

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL APPEAL NO. NET/21/2007

WATAMU MARINE STAKEHOLDERS ASSOCIATION.....1ST APPELLANT
WATAMU ENVIRONMENTAL CONSERVATION GROUP.....2ND APPELLANT

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA).....1ST RESPONDENT
BLAZER WATAMU LIMITED.....2ND RESPONDENT

RULING ON PRELIMINARY OBJECTION

1. By Notice of Appeal dated 4th September 2007 and filed in the Tribunal the same day, the Appellants appealed against the 1st Respondent's lifting of a Stop Order issued on 15th August 2007 against the 2nd Respondent's construction of Blue Lagoon Villas on Plot 45/46 at Blue Lagoon in Watamu on the grounds that: there was no public consultation during the conduct of an environmental impact assessment on the proposed construction of villas; the general public is opposed to the construction; the 1st Respondent's ruling (subsequent to its Stop Order) that the 30 metres protected riparian reserve rule does not apply to the construction since the site is on a "cliff peninsula" is contrary to the "national ruling" which places areas within 30 metres of marine parks under the jurisdiction of Kenya Wildlife Service; a geological survey of the project site was not conducted by experts prior to commencement of the project; the project proponent constructed a murrum access road on a protected marine reserve and sea turtle breeding ground contrary to applicable laws on wildlife and on roads; the 2nd Respondent has not applied for change of use for commercial purposes of Plot 45/46 in question, which is for residential purposes; and that since its last visit to the project site on August 2007, the District Environment Committee for the area in question has not deliberated on the project and given its findings. On these bases, the Appellants sought provision of a public access road to the area and consideration of opinion of the general public.
2. On 9th October, 2007, the 1st Respondent filed Reply denying lack of public consultation during the environmental impact assessment (EIA) carried out on the proposed construction of villas by the 1st Respondent, stating that it had followed all the required statutory procedures in issuing an EIA licence to the 2nd Respondent. The 1st Respondent also contended in its Reply that "a geological survey of the project site had not been conducted by a recognized expert because the project in question was duly surveyed by experts selected by the project proponent from a list approved by NEMA"; that NEMA, the 1st Respondent, lifted a Stop Order it earlier issued on the understanding that likely environmental impacts would be mitigated by the project proponent's adherence to prescribed conditions; that a change of use regarding the project site had been applied for and since the application, the 1st Respondent had examined its potential impacts on the

quality and quantity of the natural resources in the area and found that the impacts can be mitigated; and that the 1st Respondent acted within its mandate in lifting the Stop Order since it had observed all the required statutory procedures.

3. The 2nd Respondent filed Reply on 19th November 2007 stating, among other things, that the Appellants had no *locus standi* under Section 129 of the Environmental Management and Co-ordination Act (EMCA) to appeal against the Respondents on the issues raised in the Tribunal; that the Appellants are time-barred in law and their appeal cannot be entertained in law; that the Tribunal has no jurisdiction under section 129 of EMCA to grant the relief sought by the Appellants and that instead, they have a right to approach the Public Complaints Committee (PCC) on Environment under section 31 of EMCA; that the 30-metre riparian rule claimed against the property in question does not apply because it cannot operate retrospectively since it was created ten years after the survey, adjudication and registration of the property in question as an absolute freehold; the 30-metre riparian rule does not apply to the lagoons and cliffed peninsula off adjoining mainland; that the Stop Order issued against the 2nd Respondent to stop the construction of villas was temporal in nature and did not revoke or suspend the 2nd Respondent's EIA licence; that the appeal is an abuse of the Tribunal's process; that the question of change of use does not fall within the jurisdiction of the Tribunal; the EIA licence issued to the 2nd Respondent by the 1st Respondent was on conditions intended to protect the environment in question; that the 2nd Respondent had engaged a contractor who was incurring expenses yet the appeal was scandalous, in bad faith and filed to create bad publicity against the 2nd Respondent's project. On the basis of its said Reply, the 2nd Respondent asked the Tribunal to dismiss the appeal with costs.
4. In the appeal, the Appellants were represented by Mr. Ndubi, the 1st Respondent by Mr. Muthome of Mohammed Muigai Advocates, the 2nd Respondent by Mr. Kilonzo of Fadhil & Kilonzo Advocates.
5. Before hearing of the appeal, the Respondents' Counsel raised a preliminary objection. At the hearing of the objection, Counsel indicated that Watamu Environmental Conservation Group, the 2nd Appellant had filed and served them with a Notice of Withdrawal of Appeal and therefore, the 2nd Appellant was no longer a party to the proceedings. Mr. Ndubi for the Appellants stated that he was not aware of the 2nd Appellant's withdrawal of appeal. Respondents' Counsel clarified, and the Tribunal confirmed, that on 5th November 2007, the same day Mr. Ndubi came on record for the Appellants, the 2nd Appellant did file a Notice of Withdrawal of Appeal dated 3rd October 2007. Therefore, the ruling on the preliminary objection proceeds on the basis that the 2nd Appellant is no longer a party to the appeal. Should it wish to rejoin, it is at liberty to do so.
6. In their objection to the appeal, Counsel for the Respondents proceeded as if the objection related to both Appellants. However, because the 2nd Appellant had withdrawn the appeal, the Tribunal discounts arguments against it.

7. In his objection to the appeal, Mr. Kilonzo for the 2nd Respondent contended that the 1st Appellant had no *locus standi* before the Tribunal on three grounds. First, he contended that the Appellant lacks legal personality to prefer an appeal to the Tribunal against the Respondents because it is an unincorporated body without legal personality that could confer on it legal rights, liabilities and responsibilities against any decision or act done by the 2nd Respondent. Mr. Kilonzo argued that the Appellant is an amorphous group of persons which has not been shown in the appeal as possessing any legal personality and that in law, legal rights and liabilities attach solely to persons or bodies with legal life or personality. In his view, it was incumbent upon the Appellants to prove that they have legal capacity. Mr. Kilonzo maintained that being an unincorporated body, the Appellant could not prefer the present appeal. He referred the Tribunal to the case of *Simu Vendors Association vs. The Town Clerk, City Council of Nairobi & The Minister of Local Government*, Nairobi High Court Miscellaneous Application No. 427 of 2005 in which the court ruled, among other things, that suits by or against unincorporated bodies must be brought in the names of, or against all the members of the body or bodies.
8. Secondly, Mr. Kilonzo argued that the Appellant lacks *locus standi* to prefer an appeal under section 129 of EMCA. He argued that although the Appellant has *locus standi* on environmental matters, it is not a body envisaged under sections 129(1) (a)-(e), which, in his view, ought to be read, *mutatis mutandis* with section 126 of the Act. He maintained that the Appellant has the general *locus standi* given to citizens under sections 3 and 31 of EMCA which entitle citizens to approach the High Court and the PCC and that the Respondents in the appeal are the kind of bodies authorized to come before the Tribunal under sections 126 and 129 of EMCA and not the Appellant.
9. Third, Mr. Kilonzo argued that the appeal was essentially against the 1st Respondent's grant of an EIA licence to the 2nd Respondent and as such, it was time-barred because it was filed on 6th September 2007, more than six months after the grant of an EIA licence on 23rd May 2007. On those grounds, Mr. Kilonzo urged the Tribunal to dismiss the appeal.
10. Mr. Muthome for the 1st Respondent associated fully with Mr. Kilonzo's arguments, adding that the concept of legal personality applies to all parties whether they are before court or the Tribunal and that the rule was intended to protect the Respondents from vexatious claims and interests from entities that are not recognized in law. He also contended that the appeal was frivolous, vexatious and misdirected in the view that once there is an opposition to a project, it cannot be approved.
11. In his reply to the objection, Mr. Ndubi first argued that as a regulator on environmental matters, NEMA cannot raise a preliminary objection to the appeal filed herein. Further, he stated that the appeal was against the 1st Respondent's lifting of its Stop Order and that he did not have instructions on the Appellant's knowledge of the issuance of an EIA licence to the 2nd Respondents. In response to his application for adjournment to seek further instructions on the matter, Counsel for the Respondents agreed to abandon the ground that the appeal had been filed out of time and the preliminary objection proceeded on the basis that the appeal relates to a Stop Order.

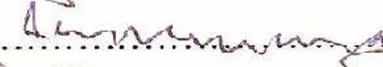
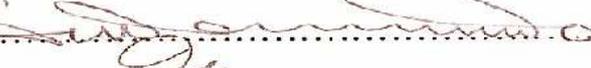
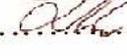
12. Regarding the allegation that both Appellants are not legal persons, Mr. Ndubi responded that the Respondent's Counsel did not tender any proof by way of affidavits or search certificates from the registrars of companies, trusts and others to prove that the bodies are not incorporated in any way known to law. Instead, Counsel made allegations from the bar. His position was that it is not incumbent upon the Appellants to prove that they are incorporated bodies. Notwithstanding the fact that the 2nd Appellant had withdrawn the appeal, Mr Ndubi stated that in any case, Watamu Environmental Conservation Group, the 2nd Appellant was registered by the Ministry of Gender, Sports, Culture and Social services on 16th February, 2007. He referred the Tribunal to its filed registration certificate Number SS/MLD/CD/2/135/2007. Mr. Ndubi maintained that the 2nd Appellant is duly registered by the said Ministry, which is a government ministry, duly created by the President under section 24 of the Constitution which empowers the President to establish public offices. In addition, a list with names of individual members was provided. Therefore, the 2nd Appellant is a duly incorporated body.
13. Mr. Ndubi further averred that in considering the position of both the Appellants as persons before the Tribunal, regard should be to both rules made under EMCA and the practice of the Tribunal. He stated that in the past, the Tribunal has granted audience to parties registered in the same manner as the Appellants without considering them as amorphous bodies. In his view, "any person" can come before the Tribunal. He maintained that rights granted to persons to approach the High Court on environmental issues are similar to those granted persons to come before the Tribunal. He maintained that any person can come before the Tribunal so long as there are issues affecting the environment and that the Appellants are identifiable persons.
14. The Tribunal has carefully considered arguments presented by Counsel for all parties. The Tribunal notes that Counsel for the Respondents abandoned their argument based on the allegation that the appeal was filed out of time. Therefore, the argument does not merit further consideration. Further, since the 2nd Appellant withdrew its appeal as previously stated, the Tribunal's ruling relates only to the 1st Appellant. The Tribunal also reiterates that as a party to the proceedings, NEMA has the right to raise a preliminary objection.
15. Regarding the Respondents' contention that the Appellant lacks legal personality to prefer an appeal to the Tribunal against the Respondents because it is an unincorporated body without legal personality that could confer on it legal rights against any decision or act done by the 2nd Respondent, the Tribunal notes that Counsel tended to postulate that only incorporation confers legal personality for purposes of appeals before it. Mr. Kilonzo contended and Mr. Muthome agreed that since the Appellant is not a corporate body, it lacks *locus standi* to prefer an appeal to the Tribunal but has the general *locus standi* under sections 3 and 31 of EMCA.
16. On the contrary, the Tribunal takes the position that under Section 126 (2) of EMCA which states, in part, that: "The Tribunal shall, upon an appeal made to it by any party..." (emphasis added) and section 129 (2) of EMCA which states that "...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...”, any person, corporate or individual, can prefer an appeal before it. In the Tribunal’s view, *locus standi*, that is, capacity to sue, includes such capacity as conforms to, established by or permitted by law, as does sections 3, 126 (2) and 129(2) of EMCA. Therefore, individuals, associations and environmental organizations have legal capacity to challenge NEMA’s decisions through appeals to the Tribunal, so long as they are persons recognized by law. In NET/7/2006 – *Narok County Council & Others vs. The Director General, National Environment Management Authority (NEMA)*, seven individuals were allowed to join in the appeal as affected parties.

17. Regarding Watamu Marine Stakeholders Association, the 1st Appellant herein, neither the Appellant nor its Counsel discharged the burden of proving its legal existence and capacity to sue by showing, for example, that it is a registered association. Therefore, the Tribunal would not accept the appeal to continue in the name of the Association. However, considering that the appeal was filed by lay persons, section 126(5) which authorizes the Tribunal to regulate its proceedings as it deems fit and Rule 26(2) of the Tribunal’s Procedure Rules (Legal Notice No 191 of 2003) made thereunder, which states that the Tribunal shall, so far as appropriate, seek to avoid legal technicality, the Tribunal is not inclined to dismiss the 1st Appellant’s appeal. The Tribunal takes the view that it would be harsh to punish lay persons on legal points and technicalities which they may not know. Accordingly, the Tribunal hereby permits members of the 1st Appellant association to appeal in the name of the officials of the association, or, individual members can appeal, if they are interested to do so, within a period of thirty days from the date of this ruling.

18. Therefore, the Tribunal, unanimously, exercises its discretion to permit officials or individual members of Watamu Marine Stakeholders Association, the 1st Appellant herein, to amend the appeal to include their own names or the names of the officials in place of the name of the Association within a period of thirty days from the date of this ruling.

DATED at Nairobi this 20th day of December 2007.

Donald Kaniaru.....		Chairman
Dwasi Jane.....		Member
Albert Mumma.....		Member
Stanley Waudu.....		Member
Joseph Njihia.....		Member