REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO.217 OF 2015

REPUBLIC…………………………….............………..………......APPLICANT

AND

THE NATIONAL ENVIRONMENTAL TRIBUNAL...RESPONDENT

JOSEPH KURIA MWANGI……..1ST INTERESTED PARTY

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (NEMA)..2ND INTERESTED PARTY

ATHI WATER SERVICES BOARD...EX-PARTE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9th July, 2015 filed on 10th July, 2015, the *ex parte* applicant herein, **Athi Water Services Board,** seeks the following orders:

1. **An order of *prohibition* prohibiting the Respondent from taking cognizance of, entertaining, hearing, conducting, proceeding with and/or determining the purported Tribunal Appeal No. NET 139/2015 - Joseph Kuria Mwangi vs. National Environmental Management Authority (Nema) & Athi Water Services Board or any other purported Appeal in variation, substitution, subtraction, addition, akin to or identical thereto.**
2. **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 purported Tribunal Appeal No. NET 139/2015 - Joseph Kuria Mwangi vs. National Environmental Management Authority (Nema) & Athi Water Services Board together with the ruling delivered therein on the 23rd day of June 2015.**
3. **An order of *mandamus* compelling the Respondent to comply with and give effect to the**

findings and holdings of this Honourable Court.

4. **The cost of this application be in favour of the Ex-parte Applicant.**

***Ex Parte* Applicant's Case**

2. According to the Applicant, it is a State Agency established under Section 51 of the ***Water Act*** 2002, as one of the eight Water Boards under the Ministry of Environment, Water and Natural Resources created to bring about efficiency, economy and sustainability in the provision of water and sewerage services in Kenya. As a duty bearer, the Applicant:- plans and develops National Public Water Works for bulk water supply, formulates development and investment plans in liaison with county governments, provides input to the national development and financing plan and provides technical assistance to Water Service Providers for county asset development and its geographical jurisdiction covers an area of 3,810 square kilometres with a population of 5.5 million people and a population density of 8,472.48 persons per square kilometre. The Applicant ensures the provision of quality and affordable water and sewerage services in its area of jurisdiction through its twelve (12) appointed Water Services Providers (WSPs) namely:- Nairobi Water and Sewerage Company Ltd, Thika Water and Sanitation Company, Limuru Water and Sewerage Company, Ruiru-Juja Water and Sanitation Company, Kikuyu Water Company, Karuri Water and Sanitation Company, Gatundu Water and Sewerage Company, Githunguri Water and Sewerage Company, Gatanga Community Water Scheme, Kiambu Water and Sanitation Company, Karimenu Community Water and Sanitation Company and Runda Water Company.

3. According to the Applicant, in line with Vision 2030, the Government of Kenya plans to improve water services in Nairobi City, Kiambu and Muranga Counties which Vision recognized infrastructure as the major drive for growth, development and poverty reduction in Kenya. In line with the above, the Applicant prepared a Water Master Plan for Nairobi City and Satellite towns which was launched in 2012. One of the Key Phase 2 (2012-2016) bulk water supply projects is the construction of the Northern Collector Tunnel Phase 1 Scheme. The said Scheme entails the construction of a 11.8 Km raw water transfer tunnel along the Eastern fringes of the Aberdare Conservation Area (ACA) approximately 60Km North of Nairobi to divert a defined flood flows from Maragua, Gikigie and Irati Rivers into the existing Thika Dam, treatment of Water at Kigoro Water Treatment Plant and subsequent transmission through 1200mm diameter pipeline to Kabete Water Reservoirs via Gigiri to supply upper zones of Nairobi. The said Scheme, it was averred is only meant to divert defined flood flows and will not affect the regular/normal river flows. It will divert the said defined flood flows from Maragua, Gikie and Irati Rivers by means of weir control intakes and convey the intercepted raw water through an 11.8km long tunnel with 3.2 m diameter to Thika Dam.
4. It was contended that the Northern Water Collector Tunnel Phase 1 Scheme (the Project) will increase the supply of water to the residents of Nairobi by 140,000 cubic meters per day and thus reduce the daily water shortfall in Nairobi to 60,000 cubic meters. The Project will also benefit the people of Muranga County by providing at least 70% of the entire Muranga County population with piped water. It was disclosed that the Applicant is at an advanced stage of implementing the Project and has applied for and obtained all the necessary licenses, authorizations and approvals including but not limited to;-, (i) Securing funding of Kshs. 6.8 Billion from the World Bank to finance the Project, (ii) acquired land and compensated affected private land owners within Githika, Gikigie, Irati and Maragua Rivers and (iii) obtained project authorization and approval by the Muranga County Government etc. which processes took the Applicants a period of over 3 years. In particular, the Applicants complied with the requirements of the ***Environmental Management and Co-ordination Act*** (EMCA), made an application for an Environmental Impact Assessment (EIA) License and submitted to the National Environmental Management Authority (NEMA) an Environmental Impact Assessment Study Report which NEMA found to have satisfactorily addressed the potential environmental impacts of the proposed development and duly issued the Applicants with an EIA License on the 9th February 2015 or thereabouts. It was added that NEMA duly complied with the requirements of ***EMCA*** and the Regulations made thereunder including but not limited to inviting public comments on the proposed development through paid

up advertisements in the local dailies and the Kenya Gazzette as well as conducting public hearings on the project affected areas to determine the environmental soundness of the Project. The consultative meetings and the public hearings on the project was widely published within Muranga County while the paid up advertisements and the gazette notice were done on the 21st November 2014 and 24th December 2014 respectively. The proposed development, it was averred, received no objection from the 1st Interested Party and/or from any other party/person and as a result, NEMA issued the Applicants with an EIA License on the 9th February 2015 or thereabouts.

5. However, on 26th February 2015 or thereabouts the 1st Interested Party acting maliciously and in bad faith, mischievously filed a purported Tribunal Appeal No. NET 139/2015.; **Joseph Kuria Mwangi –vs- National Environmental Management Authority (Nema) & Athi Water Services Board** (the Appeal), seeking to *inter alia* to permanently stop the Applicants from continuing with the development of the proposed project and to cancel and/or revoke the Applicants EIA License. This is 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. To the Applicant, the said 1st Interested Party's purported Appeal is filed maliciously and in bad faith as the same is ostensibly premised on the alleged ground that the people living in Nairobi should not abstract water from Muranga and that NEMA had allegedly failed to inform the Applicant that it was going to issue an EIA Licence to the Applicant. According to the Applicant the particulars of malice and bad faith were:

a. Filing the purported Appeal irregularly with the principle 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 development.
b. Purporting that NEMA breached Article 47 of the Constitution by allegedly granting the EIA license herein without informing the public and key stakeholders, when the Applicant is fully aware that the project was advertised and gazetted and public hearings conducted in Muranga County within the law.
c. Filing the purported Appeal yet it is fully aware that the Applicants have complied with all the legal requirements governing the proposed development and have obtained all the necessary approvals, authorizations and licenses.
d. Sitting back as the Applicants engage in costly and time consuming procedures to secure the necessary project approvals, authorizations and licenses and commence the development at an estimated cost of Kshs 6.8 Billion only to try and frustrate the project at the 11th hour.
e. Maliciously writing directly to the World Bank with a view of having them stop financing the project, when the Applicant is fully aware of the national importance of the project and the fact that the people of Muranga will be the largest beneficiaries of the project.
f. Mischievously and fraudulently filing the purported Appeal with intention to irregularly and unlawfully take advantage of section 129(4) of EMCA to halt the Applicants' development.
g. Lodging the purported Appeal in the Respondent Tribunal when it is aware or ought to be aware that only the High Court of Kenya has the jurisdiction to entertain the issues raised therein.

6. It was contended that in furtherance of his malice, mischief and bad faith, the 1st Interested Party maliciously misrepresented that the subject project, if not stopped would affect the water levels in the subject rivers, yet being fully aware that various independent studies carried out by independent experts confirm that the project will not affect the river flows as it is designed to only trap flood waters and river over flow.
7. Pursuant to the filing and service of the purported Appeal, the Applicants filed responses thereto and raised preliminary objections on the grounds *inter alia* that the Respondent Tribunal had no jurisdiction to entertain and or hear the purported Appeal and was as such acting *ultra vires* its statutory mandate as spelled out in Section 129 of the ***EMCA***. 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 any person who is aggrieved by a decision of NEMA, the Director General NEMA and the Committees under NEMA, as expressed in Section 129. It was the Applicant's view that 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.

8. It was averred 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. In support of this position the Applicant relied on Nairobi Judicial Review Miscellaneous Application Number 111 of 2008 - **Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Ol Keju Ronkai Ltd & Another** and Nairobi Judicial Review Miscellaneous Application Number 391 of 2006 - **Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd And Silversand Camping Site Limited** which decisions are binding on the Respondent Tribunal. Despite of the above legal provisions and the said High Court decisions, the Respondent Tribunal has refused, failed and/or neglected to apply the said legal position and has instead resorted to acting *ultra vires* its mandate and in excess of its jurisdiction and thereby issue decisions which are unlawful, irregular and unprocedural one of which was delivered by the Respondent Tribunal on the 23rd June 2015 in respect to the preliminary points of law raised by the Applicants in the said case. purported in which the Respondent Tribunal not only refused to give effect to the said two binding High Court decisions but also proceeded to insist that it will hear the purported Tribunal Appeal No. NET 139/2015 despite its lack of jurisdiction. The Tribunal even purported to increase its jurisdiction in express contravention of Article 159, 162 and 169 of the Constitution by holding that it is the Court with jurisdiction to enforce environmental rights under Article 70 of the Constitution.
9. In the Applicant's opinion, in finding and holding that the Respondent Tribunal is the Court under Article 70 of the Constitution with jurisdiction to enforce environmental rights and that any member of the public who claims to have an environmental concern of whatever nature is entitled to file an appeal before it, the Respondent Tribunal is acting *ultra vires* and in express contravention of Article 169 of the Constitution and attempting usurp the original jurisdiction granted to the Environmental & Land Court under Article 162 of the Constitution of the Republic of Kenya and Section 3(3) of the ***EMCA***. It was disclosed that the Respondent Tribunal fixed the hearing of the said case on 10th July 2010 an action that is *ultra vires* and irregular and has the effect of demeaning the Constitution and destabilizing NEMA's operations and rendering all its environmental procedures, processes and requirements unnecessary and irrelevant.
10. The Applicant further added that the Respondent Tribunal's decision made on 23rd June 2015 in the said Case and its refusal to be bound by the decisions of this Honourable Court on the law, reduces an EIA License into a worthless and useless piece of paper that is open to challenge by any busy body at any given time irrespective of how long the EIA has been in place and the magnitude of commitment the EIA holder has put in place pursuant to its issuance.
11. The Applicant reiterated that the Respondent Tribunal is acting *ultra vires*, in contravention of the Constitution and in excess of its jurisdiction in refusing to abide with the law in its attempt to proceed, entertain and hear the said case. It was contended that the Respondent Tribunal is acting unfairly and in bad faith in proceeding to entertain and hear the case and its insistence on hearing of the Case is unconstitutional, unreasonable, unlawful, grossly unfair and arbitrary for being premised on extraneous, irrelevant and unlawful considerations yet the Government of Kenya through the Applicant has committed huge amounts of money for the development of the project and will suffer unconscionable damages as result of the Respondent Tribunal's irregular and unlawful acts.
12. It was averred that the Respondent Tribunal if not stopped by this Honourable Court, will proceed to hear the purported Tribunal Appeal No. 139/2015 on and issue unconstitutional, irregular and unlawful orders that will interfere with their operations and unduly prejudice them.
13. According to the Applicant, NEMA 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. However, 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. Article 162(2)(b) clearly sets out the Environmental and Land Court as the Court to deal with environmental concerns. 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.
b. 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.
c. The Appellant in the purported Tribunal Appeal No. NET 139/2015 lacks the requisite *locus standi* before the Respondent Tribunal and is not a person who has 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.
d. NEMA had not made a decision against the Applicant capable of forming the basis for an appeal under Section 129 of ***EMCA***.

14. It was the Applicant's case that it is only fair, just, and proper that the proceedings, recognition, hearing, conduct and/or determination by the Respondent, of the Appeal or any other purported Appeal in variation, substitution, subtraction, addition, akin or identical thereto, be stayed pending the hearing and determination of the Application for Judicial Review. To the Applicant, under Article 62 (i), all rivers and lakes are part of public land and NEMA cannot use the Respondent to stop the project herein on a mere selfish ground that the water in issue flows from rivers within Muranga County and should not be used by people residing in Nairobi, when it is clear that the subject project will not adversely affect the water flow in Muranga as the same is designed to hugely benefit the people of Muranga County. As a result of the public importance of the project, the same have received support from the County Government of Muranga which is currently working closely with the Applicant to ensure lawful and regular implementation of the Project.
15. The Applicant reiterated 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 hence it is only fair, just, and proper that this Honourable Court do intervene and stop the Respondent Tribunal from proceeding with the hearing of the Appeal pending the hearing and determination of the application for Judicial Review.
16. It was further contended that the subject project is funded by the World Bank to the tune to ensure that only environmentally sound projects are carried out within the Country, has verified the project and approved the same for being environmentally sound. In this case, NEMA, which is the relevant state agency empowered by statute to ensure that only environmentally sound projects are carried out within the Country, has verified the project and approved the same for being environmentally sound and in considering the environmental soundness of the project, NEMA, considered the detailed EIA Study carried out by one of the highly reputed and most professional institution in that field being GIBB International, which considered all the possible environmental consequences which may arise from the project and designed necessary mitigation to address the same. The mitigations are expressly provided for as mandatory conditions for the project in the EIA License issued herein and the same are being fully complied with.
17. It was averred that the subject project is not only important for this Country and in particular the Capital City of Nairobi and the County Government of Murang'a but the same is also environmentally sound with all possible environmental concerns having been fully addressed in the EIA study and the resultant EIA Licence.
18. It was asserted that as demonstrated in the evidentiary documents annexed to the Verifying Affidavit, the members of public have been fully engaged in this project not only through the various public meetings carried out by NEMA prior to issuing the E8IIA Licence for the project but also through consultative meetings held by the County Government of Muranga and though the 2nd Interested Party has been fully aware of this project, he has never challenged the same or raised any concerns with the project but has now elected to frustrate the same by making unmeritorious issues designed to buy time and scare the World Bank from funding the project. The Applicant lamented that it has committed over six (6) years to formulate and initiate the

implementation of this project and it is unfortunate that the same is now being frustrated by one individual acting maliciously and against the public interest.

19. The Applicant further disclosed that following the issuing of the *status quo* orders by this Honourable Court, on 30th July 2015 at the instance of the 2nd Interested Party, the Ex-parte Applicant has suspended all the works with the consequence that the Ex-parte Applicant is now incurring a daily contractual damages of Kshs. 12.5 Million, which amount has now totalled to Kshs. 400,000,000 Million and continues to grow on every day that passes. Further to the huge contractual damages being incurred, the project now risks being terminated as the contract expressly provides that if the works are suspended for a period of over 84 days, the Contractor is entitled to cancel the same upon issuing a 28 days' notice. The 2nd Interested Party being fully aware of the foregoing, decided to file the purported Appeal at the Tribunal which Appeal the 1st Interested Party filed only after the contract had been executed and the commencement notice given to the contractor. This was an act of malice since the project had been well publicized during several months of consultation and any person with concerns had an opportunity to raise them. The 1st Interested Party is now trying to use the process of this Honourable Court to aid him in his attempts to frustrate the project by misleading the Honourable Court that the project presents a risk to the environment. To the Applicant, based on the value of the project and the accruing contractual damages, the 1st Interested Party is not in a position to compensate the ex-parte Applicant and/or the Government of Kenya for the damages currently being incurred as a result of his malicious and selfish actions. As the subject project is being carried out to benefit members of the public and it is unacceptable that this Honourable Court should allow one disgruntled individual to frustrate such a project when the project is being regularly and lawfully executed, considering the fact that the project has been audited and approved by NEMA. A keen analysis of the grounds upon which 1st Interested Party relies in his appeal before the Tribunal reveals that they are spurious and lacking in substance as they have all been addressed by the various process and instruments provided for in EMCA and the said appeal is therefore malicious.

20. It was submitted on behalf of the Applicant that the 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 Respondent Tribunal is expressly set out at section 129 of **EMCA** which provides as follows;-

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.***

21. To the Applicant, section 129(2) grants the Tribunal the jurisdiction to hear appeals arising from the decisions of the Director- General, the Authority or Committee of the Authority. However,

EMCA does not define what an appeal is neither do the Rules made by the Respondent Tribunal. However, an appeal in law is defined by ***Blacks Law Dictionary 8th Edition at Pg 105*** as;-

> **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.**

22. In the Applicant's view, from the foregoing, it follows *afortiori* that 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. It was submitted that the appellate jurisdiction of the 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 hearing parties and made a decision, which decision has aggrieved one party or all parties and a decision is defined by ***Blacks Law Dictionary 8th Edition at Pg 436*** as;-

> **A *judicial or agency determination after consideration of the facts and the law…***

23. It was therefore submitted that it is trite that the agencies in this case 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 which entities must of necessity make a determination on a matter/issue between disputing parties after considering the facts and the law before the Respondent Tribunal can in law be said to have jurisdiction to reconsider such a decision as provided by the above Section 129(2) of ***EMCA***. It was therefore submitted that a party must first submit a matter to the Director- General, the Authority or 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.
24. According to the Applicant, for the 1st Interested Party herein to found a legitimate appeal before the Respondent Tribunal against the decision of NEMA, the statutory provisions of ***EMCA*** mandatorily requires him (the 1st Interested Party) to first submit his matter/dispute 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. The 1st Interested Party must first submit his case to NEMA, which will then make a decision after considering the facts and the law as submitted by the 1st Interested Party and if the 1st Interested Party is aggrieved by the decision then he can appeal to the Tribunal under section 129 of ***EMCA***. However, the 1st Interested Party is precluded by law from directly approaching the Tribunal without first having submitted its complain and/or concern for a consideration and determination by NEMA, in the absence of such a determination by NEMA in respect to a concern and/or an issue raised by the 1st Interested Party, the Tribunal as established has no power/jurisdiction to consider and determine a concern/issue directly submitted to it in the first instance.
25. It was submitted that the Respondent Tribunal as established under section 125 and 129 of ***EMCA*** is strictly an appellate Tribunal with appellate jurisdiction and not a tribunal of first port of call by any person like 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.
26. In support of this position the Applicant relied on Miscellaneous Application Number 391 of 2006 - **<u>Republic –vs- National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited</u>** in which, while considering the same issue of the jurisdiction of the Tribunal to entertain an appeal against an EIA approval in the above case, **Emukule J**, considered the provisions of ***EMCA*** the legislative intent and held as follows:

> **"….I have shown in the discussions on the two previous issues that the powers of the**

Respondent Tribunal are not unrestricted. The Tribunal's powers to entertain appeals are limited to decisions made under powers given to NEMA (Authority) or to NEMA's Director General or Committee of NEMA… This is about where the jurisdiction of the Respondent Tribunal ends...On the other hand, the High Court has both an original and appellate jurisdiction commencing from the provisions of Section 3(3) of the Act which for the purposes of emphasis I set out again-

1. **…………...**
2. **……………**
3. **If a person alleges that the environment 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 a such directions as it may deem appropriate to- (a-e)**

That is the first or original jurisdiction of the High Court in matters environmental. The second original jurisdiction of the High Court or other courts of competent jurisd8iction is the power to issue an environmental restoration order. Section 111(1)..

The third original jurisdiction of the High Court is the power to issue orders on environmental easements. Sections 112(1) of the Act…

The fourth jurisdiction of the High Court is the appellate jurisdiction conferred upon the Court under Section 130 of the Act in respect of decisions of the Respondent Tribunal under sections 129(1) and (2) of the Act, and section 108,109 and 110 thereof.

Taking therefore the provisions of Sections 108-109 of EMCA which set out the powers of the Authority and the introduction of the court in Sections 111-112 with wide powers to make environmental orders and grant easements, in addition to the power under Section 3(3) and 5 of the Act clearly demonstrates and separates the powers of the Authority and the court. Similarly the later introduction of the Appeals process under the National Environmental Tribunal under Section 129 -136 of the Act again a deliberate point as to the limits of jurisdiction of those three bodies. In addition, the introduction of the Court in Section 130 of the Act to handle appeals form the National Environment Tribunal demonstrates the pivotal role of the court as the final arbiter on matters environmental.

In the context of the construction or interpretation of statute, its shows the draftsman's skill in deliberately and purposefully separating and distinguishing the powers of the Authority, the Court and the Tribunal, and at the same time laying down the grounds and procedures for approaching each of those bodies…the ultimate question is what meaning to be put or applied firstly to the opening words of Section 129(1) of EMCA which says;-

129(1) "Any person who is aggrieved by". And secondly to the words of Section 111(1) of the Act which says… "Without prejudice to the powers of the Authority under this Act a court competent of jurisdiction in proceedings brought by any person (emphasis added), and the further jurisdiction conferred upon the Respondent Tribunal be Section 129(2) of the Act".

The chairman of the Respondent Tribunal and indeed the counsel for the First, Second and Third Interested Parties by their various submissions seemed to subscribe to the view that the words- "any person who is aggrieved by…" in Section 129(1) of the Act is synonymous with the words- "If any person who alleges" in Section 3(3) of the Act or the words "in proceedings brought by any person" in Section 111(1) of the Act'.

Whereas the latter provisions allow the whole world to approach or move the court on grounds specified in those provisions, the former 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. This conforms with the accepted interpretation principle that the general yields to the specific. In R-VS- DIRECTOR OF THE SERIOUS FRAUD OFFICE ex parte Smith [1993] A.C.I, 43H. -44A Lord Mustill said;-

> **" the principle of common sense expressed in the maxim generalia specialibus non derogant, (the general yields to the particular provisions) entails that the general provision of the code (Act) yields to the particular provision of the Act in cases to which the Act applies.'**

That to me, would be a construction or interpretation which would be consonant with, and would promote the legislative purpose. It is an interpretation which gives the Respondent its territory to consider appeals, not by the whole world, but by persons with Locus Standi as we have found above, persons who have been before the Authority, a Committee of the Authority, or the Director- General and is aggrieved by the decision of either the Authority, a Committee thereof, or the Director General. That in my view and understanding is an interpretation which clearly defines, conforms and gives effect, to the relevant provisions stated above and also clearly delineates the jurisdiction of the Respondent Tribunal. ..

27. According to the Applicant, the said discussion address 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 said findings and discussions embody the Applicant's entire arguments on the Tribunal's as spelt out in Section 129 of ***EMCA***.
28. As the above decision has never been set aside and or varied by the Court of Appeal, the same, it was submitted, is binding upon the Tribunal.
29. The Applicant similarly relied on Nairobi Judicial Review Miscellaneous Application Number 111 of 2008 - **Republic vs. National Environmental Tribunal & 3 Others ex-parte Ol Keju Ronkai Ltd & Another** .
30. Arising from the foregoing discussions, it was submitted that the jurisdiction of the Tribunal as provided by its creature Section 125 and 129 of ***EMCA*** is limited to considering appeals, not by the whole world, but by persons who have been before the Authority, a Committee of the Authority, or the Director- General and is aggrieved by the decision of either the Authority, a Committee thereof, or the Director General and that the Tribunal has a limited statutory jurisdiction as expressed in the parent Act (***EMCA***) and as elaborately discussed above and for the Tribunal to irregularly and illegally attempt to expand its jurisdiction to include hearing and determining any alleged infringement of environment-related rights as held by the Tribunal in its impugned decision herein is clearly irregular, *ultra vires* and contrary to the Constitution.
31. The Respondent Tribunal in its impugned decision herein, it was disclosed, attempted to expand its jurisdiction by irregularly and erroneously finding and holding as follows;-

"Further, Counsel Agwara argued that persons such as the present Appellant who have not demonstrated connection with the disputed project and are generally aggrieved by infringement of environment-related rights ought to take their grievances to the High Court or the Environment and Land Court. The Tribunal has considered the applicable laws including constitutional provisions and finds that this argument lacks basis. Article 71(1) of the Constitution authorizes any aggrieved person to

> **"apply to court for redress in addition to any other legal remedies that are available in respect to the same matter."**

It is the Tribunal's view that other legal remedies available in respect to the same matter include appeals to it as expressly authorized by section 129(2) of EMCA. In any case, with regard to enforcement of environment related rights, Article 70(1) of the Constitution speaks of "…a court…" which may not always or necessarily be either the High Court or

the Environment and Land Court. Also, there is nothing in the laws to bar the Appellant from seeking redress in the Tribunal. Moreover, a careful reading of Article 169(1)(d) of the same Constitution indicates that for purposes of dispute resolution, Tribunals may be considered as (subordinate) courts."

32. According to the Applicant, the Tribunal's holding as hereinabove is not only unlawful, irregular and erroneous but is a threat to the rule of law and proper administration of justice and must be quashed by this Court to restrain the Tribunal from acting *ultra vires* its jurisdiction and to allow it to focus only on the matters within its jurisdiction as set out under ***EMCA***.
33. It was contended that despite the Applicant having complied with the requirements of the EMCA and applied for an EIA License and submitted to NEMA an EIA Study Report which NEMA found to have satisfactorily addressed the potential environmental impacts of the proposed development and duly issued the Applicants with an EIA License on the 9th February 2015 or thereabouts and NEMA having duly complied with the requirements of ***EMCA*** and the Regulations made thereunder including but not limited to inviting public comments on the proposed development to determine the environmental soundness of the Project, , the proposed development received no objection from the 1st Interested Party and/or from any other party/person. As a result of the above, NEMA issued the ex-parte Applicant with the subject EIA License on the 9th February 2015 or thereabouts. It is a common ground that the 1st Interested Party did not participate in any manner whatsoever in the process leading to the issuance of the EIA licence to the ex-parte Applicant in respect to the subject project.
34. The Applicant argued that the Respondent's holding that it had jurisdiction to entertain the matter was contrary to law and was an attempt by the Tribunal to give itself powers that it has not been given by the statute. To the Applicant, the Tribunal cannot unilaterally purport to expand its jurisdiction by relying on Section 3(3) of ***EMCA*** when the said section only relates to the High Court which the legislators under ***EMCA*** grants both original and unfettered jurisdiction to hear and determine allegations of infringement to the environment.
35. 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. However, the Applicant disabused this notion by contending that the enforcement of the said Articles 22, 42, 70 and 71 of the Constitution are expressly provided for under Article 23 and 165 of the Constitution and the same can only be done by the High Court as expressly provided for under 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. To the Applicant, the above argument is fully anchored on the express provisions of Articles 159(2) and 169(1)(d) of the Constitution which clearly distinguishes courts from Tribunals such as the Tribunal herein. If the drafters of the Constitution had intended to transform tribunals into court as held above by the Tribunal then there would have been no distinction between the Courts and the Tribunals as set out in Articles 159 (2) and 169 (1)(d) of the Constitution. Further to the foregoing, Article 162 (2)(b) clearly establishes a court with the same status to hear and determine disputes relating to the environment, which Court is the Environment and Land Court and not the Tribunal.
36. To the Applicant, the above arguments clearly demonstrate that Tribunal is NOT the court with the inherent jurisdiction to hear and determine every allegation of breaches to articles 42 and 70 of the Constitution and determine all environmental disputes and claims under section 3(3) of ***EMCA***, as that power and jurisdiction has been clearly preserved by both the Constitution and ***EMCA*** to the High Court and the Environment and Land Court.
37. It was therefore submitted that the Tribunal has no jurisdiction to entertain, hear and/or determine the purported Tribunal Appeal No. NET 139/2015 - **Joseph Kuria Mwangi vs. National Environmental Management Authority (Nema) & Athi Water Services Board**.
38. As the 1st Interested Party did not participate in the EIA study process for the project in question, in NEMA's process of approval of the development or complaint to the PCC, it was contended that it cannot be said that he was aggrieved by this entire process which led to the issuance of the licence as he 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".

39. The Court was urged to take cognisance of the fact that the 1st Interested Party sat back as the ex-parte Applicant engaged in costly and time consuming procedures to secure the necessary project approvals, authorizations and licenses and commence the development at an cost of Kshs 6.8 Billion only to try and mischievously frustrate the project at the 11th hour by fraudulently filing the purported Appeal with the sole intention to irregularly and unlawfully take advantage of section 129(4) of ***EMCA*** to halt the Applicant's development and frustrate their investment efforts.
40. It was therefore submitted that the Tribunal has no jurisdiction to entertain, hear and/or determine the subject purported **Tribunal Appeal No. NET 139/2015.;** **Joseph Kuria Mwangi vs. National Environmental Management Authority (Nema) & Athi Water Services Board** and that the decision by the Tribunal to assume jurisdiction over the said purported Tribunal Appeal by virtue of the provisions of section 3(3) of ***EMCA***, Article 22, 42, 70, 71 of the Constitution is therefore illegal, ultra vires and ought to be quashed by this Honourable Court. It was further submitted that a consideration of the above potion of the Respondent Tribunal's decision clearly reveals that the same is erroneous as the Respondent Tribunal is a statutory body with its mandate spelt out under section 129 of ***EMCA*** and it cannot compete with the High Court of Kenya in terms of jurisdiction in utter disregard to the very express provisions of ***EMCA***.
41. To the Applicant, the Tribunal can in law only entertain such Appeals as provided above and not matters over which section 3 of ***EMCA*** has given exclusive jurisdiction to the High Court of Kenya and hence considering the provisions of sections 129 and 3 of ***EMCA***, the Tribunal as designed under the Act must and can 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, while the Act empowers the High Court to hear anyone with an environmental concern.
42. During the argument of the preliminary objection, the ex-parte Applicants brought to the Tribunal's attention and relied on this Court's decisions in **Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd And Silversand Camping Site Limited** (supra) and **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** (supra) which decision is binding on the Tribunal. However, a perusal of the above portions of the impugned decision of the Respondent Tribunal, will readily demonstrate 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.
43. It was submitted that only the High Court of Kenya has the jurisdiction to interpret statutes and its interpretation is binding on all the subordinate courts and tribunals. The Tribunal cannot in law fail to follow and apply a High Court interpretation of the law on the basis that the decisions were given long ago when the subject law has in fact not changed over the years.
44. According to the Applicant since this application is not challenging the merits of the Tribunal's decision the contention that this Court should not hear and determine this application on the alleged basis that the ex-parte Applicant's remedy against the impugned decision of the Tribunal is to appeal under section 130 of ***EMCA*** can only be misleading.
45. The Applicant relied on page 288 of the 7th Edition of ***Administrative Law*** by **Sir William Wade** and **Christopher Forsyth** in which he renders himself on the issue as follows;-

> **"Where a jurisdictional issue is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is wrongfully declining jurisdiction and the court will order it to act properly. Otherwise the tribunal or other authority would be able to wield**

> **an absolutely despotic power, which the legislature never intended that it should exercise. It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive."**

46. Further support was sought in **Bunbury vs. Fuller** to the effect that;-

> **"If a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can enquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; this court may, by means of proceedings for certiorari, inquire into the correctness of the decision. The decision has to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal have to decide."**

47. It was submitted that the Tribunal proceeded in error of the law to declare that it had jurisdiction under sections 3(3) and 129 of ***EMCA*** and Articles 22, 42, 70 and 71 of the Constitution to entertain and hear the 1st Interested Party's purported Appeal herein. This is a clear error of law in the face of the Respondent Tribunal's impugned decision which this Honourable Court ought to review and/or correct.
48. The Applicant relied on the Court of Appeal decision in **Civil Appeal No. 266 of 1996: Kenya National Examinations Council -vs- R. Ex-parte Geoffrey G. Njoroge & 9 Others** in which it was held;-

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

49. The Tribunal in purporting to entertain, proceed with, hear and/or determine the purported Appeal herein, is acting outside its jurisdiction and this Honourable Court has the right and the power to intervene.
50. Reference was once again made to page 286 ***Administrative Law*** (supra) as follows:

> **"Certain mistakes of fact can carry an administrative authority or tribunal outside its jurisdiction. A rent tribunal, for example, may have power to reduce the rent of a dwelling-house. If it mistakenly finds that the property is a dwelling-house when in fact it is let for business purposes, and then purports to reduce the rent, its order will be ultra vires and void. For its jurisdiction depend upon facts which must exist objectively before the tribunal has power to act. As to these 'jurisdictional facts' the tribunal's decision cannot be conclusive, for otherwise it could by its own error give itself powers which were never conferred upon it by parliament."**

51. The Tribunal in so holding that it is the court under Article 70 and 71 of the Constitution and section 3(3) of ***EMCA*** mandated to hear and determine any alleged breaches to environmental rights under Article 42 of the Constitution and Section 3(3) of ***EMCA*** has in effect extended its jurisdiction beyond that which is permitted by ***EMCA***.
52. It would be different if parliament had clearly stated in section 129 of ***EMCA*** that the Respondent Tribunal shall determine appeals or matters arising from alleged breaches to the and the rights under Section 3 of ***EMCA***. That is not the case herein.
53. To the Applicant, the English Court of Appeal when faced with a similar issue as one now before Court, confirmed the Superior Courts jurisdiction to intervene in **Re Ripon (Highfield) Housing Order, 1938. Applcations of White and Collins. (1939) ALL ER 548**, where the jurisdiction of the Borough Council to make a compulsory purchase order for the purpose of acquiring land for erection of houses for the working class dependent on whether the land to be acquired inter alia formed part of a park or not, and rendered itself as follows;-

> **"… This evidence was not before the Minister, and although it was before CHARLES, J., when he heard the motion, he does not appear to have considered it, for, in refusing to quash the order of borough council and its confirmation by the Minister had decided that the land in question was not part of the park, or required for the amenity or convenience of the house, and that as these were questions of fact, he would not interfere with the findings, as he had no power to retry or rehear the case. In my judgment, CHARLES, J., was in error in deciding as he did. As I have already pointed out, the proceedings before CHARLES, J., was not by way of appeal from any order made by the borough council or its confirmation by the Minister of Health. It was a new and independent proceeding and not a rehearing of a retrial.**
>
> **The first and most important matter to bear in mind is that the jurisdiction to make the order is dependant on a finding of fact, for unless the land can be held to be part of the park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems self evident that the court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which depends the jurisdiction relied upon…"**

54. It was therefore submitted that this Court has the jurisdiction to consider based on the evidence before it whether or not the Tribunal has the requisite jurisdiction to hear and determine the purported Appeal herein.
55. It was disclose that the English Court in the above decision quoted with approval the celebrated decision in **<u>Bunbury vs. Fuller</u>** where the Court held as follows;-

> **"… it is general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to its jurisdiction depends; and however it decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court. Then, to take the simplest case –suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits. On its being presented the judge must not immediately forbear to proceed, but must inquire into the preliminary fact and for the time decide it, and either proceed or not with the principal subject matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded in the main matter in consequence of an error on this, the Court of Queens Bench will issue its mandamus or prohibition to correct his mistake."**

56. To the Applicant, it had established the grounds warranting the grant of judicial review orders sought and prayed that the Notice of Motion Application herein ought to be allowed as prayed and the orders sought therein granted to uphold the rule of law and due process.

<u>1st Interested Party's Case</u>

57. According to the 1st Interested Party, being aggrieved with the decision made and issued on 9th Feb 2015 by the Director General of NEMA granting in EIA License/Approval for the construction of the Northern Collector Water Tunnel phase I project through the Athi Water Services Board to the Applicant herein, he filed a Notice of Appeal in the National Environmental Tribunal at Nairobi Tribunal Appeal No. 139 of February 2015 on 26th February 2015.
58. Subsequently, he filed Memorandum in support of Appeal on 27th March 2015 and the Tribunal issued a **STOP ORDER** which was served on the CEO Athi Water Service Board the which order

the Applicant flagrantly disobeyed giving rise to contempt proceedings on 31st March 2015.

59. When the said contempt Application was due to be heard by the Tribunal on 17th April 2015**,** it was averred that to divert and derail the Application for Contempt the Applicant herein filed a Notice of preliminary objection challenging the jurisdiction of the Court that was on 15th April 2015 and served on the interested party's Advocate on 16th April 2015. It was disclosed that the preliminary objection on jurisdiction was eventually heard but all along the Applicants were continuing with the works. By the ruling on the preliminary objection was delivered on 23rd June 2015 by which ruling the preliminary objection was dismissed.
60. According to the 1st Interested Party, the Tribunal has jurisdiction to hear my appeal. Further the Applicant ought to have Appealed to the High Court against the ruling of the Tribunal made on 23rd June 2015. However, the applicant is attempting to derail the hearing of a properly instituted appeal and if the Applicant has its way no matters or Appeals will ever be heard in the National Environmental Tribunal.
61. According to the 1st Interested Party, all that he was challenging is the issuance of the License No. **NEMA/EIA/PSL/1207** dated 9th February 2015 and his grounds are explicitly clear in the Memorandum in Support of the Appeal.
62. Although the Applicant has quantified the alleged loss that they are incurring which is not true, the interested party was of the view that the loss the people of Muranga would incur is unquantifiable if this project goes on and that the Applicant would not be able to compensate the residents of Muranga for the environmental degradation that would occur if the project went on and this means generations to come would suffer unrepairable loss.
63. The 1st Interested Party however denied that he did **NOT** participate in any manner during the process leading to the issuance of the EIA licence and that he was present during the public hearing meeting at Kanyenyani Town on the Northern Collector Tunnel 1 project dated 30th January 2015 and participated. To him, even if he did not participate as alleged by the Applicant the law is explicitly clear that as a citizen of the Republic of Kenya he has the right to challenge an EIA licence issued anywhere in the Republic of Kenya within the statutory period provided by law.
64. It was submitted that the fact that the Tribunal has not filed its papers does not mean Application is not opposed by the Tribunal.
65. To the interested party, grounds 1 to 16 of the Motion are irrelevant, in regard to the main issue herein, which is whether the Tribunal has jurisdiction to hear and determine the 1st interested parties Appeal and secondly whether the Tribunal overstepped its jurisdiction by ruling that it has jurisdiction to hear the 1st interested parties Appeal. Grounds 17 to 21 on their Notice of Motion deals with the issue of Jurisdiction. The Respondent is mandated by law to hear Appeals from any person who is a citizen of Kenya to challenge a EIA licence issued as long as the person files his or her Appeal within the statutory period provided by law and any person being a citizen of Kenya and of sound mind can challenge the issuance of an EIA licence whether or not he/she participated in the licensing process. In the case herein the 1st interested party participated in the license issuance process as is clearly exhibited in the Appeal and the supplementary affidavit filed herein hence the 1st interested party Appeal is within the statutory provisions of section 129 of ***EMCA*** subsection 1 and 2.
66. It was contended that since grounds 22 to 40 of the Notice of Motion deal with the ruling that the Tribunal delivered on 23rd June 2015 as the Applicant had raised a preliminary objection, its trite law that any party aggravated (sic) with the decision of a competent court and that party having subjected itself to the court its only remedy is to Appeal against the decision made as outlined in section 130(1) ***EMCA***.
67. To the 1st Interested Party, if this motion was to succeed the tribunal will be rendered irrelevant and its powers curtailed and no matters would ever be heard by the tribunal hence the Court was urged to dismiss the Motion with costs.

<u>Determination</u>

68. Having considered the foregoing this is the view I form of the matter.

69. In my view the issue for determination in this Cause is whether the Tribunal had the jurisdiction to hear and determine **Tribunal Appeal No. NET 139/2015.; Joseph Kuria Mwangi vs. National Environmental Management Authority (Nema) & Athi Water Services Board.** The objection to the Tribunal hearing the matter is two pronged. Firstly, it is contended that the 1st Interested Party who is the appellant before the Tribunal does not fall within the definition of an "aggrieved party" as contemplated under section 129(1) of ***EMCA*** hence has no *locus standi* to institute the appeal and secondly that the Respondent erred in not complying with the decisions of the High Court with which it was bound.
70. The issue of jurisdiction was extensively dealt with by the Court of Appeal in the case of **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1** in which **Nyarangi, JA** while citing Words and Phrases Legally defined – Vol. 3: I-N page 13 held:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

71. Similarly, in the case of **Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, the Supreme Court of Kenya observed with regard to jurisdiction 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."

72. The expressions of this Court in **International Centre for Policy and Conflict vs. Attorney General & Others Nbi Misc. Civil Cause No. 226 of 2013**, bears repetition. There, the Court pronounced itself as follows:

"Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."

73. It is trite that a judicial or quasi-judicial tribunal, such as the Tribunal herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither

the Board nor its chairman has any inherent powers but only those expressly conferred on them.

74. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

75. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.

76. It was contended that if the instant Motion is upheld, no matters or Appeals will ever be heard in the National Environmental Tribunal. The mere fact that an Act of Parliament does not prescribe a remedy in case of breach of a person's rights does not in my view bar an aggrieved party from moving the Court for appropriate orders. So even if it were true, and I do not agree, that to uphold the Motion herein would render the Tribunal superfluous, a party with a genuine grievance is not thereby rendered remediless. In my view the Tribunal's functions cannot be curtailed by acceding to the instant Motion as long as it operates within its lawful powers and parameters.

77. Section 129 of the Act provides as follows:

(1) Any person who is aggrieved by:—

> ***(a) a refusal to grant a licence 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 revocation, suspension or variation of his licence under this Act or regulations made thereunder;***
>
> ***(d) the amount of money which he 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 after 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 Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

(3) Upon any appeal, the Tribunal may:—

a. ***confirm, set aside or vary the order or decision in question;***
b. ***exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or***
c. ***make such other order, including an order for costs, as it may deem just.***

(4) Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

78. 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 ***EMCA***, 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 the PCC cannot be said to have been 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.
79. In determining the ex parte Applicant's preliminary objection on the Tribunal's jurisdiction to hear and determine the 1st Interested Party's purported Appeal, at page 604 paragraph 17 of the impugned decision, the Tribunal expressed itself as follows:

"The clear provisions of Article 70(3) of the Constitution overrides any notion of restricted locus standi that may have been conveyed by decisions in R v National Environment Tribunal & 2 Others [ex parte Overlook Management Limited & Another (Misc Application No 391 of 2006) and R v The National Environment Tribunal [Ex parte Ol Keju Ronkai Ltd & Another (Misc Application No 111 of 2008) which were decided long before the making of the Constitution, 2010 with permissive provisions. Further, Counsel Agwara argued that persons such as the present Appellant who have not demonstrated connection with the disputed project and are generally aggrieved by infringement of environment-related rights ought to take their grievances to the High Court or the Environment and Land Court. The Tribunal has considered the applicable laws including constitutional provisions and finds that this argument lacks basis."

80. The decision in Nairobi Judicial Review Miscellaneous Application Number 111 of 2008 - **Republic vs. National Environmental Tribunal & 3 Others ex-parte Ol Keju Ronkai Ltd & Another** was however delivered on 31st September, 2010. That was definitely after the promulgation of the current Constitution. The reason for the refusal to follow the said decision was therefore irrational on the part of the Tribunal. In that decision the Court held:

"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"…Although that decision of NEMA is capable of being the subject of appeal to the Respondent Tribunal, the decision cannot however be the subject of appeal; by the 2nd and 3rd interested Parties. The 2nd and 3rd Interested Parties are not parties being or aggrieved by any decision referred to in Section 129(1) (a-e) or in Section 129(2) of the Act. They are incapable of pleading either a refusal to grant a licence or the transfer of a licence, the imposition of conditions, limitation or variation of their licence or the amount 0f money required to be paid as a fee under the Act, they cannot also plead on appeal the imposition against them of an EIA Improvement letter by the authority for the same reasons the

decisions of NEMA cannot be the subject of an appeal by the 2nd and 3rd Interested Parties under section 129(2) of the Act…and whereas I agree that strict locus standi requirement has been vacated in Kenya… I do not however agree with the contention that the right of locus standi includes or means the right to bring action or appeal before any forum or put differently, the requirement of locus standi have not been vacated in every forum. The strict requirement has been vacated in respect of only one forum, namely the High Court of Kenya, and on specific grounds. The strict requirement of locus standi has not been vacated in respect of the Respondent Tribunal which has a specific jurisdiction under EMCA namely appeals…the 2nd and 3rd Interested Parties have no locus standi or rights to bring any appeal before the Respondent Tribunal and that said tribunal has no jurisdiction to entertain any action or appeal from the said interested parties…"

81. In my view the decision of this Court would depend on the binding effect of the decision in the **Republic vs. National Environmental Tribunal & 3 Others ex-parte Ol Keju Ronkai Ltd & Another** and **Republic vs. National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd And Silvers and Camping Site Limited** (supra)**,** on the Tribunal, otherwise known as the doctrine of *stare decisis*. The said doctrine is so sacrosanct in our jurisprudence that even the highest court in the land will not lightly ignore the same as was recognised by **Sir Charles Newbold, P** in **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195**, where he pronounced himself as follows:

"A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of *stare decisis* would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was nolonger the law. It must also be remembered that the Privy Council, when it was the final court of appeal for Kenya, Tanzania and Uganda, never considered itself bound by its previous decisions. It would seem a retrograde step for the court, now that it has taken over the functions of a final court of appeal for these countries, to discard the flexibility previously possessed by the final court of appeal and instead adopt a position of rigidity."

82. **Duffus, VP** on his part held:

"The adherence to the principle of judicial precedent or *stare decisis* is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of

the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."

83. Whereas the current Constitution in Article 163(3) seems to deal only with the binding force of the decisions of the Supreme Court, it is my view that good order and proper administration of justice as well as the common law doctrine of *stare decisis* dictate that lower courts adhere to the decisions of courts of superior hierarchy where legally acceptable circumstances exist. As was appreciated by **Musinga, J** as he then was in **Rift Valley Sports Club vs. Patrick James Ocholla Nakuru HCCA No. 172 of 2002 [2005] eKLR**:

""The learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of *stare decisis* is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any reasons for doing so."

84. A similar position was taken by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** when it held that:

"Adherence to precedent should be the rule and not the exception....the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

85. Whereas a lower Court is bound by a decision of a Superior Court, it does not necessarily mean that the former must agree with the decision of the latter. To be bound by a decision does not necessarily mean to accept the correctness of the same. This was appreciated by a five judge bench of the Court of Appeal in **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 351; [2000] 1 EA 115** where it was held that:

"The High Court, while it has the right and indeed the duty to *critically examine* the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that *obiter dictum* if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules…"

86. A similar view was expressed by the Court of Appeal in **National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Civil Appeal No. 119 of 2002 [2009] KLR 762** where it was held:

"It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter."

87. It follows that even in circumstances where the lower Court is bound by the decision of the Courts superior to it, there is nothing to stop the lower Court from expressing its opinion thereon. Nevertheless as was held by **Ringera, J** (as he then was) in **Deposit Protection Fund Board vs. Sunbeam Supermarket Limited & 2 Others Nairobi (Milimani) HCCC No. 3099 of 1996**

[2004] 1 KLR 37 under the doctrine of *stare decisis* the High Court is bound by the decisions of the superior courts other than the High Court or Courts of the same status regardless of whether the decisions are agreeable.

88. With due respect the Tribunal had no jurisdiction to ignore or override the decisions of the High Court and unless it was shown that the decisions of the High Court were made *per in curium* or that the facts were distinguishable, misgivings of the Tribunal thereon notwithstanding. As was stated by **Omolo, JA** in **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003**:

"The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court's decisions can only result in unnecessary costs to the parties involved in the litigation."

89. This position was restated in **Cassell & Co. Ltd vs. Broome & Another [1972] AC 1072** in which the Court held:

"The fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers. Where decisions manifestly conflict, the decision in *Young vs. Bristol Aeroplane Co. Ltd [1944] KB 718* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously".

90. The reason for declining to follow the binding effect of the High Court decisions according to the Tribunal was the current constitutional dispensation. I accept the principle that the decisions handed down before the promulgation of the current Constitution must of necessity be looked in light of the provisions of the Constitution and where such decisions seem to go contrary to the letter and spirit of the current Constitution, those decisions even if they are decisions of courts of superior hierarchy would nolonger be binding on the Court. In other words a decision handed down based on certain legislative lapses cannot be said to be binding where the legislation is amended.
91. In this case the grounds for declining to be bound by the decisions of the High Court in particular **Republic vs. National Environmental Tribunal, ex parte Ol Keju Ronkai Limited & Another** (supra) were clearly untenable and irrational. The Tribunal, in the face of clear decisions from the High Court had no jurisdiction to trash the same.
92. Therefore without determining whether the decisions of the High Court aforesaid were correct, I find that the Tribunal had no jurisdiction to entertain the Appeal before it.
93. There mere existence of appellate provisions under section 130 of ***EMCA***, it is my view does not preclude a party from challenging a decision or proceedings which are being undertaken without jurisdiction.

Order

94. In the result the Notice of Motion dated 9th July, 2015 succeeds and I hereby grant an order of certiorari removing into this Court for the purposes of being quashed the proceedings before the National Environmental Tribunal at Nairobi in the **Tribunal Appeal No. NET 139/2015.; Joseph Kuria Mwangi vs. National Environmental Management Authority (Nema) & Athi Water Services Board** together with the ruling delivered therein on the 23rd day of June 2015 which decision and proceedings are hereby quashed.
95. I further prohibit the Tribunal from taking cognizance of, entertaining, hearing, conducting, proceeding with and/or determining the **Tribunal Appeal No. NET 139/2015.; Joseph Kuria**

Mwangi vs. National Environmental Management Authority (Nema) & Athi Water Services Board.

96. As it is clear that these proceedings arose from proceedings in the nature of public interest litigation there will be no order as to costs.

Dated at Nairobi this 4th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ochieng for Mr Agwara for the Applicant

Mr Wachira for the 1st interested party

Cc Patricia