

REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL CASE NO. NET/40/2009

MAASAI MARA NORTH CONSERVANCY LIMITED.....APPELLANT

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA).....1ST RESPONDENT

WASAFIRI CAMP LIMITED.....2ND RESPONDENT

MASAI MARA LEOPARD GORGE CONSERVANCY
LIMITED.....1ST INTERESTED PARTY
KENYA TOURISM FEDERATION.....2ND INTERESTED PARTY

RULING ON PRELIMINARY OBJECTION

1. By Notice of Appeal filed in the Tribunal on 28th May 2009, an attached summary of grounds of appeal filed the same day, an Amended Notice of Appeal filed in the Tribunal on 4th November 2009 and a statement of Further Reliefs dated 3rd November 2009, the Appellant, through the law firm of Muthoga & Gaturu Advocates, requested the Tribunal to:
 - (i) determine if any new licence had been issued by NEMA to Wasafiri Camp Limited, the 2nd Respondent for the same or for another project on the same site as the project whose licence was cancelled by the Tribunal upon hearing and determination of NET/07/2006;
 - (ii) determine the propriety of a new licence issued, if any;
 - (iii) determine whether or not Wasafiri Camp has submitted a full EIA study report for the development proposed to be undertaken in Leopard Gorge as ordered by the Tribunal in NET/07/2006;
 - (iv) direct NEMA to provide the Appellant with an EIA study report to enable the Appellant to determine its propriety, if an EIA study was conducted,
 - (v) issue a stop order for the 2nd Respondent's development within Leopard Gorge area if no EIA study has been conducted or no EIA licence has been issued;
 - (vi) order the demolition of any permanent and other structures erected by the 2nd Respondent within Leopard Gorge on the site questioned in NET/07/2006 if no EIA licence has been issued by NEMA to the 2nd Respondent pursuant to the EIA study ordered by the Tribunal in that appeal;
 - (vii) grant parties an early hearing of the appeal because the 2nd Respondent's development was proceeding at a fast pace;
 - (viii) conduct a site inspection of parcels of land known as CIS/Mara /Koiyaki/ Dagurugurueti/ 280, 281, 294, 295 296, 319 and 2601 within Leopard Gorge;
 - (ix) order the closure of tourist facilities or any other businesses conducted on land parcels known as CIS/Mara /Koiyaki/ Dagurugurueti/ 280, 281, 294, 295 296, 319 and 2601;

- (x) issue an appropriate environmental restoration order to the 2nd Respondent and the 1st Interested Party who are the proprietors and managers of tourist facilities and business enterprises operated on land parcel numbers CIS/Mara /Koiyaki/ Dagurugurueti/ 280, 281, 294, 295 296, 319 and 2601; and that
 - (xi) in the alternative, the Tribunal directs NEMA to carry out the matters set out in (vi), (viii), (ix) and (x) above.
2. The Appellant based its appeal and reliefs sought on the grounds that: on 20th December 2006, the Tribunal, in NET/07/2006 cancelled the 2nd Respondent's EIA licence issued on 8th March 2006 thereby stopping the 2nd Respondent's development on land parcels known as CIS/Mara/Koiyaki/Dagurugurueti/294, 295, 296 and 2601, ordered that no development should take place at the proposed site and directed that the 2nd Respondent conducts a full environmental impact assessment (EIA). However, the Appellant stated, the 2nd Respondent's development which was challenged in the previous appeal consisting of permanent structures constructed of stone, timber and concrete material continue to remain on the site. In addition, the Appellant states, the project proponent moved to parcels of land immediately adjoining the parcels that were in question in NET/07/2006, namely, parcels CIS/Mara/Koiyaki/Dagurugurueti 280 and 281 and on additional parcels of land in the same environment, namely: CIS/Mara/Koiyaki/Dagurugurueti/294, 295, 296, 319 and 2601 which are within the same ecologically-sensitive Leopard Gorge and located within few hundred metres of the location disputed in the former appeal, which is still within the immediate and adjoining environs of the site disputed in the previous appeal.
 3. On 7th July 2009, the law firm of Mereka & Company Advocates filed Notice of Appointment of Advocates on behalf of the 1st Respondent, NEMA but to date, the 1st Respondent has not yet filed reply to the appeal. The Tribunal also notes that on 26th October 2009, the 1st Respondent's Counsel, Mr. Ng'ang'a of Mereka & Company Advocates, confirmed that NEMA has not issued any new EIA licence to the 3rd Respondent since the Tribunal issued a decision in NET/07/2006.
 4. On 22nd August 2009, the law firm of Sharpley Barret & Company Advocates entered appearance for the 2nd Respondent but it is noted that to date, it has not filed reply to the appeal.
 5. On 4th April 2009, the 2nd Interested Party, in response to the appeal, filed an Affidavit sworn by Adam Jillo, its Chairman, stating, among other things, that:
 - (i) it filed an appeal in the Tribunal seeking to have NEMA's EIA licence issued to the 2nd Respondent herein quashed;
 - (ii) after hearing the appeal, the Tribunal cancelled the EIA licence issued to the 2nd Respondent herein, thereby stopping the development of a tourist facility on land parcel number CIS/Mara/Koiyaki/Dagurugurueti/280, 281, 294, 295 and 2601;
 - (iii) the Tribunal also directed the 2nd Respondent herein to conduct a full EIA study for the proposed development before any development continues on the project site;
 - (iv) by the time the Tribunal delivered its ruling in NET/07/2006, the 2nd Respondent herein had commenced construction on the site in question within Leopard Gorge and the development should have been stopped by NEMA pursuant to the Tribunal's ruling;
 - (v) NEMA has failed to take any steps to ensure compliance with the Tribunal's order in NET/07/2006 as aforesaid;

- (vi) NEMA has failed to issue environmental restoration order against the 2nd Respondent herein;
 - (vii) instead of stopping the development in question, the 2nd Respondent herein has continued to construct more structures on the tourist site in question and made it a fully functioning tourist camp;
 - (viii) Ben Kipeno and other owners of the parcels of land in question have registered a company, which is the 1st Interested Party herein;
 - (ix) the tourist facility challenged in NET/07/2006 stands in the same location and has been extended;
 - (x) neither Wasafiri Camp Limited nor Leopard Gorge Conservancy Limited or any of its directors or managers conducted an EIA study as ordered by the Tribunal in NET/07/2006;
 - (xi) NEMA's Counsel confirmed to the Tribunal on 26th October 2009 that no new EIA licence has been issued since the Tribunal issued its ruling in NET/07/2006;
 - (xii) the Tribunal ought to visit the area in question to satisfy itself as to the condition and extent of developments in Leopard Gorge area with a view to making further orders for the protection and conservation of the unique environment; and that
 - (xiii) the developments in question pose a grave environmental risk to the entire Mara ecosystem and the Leopard Gorge in particular.
6. On 23rd January 2010, the 1st Interested Party filed Notice of Preliminary Objection to the Appeal on the grounds that:
- (i) the Appellant has fraudulently converted to its own commercial use and profit the property of the Interested Party and has filed the present appeal not for the purpose of conserving the environment but for the dominant and unlawful purpose of covering up its criminal acts of fraud, theft and exploitation of the 1st Interested Party and its property;
 - (ii) the Appellant is in contempt of the Tribunal by filing a feigned appeal for the purpose of concealing its unlawful and criminal activities against the 1st Interested Party and the indigenous people who own it;
 - (iii) the Appellant cannot, by any stretch of imagination, purport to be an aggrieved party, having stolen and/or fraudulently converted the 1st Interested Party's property to its own commercial use;
 - (iv) the present appeal infringes the rights of indigenous people who constitute or own the 1st Interested Party herein and contravenes the Constitution of Kenya, the Registered Land Act and the Environmental Management and coordination Act (EMCA) of 1999; and that
 - (v) Parliament did not create or ordain the Tribunal to be used for criminal and illegal purposes.
7. The 1st Interested Party's Preliminary Objection was supported by the Affidavit of Ben Kipeno dated 17th January 2010.
8. The Appellant, in its Reply to the Preliminary Objection stated, among other things, that:
- (i) the Preliminary Objection filed by the 1st Interested Party is incompetent and fatally defective because it was filed out of time allowed by Rule 9 of the Tribunal Rules of Procedure (Legal Notice No. 191 of 2003);

- (ii) the Preliminary Objection is an afterthought which is intended to delay the Tribunal's process of hearing and determining the appeal;
 - (iii) the Preliminary Objection is incompetent and fatally defective because it does not disclose any question of law that the Tribunal could decide upon;
 - (iv) the 1st Interested Party's allegations of theft, fraud and concealment of fact against the Appellant are not issues of law that could be decided upon in a Preliminary Objection;
 - (v) the 1st Interested Party's allegations in the Preliminary Objection are material falsehoods and misrepresentation of facts; and that
 - (vi) the 1st Interested Party's constitutional right to property is not absolute since the same is subject to existing laws, including EMCA.
9. The 1st Interested Party's Preliminary Objection was heard on 27th January 2010. At the hearing, the 1st Interested Party was represented by Mr. Oyatsi of Sharpley Barret & Company Advocates, the Appellant by Mr. Oyomba of Muthoga & Gaturu Advocates and the 1st Respondent by Mr. Omari who was holding brief for Mr. Ng'ang'a of Mereka & Company Advocates.
10. For the 1st Interested Party, Mr. Oyatsi first gave a lengthy background to his case and then proceeded to argue that: In the Affidavit of Mark Gross sworn on 30th October, 2009 it is stated that parcels of land in question are within Leopard Gorge outside Maasai Mara Game Reserve and that is an admission by the Appellant that it is managing and controlling land owned by indigenous people and that there was no evidence given by the Appellants on how they acquired the parcels of land in question or their interest in the land. Mr. Oyatsi stated that the Appellant's acquisition of the 1st Interested Party's land was contrary to the Constitution, especially section 75 thereof, section 28 of the Registered Land Act and section 50 of EMCA.
11. Further, Mr. Oyatsi stated that the mere filing of the present appeal by the Appellant who is a thief is an act of contempt of the Tribunal. Further, he argued that for a party to qualify to bring a matter in the Tribunal, it must have a legal right known in law, which must have been violated and it must have been the defendant who violated the right. In the present appeal, he argued, the Appellant failed to meet all the three tests and therefore, the Appellant had no legal right under EMCA or any other law over the pieces of land in question.
12. Further, Oyatsi argued that the Appellant had infringed the right of indigenous people which is protected by section 50 of EMCA. He further argued that if the Appellant felt that the 1st interested Party's land in dispute should be for public purposes, it should petition the responsible authorities to acquire it compulsorily so that the relevant constitutional provisions can be followed.
13. Further, he argued that the Tribunal is a creature of law and that a party who comes before it must have a right under EMCA and that EMCA does not confer rights to a thief to come to the Tribunal to prevent parties from enjoying their rights. Also, he stated, EMCA does not confer rights for declaration of public rights over private property and that if that were to happen, the Tribunal "would be protecting aggressors against victims."
14. In response to the Preliminary Objection, Mr. Oyomba for the Appellant stated that the Objection contravenes Rule 9(1) of the Tribunal Rules of Procedure which require such objections to be based on admissibility of appeals, objections to the Tribunal's jurisdiction and matters of law. He further

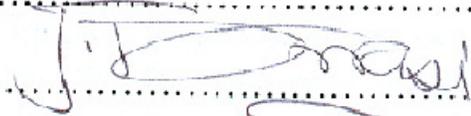
stated that the Objection contravenes Rule 9(1) of the Tribunal Rules of procedure because it was filed outside of the time allowed for filing objections without first seeking the Tribunal's extension of time.

15. Further, Mr. Oyomba argued that all the issues raised by the 1st Interested Party's Objection are allegations of fact that would require evidence for proof and cannot be raised by way of preliminary objection. Further and in reference to the affidavit of Mark Gross, Mr. Oyomba stated that the Appellant was not claiming to have any proprietary, equitable or legal right over the property in question. He further stated that EMCA mandates proprietors of land to obtain EIA licences under given circumstances before proceeding with developments and that in NET/07/2006, the Tribunal made a decision requiring the 2nd Respondent herein to conduct a full EIA study before proceeding with the development in question but that no EIA licence has been issued. Further, Mr. Oyomba argued that property rights are subject to myriad statutes and well documented restrictions. In any case, he stated, if the 1st Interested Party felt that its constitutional right had been infringed, it was free to file a constitutional reference.
16. Regarding the Appellant's capacity to prefer the appeal, Mr. Oyomba argued that environmental issues are public interest issues and not private rights issues and therefore, the Appellant did not have to show actual harm done to it to qualify to bring the appeal. He concluded that the 1st Interested Party's Preliminary Objection was simply meant to scuttle the proceedings in the Tribunal and should be dismissed with costs.
17. Mr. Omari did not present any arguments for or against the Preliminary Objection. He responded that matters raised in the Objection are largely between the Appellant and the 1st Interested Party. Therefore, he left it to the Tribunal to make a determination.
18. The Tribunal has carefully considered the Preliminary Objection filed by the 1st Interested Party, the grounds thereof, arguments made by Counsel for the Appellant in response and the applicable law.
19. The Tribunal notes that Rule 9(1) of the Tribunal Rules of Procedure allows parties to an appeal to file any objection "to the jurisdiction of the Tribunal, or to the admissibility of an appeal or other objection..." but such objections must be filed within thirty days of the date the party seeking to file objection was notified of the appeal. In the present case, Sharpley Barret & Company Advocates filed Notice of Appointment of Advocates to act for the 1st Interested Party on 27th August 2009, which means that the 1st Interested Party was notified of the appeal before then. Clearly, filing of the 1st Interested Party's Notice of Preliminary Objection on 23rd January 2010 was outside of the time allowed by the Rules. It is not denied that Counsel for the 1st Interested Party did not first seek the Tribunal's leave to file the objection out of time. The belated attempt by Mr. Oyatsi to apply for extension of time to file the objection after arguing the objection, in his reply to Mr. Oyomba's arguments and only after Mr. Oyomba raised the point that the Objection was filed out of time is unreasonable and is hereby rejected. The Tribunal has duly considered the authority of *Kamau John Kinyanjui v. Republic* – Criminal Appeal No. 295 of 2005 submitted by Mr. Oyatsi in support of his arguments and finds that the authority is irrelevant to matters in this appeal.
20. The Tribunal also notes that under Rule 9(1) of its Rules of Procedure and in law generally, a preliminary objection can only be brought on matters of law. In this regard, the Tribunal draws

attention of the parties to such cases as *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.* (1969) E.A. 696 which states, in part, that a preliminary objection cannot be raised if any fact has to be ascertained to determine it. In the present case, the key issues that Mr. Oyatsi, the 1st Interested Party's Counsel has raised include fraud, theft and conversion of property. These are matters of fact to be established by evidence which cannot be determined in a preliminary objection and are best dealt with in another forum.

21. For the reasons explained, the Tribunal hereby dismisses the Preliminary Objection with costs to the Appellant.

DATED and DELIVERED at Nairobi this 10th day of February 2010.

Donald Kaniaru  Chairman
Dwasi Jane  Member
Stanley Waudo  Member
Joseph Njihia  Member

CHAIRMAN
National Environment Tribunal
P.O. Box 74772 Tel _____
NAIROBI