



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**CIVIL APPEALS NO 81 OF 2013 AND 1 OF 2014**

**ADDAX (K) LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....1<sup>ST</sup>  
RESPONDENT**

**MATERMIND TOBACCO LIMITED.....2<sup>ND</sup> RESPONDENT**

**(Appeals arising out of the rulings of the National Environmental Tribunal in NET/109/2012 delivered on 30<sup>th</sup> January 2013 and 31<sup>st</sup> December 2013 respectively)**

**JUDGMENT**

**Introduction**

The appeals herein arise from two rulings given by the National Environment Tribunal on and 30<sup>th</sup> January 2013 and 31<sup>st</sup> December 2013 respectively. There were initially two separate appeals filed against each of the rulings, which appeals were consolidated for purposes of being heard and determined together, upon an application made by the Appellant.

The rulings by the National Environmental Tribunal (hereinafter “The Tribunal”) were made in Tribunal Appeal No. NET/109/2012. The said Appeal to the Tribunal (hereinafter referred to as “The First Appeal”) was by the 2<sup>nd</sup> Respondent herein, by way of a Notice of Appeal and Statement both dated 23<sup>rd</sup> November 2012 and filed on 26<sup>th</sup> November 2012. The Appellant and the 1<sup>st</sup> Respondent herein were the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively to the First Appeal.

The First Appeal was made against the following events: the decision by the 1<sup>st</sup> Respondent herein to grant the Appellant herein a license to commence the Liquefied Petroleum Gas Storage and Distribution project on L.R 12715/604 Syokimau, Machakos; the conduct of an EIA study without consulting the 2<sup>nd</sup> Respondent herein; and the failure by the 1<sup>st</sup> Respondent herein to carry out an environment monitoring as required by section 69 of the Environment and Coordination Act in respect of the activities of the Appellant herein in L.R 12715/604 Syokimau, Machakos.

Subsequently on 17<sup>th</sup> December 2012, the Appellant herein filed a Defence dated 15<sup>th</sup> December 2012,

and thereafter on 19<sup>th</sup> December 2012 filed a Notice of Preliminary objection of the same date under Rule 9 of the National Environmental Tribunal Procedure Rules (hereinafter “the Tribunal Rules”). The ground for the preliminary objection was that the First Appeal should be dismissed for being time barred, as the 2<sup>nd</sup> Respondent herein was well aware of the fact that the licence was issued to the Appellant herein on 7<sup>th</sup> March 2012, and chose not to file its appeal within 60 days as set out under section 129 of the Environmental Management and Coordination Act and Rule 4(2) of the Tribunal Rules.

The said preliminary objection was canvassed by the parties to the First Appeal, and dismissed by the Tribunal in a ruling that was delivered on 30<sup>th</sup> January 2013. This ruling is the subject of ELC Appeal No 81 of 2013. The Appellant then filed an application in the Tribunal on 12<sup>th</sup> June 2013, seeking to vary and set aside the Tribunal’s ruling delivered on 30<sup>th</sup> January 2013, and that the First Appeal be dismissed with costs for being time barred. The main ground for the application was that the earlier ruling of the Tribunal was predicated on an affidavit or set of facts that the 2<sup>nd</sup> Respondent herein had since admitted to be false and incorrect. The said application was canvassed by the parties to the First Appeal, and dismissed in a ruling delivered by the Tribunal on 31<sup>st</sup> December 2013. This ruling is the subject of the second appeal herein being ELC Civil Appeal 1 of 2014.

### **The Grounds of Appeal**

The first appeal herein was filed on 18<sup>th</sup> February 2013 in ELC Civil Appeal No 81 Of 2013 by way of a Memorandum of Appeal dated 15<sup>th</sup> February 2013. The Appellant in the said appeal was dissatisfied with the ruling of the Tribunal delivered on 30<sup>th</sup> January 2013 on the following grounds:

1. (i) The Tribunal erred in law in fact, in holding that the cause of action was the failure by the 1<sup>st</sup> Respondent to indicate whether it would review or revoke the E.I.A licence when the cause of action was the 1<sup>st</sup> Respondent’s decision to issue the E.I.A licence despite the 2<sup>nd</sup> Respondent opposition.

(ii) Further, the Tribunal’s decision that the cause of action was the failure for the 1<sup>st</sup> Respondent to indicate whether it would revoke the licence was contrary to its own decisions where it had previously held that the cause of action in relation to Section 129(2) of the Environmental Management & Co-ordination Act arises from the date of the issuance of the E.I.A licence.

2. (i) The Tribunal erred in holding that there was a continuing breach when there was no such continuing breach in the first instance.

(ii) The Tribunal erred in law and fact in finding that there was a continuing breach by the 1<sup>st</sup> Respondent when Section 129(2) of the Environmental Management & Co-ordination Act & Rule 4 (2) of the Tribunal Rules do not provide for a continuing breach. The Tribunal erred in failing to consider the Applicant’s submissions and authorities in this regard.

(iii) The Tribunal erred in law and fact relating to the alleged continuing breach contrary to its own previous decisions in relation to dispute facts arising in preliminary objections and the holding in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors, (1969) EA 696.**

(iv) The Tribunal erred in law and fact in failing to take into account and read the minutes of the meeting held on 29<sup>th</sup> August 2012 in which the 1<sup>st</sup> Respondent did not undertake to review or revoke the E.I.A licence issued by the 1<sup>st</sup> Respondent to the Appellant.

3. Without prejudice to the foregoing, the Ruling by the Tribunal was internally inconsistent as a result of the fact that even if 29<sup>th</sup> August 2012 was the date the cause of action arose (which is denied) the appeal by the 2<sup>nd</sup> Respondent would still have been time barred under Section 129 (2) of the Environmental Management & Co-ordination Act and Rule 4 (2) of the Tribunal Rules. In

addition, the decision was contrary to its own previous decisions in this regard.

4. The Tribunal erred in failing to find that the 2<sup>nd</sup> Respondent did not file an application for extension of time under the Rules and consequently the appeal filed by the 2<sup>nd</sup> Respondent was time barred and the Tribunal lacked jurisdiction to deal with the appeal.
5. The Tribunal failed to exercise its discretion judiciously and failed to properly and comprehensively consider all relevant facts.

The Appellant accordingly sought the following relief in the first appeal filed herein:

- a. That the Tribunal's ruling made on 30<sup>th</sup> January 2013 under paragraphs 24 and 25 be set aside.
- b. The High Court upholds the Appellants preliminary objection dated 19<sup>th</sup> December 2012.
- c. Alternatively, an order be given in accordance with section 130(4)(b) of the Environment Management and Coordination Act.
- d. Any further order(s) that this Court may deem fit to make.
- e. The costs of the Appeal be awarded to the Appellant in any event.

The Appellant's second appeal filed on 10th January 2014 in ELC Civil Appeal No 1 of 2014 by way of a Memorandum of Appeal of the same date, appeals the ruling of the Tribunal delivered on 31<sup>st</sup> December 2013 on the following grounds:

1. (i) The Tribunal erred in law and fact in holding that there were no new matters despite the fact that the Tribunal admitted that the evidence of Geoffrey Mugambi was at variance with Robert Mutuma's affidavit sworn on 7<sup>th</sup> January 2013. The Tribunal's erred in making inconsistent findings.  
  
(ii) The Tribunal erred in law and fact in holding that there had been no new discovery or any new matters since the ruling of 30<sup>th</sup> January 2013 when the evidence of Geoffrey Mugambi of 7<sup>th</sup> June 2013 established new and fresh facts.
2. (i) The Tribunal erred in law and fact in failing to apply the test set out in the case of **Mukisa Biscuits Manufacturing co. Ltd West End Distributors (1969) EA 696** in relation to the issue of the affidavit of Robert Mutuma sworn on 7<sup>th</sup> January 2013.  
  
(ii) The Tribunal erred in failing to consider that the Appellant had made submissions on the issue of continuing breaches.
3. The Tribunal disregarded the fact that the Appellant had filed an appeal on 18<sup>th</sup> February 2013 in respect of the Ruling delivered on 30<sup>th</sup> January, 2013.
4. (i) The Tribunal erred in law is completely disregarding the admission on oath by the 2<sup>nd</sup> Respondent's witness – Geoffrey Mugambi that the Affidavit of Robert Mutuma sworn on 7<sup>th</sup> January 2013 was false and the fact that the 1<sup>st</sup> Respondent never indicated that it would review the E.I.A licence in the meeting of 29<sup>th</sup> August, 2012.  
  
(ii) The Tribunal in law in completely disregard and ignoring the admission on oath by Geoffrey Mugambi that the 2<sup>nd</sup> Respondent had knowledge that the E.I.A licence was issued to the Appellant in March 2012.
5. (i) The Tribunal erred in law in holding that the 2<sup>nd</sup> Respondent ought to be allowed to continue with its case in respect of a claim that was time barred. Further the Tribunal erred in failing to appreciate that a hearing can only proceed in accordance with the applicable law.  
  
(ii) The Tribunal erred in law in deliberately ignoring and failing to uphold the binding Court of Appeal holdings in the **Owners of the MV Lillian S. vs. Caltex (1989) KLR I** that jurisdiction

should be decided based on the available evidence at that particular time and that the issue of jurisdiction is critical and fundamental importance in respect of any proceedings. The Tribunal further erred in law and fact in holding that the issue of jurisdiction had passed and could not be raised again.

6. (i) The Tribunal erred in law in stating that the issue of jurisdiction was a technicality.

(ii) Further, the finding that the issue of Jurisdiction was a technicality was contrary and inconsistent with their previous ruling of 30<sup>th</sup> January 2013 and their other previous decisions in this regard.

7. (i) The Tribunal's ruling is biased and the Tribunal failed in their analysis to take into account any of the Appellant's authorities.

(ii) Further, the Tribunal erred in holding that the issue of jurisdiction could not be raised again regardless of any evidence tendered by the parties.

8. The Tribunal failed to consider the Appellant's submission that once a cause of action had expired it could not be revived and the issue of a continuing breach could not arise.

9. The Tribunal's ruling is inconsistent with their previous decisions in which the Tribunal has struck out claims that are time barred and where the Tribunal has held that the proceedings ought to be filed within 60 days from the issuance of the E.I.A licence.

10. The Tribunal failed to uphold the principle that it offends public policy to aid a party that has participated in an illegality. The Tribunal erred in failing to uphold the Appellant's cardinal constitutional right to a fair hearing. Further, the Tribunal erred in failing to uphold the sanctity of its proceedings.

11. The tribunal failed to exercise its mandate judiciously and failed to properly and comprehensively consider all relevant facts.

The Appellant sought the following relief in its second appeal:

- a. The Tribunal's ruling made on 31<sup>st</sup> December 2013 be set aside.
- b. The High Court upholds the allows the Appellants application dated 12<sup>th</sup> June 2013 .
- c. The costs of the appeal be awarded to the Appellant in any event.

Under section 130 (1) of the Environmental Management and Coordination Act, any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court. The powers of the High Court in this regard are provides in section 130 (4) and (5) of the Act as follows:

**“(4) Upon the hearing of an appeal under this section, the High Court may—**

**(a) confirm, set aside or vary the decision or order in question;**

**(b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;**

**(c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or**

**(d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.**

**(5) The decision of the High Court on any appeal under this section shall be final.”**

The High Court no longer has jurisdiction to hear and determine disputes relating to the environment and land, which jurisdiction is now conferred in the Environment and Land Court by virtue of the following

provisions of Article 162 (1) to (3) of the Constitution:

**“(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).**

**(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—**

**(a) employment and labour relations; and**

**(b) the environment and the use and occupation of, and title to land.**

**(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”**

In addition, the specific jurisdiction of this court to hear this appeal is provided by the provisions of section 13 (1) of the Environment and Land Court Act, which provides that this Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the Environment and Land Court Act or any other law applicable in Kenya relating to environment and land. Lastly, as regards procedure, section 19(2) of the Environment and Land Court Act binds this court to apply the Civil Procedure Act.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. The duty of this court as the first appellate court is therefore to examine and re-evaluate the evidence in, and findings of the Tribunal, and to reach its own independent conclusion as to whether or not the findings of the Tribunal should stand.

### **The Facts and Evidence**

I will proceed with a summary of the facts and evidence that was given in the Preliminary Objection dated 19<sup>th</sup> December 2012 and application dated 12<sup>th</sup> June 2013 filed in the Tribunal by the Appellant herein. The main ground for the Notice of Preliminary Objection was that the First Appeal before the Tribunal was time barred. The 2<sup>nd</sup> Respondent herein filed a Replying Affidavit in response to the said Preliminary objection sworn on 7<sup>th</sup> January 2013 by Robert Mugambi Mutuma, its Company Secretary. The said deponent stated that he was aware that whereas the 1<sup>st</sup> Respondent issued the Appellant herein with the EIA licence on 7<sup>th</sup> March 2012, on 29<sup>th</sup> August 2012 the issue of the licence was revisited at a meeting called by the 1<sup>st</sup> Respondent to reconsider the objections raised by the 2<sup>nd</sup> Respondent herein.

The said deponent urged the Tribunal to substantively determine the issues on merit as the Notice of Preliminary Objection was a technicality and the appeal to the Tribunal was of great public interest as the lives of Kenyan living and or working in the Syokimau region, as well as the property of the 2<sup>nd</sup> Respondent were at risk of being lost as a result of the Appellant’s proposed project. Further, that the Tribunal was empowered under section 126(2) and 129(3)(c) of the Environmental Management and Co-ordination Act to make any orders in the interests of justice. The deponent further averred that the issue of limitation pursuant to the requirement of Regulation 4(2) of the Tribunal Rules did not lie, as neither the Appellant nor the 1<sup>st</sup> Respondent herein gave or served the 2<sup>nd</sup> Respondent with the disputed licence.

The 1<sup>st</sup> Respondent herein did not oppose the said Preliminary Objection, and relied on the Appellant’s submissions during the hearing of the Preliminary Objection.

The hearing of the Preliminary Objection was held by the Tribunal on 15<sup>th</sup> January 2013, and the counsel

for the Appellant herein argued that it was not disputed that the licence was issued to the Appellant on 7<sup>th</sup> March 2012, and that the 2<sup>nd</sup> Respondent herein had not given any reason why its appeal was not filed within 60 days. Further, that the issue of being time barred was not a technicality, and that time frames serve to protect a defendant's right to a fair hearing, and ensure that claimants act diligently and do not sleep on their rights. The counsel cited various legal authorities in support of this position including **Westmont Power (K) Limited vs Commissioner of Income Tax ,Civil Application No 128 of 2006** and the Tribunal's decision in **Hassan Olow Dahir & Others vs NEMA & Another, Tribunal Appeal No. NET/52/2010.**

The counsel also distinguished the judicial decisions relied upon by the 2<sup>nd</sup> Respondent herein namely **Stephen Boro Gitihia vs Family Finance Building Society & 3 Others, Civil Application No. 263 of 2009** and **Kenya Commercial Bank Ltd vs Kenya Planters Cooperative Union, Civil Application No. 85 of 2010,** on the ground that in the former case there had been inordinate delay, and that in the latter case, the Tribunal had no discretion such as is available to the High Court to extend time within which to file an appeal.

The 2<sup>nd</sup> Respondent on the other hand submitted that the procedure prescribed by the Tribunal as to filing of Appeals under Rule 4(2) of the Tribunal Rules, is that an appeal is required to be filed within 60 days from the date on which the disputed decision is given to the Appellant or served on him. Further, that it was not disputed that the decision on the licence issued to the Appellant by the 1<sup>st</sup> Respondent had not been served on the 2<sup>nd</sup> Respondent herein. The counsel also argued that time started to run from the date of the meeting held 29<sup>th</sup> August 2012 where the issue of the licence was reopened, and urged the Tribunal not to base its decision on an issue of technicality.

The 2<sup>nd</sup> Respondent's counsel relied on the decision in the case of **Kenya Commercial Bank Limited vs Kenya Planters Cooperative Union, Civil Application No. 85 of 2010** where an appeal was allowed regardless of lapse of time, and on the decision in **Stephen Boro Gitihia vs Family Finance Building Society & 3 Others, Civil Application No. 263 of 2009** where the overriding objective was found to override all technicalities. The counsel also distinguished the authorities relied upon by the Appellant, and submitted that the decision in **Nixon Azaria Ooko vs the Director General, NEMA & Another, Tribunal Appeal NET/76/2011,** the Tribunal found the appeal to be time barred because the Appellant therein did not give reasons for the delay in filing the appeal. Further, that in **Hassan Olow Dahir & Others vs NEMA & Another, Tribunal Appeal NET/52/2010,** the appeal therein was struck out because the Tribunal sent summons to the Appellant but he did not appear.

Lastly, the 2<sup>nd</sup> Respondent submitted that Rule 7 of the Tribunal Rules granted the Tribunal discretion to grant extension of time, and urged the Tribunal to hear its appeal on merit as it raised issues of compliance with the law in the conduct of the subject Environmental Impact Assessment.

It is not disputed by the parties herein that the Tribunal delivered its ruling on the Preliminary Objection on 30<sup>th</sup> January 2013. However, this Court notes that the said ruling is dated 30<sup>th</sup> January 2012, which is clearly a typographical error since the ruling is on the Preliminary Objection by the Appellant herein which was dated and filed at the Tribunal on 19<sup>th</sup> December 2012. Furthermore, the hearing of the said Preliminary Objection as shown from the Tribunal's record took place on 15<sup>th</sup> January 2013. This Court will therefore for these reasons rely on the contents of the said ruling for the purpose of this appeal. The said ruling considered the arguments made by the parties and the applicable law on the time of filing of appeals before it, and the Tribunal reached the decision that the appeal before it was not time barred.

The full hearing of the appeal in the Tribunal subsequently commenced on 12th April 2013, with the 2<sup>nd</sup> Respondent's first witness giving his evidence in chief. The said witness was cross-examined by the Appellant and 1<sup>st</sup> Respondent's counsel at a hearing of the Tribunal held on 7<sup>th</sup> June 2013. When the appeal at the Tribunal came up for further hearing on 13<sup>th</sup> June 2013, the counsel for the present Appellant informed the Tribunal that she had filed an application which she wanted heard first.

The said application was dated 12<sup>th</sup> June 2013, and it sought orders that the Tribunal vary and sets aside its ruling dated 31<sup>st</sup> January 2013, and that the appeal filed in the Tribunal on 26<sup>th</sup> November 2012 by the 2<sup>nd</sup> Respondent herein be dismissed with costs for being time barred. The main ground for the application was that the ruling of the Tribunal dated 31<sup>st</sup> January 2013 was based on an affidavit or set of facts that the 2<sup>nd</sup> Respondent herein had since admitted to be false and incorrect.

This ground was detailed in the affidavit in support of the application sworn on 12<sup>th</sup> June 2013 by Edward Rutto, wherein he stated that the witness for the present 2<sup>nd</sup> Respondent, one Geoffrey Mugambi, confirmed on oath during the hearing of the appeal at the Tribunal that the 2<sup>nd</sup> Respondent herein was aware that the licence was issued to the Appellant in March 2012. Further, that the said witness also testified that he was at the meeting held at the 1<sup>st</sup> Respondent's premises on 29<sup>th</sup> August 2012, and that the said 1<sup>st</sup> Respondent never indicated that it would reconsider or review the conditions of its licence. According to the said witness, the affidavit by Robert Mutuma sworn on 7<sup>th</sup> January 2013 stating that the 1<sup>st</sup> Respondent would reconsider or review the conditions of the licence was false.

The 1<sup>st</sup> Respondent herein supported the said application in a replying affidavit sworn on 20<sup>th</sup> June 2013 by its Advocate, Cecilia Githaiga.

The 2<sup>nd</sup> Respondent herein filed a replying affidavit opposing the said application sworn on 20<sup>th</sup> June 2013 by Robert Mugambi Mutuma. The deponent stated that the sole purpose of the application was to delay and embarrass the 2<sup>nd</sup> Respondent's case, and that there was no basis to dismiss his earlier impugned affidavit, as he had not been cross-examined as the maker to determine if the averments were false. He further stated that he stood by his averments in the said affidavit. The deponent averred that the admissibility of the 2<sup>nd</sup> Respondent's witness evidence was one to be determined after the full hearing of the first appeal, and that the Appellant's application would prejudice the 2<sup>nd</sup> Respondent who was yet to conclude its case.

The hearing of the application dated 12<sup>th</sup> June 2013 was heard by the Tribunal on 8<sup>th</sup> November 2013, and the parties made their respective submissions thereon. The Appellant herein relied on the decisions in **Saflo Ltd vs Llyod Masika Ltd, (2010) e KLR** and **Festus Ogada vs Hans Mollin, (2009) e KLR**, to argue that the Tribunal should stop the hearing where there has been material non-disclosure by one of the parties, and that a party should not be allowed to benefit from its own misconduct.

Further, that to proceed with a case where illegality had been admitted would offend Articles 10(1) and 50(1) of the Constitution and section 127 of the Environmental Management and Co-ordination Act. The Appellant also argued that it was clear from the evidence that had been adduced that the first appeal was time barred, and that the Tribunal had no jurisdiction and was bound by the decision in **The Owners of the MV "Lillian S" vs Caltex Oil Kenya Ltd (1989) KLR 1**.

The 2<sup>nd</sup> Respondent herein on its part submitted that the application was seeking to challenge an affidavit and the issue of jurisdiction, on which the Tribunal had already made a decision and was *res judicata*. Further, that the 2<sup>nd</sup> Respondent should be allowed an opportunity to complete its case and the Tribunal to weigh the totality of its evidence, and the application was therefore seeking to foreclose its right to a fair trial. The 2<sup>nd</sup> Respondent relied on the decisions in **Prime Bank Ltd vs Esige (2005) 1 KLR 160**, and **Moses Wanjala Lukoye vs Bernard Alfred Wekesa Sambu & 3 Others, (2013) e KLR** in this respect, and also sought to distinguish the case law relied upon by the Appellant.

The ruling on the Appellant's application dated 12<sup>th</sup> June 2013 was delivered by the Tribunal on 31<sup>st</sup> December 2013, wherein it dismissed the application and found that striking out the appeal before it at that stage would not serve the interests of justice nor the interests of environmental management.

### **The Issues and Determination**

Upon examination of the preliminary objection dated 19<sup>th</sup> December 2012 and application dated 12<sup>th</sup> June 2013 filed by the Appellant at the Tribunal; the responses thereto; and the evidence given by the parties, I find that there are two main issues that required determination. The first is whether the appeal before the Tribunal was time barred. Secondly, whether there was any new evidence that warranted the Tribunal to review, vary or set aside its earlier ruling delivered on 31<sup>st</sup> January 2013.

The parties were directed to file and exchange submissions on the present appeal which were highlighted during the hearing of the consolidated appeals held on 11<sup>th</sup> April 2014. The Appellants filed submissions dated 12<sup>th</sup> February 2014 and supplementary submissions dated 17<sup>th</sup> April 2014 on their two appeals. The 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent also filed submissions which were both dated 10<sup>th</sup> March 2014.

On the first issue as to whether the first appeal before the Tribunal was time barred, the Appellant and 1<sup>st</sup> Respondent herein submitted that the first appeal was filed by the 2<sup>nd</sup> Respondent under section 129 (2) of the Environmental Management & Co-ordination Act, and that Rule 4 (2) of the Tribunal Rules provides that appeals shall be filed within 60 days of the disputed decision. The Appellant referred the Court to various decisions of the Tribunal on this requirement including **Mumias Sugar Company Limited & Another vs. NEMA & Another**, NET 106/12; **Juja Road Estate Welfare Group vs. NEMA Others** NET 110/12; **Nixon Ooka vs. NEMA & Another**, NET 76 of 2011 and **Bernard Njau & Others vs. NEMA & Others**, NET 47/09

Further, that it is undisputed that the E.I.A Licence in this case was issued on 7<sup>th</sup> March 2012 and that consequently, the 2<sup>nd</sup> Respondent's claim at the Tribunal was time barred as it was filed on 26<sup>th</sup> November 2012, well beyond the time provided. The Appellant further submitted that the Tribunal in its ruling of 30<sup>th</sup> January 2013 indicated that it would take 25<sup>th</sup> May 2012 as the date when the 2<sup>nd</sup> Respondent became aware of the issuance of the E.I.A license, and that the said date of 25<sup>th</sup> May 2012 is an undisputed fact as the 2<sup>nd</sup> Respondent wrote to the 1<sup>st</sup> Respondent stating that it was aware that the EIA licence had been issued to the Appellant. Even then, that 2<sup>nd</sup> Respondent then ought to have filed their appeal by 25<sup>th</sup> July 2012. However, that this was not done and consequently their claim was time barred.

The Appellant and 1<sup>st</sup> Respondent further submitted that the 2<sup>nd</sup> Respondent also failed to apply for an extension of time despite the fact that Rule 7 of the Tribunal Rules provides that such an application can be made. Further, that the Tribunal itself has held on several occasions that failure to apply for an extension of time was fatal, and this Court was referred to the decisions of the Tribunal in this regard in **Mumias Sugar Company Limited & Another vs. NEMA & Another**, NET 106/12 and **Juja Road Estate Welfare Group vs. NEMA Others** NET 110/12.

The Appellant and 1<sup>st</sup> Respondent contended that the issue of the first appeal being time barred affected the jurisdiction of the Tribunal. The Appellant relied in this respect on the decisions of the Court of Appeal in **Bwagasi Nyangau vs. Omosa Nyakwara** and of Odunga J. in **R vs. Public Procurement Board**, JR 382 of 2013 where it was held that the issue of a time bar went into the root of jurisdiction, and any proceedings conducted outside the time prescribed amounted to a nullity. Further, that the Tribunal has also previously held that the issue of a claim being time barred is not a technicality in the case of **Mumias Sugar Company Limited & Another vs. NEMA & Another**, NET 106/12, where it stated that Article 159(2) of the Constitution did not absolve parties from meeting time bound obligations especially where such obligations have an implication for development projects and likelihood of loss.

The Appellant and 1<sup>st</sup> Respondent urged that the cause of action in this case is the decision of the 1<sup>st</sup> Respondent to issue the Environment Impact Assessment licence to the Appellant as per section 129 (2) of the Environmental Management and Co-ordination Act, and not any subsequent actions by the 1<sup>st</sup> Respondent. Further, that section 129(2) of the Environmental Management and Co-ordination Act and Rule 4 (2) of the Tribunal Rules do not provide for any continuing breach, and reliance was placed on the Court of Appeal decision in **Sagoo vs. Dourado (supra)**, that it was not open to the Court to write words

into the contracts/statutes.

The Appellant in addition submitted that the issue of what transpired at the meeting of 29<sup>th</sup> August 2012 was a disputed fact and the Tribunal erred in dealing with this particular fact in its ruling in relation to the preliminary objection contrary to the holding in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**. Thus it would not have been possible to file a Replying Affidavit in respect of Robert Mutuma's Affidavit filed on 7<sup>th</sup> January 2013, as this would have been contrary to Rule 9 of the Tribunal Rules which provides that preliminary objections relating to jurisdiction are handled before the commencement of the case is heard substantively on merits. In addition, at the hearing of the preliminary objection, the undisputed facts were the fact that the licence was issued by the 1<sup>st</sup> Respondent on 7<sup>th</sup> March 2012, and the fact that the 2<sup>nd</sup> Respondent had by a letter dated 21<sup>st</sup> May 2012 indicated that they were aware of the issuance of the licence to the Appellant.

Lastly, the Appellant denied that it did not dispute the issue of the meeting held on 29<sup>th</sup> August 2012, and submitted that it raised the issue of law as to whether section 129(2) provided for any continuing breaches in its arguments on the preliminary objection, and the issue of what transpired at the meeting of 29<sup>th</sup> August, 2012 was irrelevant for the reason that section 129 (2) of the Environmental Management and Co-ordination Act and the Tribunal Rules did not provide for any continuing breach.

The submissions by the 2<sup>nd</sup> Respondent on the issue of whether the first appeal was time barred were that the Appellant had the opportunity to tender evidence in opposition to the Replying Affidavit of Robert Mutuma sworn on 7<sup>th</sup> January 2013. More so, they had the opportunity to call him for cross-examination of the contents of his affidavit when the Preliminary objection was urged by the Appellant's counsel. Thus the time to challenge the said affidavit has long passed, and that it was in the interests of justice that the appeal before the Tribunal proceeds to conclusion.

The 2<sup>nd</sup> Respondent in this respect relied on the decision by Gikonyo J. in **Moses Wanjala Lukoye vs. Benard Alfred Wekesa Sambu & 3 Others (2013) e KLR** that any issue that will require probing for it to be proved is not a preliminary objection, and that admissibility of evidence is a matter for trial and is done in the purview of the entire evidence being presented at the hearing.

This Court has considered the arguments made on this issue, and notes that the time for filing appeals at the Tribunal is provided in section 129(1) and (2) of the Environmental Management and Coordination Act 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; 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.”**

Rule 4 of the Tribunal Rules prescribes the manner of filing appeals as follows:

**“(1) An appeal to the Tribunal shall be made by written notice, and where the Tribunal has approved a form of notice for the purpose, in the form so approved.**

**(2) The appellant shall send or deliver six copies of the notice of appeal to the Tribunal so as to reach it not later than sixty (60) days after the date on which the disputed decision was given to or served upon him.**

**(3) The notice shall include-**

**(a) the name and address of the appellant(s);**

**(b) the particulars of the disputed decision; and**

**(c) a statement of the purpose of the hearing and a short and precise statement of the grounds of the appellant's dissatisfaction with the decision which is the subject of the appeal.**

**(4) The appellant or his representative shall sign the notice of appeal.**

**(5) The Tribunal shall duly acknowledge receipt of the notice of appeal and will advise the appellant or his representative of any further steps required to enable the Tribunal to decide the appeal as well as the time and place of the hearing of the appeal.”**

It is evident from the said provisions that there is a sixty days' time limit for filing appeals at the Tribunal, and that time starts to run either from the time of the occurrence of the event giving rise to the appeal, or the date on which the disputed decision was given to or served upon the aggrieved party, unless the time is extended upon the application.

From these provisions it is also evident that the fact of when time starts to run for purposes of the sixty days threshold has to be determined first before it can be found whether an appeal is time barred or not. If the fact of when time starts to run is not disputed, it can then be raised as a preliminary objection as explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

***“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

Likewise, in the case of **Oraro -vs- Mbaja (2005)1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. That is the primary reason why Rule 9 of the Tribunal Rules provides for the suspension of proceedings pending the hearing and determination of a preliminary objection. The Appellant and 2<sup>nd</sup> Respondent both acknowledge this requirement in their submissions, with the Appellant arguing that the Tribunal erred by making findings on disputed facts, and the 2<sup>nd</sup> Respondent placing reliance on the decision in **Moses Wanjala Lukoye vs. Benard Alfred Wekesa Sambu & 3 Others (supra)** to argue that in being asked to review its ruling, the Tribunal will be called to decide on disputed facts.

In the present appeals, it is evident that section 129 (1) of the Environmental Management and Co-ordination Act is inapplicable as the 2<sup>nd</sup> Respondent was not appealing any of the events listed therein. His appeal therefore is brought pursuant to the provisions of section 129 (2) of the Environmental Management and Co-ordination Act, to which the Tribunal rules are specifically applied. The operative and material time and event in terms of filing of an appeal at the Tribunal under Rule 4 of the Tribunal Rules in this respect is not later than sixty (60) days after the date on which the disputed decision was given to, or served upon the appellant (emphasis mine).

The dates of the decisions that are appealed from to the Tribunal by the 2<sup>nd</sup> Respondent are not disputed. The Notice of Appeal filed in the Tribunal by the 2<sup>nd</sup> Respondent herein on 26<sup>th</sup> November 2012 gives the decisions being appealed from as firstly, the granting to the Appellant herein of a Licence to commence to the liquefied Petroleum Gas Storage and Distribution Project on L.R 12715/604 Syokimau, Machakos. The date of this decision is not disputed and it was 7th March 2012.

The 2<sup>nd</sup> Respondent however argued that the said decision was not given or served upon him as required by Rule 4 of the Tribunal Rules. It is in this respect also not disputed that as at 21<sup>st</sup> May 2012, the 2<sup>nd</sup> Respondent was aware of the said decision as shown by its letter of the same date to the Appellant that was copied to the 1<sup>st</sup> Respondent herein which read as follows:

**“MASTERMIND TOBACCO LIMITED,**

**MOMBASA ROAD,**

**P O. BOX 68144 – 00200**

**NAIROBI.**

**21<sup>st</sup> May 2012**

**Project & Assets Manager,**

**Addax & Oryx Group,**

**Addax Kenya Limited,**

**Chaka Place, 4<sup>th</sup> Floor,**

**P. O. Box 12403 – 00100,**

**NAIROBI.**

**Dear Sir,**

**RE: PROPOSED I.P.G PROJECT AT SYOKIMAU**

**We refer to the above matter.**

**We understand that you have been licensed by NEMA to undertake the above project on the grounds that you have put in place sufficient mitigating and on condition that you ensure sufficient safety measures are in place.**

**We maintain our objection to the said project due to the activities that we have ongoing on the neighbouring parcels of land. These include running of boilers, tobacco processing and**

**cigarette manufacture. In our view, having the project near these activities exposes us to heightened risk.**

**Though we raised these concerns with NEMA but they opted to still proceed and license the project, note that we shall not hesitate to hold you entirely responsible and liable for any loss visited upon us from or incidental to your performance of the project.**

**Yours faithfully,**

**MASTERMIND TOBACCO (K) LIMITED**

**R. M. MUTUMA**

**COMPANY SECRETARY**

**C.C.        The Managing Director**

**National Environment Management Authority,**

**P. O. Box 67839-00200,**

**NAIROBI.**

Consequently even if time was not run from 7<sup>th</sup> March 2012 for purposes of filing an appeal against this decision, it would certainly have started to run as from 21<sup>st</sup> May 2012 when it is not disputed the 2<sup>nd</sup> Respondent was aware of the decision, which meant that the 2<sup>nd</sup> Respondent ought to have filed his appeal against the said decision by 23<sup>rd</sup> July 2012.

The second decision appealed from is the conduct of an Environment Impact Study without consulting the 2<sup>nd</sup> Respondent herein. The 2<sup>nd</sup> Respondent annexed the report of the Environmental Impact Study that he alleges was not validly undertaken, which report is dated August 2011. Therefore for this decision the 2<sup>nd</sup> Respondent ought to have filed his appeal by 31<sup>st</sup> October 2011.

The third and last decision appealed from is the failure by the 1<sup>st</sup> Respondent herein to carry out an environment monitoring as required by section 69 of the Environment and Coordination Act in respect of the activities of the Appellant herein in L.R 12715/604 Syokimau, Machakos. The 2<sup>nd</sup> Respondent in its statement detailing its grounds of appeal in this respect refers to a meeting held on 29<sup>th</sup> August 2012 at the offices of the 1<sup>st</sup> Respondent, where it is alleged the issue of the licence to the Appellant was reopened, and the parties discussed the insufficiency of the mitigating factors put in place. An appeal against any decisions made in the said meeting should then have been filed by 29<sup>th</sup> September 2012.

Therefore, even if the 2<sup>nd</sup> Respondent were to be granted the benefit of allowing time to run from the date of the latest decision it appealed from, the date by which it ought to have filed its appeal was 30<sup>th</sup> September 2012. It is not disputed that the 2<sup>nd</sup> Respondent herein filed its Notice of Appeal at the Tribunal on 26<sup>th</sup> November 2012. It is therefore evident that the 2<sup>nd</sup> Respondent filed its appeal at the Tribunal out of time with respect to all the decisions it appealed against.

To this extent, it is the finding of this Court that the Tribunal erred in its finding that the appeal filed at the Tribunal was not time barred. Further, the Tribunal erred by taking into account immaterial and disputed facts in its consideration as to whether the appeal was time barred. The reasons for the Tribunal's decision which are in paragraphs 23- 24 of its ruling delivered on 31<sup>st</sup> January 2013 are as follows:

**“The Tribunal further considers that after the Appellant became aware of the issuance of licence, it did express its objection to it, prompting NEMA to call to meeting with the Appellant and the 2<sup>nd</sup> Respondent. Also, the 2<sup>nd</sup> Respondent does not deny that at the meetings, NEMA undertook to either review the conditions of the licence or to revoke it.**

**The Tribunal finds that having stated that it would either review conditions of the Licence or revoke it, NEMA gave the Appellant reason to expect that it would do so and notify it, the Appellant, of its further decision. Therefore, the Tribunal does not agree with the position that the Appellant should have gone ahead to appeal regardless of deliberations with NEMA and the 2<sup>nd</sup> Respondent over the matter by NEMA either revoking the Licence or reviewing its conditions. Having undeniably expressed its intention to change its decision to issue the licence, NEMA gave the Appellant reason to believe that time of issuance of the licence on 7<sup>th</sup> March 2012 would no longer hold. Therefore, the Tribunal finds that there was no inordinate delay in filing the appeal on the part of the Appellant. The Tribunal also finds that for as long as NEMA fails or refuses to communicate to the Appellant its decision on cancellation of the licence or review of its conditions, there is a continuing breach of law on its part.”**

The findings of the Tribunal as to the undertakings by the 1<sup>st</sup> Respondent at the meeting of 29<sup>th</sup> August 2012, and what was decided upon at the said meeting were not material in the determination of when time starts to run, as the only relevant consideration in calculating time for purposes of filing an appeal at the Tribunal is the date when the decision being appealed from was made or given.

In addition, in light of the evidence provided by the Appellant particularly the minutes of 29<sup>th</sup> August 2012 that were annexed to the Appellant’s defence to the appeal at the tribunal filed on 17<sup>th</sup> December 2012, it is apparent that the decisions made at the meeting are also disputed. The Tribunal therefore erred in making a finding at a preliminary stage on the decisions made at the meeting of 29<sup>th</sup> August 2012, despite the existence of evidence showing a contrary position.

It is therefore the finding of this court that the Tribunal erred in both in law and fact in the ruling delivered on 31<sup>st</sup> January 201, in considering and determining immaterial and disputed facts in relation to the preliminary objection by the Appellants herein dated 19<sup>th</sup> December 2012. The Appellant’s first appeal dated 15<sup>th</sup> February 2013 is therefore allowed.

The consequences of the error by the Tribunal of making a finding on disputed facts at a preliminary stage became apparent as the hearing of the Appeal before the tribunal proceeded, and evidence started being adduced that contradicted the findings by the Tribunal. This is what gave rise to the second application by the Appellant dated 12<sup>th</sup> June 2013, and the second issue for determination herein.

On the second issue as to whether the Tribunal should have reviewed its earlier ruling and struck out the 2<sup>nd</sup> Respondent’s appeal for being statute barred, the Appellant submitted that the Tribunal completely failed to take into consideration the evidence of the 2<sup>nd</sup> Respondent’s witness, one Geoffrey Mugambi, who was present at the meeting of 29<sup>th</sup> August 2012, and whose testimony on oath was that the 1<sup>st</sup> Respondent never indicated that it would review or cancel the Appellant’s licence at the meeting of 29<sup>th</sup> August 2012. Further, that this constituted new and fresh facts after the ruling of the preliminary objection on 30<sup>th</sup> January 2013. It was also contended by the Appellant that the Tribunal’s ruling was inconsistent as a result of the fact that though they acknowledge that the affidavit of Robert Mutuma was at variance with the testimony of Geoffrey Mugambi, they found that they were no new facts necessitating their departure from their previous ruling.

Further, that the Tribunal erred in holding that the matter had moved beyond the issue of jurisdiction and that the matter should proceed for full hearing. The Appellant submitted that the law as per the decision in **“Lillian S” (supra)** was clear that if the Tribunal lacks jurisdiction, it ought to down it tools immediately as its decision amount to a nullity if it proceeds without jurisdiction. In addition, that the Tribunal erred in failing to uphold the sanctity of its proceedings after the witness Mugambi admitted on

oath that the affidavit of Robert Mutuma was false. It was argued by the Appellant that the Tribunal ought not to have countenanced such an abuse of the court process, as it was decided by the High Court in **Saflo Limited vs. Lloyd Masika (supra)** and the Court of Appeal in **Festus Ogada vs Hans Mollin (supra)** that it offends public policy to aid flouters of the law to benefit from their illegal acts.

Lastly, the Appellant submitted that the minutes of the meeting held on 29<sup>th</sup> August 2012 at the 1<sup>st</sup> Respondent's premises show that the 1<sup>st</sup> Respondent did not indicate that it would review, revoke or cancel the Appellant's licence. Further, that the Tribunal failed to take into account these minutes in both rulings dated 30<sup>th</sup> January 2013 and 31<sup>st</sup> December 2013 respectively.

The 2<sup>nd</sup> Respondent in its submissions on this issue invoked the provisions of Article 50 of the Constitution of Kenya, which guarantees every person the right to a fair hearing, and submitted that it must be given an opportunity to present its case. It also relied on the decision by Virsam J. (as he then was) in **Prime Bank Limited v. Esige (2005) 1KLR 160** that an appellant court should guard against locking out any litigant by summary procedure, unless the case or appeal is plain and obvious and that litigants must be given an opportunity to present their case for adjudication as to merit.

The 2<sup>nd</sup> Respondent further submitted that the present appeals should be looked at within the context of the entire appeal and the evidence of all the witnesses to be called at the pending proceedings at the Tribunal, and is an abuse of the court process and meant to stifle the 2<sup>nd</sup> Respondent's appeal pending at the Tribunal. Further, that the present appeals as filed seek to re-litigate upon the Preliminary objection filed at the Tribunal on 19<sup>th</sup> December 2012, and are designed and meant to challenge a replying affidavit that has already been litigated upon on two occasions at the Tribunal.

It was the 2<sup>nd</sup> Respondent's contention that the proceedings before the Tribunal had moved beyond the issue of jurisdiction, which issue was long settled, and that the substratum of the current appeals is *res judicata*. Further, that to allow the Appellant's appeals herein would be to enable the Appellant to steal a march on the 2<sup>nd</sup> Respondent in view of the already exhausted preliminary objection on one hand, and the 2<sup>nd</sup> Respondent's incomplete and ongoing case/trial before the Tribunal on the other hand.

Furthermore, that all the 2<sup>nd</sup> Respondent's witnesses must be allowed to testify, after which the Tribunal can assess the weight of their entire evidence. It was urged in this respect that the 2<sup>nd</sup> Respondent intends to call other witnesses, and that the Tribunal has the obligation to consider any other evidence which supports or contradicts the 2<sup>nd</sup> Respondent's case. It was also submitted that section 30(a) of the Tribunal Rules provides that the Tribunal shall grant to any party a reasonable opportunity to be heard, to submit evidence and to make representations.

The 2<sup>nd</sup> Respondent in this respect relied on the decision in **Republic vs. Subordinate Court of the 1<sup>st</sup> Class Magistrate at City Hall, Nairobi & Another Ex-parte Yougindar Pall Sennik & Another, (2006) e KLR** on the principle of equality of arms, and on the case of **Ewer vs. Ambrose (1825) 3 B & C 74** that a witness may be contradicted by other witnesses on the same side. The 2<sup>nd</sup> Respondent contended that the power to strike out the appeal before the Tribunal, if necessary, is to be considered only after the Tribunal has considered all evidence so as not to prejudice a fair trial.

The consideration of this issue by this Court is only for record purposes, as this Court has already found that the appeal by the 2<sup>nd</sup> Respondent to the Tribunal was time barred. There are however two aspects of law that are raised by this issue that require determination by this Court. The first is on the argument that there was new evidence before the Tribunal that required review of its earlier ruling delivered on 31<sup>st</sup> January 2013. However, this Court finds in this respect that the evidence by the 2<sup>nd</sup> Respondent was not new evidence that would have warranted a review of the Tribunal's ruling, as such evidence was not in existence at the time the Tribunal delivered its ruling on 31<sup>st</sup> January 2013.

For new evidence to warrant a review of a Tribunal's or Court's rulings and/or orders, the material time

with regard to its existence is the time when the impugned ruling is given or order is made, and such evidence could not for good reason be brought before the attention of the Tribunal or Court. This was also the holding in the case of **Chrispinus Lawrence Wanyama v Public Service Commission of Kenya & Another (2007) eKLR**. This ground for review does not therefore apply to any evidence or facts that arise after a ruling is given or order made.

It is also the finding of this Court that the Tribunal did not err in not taking into account the evidence of the 2<sup>nd</sup> Respondent's witness, one Geoffrey Mugambi, in its decision not to review its earlier ruling, as it was clearly evidence on a disputed fact that could only be resolved after full hearing. In addition, as already noted by this Court this issue arose as a result of the earlier error of the Tribunal in considering disputed facts during the hearing of the preliminary objection by the Appellant, which error has since been rectified by allowing the Appellant's first appeal. The Appellant's second appeal dated 10th January 2014 is therefore dismissed.

As the Appellant has been successful in its first appeal, and as its second appeal also arose from the 2<sup>nd</sup> Respondent's appeal at the Tribunal being time barred, this Court finds that it would be just for the 2<sup>nd</sup> Respondent to bear the Appellant's costs of both appeals.

I must at this stage express my gratitude and appreciation for the various legal and judicial authorities that were cited by the counsel for the Appellant and Respondents, which have greatly assisted this Court in reaching its determination.

Arising from the foregoing reasons it is accordingly ordered as follows:

1. The Tribunal's ruling made on 30<sup>th</sup> January 2013 and dated 30<sup>th</sup> January 2012 be and is hereby set aside.
2. The preliminary objection by the Appellant herein dated 19<sup>th</sup> December 2012 and filed at the National Environment Tribunal is hereby upheld, and the appeal by the 2<sup>nd</sup> Respondent herein dated 23<sup>rd</sup> November 2012 and filed at the said Tribunal on 26<sup>th</sup> November 2012 is hereby dismissed for being time barred.
3. The Appellant's appeal herein dated 10<sup>th</sup> January 2014 is hereby dismissed
4. The 2<sup>nd</sup> Respondent shall meet the Appellant's costs of the appeals filed herein dated 15<sup>th</sup> February 2013 and 10<sup>th</sup> January 2014.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF AUGUST 2014.**

**P. NYAMWEYA**

**JUDGE**