunal and that Article 169(1) (d) of the Constitution categorizes the Respondent Tribunal herein as a court.
61. It was the Tribunal's case that the Applicant's reading of section 129 of **EMCA** was selective and egocentric as it only focused on section 129(1) which grants persons who were parties to the licensing of EIA a chance to appeal to the Tribunal without elaboration of the rights of potentially affected persons to appeal under subsection (2) of section 129 of **EMCA**.
62. In the Tribunal's view, the Applicant submitted itself to the jurisdiction of the Tribunal and never, at any time, did it raise a preliminary objection concerning the Tribunal's Jurisdiction to hear and determine the Appeal as provided for under Rule 9 of the Tribunal's Rules of Procedure.
63. According to the Tribunal, section 128 of **EMCA** provides for the quorum of the Tribunal as 3 members, including the Chairman, for purposes of transacting businesses of the Tribunal. The Chairman must sit together with two other members and that the Tribunal strictly adhered to this statutory requirement during the hearing of the appeal as the Chairman consistently sat together with 2 other members of the Tribunal. To the Tribunal, there wasn't any alternation in the quorum of the Tribunal's 3 members who sat and heard the appeal to its logical conclusion. It was however not disputed that **Prof. Tom Ojienda** was the only member of the Tribunal who attended only some of the sittings because of other engagements, in which instances the quorum became 4 in accordance with **EMCA**, sections 125 and 128.
64. The Tribunal maintained that it never adjourned for lack of requisite quorum except on the 10th November 2015 when **Prof Situma** who is one of the three members who consistently heard the appeal, was bereaved, having lost his wife in a tragic road accident in Kakamega. On that date though the tribunal had the quorum of 3 members, it was decided that the sitting should be adjourned since **Prof Tom Ojienda** though present had not substantially appeared in other sittings of the Tribunal in hearing the particular appeal and Counsel for parties who appeared on the aforementioned date, including **Mr. Agwara** for the Applicant herein, were duly informed of **Professor Situma's** bereavement as the reason for adjournment.
65. It was averred that on request by Counsel for the Applicant herein, **Professor Situma, Ms. Maureen Mathenge** and **Dr. Dwasi Jane**, being three members of the Tribunal, including the Chairperson, visited two sites of the project in question at Port Reitz and in the high seas, at a location which could only be identified by GPS coordinates, on the 19th of September 2015. The purpose of the site visit was to create familiarity with the subject matter of the appeal, especially the method of sand harvesting that the Appellants objected to and the environment that was likely to be affected. During the site visit, the Applicants mounted their proposed sand harvesting machine and demonstrated how sand harvesting would be conducted after which members of the Tribunal present raised questions which the Applicants representatives, including **Prof. Jacob Kibwage**, a representative of China Road and bridges Corporation, the 2nd Respondent in the appeal and a crew member of the dredger ship responded to. There was no party that was stopped from raising any matter with the Tribunal during this visit. According to the Tribunal, the site visit was not a hearing and the Applicants and their Counsel were of the same understanding. In any

- case, the two sites were not conducive to a hearing, the Ocean, in particular, having adversely affected the health of many, including some of the members of the Tribunal.
66. The Tribunal's case was therefore that it conducted a hearing of the appeal in utmost dignity and in strict compliance with the Tribunals' Rules of procedure and that no issue was ever raised with the Tribunal regarding any unfair handling of the appeal by any party or Counsel, including the Applicants herein, thus, raising the same in this application is tantamount to an abuse of the Judicial Review mechanism as such matter should have been raised by way of an appeal in the High Court. Its position was that the Tribunal did comprehend the basis of the Appeal having had the opportunity to hear from all the Applicants witnesses, including **Dr. Luis Sitoki**, the Acting Chairman of Geo Science Technology Institute, **Dr. Renison Kahindi Ruwa** who is the Acting Director of Kenya Marine Research Institute, **Dr. Charles Magoli** and **Professor Jacob Kibwage**, the EIA Expert himself, who all testified on sand harvesting and sand volumes, which was part of the subject matter of the Appeal before the Tribunal.
67. It was the Tribunal's case that none of the Applicant's witnesses was denied a hearing before the Tribunal. However, the Applicant's Counsel, **Mr. Agwara**, on 17th November 2015, after all the Appellant's witnesses testified and without prior notice to the Tribunal and other Counsel for other parties in contravention of Rule 8 of the Tribunal rules of Procedure, attempted to introduce an additional witness by making an on-the-spot oral application. The additional witness was only described as another witness on sand volumes and his name was not in the list of witnesses filed with the Tribunal. **Mr. Agwara** for the Applicant further stated that the additional witness they wanted to call had a report but the report was confidential and could not be produced. Therefore, the Tribunal issued a ruling on the matter, denying the application. To the Tribunal, **Mr. Agwara**, Counsel for the Applicant herein, had a chance and the right to appeal against the Tribunal's ruling on the said application but he never did.
68. It was the position of the Tribunal that all the Applicants witnesses did not satisfy the Tribunal's persistent questioning on whether or not an assessment was conducted to determine if there was enough sand in the area capable of been harvested in view of the fact that Kenya Ports Authority had conducted a similar exercise of sand harvesting in the area. **Professor Jacob Kibwage**, the EIA Expert who conducted the EIA for the sand harvesting project, had, in the first place an obligation to satisfy NEMA in the EIA Project Report and subsequently, the Tribunal, that according to his assessment, there was enough sand in the area of the project but he failed to satisfy the requirement and the Applicants herein did not tender any report on the issue of sand volumes which was critical in the issuance of the EIA licence that it had been granted.
69. The Tribunal averred that although sand harvesting was part of the Standard Railway Project, it was regarded, by the Applicants herein, as a separate project for which a separate EIA was conducted and a separate EIA Project Report prepared and submitted to NEMA, which formed the basis of NEMA's licence of sand harvesting as a distinct project. Consequently, approval and licence of sand harvesting was challenged as a project or activity with likely negative impacts on the environment and all pleadings filed by the Applicants herein in the Tribunal clearly indicate that although sand harvesting was meant for the SGR project as a whole, it was a distinct project for purposes of NEMA's approval and licence and any queries that may have arisen later. It appears clearly, from the pleadings filed by the Applicant herein in the Tribunal, that it is not the Tribunal that separated sand harvesting from the entire SGR project and to the contrary, the Tribunal receives, hears and determines appeals as presented to it by parties and their lawyers.
70. The Tribunal asserted that the ruling on the Appeal in this matter was prepared by all the 3 members who sat consistently in the Tribunal's hearing. Its case was that it is a practice that if a member participates in the proceeding, he/she will sign the Ruling delivered by the Tribunal, which is why **Professor Ojienda** signed the Ruling, even though he took part in only some of the proceedings. The Tribunal asserted that this consistent practice has never been challenged and does not constitute malice, bad faith or bias, for purposes of judicial review. It disclosed that its chairperson read the Ruling in this appeal which was signed by all members of the Tribunal in the Company of **Prof. Tom Ojienda**. The said Ruling however had typographical errors which required time to correct hence all the parties and their Counsel, including the Applicant herein, could not get a hard copy of the Ruling on the date it was issued. Subsequently, all the lawyers who represented parties during hearing received copies and, in terms of delivery of the Ruling, the Tribunal did not treat the Applicant herein, or its Counsel, disparately, in any way that would

constitute malice, bad faith or bias. The contents of the oral Ruling were not different from the hard copy that the parties were invited to collect on the 8th February 2016 after the typos had been corrected and copies made for all the parties involved in the Appeal. That allegation, according to the Tribunal is not supported by any evidence and fails to meet required elements of bad faith, malice or bias for purposes of judicial review. Also, allegations by the Applicant that the Ruling was unsigned are unsupported by any evidence and are mere allegations and so is the assertion that the hard copy ruling differed materially in its content from the Ruling read to the parties. According to the Tribunal, all members of the Tribunal signed the Ruling that was read to Counsel for parties in the Appeal and there was no alteration or introduction into the Ruling of anything that the members had not previously approved.

71. With respect to costs, the Tribunal's position was that it was acting within its mandate in response to parties' request for costs of the appeal by asking parties to appear before it to argue the issue of costs as is provided for under section 129(3) (c) and Rule 39 of the Tribunals Rules of Procedure.
72. In the Tribunal's view, the issue of illegality, unreasonableness, *ultra vires* and procedural impropriety which forms the basis of judicial review does not arise in the manner the Tribunal conducted itself in the proceedings that have been subjected to this application and that the Applicant should have appealed to the High Court if they felt aggrieved by the decision of the Tribunal.
73. The Tribunal prayed that this application be dismissed with costs.
74. It was submitted on behalf of the Tribunal that the appellate jurisdiction of the Respondent Tribunal is expressly provided for under section 129 of **EMCA**. To the Tribunal, the applicant has engaged in a selective reading of this section and hence has arrived at an erroneous conclusion since the Ex- Parte Applicant's position that the Tribunal had no jurisdiction to entertain the appeal is based on a partial reading of section 129(1) of the Act and in total neglect of the succeeding subsections of the same section. In the Tribunal's view, it had jurisdiction to hear and determine the dispute before it.
75. According to the Tribunal, it is an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. All the constituents' parts of a statute are to be taken together and each word, phrase or sentence is to be considered in light of the general purpose of the Act itself hence the words, phrase occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. To the Tribunal, the above mentioned principle equally applies to different parts of the same section which must be construed as a whole whether or not one of its parts is a saving clause or a proviso and that the subsection must be read as parts of the integral whole as being interdependent, each portion throwing light if need be on the rest since it is an elementary rule that construction of a section is to be made of all the parts together.
76. In the Tribunal's view, section 129(2) extends the jurisdiction of the Respondent to deal with appeals from decisions of the Director General, the Authority or Committee of the Authority unless there is an express provision to the contrary in the Act. By virtue of section 129(2) the powers of the Tribunal are extended beyond the instances outlined under section 129(1) and therefore the Tribunal can entertain an appeal even when the same is not strictly provided for within the purview of section 129(1), provided there is no provision of the Act stipulating to the contrary. A perfect indication of this, it was contended, is provided for under section 33 of the **EMCA** where a person aggrieved by the decision of the Complaints committee is entitled to approach the Tribunal and need not be a person enumerated under section 129(1). It was further submitted that since section 129(1) of the Act deals with the issuance of a license and the conditions attached thereto, that section cannot be said to cover the acts and omissions of the Director General or a committee of the Authority or even the Authority itself in matters not covered under the provision of section 129(1). This Court was therefore urged to find that section 129(2) of the Act deals with appeals other than appeals covered under section 129(1) as long as the same are not otherwise expressly provided for.
77. According to the Tribunal, the Court in **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** which (supra) did not address its mind to the

provisions of section 129(2) of the Act and the Tribunal relied **Republic vs. National Environment Tribunal & 3 Others ex-parte Abdulhafidh Sheikh Ahmed Zubeidi** Miscellaneous Application N. 155 of 2012, the Court was categorical that if that court in ***Ol Kenju Ronkai Limited Case*** had considered the provisions of section 129(2), it might have arrived at a different decision and that although the said section was cited by the court, there was no decision made as to its scope, relevance and applicability. It was therefore contended that the Authority in ***Ol Kenju Ronkai Limited Case*** is not supportive in any way to the Ex- Parte Applicants position herein.

78. According to the Tribunal, its jurisdiction is further anchored in the Constitution of Kenya, 2010 under which Article 70(1) “any person alleging that a right to a clean and healthy environment is being or is likely to be denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect of the same matter.’ It was the Tribunal’s case that what the 1st, 2nd & 3rd Respondents herein did was to exercise their right in any other legal remedy at their disposal which was by way of appealing to the Respondent Tribunal. To the Tribunal, it is a court by virtue of Article 169(1) (d) of the Constitution of Kenya and relied on **Republic vs. The National Environmental Tribunal Ex Parte Orbit Chemicals Industries Limited [2013] eKLR**. It was further contended that it is worth noting that the Tribunal is presided over by persons who are specialists’ in environmental law hence properly equipped in adjudicating the disputes before the Tribunal. To the Tribunal, persons appearing before the Tribunal Respondent have a right of access to Justice by virtue of Article 48 of the Constitution of Kenya 2010 which should not be taken away from them on the technical grounds as those being relied upon by the Ex- Parte Applicant. To the contrary, the Kenya Constitution has enlarged parameters of litigation by virtue of Article 22 which does away with the issue of locus standi in breaches of Bill of Rights.
79. With respect to the allegation that the Tribunal was in breach of the ex- parte applicant’s rights to a fair hearing in the course of hearing the Tribunal’s position was that it accorded all the parties appearing before it a fair and just hearing and did not in any way contravene the Ex-parte Applicants legitimate expectations.
80. On quorum, it was the Tribunal’s case that section 128 of ***EMCA*** provides for the quorum of the Tribunal as 3 members, including the Chairman, for purposes of transacting businesses of the Tribunal. The Chairman must sit together with two other members. It was submitted that the Tribunal strictly adhered to this statutory requirement during the hearing of the appeal as the Chairman consistently sat together with 2 other members of the Tribunal. To the Tribunal, there wasn’t any alteration in the composition of the members who sat and heard the appeal up to its logical conclusion. To the Tribunal it is only one member of the Tribunal out of four who missed some of the sittings of the Tribunal but the same did not affect the quorum of the Tribunal as is required under section 128 of ***EMCA***.
81. On the allegation that the Tribunal made its decision taking into account irrelevant matters which did not form part of its record of proceedings, it was submitted that neither party was heard during the site visit nor any evidence recorded and that the site visit was not supposed to be a hearing as its sole purpose was to create familiarity with the subject matter of the appeal, especially with regards to the method of sand harvesting that the Appellants were objecting to.
82. From the record, it was submitted that the Tribunal was not short of evidence of sand volumes but only queried whether sand in the area was enough to allow harvesting to be carried out. In the circumstances the Respondent Tribunal was only asking probing questions to the Ex-Parte Applicant’s witnesses as none of them seemed to satisfactorily shed light on the issue of sand volumes which was a critical aspect for determination before the Tribunal. With respect to refusal to allow the applicant call a witness it was submitted that to permit the Ex- Parte Applicant an opportunity to call the additional witness would have been unfair to the Appellants who would have been ambushed.
83. With respect to the swearing of an affidavit by the Chairperson of the Tribunal, it was contended that in instances where a Tribunal is sued, the most competent person to respond is the Chairperson of such a Tribunal and that the responses by the Tribunal in this matter by the Chairperson by way of the Replying Affidavit are only a restatement of the law and based on factual issues. The Chairperson is not taking sides in this litigation but only presenting facts as they happened during the course of hearing the Appeal before the Tribunal.

Interested Parties Case

84. The interested parties, apart from setting out the facts contended that based thereon, the proceedings before the Respondent were conducted in a professional, timely manner to the satisfaction of the Applicant and the interested parties. According to them, even after the delivery of the ruling dredgers were spotted in Diani and Tiwi areas undertaking sand harvesting activities. It was therefore contended that the applicant was hell bent on sand harvesting irrespective of the consequences, Court process or any views the residents of Kwale County may have.
85. The interested parties however disclosed that while they were they were not and have never been opposed to the construction of the Standard Gauge Railway and fully support it, the sand harvesting activity can only be undertaken after a full study is carried out by the Applicant or an alternative source of sand/ material be identified for use on reclamation of land at Port Reitz in Mombasa.
86. According to the interested parties they lodged the appeal pursuant to their constitutional rights and section 129 of the *EMCA* and that during the hearing of the appeal, the Applicants never raised any objection to the jurisdiction of the Respondent in hearing the appeal. Similarly, at no point during the hearing of the appeal before the Tribunal did the Applicant oppose the members of the Tribunal alternating to form a quorum.
87. It was submitted on behalf of the interested parties by **Mr Midikira**, their learned counsel that Before the Appeal proceedings begun, at the insistence of the Applicant, a site visit was planned for the 10th September 2015 and the Respondent represented by **Dr. Dwasi Jane, Prof. Situma** and **Maureen Mathenge**, the Applicant represented by **Prof. Mumma**, the 4th Interested Party represented by **Irene Lukoba** and the Interested Parties represented by **Felix Midikira**, were taken to the proposed site by the Applicant's dredging ship.
88. It was submitted that no evidence was produced to demonstrate that the Applicant was denied a chance to address the Respondent and in any event it is the Applicant who took the Respondent and Interested Parties to the site and demonstrated the process of dredging they intended to use in sand harvesting. It is also clear from the Replying Affidavit of the Respondent's Chairperson that the site visit was not a hearing session but a familiarity session however, any party was allowed to address the Respondent on any matter regarding the site and the dredging process. Further, the Applicant had a further opportunity when it presented seven witnesses, to lead evidence on any matter or issue that it observed or arose during the site visit, as did the 2nd and 3rd Interested Parties through their witnesses, **Caspar Van Geer, Onesmus MACHARIA** and **Elias Kimaru**. It was contended that before the Appeal proceedings begun the Applicant and Interested Parties were given an opportunity to bring as many relevant witnesses they felt would be supportive to their case and at the hearing all the parties produced witnesses whom they each intended to call, however the Applicant after closing its case, requested to call yet another witness. To the interested parties, the purpose of the site visit was for all parties in the appeal and the Honourable Tribunal to familiarize themselves with the site and the process of dredging for sand.
89. According to them, the intention of the parties and the Honourable Tribunal was that after the site visit, the hearing would start at the Mombasa Law courts, however the site visit took the whole day and parties agreed by consent to defer the hearing to another date in Nairobi. However at the site, any party had the freedom to ask questions or explain anything important to the Respondent. The Applicant on its part identified the site and showed the same to the Interested Parties and the Respondent through **Prof. Jacob Kibwage** and the crew of the dredging ship. Further, the Applicant demonstrated to the Respondent and the interested parties on how the dredging process would be undertaken. The Respondent and interested parties were free to seek clarification on any issue regarding the site and the dredging process.
90. It was submitted that the Respondent delivered an oral ruling and the typed ruling delivered at a later date, duly signed by all members of the Respondent. Therefore false for the Applicant to loudly claim that the ruling is unsigned. To the interested parties, the conduct of the Applicant during the said appeal proceedings must be scrutinized before the Court can entertain the application for Judicial Review and as indicated in the above submissions the Applicant consented to the manner in which the proceedings were conducted. In this respect the interested parties relied on **Republic vs The National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR**, where the Court held that:

“In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”

91. To the interested parties, the Appeal proceedings were legal, rational, fair and proper and that the issues raised by the Applicant in this application delves into the merits and demerits of the ruling by the Respondent. According to them, it is evident that the Applicant was heard and given an opportunity to ventilate its case, just like the Interested Parties in the Appeal and the proceedings, as conducted by the Respondent, did not offend any known law or principles thereof. Further, as the Respondent had jurisdiction to hear and determine the said Appeal, the application herein and the issues raised therein do not qualify to be brought under the Judicial Review Process, rather the Applicant ought to have filed an appeal as prescribed under section 130 of the Environmental Management and Co-ordination Act CAP 387.
92. On jurisdiction, it was submitted that the Respondent had jurisdiction to hear and determine the said Appeal as section 129 (1) (a) of *EMCA* as amended by Act No. 5 grants “*Any person who is aggrieved by the grant of a license or permit..... may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal*”. Further, section 129 (2) grants the Tribunal, jurisdiction to an appeal from any decisions, including issuance of a license or permit by the 4th Interested Party or its Agents. In support of this position the interested parties relied on **Patrick Musimba vs. National Land Commission & 4 others [2016] eKLR.**
93. It was submitted that the Respondent granted the Applicant and the Interested Parties a fair hearing during the appeal proceedings and fulfilled legitimate expectations of all the parties by giving them the opportunity and time to ventilate their cases. Such expectations should not include favourable rulings but consideration of all matters and evidence for purposes of delivering a just ruling. According to them, under section 126 of the *EMCA*, the Tribunal is not bound by the rules of evidence as set out in the *Evidence Act* and can regulate its proceedings as it deems fit. Section of the *National Environmental Tribunal Procedure Rules 2003*, provides that, the Tribunal shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it. The interested party averred that it was evident from the Respondent’s affidavits in reply that of the four members of the Respondent, it is only one who was not consistent in hearing the appeal. Further, the members of the Respondent are highly intellectual, professional individuals and experts in their own right, with the ability to read the proceedings of the Appeal, the submissions, the lengthy documentation provided by the Applicant and the Interested Parties to enable them come to a just decision.
94. On the issue of taking into account irrelevant matters which did not form part of its record of proceedings, the interested parties contended that the said allegation was false and an attempt to misguide the Court.
95. To the interested parties, the conduct of the Applicant proceeding with the Appeal proceedings and awaiting for a ruling and then purporting to be prejudiced with the rejection of its application to reopen its case, can only be termed as being an afterthought considering the ruling was not favourable to the Applicant. To them, the appeal was not allowed merely because the Applicant failed to demonstrate that there was no evidence of sand, rather the Respondent provided many other grounds for allowing the appeal, which grounds can be found between page 50 and 66 of the ruling by the Respondent. It is therefore a fallacy that the appeal succeeded just because the Applicant’s did not prove existence of enough sand at the proposed sand harvesting site.
96. To the interested parties, the Respondent has its own proceedings as provided under the National Environmental Tribunal procedures 2003 and further the Respondent has its own culture, custom of conducting proceedings where the law requires it to adopt any procedure that would make it reach a just conclusion and the Applicant did not demonstrate how the Respondent has breached the same.
97. According to the interested parties, it is also clear that all the four members of the Respondent heard the appeal however only three were consistent, and it therefore follows that if indeed these members of the Respondent participated in the ruling and the fourth one signed in agreement with the rest, provisions of rule 37(2) of the National Environmental Tribunal Procedures 2003 were

fully complied with by the Respondent. To them the purpose of rule 37(2) is not to ensure that only a member who has **fully** participated in the hearing should sit in decision making, rather than to sign the decision, a member must have heard the matter. It was contended that all four members of the Tribunal heard the Appeal save that one member **Prof. Ojienda** missed to hear two witnesses, being fishermen **Mwafitima Juma** and **Abdalla Matano Mwakumega**. It was submitted that section 128 of **EMCA** provides that quorum of the Tribunal shall be the chair and two members of the Tribunal, and nowhere in the said Act has it been specified that it should be the same two members with the chairman to form a quorum. Indeed if parliament intended that a matter must be heard by the same two members, it would have stated so. This position according to them is supported by section 125(3) of **EMCA** Because parliament envisaged situations where members of the Tribunal may not be available either by expiry of their terms, removal or inability to sit in the Tribunal and this can happen during the hearing of any matter before the Tribunal. To adopt the contrary view, they contended would lead to an inefficient, ineffective and slow Tribunal where matters would take long to be concluded and this would be contrary to the objective and purpose of the Respondent as established under section 125 of the **EMCA**, to provide a quick, efficient and practical delivery of services by knowledgeable persons in Environmental issues compared to the “normal” courts.

98. The interested parties’ position was therefore that the remedy available to the Applicant is to appeal to the Land and Environmental Court. Since the Respondent had jurisdiction to entertain the said Appeal, the proceedings were rational, proper and therefore the Application ought to be dismissed with costs.

Determinations

99. Having considered the application, the response thereto, the submissions of the respective parties and the authorities cited this is the view I form of the matter.

100. The Applicant took issue with the swearing of a replying affidavit by the Tribunal’s chairperson. To the applicant that action was a clear manifestation of bias on the part of the Tribunal. However, no legal provision was cited before me which expressly bars the chairperson of the Tribunal from swearing a replying affidavit and this Court would not be entitled to craft one. For this Court to find that the Chairperson had a predisposition against the applicant, it is my view that the applicant would have to go further than merely relying on the fact that the chairperson swore the replying affidavit. In my view there is nothing inherently wrong in a decision maker defending his/her decision if the defence does not go beyond the acceptable legal parameter. In this case it is not alleged that the depositions of the chairperson crossed the acceptable legal boundaries in order for the same to amount to bias on her part.

101. It was contended that the refusal to permit the applicant’s witness testify was similarly an indication of bias. First and foremost, the decision to permit a person all a particular witness at a late stage of the proceedings is an exercise of discretion and the Court in judicial review would not lightly interfere with such exercise of discretion in judicial review proceedings as opposed to an appeal. In this case the Tribunal contended that the manner in which the said application was made would have prejudiced the appellant since it would have amounted to an ambush. In my view the Tribunal was properly entitled to consider the effects of permitting a witness to be called at that late stage of proceedings on the other party to the proceedings and I cannot say that the reasons advanced by the Tribunal were irrational. To the contrary, one of the considerations to be taken into account where a party intends to call a witness at a late stage of the proceedings is the effect thereof on the other parties to the proceedings. Whereas, eyebrows may be raised with respect to that refusal taking into account the allegation by the Applicant that its earlier attempt to have the same witness testify was made impossible by the inability of the Tribunal itself to hear him, that issue in my view properly belongs to an appellate Tribunal which would be in a position to determine whether taking into consideration the factors prior to and after the decision the Tribunal ought to have exercised its discretion in favour of the applicant.

102. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful

authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

103. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.
104. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See *Chief Constable of the North Wales Police vs. Evans* (1982) 1 WLR 1155.
105. With respect to the ground of *Wednesbury* unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In our view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the *Wednesbury* test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of *Wednesbury* unreasonableness.
106. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475:**

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

107. It is therefore my view that considering the material placed before me I am unable to find that the decision by the Tribunal to deny the Applicant to call the particular witness though may have been a wrong decision on the merits, cannot in the circumstances be termed as having been irrational.
108. It was contended that the Tribunal relied on material which it ought not to have relied upon. This was the material gathered at the site visit. This issue calls for determination of the role of the Court or Tribunal on a visit to *locus in quo*. The purpose of a visit of the *locus in quo* was explained in Ugandan case of **E. Kangye vs. E. Bwana Kampala HCCS No. 38 of 1989** in which **Ouma, J** expressed himself as follows:

“The law relating to *locus quo*, is well settled. It is to enable witnesses clarify what they

have stated in court and must do so on oath... When the court goes to the *locus quo* it goes to check on the evidence given in court, and not fill in gaps. If trial court had to fill in gaps, it would run the risk of being a witness in the case, which should be avoided which did not happen in this case... the intention of visiting a *locus in quo* is to enable the court to clarify the evidence and to enable the court to form impressions or findings...Allowing some witnesses to clarify their evidence at the *locus in quo* and denying others to do so, and by the trial court relying on its own impressions which appear to have been within the evidence which he relied on in making his own decision did not render the trial at the *locus in quo* illegal and the decision was therefore not unjust to the defendant/appellant...It was not a question of allowing some witnesses to testify and denying others opportunity to testify. The proceedings at the *locus in quo* were stopped because of the rain. Both parties and their advocates were present and if any of the parties and or their advocates indicated to the trial court that their witnesses who had not testified needed to testify at the *locus*, the trial court would not have refused to adjourn the hearing of the case at *locus in quo* to another date...As regards the court's reliability on its own impressions, so long as the court's impressions were formed within the law, which was the case, and they form part of the evidence on record, there is no way it can be said that by the court relying on its impressions, it occasioned a miscarriage of justice. After all the intention of visiting a *locus in quo* is to enable the court to clarify the evidence and to enable the court to form impressions or findings.”

109. Similarly in Zziwa Ssalongo & Another vs. Kafumbe High Court, Kampala Civil APPEAL No. 33 of 2012 it was held:

“Visiting a *locus in quo* is not mandatory and depends on the circumstances of each case. In *Yeseri Waibi vs. Edisa Lusi Byandala [1982] HCB* it was held that the practice of visiting the *locus in quo* is to check on the evidence given by witnesses and not to fill the gap for them or [the] court may run the risk of making itself a witness in the case.”

110. The procedure on a visit to the *locus quo* was, however, restated by Ongom, AJ, in Badiru Kabalega vs. Sipiriano Mugangu Kampala HCCS No. 7 of 1987 [1992] II KALR 110 in which the learned Judge held as follows:

“It is well established that the purpose of visiting the *locus in quo* is for each party to indicate what he is claiming. Each party must testify on oath and be cross-examined by the opposite party. Similarly, witnesses who have already testified in court are required at the *locus quo* to clarify what they were stating in court to indicate features or boundary marks, if any, to the court. Any observation made or noted and recorded must form part of the record. Unless it is requested and intimated in advance, the court should not allow fresh witnesses to be called at the *locus quo*. If the trial court fails to follow this accepted procedure at the *locus in quo* and bases his judgement on the trial at the *locus in quo*, that omission is fatal to the whole trial.”

111. Therefore even in ordinary civil proceedings where the Court deals with the merits of the case, a visit to the *locus in quo* is the exception rather than the rule. Its purpose is primarily to make the Court understand the nature of evidence adduced by the parties rather than to collect missing evidence. It is therefore my view that even in civil cases, there should be special circumstances before a decision to visit the *locus in quo* is made and the court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to visit the *locus in quo*.

112. In this case, it was contended that the Tribunal, of its own motion, repeatedly inquired about the availability of sand at the proposed sand harvesting site even though this matter had not formed part of the case filed by the Appellants with the consequence that the *ex parte* Applicant had not lined up witnesses on the issue. It was submitted that the Tribunal carried out a site visit on 10th September 2015, wherein only three (3) of its members were present and neither party was heard

during the site visit and no evidence was recorded. In breach of the ex parte Applicant's legitimate expectation that only matters which appear in the record of the Tribunal's proceedings would be used in the determination of the appeal, at paragraph 7 on page 10 of its impugned Ruling the Respondent Tribunal based its decision against the ex parte Applicant on matters it claims to have observed during the site visit which matters do not form part of the record of the Tribunal's proceedings. It was therefore submitted that not only did the Tribunal itself introduce the issue of sand volumes into the appeal, it proceeded to deny the ex parte Applicant a fair opportunity to respond to the issue.

113. As held hereinabove, any observation made or noted and recorded must form part of the record. In this case, it was contended that one of the findings of the Tribunal was based on an observation which was not part of the record of the proceedings. It was contended further that, paragraph 7 of the Tribunal's written Ruling is a lengthy write up of what the Tribunal members allegedly witnessed during the site visit made on 10th September 2015 in which the Tribunal claims falsely to have witnessed the ex parte Applicant's vessel "scooping" sand from under the water, along with pebbles, stones, fragments or corals, sponges, sea organisms of various kind, certain kinds of vegetation, which may be sea weeds and water and so on. However, the entire write up does not appear anywhere in the Tribunal's records of the proceedings which record was reproduced in the Respondent's further replying affidavit and therefore the entire write up which forms part of the Tribunal's ruling was introduced into the proceedings by the Tribunal itself and used to judge the ex parte Applicant adversely without the ex parte Applicant having been given an opportunity to comment on the allegations therein. Further one of the Tribunal members who participated in making the decision against the ex parte Applicant and signed the ruling did not attend the site visit and therefore could not possibly have witnessed the sand allegedly being "scooped" by the ex parte Applicant's vessel as is falsely claimed in paragraph 7 of the Ruling.

114. On my part I have perused paragraph 7 at page 10 of the ruling and I must agree with the applicant that the said paragraph was rather lengthy and in actual fact constituted evidence as opposed to mere observation in order to clarify the issues which were already in evidence which is the purpose of the visit of the *locus in quo*. In my view where, as a result of the visit of the locus in quo certain issues arise which had not been part of the proceedings, the parties ought to be afforded an opportunity to deal with the same. In this case, from paragraph 8 at page 11 of the ruling it would seem that the hearing of the appeal was conducted subsequent to the site visit. It would therefore seem that the site visit was not carried out for the purposes of clarifying the evidence on record, but for the purposes of collection of evidence. In this respect I must agree with the applicant that the procedure adopted by the Tribunal in this matter was erroneous. I associate myself with the decision of the Court of Appeal in **Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited [2001] eKLR** that:

"It is trite law that where rules of court prescribe a procedure for the doing of any act, a departure from or a variation thereof may render the act done a nullity."

115. It was the applicant's case that the manner in which the Tribunal's ruling was delivered was unprocedural and was a nullity. Doubts were raised as to whether the said ruling was signed by the members of the Tribunal before it was delivered as required by the law. That brings into focus the consequences of the failure to sign a Judgement and whether such an omission renders the judgement a nullity or whether the same is curable. In **C K Matemba vs. Mary Matemba Dar-Es-Salaam HMC No. 1 of 1966 [1968] EA 646**, it was held that the mere failure to sign the judgement should not be held as significant and it should be treated as if it had in fact been signed on the day pronounced. This Court is aware that at one point the Court of Appeal was very strict on matters of technicality and invariably found that the failure to sign or date a judgement rendered the same a nullity. However, subsequently this approach was relaxed and in some cases ignored all together. For example in **Tachasis Wholesalers Ltd. vs. Kenya Seed Co. Ltd Civil Application No. NAI. 299 of 2000**, a judgement had been delivered by the Deputy Registrar. The Court of Appeal held that there was no delivery within the meaning of Order 20 rules 2 & 3 of the Civil Procedure Rules and directed that the file be placed before the Superior Court Judge for the reading of the Judgement as required by law after which a copy of the proceedings would be included in a supplementary record and made part of the record of appeal. In this case, there is no

express averment that the judgement was in fact not signed. What is alleged is that from the circumstances surrounding the delivery thereof and subsequent events, it can be inferred that the same had in fact not been signed by all the members of the Tribunal at the time the same was being delivered. I, with respect, cannot, based on the material placed before me, make a definitive finding on this issue.

116. The applicant relied on Rule 37(2) of the Tribunal Rules, 2003 which provides as follows:

The decision of the Tribunal may be given orally at the end of the hearing or may be reserved and, in either event (and whether there has been a hearing or not) shall be reduced to writing and, save in the case of a decision by consent, shall also contain a statement of the reasons (in summary form) for the decision, and shall be signed and dated by the Chairman and every member who heard the matter.

117. It is clear that the Tribunal is empowered to give an oral decision. What is required is that either way, the decision must be reduced in writing. In other words, an oral decision given is subsequently required to be in writing. This, in my view contemplates that there may be situations where a decision is not in writing at the time of its delivery but ought to be later reduced into writing. In other words the mere fact that a decision is not in writing at the time of its delivery (and therefore not signed) does not necessarily render the same a nullity. Similarly, section 128 of **EMCA** which deals with the quorum at the time of the hearing and determination does not expressly provide that the delivery of a decision already made by all the members of the Tribunal.

118. The next issue was that the Tribunal had no jurisdiction to entertain the matter as the appellants before it had no locus to file the same. I am in agreement with the applicant that jurisdiction may be lost where wrong parties are before the Tribunal and this position is supported by the opinion in **Halsbury's Laws of England** Vol. 1(1), 4th Edn at para. 75 where it is noted that:

A public body purporting to exercise statutory powers will also act without jurisdiction or vires where its act or decision lies outside the ambit of the enabling power by reason of the parties.

119. It follows that if the appellants before the Tribunal had no right to file the appeal, it would render the proceedings before the Tribunal a nullity.

120. In support of its case, the applicant relied on section 129 of **EMCA**. The said provision provides as hereunder:

1. ***Any person who is aggrieved by :-***

- a. ***A refusal to grant a license or to the transfer of his licence under this Act or regulations made thereunder;***
- b. ***The imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;***
- c. ***The relocation suspension or variation of his licence under this Act or regulations made thereunder;***
- d. ***The amount of money which is required to pay as a fee under this Act or regulations made thereunder;***
- e. ***The imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder;***

may within sixty days of the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

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

121. Based on these provisions the Applicant contended that the Respondent is a statutory body established under section 125 of *EMCA* with the sole mandate to operate as an appellate body over the decisions of NEMA, the Director General NEMA and the Committees under NEMA hence its appellate jurisdiction ought to and/or should only be invoked by a person who is aggrieved by a decision of NEMA, the Director General NEMA and the Committees under NEMA, as expressed in section 129. Further the Respondent Tribunal can in law only entertain such Appeals as provided for by *EMCA* and not matters over which section 3 of *EMCA* and Article 70 of the Constitution has given exclusive jurisdiction to the High Court of Kenya, which is also mandated by section 130 of *EMCA* to operate as the final Appellate body over the decisions of the Respondent Tribunal. It was further contended that the Respondent Tribunal as designed under *EMCA* must only entertain, hear and determine appeals from persons with *locus standi* before it, and these are persons who have been before the Authority, a committee of the Authority, or the Director General and are aggrieved by a decision of either the Authority, a committee thereof, or the Director General.

122. These provisions have been the subject of judicial pronouncements in this jurisdiction.

123. However, before I deal with the same, it was contended by the Tribunal that the issues being raised herein are mere technicalities. I wish to remind the Tribunal that jurisdiction is not a technical ground. This was appreciated by none other than the Supreme Court in Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, where it observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

124. To the Tribunal since the Applicant did not raise the issue of jurisdiction it ought not to do so in these proceedings. In Re Continental Credit Finance Ltd Nairobi (Milimani) HCCC No. 29 of 1986 [2003] 2 EA 399, the Court held that:

“If the Court has no jurisdiction over the subject matter of the litigation, its judgements and orders, however precisely certain and technically correct, are mere nullities, and not only avoidable; they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which they were rendered, but shall be declared void by every court in which they may be presented and jurisdiction cannot be conferred on a Court by consent of the parties and any waiver on their part cannot make up for lack or defect of jurisdiction and the point of jurisdiction may properly be taken in an appellate court and decided there even if it was not raised at the original trial.”

125. Back to the merits of the issue, in support of this position the applicant relied on Miscellaneous Application Number 391 of 2006; Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited.

126. In Nairobi Judicial Review Miscellaneous Application Number 111 of 2008; Republic -vs- National Environmental Tribunal & 3 Others Ex-Parte Ol Keju Ronkai Ltd & Another, the Court expressed itself as follows:

“There is no dispute that the 1st Interested Party did not participate in the EIA study process for the development in question, in NEMA’s process of approval of the development or complaint to the PCC. It cannot be said that it was aggrieved by this

entire process which led to the issuance of the licence as it did not participate in it and no decision was made against it that would have led to a challenge by way of appeal to the Respondent. There is no way one can read Section 129 of EMCA to make the 1st Interested Party “an aggrieved Party”.

127. This decision was considered in **Republic vs. National Environment Tribunal & 3 Others ex parte Abdulhafidh Sheikh Ahmed Zubeidi** Miscellaneous Application N. 155 of 2012 where the Court expressed itself as follows:

“Although subsection 129(1) of the Act in its opening seems to permit any person to appeal to the Tribunal a reading of the clauses thereunder seems to limit the appeal thereunder only to a person who has applied for a licence. I therefore agree with the decision in **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** (supra) that under section 129(1) of the Act, a person who did not participate in the EIA study process for the development in question, in the NEMA’s process of approval of the development or complaint by to the PCC cannot be said to have been an aggrieved by the process which led to the issuance of the licence as no decision could be said to have been made against him hence could not challenge the decision by way of an appeal to the Tribunal and if the Tribunal purports to entertain such an appeal under the aforesaid section, the Tribunal would be acting ultra vires its authority hence its decision would be liable to be quashed. It is however contended that the appeal does not fall under section 129(1) of the Act but falls under subsection(2) thereof hence the definition of an aggrieved party under subsection (1) does not apply to the 2nd respondent. The respondents’ position if I understood them correctly is that whereas subsection (1) deals with appeals by a person who applied for a licence, subsection (2) deals with all other persons who are aggrieved by the decision of the Director General, the Authority or a Committee. I agree with the submissions made on behalf of the applicant that any procedures made under subsection (2) cannot supersede the provisions of subsection (1) and therefore in making its procedures the Tribunal cannot for example provide that an appeal covered by section 129(1) may be filed outside the period provided thereunder. However, the Tribunal is clearly empowered under subsection (2) to make procedures for appeal from decisions of the Director-General, the Authority or Committees of the Authority unless otherwise provided. Section 63 of the Act provides:

The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.

It is therefore clear that only the Authority that is empowered to issue a licence under section 63 of the Act. Since section 129(1) of the Act deals with the issuance of a licence and the conditions attached thereto, that subsection cannot be said to cover the acts and omissions of the Director General or a Committee of the Authority or even the Authority itself in matters not covered under of the section 129(1). Accordingly, it is my view and I so hold that section 129(2) of the Act deals with appeals other than appeals covered under section 129(1) as long as the same are not otherwise expressly provided.

In this case it is clear that the appeal in issue does not fall within section 129(1) since the 2nd respondent was not a participant in the licensing process. I have not been told that he is barred from appealing by any other provision in the Act or Regulations made under the Act. Accordingly I find that the 2nd respondent was clearly entitled under section 129(2) to appeal against the decision of the Authority. To rule otherwise would have the effect of nullifying the avenue for appeals against decisions made by the Director General and a Committee of the Authority as provided under section 129(2) without any justifiable legal reasons. As was held by the Court of Appeal in **Leisure**

Lodges Ltd. vs. Yashvina Shretta Civil Appeal No. 10 of 1997, it is an established rule, in construing a statute the intention of the legislature and the meaning of the law is to be ascertained by viewing the whole and every part of the Act and no clause, sentence or word is to be superfluous, void or insignificant and regard is to be had to the policy that dictated the Act as well as the words used. To arrive at a contrary decision would render section 129(2) superfluous, void and insignificant and that would in my view be contrary to the policy that dictated the Act. One cardinal and essential foundation of the interpretation of legislative enactment is that the words of the enactment are to be used in their natural and ordinary sense. A certain amount of common sense must be applied in construing statutes and the object of the Act has to be considered and where the language of an Act is clear and explicit, it must be given effect whatever may be the consequences, for in that case the words of the statute speak for the intention of the legislature. See **Barnes vs. Jarvis [1953] 1 WLR 649; Warburton vs. Loveland [1832] 5 ER 499.**

I have perused the decision in **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** (supra) and it is my view that with due respect the Court did not address its mind to the provisions of section 129(2) of the Act and that had it done so, it might have arrived at a different decision. Although the said section was cited by the Court, there was no decision made as to its scope, relevance and applicability.

Having found that the 2nd respondent's appeal to the Tribunal did not fall under section 129(1) of the Act, it follows that the limitation period provided under section 129(1) does not apply to the 2nd respondent since in my view that limitation only applies to a person appealing pursuant to section 129(1)."

128. With due respect I still hold the same view. That a person ought to approach the Tribunal before coming to the High Court was appreciated in **Patrick Musimba vs. National Land Commission & Others [2016] eKLR** where it was held at paragraph 156 that:

"On these two issues, we are satisfied that the court should not arrogate itself jurisdiction. The Court of Appeal in *Republic –v- N.E.M.A Ex parte Sound Equipment Ltd CACA 84 of 2010 [2011] eKLR* made it clear that challenges to Environmental Impact Assessment Study Reports and or Environmental Impact Assessment Licences should be made to the National Environmental Tribunal established for under Section 125 of the EMCA. Rather than come to this court, the tribunal should have been given the first opportunity and option to consider the matter. We agree with Mr. Gitonga for the 3rd Respondent that the tribunal is the specialized body with the capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licenses."

129. In the premises I disagree with the applicant's contention that the Tribunal had no jurisdiction to entertain the appeal before it by virtue of the purported lack of *locus standi* by the interested parties. In my view, this is the only way in which the opening words "*unless otherwise expressly provided in this Act*" in section 129(2) can be meaningful. In other words, the provisions of section 129(2) can only be excluded by express provisions under the Act and not by way of adoption of the principles of statutory interpretation as was held in **Miscellaneous Application Number 391 of 2006; Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited.**

130. It is trite law that if the words of an enactment are themselves precise and unambiguous, then no more is necessary than to expound those words in their ordinary and natural sense... The words themselves alone do, in such a case, best declare the intention of the lawgiver. See **The Katikiro Of Buganda vs. The Attorney General of Uganda [1959] EA 382**

131. My view on this issue is reinforced by the provisions of section 3(3) of the *EMCA* which provide as follows:

If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate..

132.Subsection (1) on the other hand provides:

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

133.A reading of these two provisions in my view reveal that a person who contends that his entitlement to a clean and healthy environment is being violated can approach the High Court or seek other lawfully available remedy. One of the lawfully available remedy which is not expressly excluded under the Act, in my view, is an appeal pursuant to section 129(2) of *EMCA* to the specialised Tribunal established by section 125 thereof.

134.The applicant in addition relied on **Republic vs. National Environmental Tribunal & 2 Others ex-parte Athi Water Services Board [2015] eKLR**. In that case however the reason for the quashing of the Tribunal’s decision was the finding by the Tribunal that it was not bound by the decision of the High Court. In other words that decision is not an authority for the proposition that the Tribunal has no jurisdiction under section 129(2) to entertain a dispute where the appellant did not participate in the proceedings before NEMA.

135.The Tribunal however contended that its jurisdiction is further anchored in the Constitution of Kenya, 2010 under which Article 70(1) “any person alleging that a right to a clean and healthy environment is being or is likely to be denied, violated, infringed or threatened, the person may apply to court for redress in addition to any other legal remedies that are available in respect of the same matter.’ It was the Tribunal’s case that what the 1st, 2nd & 3rd Respondents herein did was to exercise their right in any other legal remedy at their disposal which was by way of appealing to the Respondent Tribunal. To the Tribunal, it is a court by virtue of Article 169(1) (d) of the Constitution of Kenya and relied on **Republic vs. The National Environmental Tribunal Ex Parte Orbit Chemicals Industries Limited [2013] eKLR**. It was further contended that it is worth noting that the Tribunal is presided over by persons who are specialists’ in environmental law hence properly equipped in adjudicating the disputes before the Tribunal.

136.That the Tribunal is a specialised Tribunal and is entitled to respect is not in doubt. This position was appreciated by the Court of Appeal in The Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) eKLR** where the said Court expressed itself as follows:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped that the High Court to handle disputes relating to breach of duty of the procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

137.However that respect and liberty only inures as long as it is exercising the powers conferred upon it under the law. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA**

No. 19 of 1971 [1973] EA 327, it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The Tribunal has purported that under Article 169(1) (d) of the Constitution of Kenya, it is a Court and therefore it can exercise powers under Article 70 of the Constitution. On this issue the Court in **Republic vs. National Environmental Tribunal & 2 Others ex-parte Athi Water Services Board [2015] eKLR** expressed itself as follows:

“The Tribunal has also attempted to expand its jurisdiction by invoking Articles 22, 42, 70 and 71 of the Constitution and holding that it is the court envisaged under those Articles of the Constitution to enforce the Bill of rights including the rights under Article 42 and 70 of the Constitution...The Tribunal is not the Court contemplated under Article 22, 70 and 71 of the Constitution and the said holding is therefore a deliberate self-serving misinterpretation of the Constitution by the Tribunal with the sole objective of usurping the jurisdiction reserved to the High Court by the Constitution.”

138. In other words, whereas the Tribunal is pursuant to section 169(1) of the Constitution deemed as a subordinate court, it is not a Court for all purposes under the Constitution. I wish to restate what the Court stated in the above case that:

“the Tribunal has no regard whatsoever to the decisions of the High Court. The Tribunal did not even consider the findings of the High Court in respect to the Tribunal’s jurisdiction under section 129(2) of the EMCA which section has never been amended and the interpretation of the limits thereunder by the High Court are binding on the Tribunal. The Tribunal instead deliberately wished away the said decisions of the High Court by claiming that they were delivered before the new Constitution was enacted, which fact is untrue since one of the decisions was delivered under the current constitution and in any event the current constitution has neither expanded the jurisdiction of the Respondent Tribunal in any manner nor amended sections 125 and 129 of EMCA which have remained the same and operates as enacted in the year 1999.”

139. According to the Applicant the Tribunal is currently made up of four members, but any three including the Chairman would form a quorum for the business of the Tribunal as provided by section 128 of *EMCA*. It is the rule of law, according to it, that the Respondent Tribunal in hearing and considering matters before it will not alternate its member’s composition during the hearing of the matter so as to guarantee consistency and a fair trial with a view of ensuring that the members are fully seized of the issues in dispute.

140. According to the applicant, the Tribunal purported to give a determination in the matter, which determination was purportedly made by all the four (4) members of the Respondent Tribunal despite the fact that the four (4) members did not fully hear the Applicants case and as such their decision was either based on hearsay or segments of the evidence which they heard and in exclusion of other material evidence which were given in the matter and when the particular members were absent.

141. The Applicant graphically tabulated the manner in which the members participated in the proceedings. From the said table, it is clear that **Prof. Ojienda** missed quite a number of crucial sittings while **Prof Situma** missed at least three crucial sittings. As already stated hereinabove, Rule 37(2) of the Tribunal Rules, 2003 provide *inter alia* that the decision of the Tribunal shall be signed and dated by the Chairman and every member who heard the matter. The Tribunal seems to be of the view that since at any one given crucial hearing there was a quorum, the fact that some of the members were present at one sitting and absent at another was immaterial.

142. *Halsbury’s Laws of England* Vol 1(1), 4thEdn at para. 110 where it is stated that:

A member of a tribunal who has not heard all the evidence must not participate or appear to participate in the tribunal’s decision.

143. In **Republic vs. Complaints Commission, Media Council for Kenya & Another Exp Baraza**

Limited t/a Kenya Television Network (KTN) Misc. Civil Application No. 182 of 2012, this Court expressed itself as follows:

“Even if the Commission had the power to establish the said panels to hear complaints outside the three mechanisms, one would have expected the panel as constituted to hear the complaint from its inception to conclusion. In this case, in the course of the hearing the composition of the panel was altered with one Commissioner who sat on the first day of the hearing not sitting on the second hearing and only appearing to sign the decision. Another Commissioner who never sat during the hearing at all only sat during submissions and during the delivery of the decision. From the evidence it is clear that only two Commissioners Peter Mwarua and Priscilla Nyokabi sat throughout the proceedings. Procedural impropriety is one of the grounds for seeking and granting judicial review and this has been described as a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See Al-Mehdawi vs. Secretary of State for The Home Department [1990] AC 876; Pastoli vs. Kabale District Local Government Council and Others Kampala HCCC No. 152 of 2006 [2008] 2 EA 300. The manner in which the hearing of the complaint was conducted was clearly tainted with procedural impropriety and I so find.”

144. Similarly in Eusebius Karuti Laibuta vs. National Police Service Commission [2014] eKLR, this Court found as follows:

“In this case, three people seem to have participated in the impugned decision yet they were never part of the panel which interviewed the Petitioner. In my view that was clearly unlawful and unfair. On what basis were they expected to arrive at a sound decision when they never participated in the hearing? Whereas it may well be that had all these persons participated in the interview they may have arrived at the same decision, this Court cannot say that it is certain that they would have arrived at the said decision.”

145. In Ferdinand Indagasi Musee & Another vs. Republic (supra) an appeal arising from the decision of a two judge bench, the Court of Appeal expressed itself as follows:

“We note that whereas the judgement was crafted by both Judges, it is only Odera, J who signed it after delivering it. In the absence of the signature of the other Judge, it cannot be said that the judgement was regular or proper or valid.”

146. It is therefore my view that judicial and quasi-judicial proceedings especially where determination of constitutional rights such as the right to a clean and healthy environment are involved the same ought to be taken very seriously by those presiding thereat. The members of the Tribunal ought not to treat the same as a “walk-in walk-out” function by attending the same when convenient and absenting them at will only later on to resume the sitting as if they had not absented themselves from the previous sitting or sessions. In my view where a member of the Tribunal misses a crucial sitting or session it is not permissible for the same member to participate in the said proceedings and make a determination thereof at a later stage. This was the position adopted in Rex vs. Huntington Confirming Authority ex parte George and Stamford Hotels Ltd [1929] 1 KB 698, where it was held by Lord Hanworth, MR at page 714 as follows:

“One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend.

It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.”

147. **Romer, J** on his part held at page 717 of the said judgement as follows:

“Further, I would merely like to point this out: that at the meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of the confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.”

148. The facts of the instant case were similar to those in **Samuel Max Mehr vs. The Law Society of Upper Canada [1955] CanLII 7** where the Supreme Court of Canada (**Cartwright, J**) while adopting the holding in **Rex vs. Huntington Confirming Authority ex parte George and Stamford Hotels Ltd** (supra) allowed the appeal and quashed the Respondent’s decision.

149. The same decision was cited with approval in **Re Ramm and the Public Accountants Council for the Province of Ontario [1957] CanLII 130**, where the Canadian Court of Appeal while allowing the appeal expressed itself as follows:

“With respect to the difference in the constitution of members of the Public Accountants Council on the first and second hearings, it may well be that the two members of the Public Accountants Council who were not present at the earlier hearing, abstained from argument on the issues which fell for determination. It appears, however, that they did vote inasmuch as the decision to revoke the licence of the appellant Ramm was unanimous. It is well established that it is not merely of some importance but of fundamental importance, that “justice should not only be done but should manifestly and undoubtedly be seen to be done.” In a word, it is irrelevant to inquire whether two members of the Council who were not present at the earlier hearing took part in the proceeding in the Council’s deliberation on the subsequent hearing. What is objectionable is their presence during the consultation when they were in a position which made it impossible for them to discuss in a judicial way, the evidence that had been given on oath days before and in their absence and on which a finding must be based.”

150. In **Moyer vs. Workplace Health, Safety and Compensation Commission [2008] NBCA 41 (CanLII)**, **Richardson, JA** whose decision received concurrence of the other judges held, while allowing the appeal, by that:

“In my view the record reveals a breach of the fairness. I agree with the Commission that lengthy arguments can at times result in panel members no longer being able to resume a hearing. However, when this occurs, steps can easily be taken to ensure procedural fairness. When a hearing has truly begun, as was the case here, and when, after an adjournment, it has become necessary to substitute decision-makers, the least that can be expected to avoid procedural unfairness is that the parties be advised on the change before the resumption of the hearing and be given an opportunity to recommence the hearing. This is not to say that, in all cases, proceedings will need to recommence. It may be that the parties will reach some agreement on how to acquaint the decision-maker(s) with evidence previously adduced or arguments previously made. However, what is important is that the parties at least be advised of the change in a timely fashion and be given the opportunity to recommence the hearing, if that is how they wish to proceed.”

151. In this case, it may well be that the views of the said persons who did not participate in all the crucial proceedings did not influence the outcome of the decision. However, rule 37(2) of the

National Environmental Tribunal Procedures 2003 dictates that the decision be made by all the members who participated in the hearing. By signing a decision, it signifies ownership of the same. To own a decision is therefore an intimation that one agrees with the whole decision and in judicial or quasi-judicial proceedings, I do not see how a person can claim to own the decision when he or she never participated in the matter, unless the matter is such that the law permits such a procedure.

152. The interested parties however contended that the Respondent has its own proceedings as provided under the *National Environmental Tribunal Procedures 2003* and further the Respondent has its own culture and custom of conducting proceedings where the law requires it to adopt any procedure that would make it reach a just conclusion. In my view whatever procedure customs or culture as the interested parties baptise them, a body adopts, they must meet the basic tenets of fairness and justice. To adopt an unusual procedure under the pretext of reaching a decision can only be termed as being irrational. In my view whatever procedure is adopted it has to achieve the degree of fairness appropriate to the task at hand and whatever standard is adopted one essential is that it must be such as will enable the Tribunal to fairly to determine the question at issue. In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means.” See *Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587.*

153. In this case, it is my view that the manner in which the proceedings were conducted at the site visit and the irregular manner in which the members of the Tribunal presided over some crucial sittings cannot be said to have lent themselves to fair hearing. It is therefore clear in my view that hearing before the Tribunal was conducted in a most unsatisfactory manner. That mode of carrying out the proceedings was inimical to and violated the spirit and the letter of Articles 47 and 50 of the Constitution.

Finding

154. It is therefore my view and I so find that the decision of the Tribunal cannot be allowed to stand.

Disposition

155. In the premises the Notice of Motion dated 22nd February, 2016 succeeds and I hereby grant the following orders:

- a. **An Order of Certiorari removing to this Honourable Court for purposes of being quashed the proceedings before the National Environmental Tribunal at Nairobi in the Tribunal Appeal No. NET 152/2015; South Coast Resident’s Association & 2 Others –vs- National Environmental Management Authority (NEMA) & China Road & Bridge Corporation together with the unsigned ruling delivered therein on the 22nd day of January 2016 which proceedings and decision are hereby quashed.**
- b. **An Order of Prohibition prohibiting the implementation of the ruling of the National Environmental Tribunal at Nairobi as delivered on 22nd January 2016 in the Tribunal Appeal No. NET 152/2015; South Coast Resident’s Association & 2 Others –vs- National Environmental Management Authority (NEMA) & China Road & Bridge Corporation.**

156. I also award the costs of these proceedings to the applicant to be borne by the Respondent.

157. Orders accordingly

Dated at Nairobi this 4th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Agwara for Prof. Mumma for the applicant and holding brief for Miss Lukoba for the 4th interested party

Mr Andolo for Mr Ligunya for the 1st Respondent and also holding brief for Mr Midikira for the 1st, 2nd and 3rd interested parties

Cc Mwangi