

**REPUBLIC OF KENYA  
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI  
TRIBUNAL CASE NO. NET/34/2008**

TOURISM PROMOTION SERVICES (KENYA) LIMITED.....APPELLANT

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT  
MANAGEMENT AUTHORITY (NEMA).....1<sup>ST</sup> RESPONDENT

COUNTY COUNCIL OF TRANSMARA.....2<sup>ND</sup> RESPONDENT

COBRA'S CORNER LIMITED.....3<sup>RD</sup> RESPONDENT

**RULING**

1. By Notice of Appeal dated 10<sup>th</sup> December 2008 and filed in the Tribunal on the same date, the Appellant herein challenged the 1<sup>st</sup> Respondent's issuance to the 3<sup>rd</sup> Respondent of an environmental impact assessment (EIA) licence on 24<sup>th</sup> October 2008, authorizing the 3<sup>rd</sup> Respondent to construct 27 luxury tourist cottages on L.R. No. Transmara/Enkul/27703 in the Mara Triangle on the basis, among others, that:

- (i) the area has at all times been recognized as a fragile ecosystem for which numerous initiatives have been undertaken by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents, among other stakeholders;
- (ii) stakeholders in the whole Maasai Mara National Reserve and more specifically, the Mara Triangle have engaged a consultant to develop a management plan for the area;
- (iii) the 1<sup>st</sup> Respondent has confirmed the development of a management plan for Maasai Mara National Reserve and Mara Triangle and issued a public notice stating that it will not accept EIA reports for proposed developments in the Maasai Mara ecosystem until the management plan being developed is finalized;
- (iv) the 2<sup>nd</sup> Respondent entered into a memorandum of understanding with stakeholders on 24<sup>th</sup> September 2007 to suspend the approval of any further development in the area including campsites, lodges and hotels except those approved prior to the aforesaid date;
- (v) NEMA issued the challenged EIA licence to the 3<sup>rd</sup> Respondent without an environmental impact assessment (EIA) study thereby violating the provisions of the Environmental Management and Co-ordination Act (EMCA); and that
- (vi) in issuing an EIA licence to the 3<sup>rd</sup> Respondent, NEMA, the 1<sup>st</sup> Respondent, acted collusively, capriciously and contrary to the rules of natural justice, thereby violating its statutory mandate and principles established by EMCA.

2. On the basis of the matters aforesaid, the Appellant asked the Tribunal to revoke the licence, number 0002276 dated 24<sup>th</sup> October 2008 and granted to the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent, impose conditions on the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents to comply with the public notice issued by the 1<sup>st</sup> Respondent suspending developments in the Mara Triangle until the management plan is finalized and direct the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to comply with all laws affecting developments in the Mara Triangle.
3. On 13<sup>th</sup> March 2009, the 1<sup>st</sup> Respondent filed Reply to the appeal in which it stated, among other things, that:
  - (i) it has not yet received any advice from its Standards and Enforcement Review Committee to revoke, cancel or suspend the EIA licence it issued to the 3<sup>rd</sup> Respondent;
  - (ii) the appeal is incompetent, premature and/or misconceived and the Tribunal lacks jurisdiction to entertain it;
  - (iii) the EIA process is governed by law and not by the existence of management plans;
  - (iv) Regulation 10(1) of the EIA and Audit Regulations mandate NEMA to respond to a project report within 45 days, the existence of a management plan notwithstanding;
  - (v) the public notice issued by NEMA was not gazetted, nor founded on any known provisions of EMCA and therefore, it could not confer any cause of action to the Appellants; and that
  - (vi) at the time NEMA considered the EIA project report in respect of the 3<sup>rd</sup> Respondent's development, development of the management plan for the Mara area had not been completed.
4. For the reasons stated, the 1<sup>st</sup> Respondent asked the Tribunal to dismiss the appeal with costs.
5. The 2<sup>nd</sup> Respondent filed Reply on 4<sup>th</sup> May 2009 in which its stated, among other things, that:
  - (i) it held a full Council meeting on 11<sup>th</sup> December 2006 at which the 3<sup>rd</sup> Respondent's development was considered and approved;
  - (ii) later, the 2<sup>nd</sup> Respondent and Ewaso Ngiro South Development Authority signed a memorandum of Understanding creating, among others, the Maasai Mara National Reserve Management Plan on or about 24<sup>th</sup> September 2008, which suspended approval of any subsequent development plans; and that
  - (iii) the Maasai Mara Game Reserve, like any other game reserve, is a special sensitive ecosystem.
6. The 3<sup>rd</sup> Respondent filed Reply on 4<sup>th</sup> May 2009 stating, among other things, that:
  - (i) in preferring the appeal, the Appellant is not propelled by any legitimate concern for environmental degradation or preservation but rather, it is actuated by extraneous business considerations and interests;

- (ii) the 3<sup>rd</sup> Respondent sought and was granted a 33-year lease of 20 acres of land, which lease was subsequently approved by a full Council meeting; and that
- (iii) the 2<sup>nd</sup> Respondent entered into a Memorandum of Understanding with stakeholders, including County Council of Narok and Ewaso Ngiro South Development Authority for the preparation and implementation of the Greater Maasai Mara Tourism Development Plan which Memorandum provided for the suspension of approval of any further developments of camp sites, lodges, hotels and shipping centres, among others, but the Memorandum of Understanding was not intended to be retrospective.

7. For the reasons stated, the 3<sup>rd</sup> Respondent asked the Tribunal to dismiss the appeal.
8. Subsequent to the matters aforesated and before the appeal was set down for hearing, Mr. Ng'ang'a, Counsel for the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection to the Appeal on 28<sup>th</sup> July 2008 which was supported by Counsel for the 3<sup>rd</sup> Respondent. The Preliminary Objection was heard on 31<sup>st</sup> July 2009 and on 5<sup>th</sup> August 2009, the Tribunal dismissed the objection.
9. After final determination of the Preliminary Objection, the appeal was heard on four occasions between 16<sup>th</sup> October 2009 and 11<sup>th</sup> January 2010. A total of three witnesses testified. The Appellant called Mr. Allan Elliot Ainslaw, the Chairman of Kenya Tourism Federation and Mr. Alistair Malcolm Adison, the Operational Director of Tourism Promotion Services. The 1<sup>st</sup> Respondent called to testify, Naomi Njeri Gitau, an officer in NEMA's EIA section. The 2<sup>nd</sup> Respondent chose not to call any witness. The 3<sup>rd</sup> Respondent did not call any witness but through Counsel, Mr. Akoto, associated itself with the position of the 2<sup>nd</sup> Respondent.
10. At the hearing of the appeal, the Appellant was represented by Mr. Chacha Odera of Oraro & Company Advocates, the 1<sup>st</sup> Respondent by Mr. Ng'ang'a of Mereka & Company Advocates, the 2<sup>nd</sup> Respondent by Miss Oburu of Kemboy & Company Advocates and the 3<sup>rd</sup> Respondent by Mr. Akoto of Akoto & Company Advocates.
11. On behalf of the Appellant, Mr. Allan Elliot Ainslaw stated that he is the Chairman of Kenya Tourism Federation (KTF) which is the major umbrella body for operators in the tourism industry including hotel operators, Ecotourism Kenya, Mombasa Coast Tourism Association, Air Operators and Kenya Association of Travel Agents, among others. He stated that the main objective of KTF is to encourage and promote sustainable high quality tourism products for Kenya because the organization considered tourism as one of the pillars of the country's economy that would allow realization of Vision 2030 and that KTF is not interested in quick profits. It is interested in the sustainability of the business and has to protect the environment in order to market the country and tourism products.
12. Mr. Ainslaw further stated that Kenya Wildlife Service (KWS) initiated the process of developing management plans for protected wildlife areas, beginning with Amboseli. Subsequently, KWS, in collaboration with the respective local authorities, completed the process of developing a management plan for Maasai Mara Game Reserve in the year 2007

and that in the process of developing the Plan for the Mara, one hundred and fifty stakeholders, including KTF took part. He stated that the primary objective of developing management plans for protected areas is to zone them in terms of areas of high use, low use, wilderness areas, strengthen security programmes for the parks, and streamline park operations with the environment such that the tourism capacity of the parks is balanced with their environmental capacity. However, he stated, the two county councils in the Mara have not adopted the management plans developed.

13. He also stated that the Minister for Environment and the Director General of NEMA had been requested to stop any further tourism development in the Mara until the management plan is completed and adopted. On that basis, he stated, NEMA issued a notice on 15<sup>th</sup> July 2008 informing the public that a management plan for the Maasai Mara ecosystem – the Maasai Mara National Reserve and the Mara Triangle was being developed with NEMA's support which would detail buffer zones, the ecosystem's carrying capacity, conservation zones (wilderness zones), restricted use zones, tourism development zones and community development zones. NEMA's public notice states that development plan for Maasi Mara National Reserve was expected to be completed by September 2008 and development of the plan for the Mara Triangle by June 2009. Further, NEMA's notice advises persons intending to put up any development in the Mara Ecosystem to wait and that NEMA would not accept Environmental Impact Assessment (EIA) reports for proposed developments in the Mara ecosystem until the management plans are finalized. Mr. Ainshaw further stated that it was anticipated that the management plan for the Mara Triangle would be concluded by September 2008 but by 24<sup>th</sup> October 2008, development of the management plan for the Mara had not been concluded.
14. Mr. Ainshaw went further to state that he is familiar with the Mara ecosystem because he has been guiding tourists there for the last thirty years and that he is involved in conservation. He said that Cobra's Corner which is within the Mara Triangle is located on the extreme south-western corner of Maasai Mara National Reserve near the border of the Maasai Mara Game Reserve with Serengeti National Park and that it is a low use zone whose management plan was due to be completed in June 2009. He also stated that in his understanding as part of the Tourism Working Group, Cobra's Corner is designated as a low use zone because it is a high rainfall area with poor roads and very few vehicles can get there.
15. Mr. Ainshaw also stated that he was not aware of any development projects that have been approved in Maasai Mara National Reserve since the year 2007.
16. Mr. Allistair Malcolm Adison also testified for the Appellant. In his testimony, he stated that he works with Tourism Promotion Services as the Operational Director for Eastern Services and that he manages hotels for Serena in the East Africa region. In Kenya, Serena has nine properties including Mara Serena Safari Lodge located in the Mara Triangle, which was developed in the 1970s. He stated that Serena has not developed other lodges in the Mara Triangle even though it is permitted to do so by the lease agreement with Trans Mara County Council. This is because Serena and its managers have always taken the position that they will not develop more lodges in the Triangle until there is in place a full management plan to ensure sustainability of the greater Mara ecosystem. Further, he stated that Serena is the sole

operator of a game lodge in the Mara Triangle and that at the time the hotel was developed, the fact that the Mara Triangle is a fragile ecosystem did not prevent Serena from developing the lodge in that location.

17. Mr. Adison further stated that he was aware of a memorandum of understanding (MOU) between Ewaso Nyiro Development Authority and Trans Mara and Narok county councils dated 24<sup>th</sup> September 2007. The MOU was for the preparation and implementation of greater Maasai Mara tourism development plan. He pointed out that at paragraph 1.5 of the MOU whose copy was submitted to the Tribunal, Narok and Transmara county councils were required to suspend, with effect from the date of the MOU, approval of new tourism developments (which were defined to mean camp sites, lodges, hotels, ballooning, trading and shopping centres) in the Mara and greater Mara ecosystem until a development plan for the Mara is completed and incorporated as law.
18. Further, Mr. Adison stated that the MOU required the parties thereto to appoint a Joint Consultative Committee (JCC) that would be responsible for the coordination of the preparation and implementation of the development plan. It was also agreed that approval of tourism developments granted by the councils prior to the date of the MOU would be considered by the JCC to ensure that they are in conformity with the development plan. Mr. Adison stated that he considered Serena, his institution, a stakeholder in the development of the management plan for the Mara ecosystem.
19. Mr. Adison stated that NEMA issued a public notice of the development plan for the Mara ecosystem. He could not recall the date the notice was issued but stated that it was brought to their attention and that he is a member of the environment committee of the KTF. Further, he stated that Serena operates many hotels in many countries and that it is not afraid of competition in the Mara. Rather, the concern of Serena and its officers including him, Adison, is about overburdening the Mara. Further, he stated that as an institution, Serena was not invited to object to the issuance of an EIA licence by NEMA to the 3<sup>rd</sup> Respondent, neither were its officers consulted in any way.
20. Mr. Adison also stated that there are other tourist facilities in the Mara and that his ecological concern is that the Mara is a busy area with the number of beds having increased from 2000 to 4000 bed-nights per day. These raised his concern about long-term sustainability of tourism in the area. His concern was to ensure long-term and high value tourism in the Mara which would not be possible if too many lodges were allowed in the area because the increasing number of vehicles in the Maasai Mara Game Reserve, the increasing number of people who visit the Reserve and the five hundred people who visit the Mara from Narok for ballooning activities every day threaten sustainability of the animals, including their feeding patterns and their habitat. He stated that Serena maintains a policy of reducing the number of vehicles in the Mara and the number of off-road driving. Serena's policy also requires keeping a distance between tourists and their vehicles from wild animals. The policy, he stated, provides rules that have helped to conserve wild animals in the Mara and that Serena has people who look after the environment.

21. The 1<sup>st</sup> Respondent, NEMA, called only one witness, Miss Naomi Njeri Gitau, its EIA officer who has worked for the Authority for the last two years. Miss Gitau stated that she is the one in charge of the EIA process at NEMA.
22. Miss Gitau submitted the EIA Project Report that NEMA received from the 3<sup>rd</sup> Respondent in respect of the development in question. She stated that the project report for the proposed Cobra's Corner Luxury Lodge to be developed on Transmara/Enkui/27703 was received by NEMA on 14<sup>th</sup> April 2008. She stated that the Project Report was submitted to the Lead Agencies specified under cover of NEMA's letter dated 9<sup>th</sup> June 2008 for comment and that the Lead Agencies, in response, wrote, stating that they had no objection to the development. Miss Gitau stated that upon receipt of comments from the Lead Agencies, NEMA approved the 3<sup>rd</sup> Respondent's development with conditions by letter dated 24<sup>th</sup> October 2008 and issued an EIA licence the same day. However, she was aware that after the EIA licence was issued on 24<sup>th</sup> October 2008, objections were raised. Miss Gitau stated that subsequent to NEMA's approval, it would follow up the development and the developer would carry out environmental audit.
23. Miss Gitau further stated that NEMA did issue a public notice stating that the development of a management plan for Maasai Mara Game Reserve was on-going. She stated that NEMA expected the public to take the public notice of 15<sup>th</sup> July 2008 seriously but she was not aware that there are regulations precluding NEMA from considering project reports and approving developments where the development of such plans is pending. She stated that NEMA approved the development on conditions, one of which was that the 3<sup>rd</sup> Respondent adheres to an environmental management plan (EMP) developed throughout the project cycle. Further, she stated that NEMA can issue improvement orders after issuing an EIA licence and that such an order can emanate from an environmental management plan developed by stakeholders.
24. In her evidence, Miss Gitau also stated that Maasai Mara ecosystem is considered a sensitive ecosystem "because it is the 7<sup>th</sup> wonder of the world." She also stated that Maasai Mara ecosystem is considered fragile because it contains endangered species of wildlife. Further, she stated that the Project Report submitted by the 3<sup>rd</sup> Respondent contains adequate proposed mitigation measures but the measures can be improved.
25. Miss Gitau also admitted that there is wildlife in the area of the proposed project. However, referring to page 15 of the Project Report, she acknowledged that it is the only section of the Report addressing the issue of wildlife. The Tribunal notes that the reference to wildlife on that page (paragraph 3.7(b)) in just one paragraph is very brief and does not adequately address all pertinent issues concerning the likely impacts of the proposed development on wildlife in the locality in question and the Mara ecosystem as a whole. Miss Gitau also referred to page 5 of the Project Report which considers negative impacts of the proposed development on the environment. She stated that of the ten impacts stated, there was no reference to wildlife. Further, she referred to page 6 of the Project Report, noting that none of the proposed mitigation measures addresses wildlife. She also referred to page 3 of comments of the Trans Mara District Environment Officer which state, among other things, that the area of the proposed project is a residence for elephants and that conflicts are likely

to arise. However, she acknowledged that the EIA expert who prepared the 3<sup>rd</sup> Respondent's Project Report did not address the issue of elephant presence in the area at all and made no reference in the Report of the possible conflicts between the development and wildlife, especially elephants. Further, she stated that the location of the proposed project is an area where elephants reside during the dry season, but she did not know how NEMA would address the issue, stating further that she did NOT read the Project Report in question and that she is not the one who reviewed it. In response to a question from the Tribunal, Miss Gitau admitted that she is not an EIA expert.

26. Miss Gitau also stated that a National Steering Committee was formed to come up with a tourism development plan for the Mara. However, by the time of the hearing, no plan had been issued at all and that this puts NEMA in a fix. She further stated that through the public notice that NEMA issued, it stated that it would no longer accept project reports for proposed developments in the Mara and that since then, NEMA has not received any project report.
27. The Tribunal has carefully considered the grounds of appeal, the evidence tendered by witnesses called by the Appellant and the 1<sup>st</sup> Respondent, all documents submitted by parties in support of their positions and the applicable law, especially the Environmental Management and Coordination Act (EMCA of 1999) and the EIA and Audit Regulations (Legal Notice No. 101 of 2003).
28. From the grounds of appeal filed and the evidence tendered, the bases of the Appellant's claim can be summarized as follows: it was not consulted before the 1<sup>st</sup> Respondent approved the 3<sup>rd</sup> Respondent's Project Report and issued an EIA licence for the development in question; the 1<sup>st</sup> Respondent approved the 3<sup>rd</sup> Respondent's development in question and granted to it an EIA licence contrary to its public notice issued to the effect that no further project reports would be considered by the 1<sup>st</sup> Respondent for approval of developments in the Mara ecosystem until a management plan is developed and implemented; pertinent environmental issues such as the presence of elephants in the location of the project in question, their use of the area by resident elephants especially in the dry season and likely conflicts between the development and elephants were not considered at all in the project report; the 3<sup>rd</sup> Respondent's proposed mitigation measures as presented in the Project Report are inadequate; the 3<sup>rd</sup> Respondent's EIA expert who developed the Project Report did not at all consider likely negative impacts of the project on wildlife in the area; and that there exists an MOU between Ewaso Nyiro Development Authority and Trans Mara and Narok county councils dated 24<sup>th</sup> September 2007 in which the parties agreed to the preparation and implementation of tourism development plan for the greater Maasai Mara and required Narok and Trans Mara county councils to suspend, with effect from the date of the MOU, approval of new tourism developments in the Mara and greater Mara ecosystem until a development plan for the Mara is completed and incorporated as law. The Tribunal proceeds to consider each one of the issues in light of the applicable laws and regulations in order to arrive at a final determination of the matter.
29. The Appellant maintained that NEMA, the 1<sup>st</sup> Respondent issued a notice informing the public that it had suspended approval of developments in the Mara until a management plan for the Mara ecosystem was developed and operationalized. While the Appellant maintains

that having issued the notice, NEMA ought not to have approved the development in question, NEMA's witness confirmed that NEMA did in fact issue a public notice as claimed, but goes further to state that the notice was issued by NEMA on 15<sup>th</sup> July 2008 after NEMA received the 3<sup>rd</sup> Respondent's project Report on 14<sup>th</sup> April 2008 and therefore, the 3<sup>rd</sup> Respondent's project Report was not affected by the notice. The Tribunal notes that the Appellant and its witnesses did not contest the date of NEMA's issue of the public notice as presented in the evidence. On these bases, the Tribunal takes the view that although NEMA, having issued the notice, would be estopped from denying its validity and intended effect, the notice appears to have been issued after the 3<sup>rd</sup> Respondent's project report was received by NEMA and NEMA could not have applied the notice retrospectively to prevent its receipt and consideration of the 3<sup>rd</sup> Respondent's Project Report. NEMA's Counsel argued that the public notice issued by NEMA was not legal because it was not gazetted and therefore had no effect on NEMA's approval of developments in the Mara. To the contrary, the Tribunal takes the position that NEMA is the governmental body with overall responsibilities over environmental conservation in Kenya, fully clothed with powers to make regulations under EMCA. Therefore, the public notice it issued on 15<sup>th</sup> July 2008 was to the general public ostensibly authority which would be relied on by the public and assumes the status of subsidiary regulation. For these reasons, among others, it is not open to NEMA to deny the validity or legality of the notice.

30. The Appellant also faulted approval of the 3<sup>rd</sup> Respondent's development on the ground that there exists an MOU between Ewaso Nyiro Development Authority and Trans Mara and Narok county councils dated 24<sup>th</sup> September 2007 in which the parties agreed to the preparation and implementation of a tourism development plan for the greater Maasai Mara and required Narok and Trans Mara county councils to suspend, with effect from the date of the MOU, approval of new tourism developments in the Mara and greater Mara ecosystem until a development plan for the Mara is completed and incorporated as law.
31. A copy of the MOU was tendered in evidence and the Tribunal has had occasion to consider it. Among other things, the MOU requires parties thereto to appoint a joint Consultative Committee (JCC) to take responsibility over the preparation and implementation of a Maasai Mara National Reserve Management Plan. Parties to the MOU noted in the Preamble thereof that Narok and Trans Mara county councils are empowered by law, specifically, the Local Government Act, sections 93 and 94, to form a joint committee for the purpose of developing a management plan for the Mara. It is observed that in their considered view as the local authorities with management responsibilities over wildlife resources in the Mara, Narok and Trans Mara county councils determined that it was necessary to implement such a plan to ensure that tourist activities, which they listed in the MOU (paragraph 1.5) to include development of camp sites, lodges and hotels, do not adversely affect wildlife resources. Such a determination and the commitments in their requirements aforesaid were expressed in writing on 24<sup>th</sup> September 2007, long before NEMA forwarded to the local authorities the 3<sup>rd</sup> Respondent's Project Report for comment (by letter dated 9<sup>th</sup> June 2008). The Tribunal would have expected Narok and Trans Mara county councils, once they received the Project Report, to inform NEMA, if NEMA did not already know, that they, the local authorities, had an MOU which bound them NOT to approve any more developments in the Maasai Mara,



including camp sites and tourist lodges, until a development plan was developed and implemented.

32. To the extent that the Council accepted the development in question and/or failed to inform NEMA of the existence of the MOU which, in effect, suspended developments in the area in question, the Council misled NEMA. For reasons known only to Trans Mara County Council, it declined to give evidence in the Tribunal to clarify why it failed to consider the development in question in accordance with the terms of the MOU, which it intended to have legal force. The Tribunal takes this opportunity to clarify that to the extent that NEMA's approval of a development is predicated on local authority laws, by-laws and guidelines, as is the case in the present appeal, the Tribunal has jurisdiction to consider those local authority laws, by-laws and guidelines to determine an appeal. In this case, NEMA did, in its approval letter dated 24<sup>th</sup> October 2008, paragraph 7, condition the approval of the development in question on the requirement that the 3<sup>rd</sup> Respondent complies with "*...the relevant principal laws, by-laws and guidelines issued for development of such a project within the jurisdiction of Ministry of Housing, Ministry of Tourism, County Council of Transmara...*" Because this requirement forms part of the conditions of NEMA's approval of the development in question, the Tribunal has properly considered NEMA's approval of the development in question and found that it was against an existing MOU to the contrary.
33. The Appellant also objects to NEMA's approval of the development in question on the basis that the 3<sup>rd</sup> Respondent's EIA expert who developed the Project Report did not at all consider likely negative impacts of the project on wildlife in the area. The Tribunal has carefully examined the Project Report in question in light of the evidence tendered and the applicable laws and regulations. The Tribunal notes that the Project Report states, at page 3, that the 3<sup>rd</sup> Respondent proposed to construct twenty seven cottages in a place known as Cobra's Corner. Further, on page 9, the Report states that the project location falls within the Mara Triangle. On page 5 of the Report, it is stated that each cottage will be divided into three camps and that each camp will have an attached lounge for breakfast, lunch and dinner and also serve as a meeting place. The 3<sup>rd</sup> Respondent states, on the same page that the development will, in addition have heated swimming pool, spa facility, campfire site, vehicle parking, staff quarters, walk ways and septic tanks and waste water management area. However, the Report lacks critical baseline information on the area. On page 15, the EIA expert described wildlife in Maasai Mara generally, without specifying, on the same page or anywhere else in the Report, the species of flora and fauna in the area of the proposed project.
34. Further, the Tribunal finds that the EIA expert who prepared the Project Report did not at all consider likely negative impacts of the project on wildlife in the area. Potential negative impacts of the 3<sup>rd</sup> Respondent's project are discussed on pages 26 – 30 of the Report. However, the EIA expert chose to only focus on likely impacts in relation to vegetation, soil, fire hazards, water quality, solid waste, air quality, workers and public health, microclimate and noise without any mention of likely impacts on wildlife at all. This is contrary to Regulations 7(f) of the EIA and Audit Regulations. Clearly, NEMA approved the project report without any consideration at all of the likely impact of the development of twenty seven cottages and other facilities on wildlife in the area. NEMA's approval was regardless of its District Environment Officer's elaborate comments, upon receipt of the Project Report,

that: the 3<sup>rd</sup> Respondent proposed to undertake the development in question in an area regularly used by resident elephants as a resting place during “sunny days”; during construction phase, conflicts were likely to arise because the habitat of resident elephants is likely to be altered; the proposed facility is likely to increase water demand, thereby occasioning conflict between the development, wildlife and humans downstream as they compete for water; and that in the absence of a management plan to specifically address the conservation of the catchment area of *Ngiro-are* stream at the border between the park and individually-owned land, degradation effects of the 3<sup>rd</sup> Respondent’s development may take toll on the quality and quantity of the water available. One wonders why NEMA chose to ignore critical ecological concerns of its own DEO on the ground. Miss Gitau, NEMA’s EIA officer who testified in the Tribunal did confirm that the location of the proposed project is in an area where elephants reside during the dry season.

35. Having considered the evidence tendered and the documents submitted before it, specifically the 3<sup>rd</sup> Respondent’s Project Report, the Tribunal also finds that the 3<sup>rd</sup> Respondent’s proposed mitigation measures were grossly inadequate and contrary to the requirements of EIA Regulations. Having failed to appreciate, in the Project Report, likely negative impacts of the 3<sup>rd</sup> Respondent’s development on wildlife in the area of concern, the 3<sup>rd</sup> Respondent’s EIA expert proceeded to propose a number of mitigation measures which appear on pages 30-34. However, the expert only proposed mitigation measures for vegetation loss, soil compaction and damage, water demand, solid wastes, liquid wastes, air quality, noise, worker and public safety and microclimate modification. There is no proposed mitigation measure at all for likely negative impacts of the project on wildlife during construction and operational phase, for example on their movement in the area, their feeding patterns or on their habitat. This is contrary to Regulation 7(f) of the EIA and Audit Regulations which specifically requires a statement of proposed mitigation measures to be undertaken during and after implementation of a project. In his comments on the 3<sup>rd</sup> Respondent’s Project Report, NEMA’s District Environment Officer suggested a number of mitigation measures. For example, on page 3 of his comments, he suggested that,

*“Some adjustments should be made on specific locations of the establishment of the cottages. This is in view of the fact that the natural elephant’s habitat should not be tampered with for the posterity of the natural ecology.”*

The District Environment Officer (DEO) had also proposed that,

*“A joint management plan by the proponent and the surrounding community of Kerinkani (and more so, the immediate neighbouring land owners) should be developed to enhance conservation of the Ngiro-are water catchment...”*

The DEO’s comments resonate with those of Miss Gitau, NEMA’s EIA officer who, in her testimony in the Tribunal, stated that the area in question is a sensitive and fragile ecosystem. However, all of the DEO’s proposed mitigation measures do not seem to have been given due regard by NEMA, if the Project Report in question was reviewed at all.

36. In view of the matters stated in paragraphs 34 and 35 above, the Tribunal finds that NEMA approved the 3<sup>rd</sup> Respondent's project and issued an EIA licence for it contrary to Regulation 9(2) and (3) of the EIA and Audit Regulations. Regulation 9(2) specifies that the Authority, i.e, NEMA may issue an EIA licence where it is satisfied that a project will have no significant impact on the environment or that a project report discloses sufficient mitigation measures. As explained, the Project Report in question does not disclose sufficient mitigation measures. Moreover, NEMA did not have sufficient information to determine whether the proposed project will have no significant impacts on the environment because likely negative impacts on wildlife, among others, were not considered in the Project Report at all.
37. Where a project report discloses no sufficient mitigation measures, as is the case with the 3<sup>rd</sup> Respondent's Project Report, Regulation 9(3) obligates NEMA to require a developer to undertake a full EIA study in accordance with the Regulations.
38. Further, the Tribunal notes that the 3<sup>rd</sup> Respondent failed to comply with the requirements of Regulation 7(d) and (e) of the EIA and Audit Regulations which require the design of a project and a statement of the materials to be used for construction. It is noted that on page 9 of the Project Report, the EIA expert only made a summary of a "design Concept" without providing details, accompanied by actual design or designs of the proposed project. Equally lacking is the design of the proposed solid waste and sewage management. On page 32 of the Project Report, the proponent proposes merely to construct septic tanks and soak away pits to dispose of liquid wastes "...to be constructed in accordance with WHO standards.... and located away from surface water regimes...." Further, the Project Report states, on the same page, that wastewater from the kitchen will be passed through a grease trap due to the oily content but the design of the mode of disposal proposed is lacking. Therefore, it would be difficult for a reviewer in the position of NEMA to determine whether or not the proposed waste disposal methods are appropriate in light of the surrounding sensitive environments, including "surface water regimes" and boreholes (page 32, paragraph 6.11.6) which the EIA expert acknowledges to be present in the proposed location.
39. The Appellant also faulted NEMA's approval of the development in question on the basis that it is a stakeholder on matters concerning wildlife and tourism developments in the area in question but NEMA did not consult it prior to its approval of the development. This allegation was not denied by the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Respondents. Therefore, the Appellant's evidence stands that the Appellant, a key stakeholder, was not consulted by NEMA before NEMA approved the development in question. This is contrary to both the letter and spirit of EMCA and the EIA Regulations. In previous cases, including: NET/28/2008 - *Francis Munene Hiram & 93 Others v. Director General, National Environment Management Authority & 2 Others*; NET/15/2007 - *James Mahinda Gatigi & 3 Others v. NEMA & Universal Corporation Ltd.* and in NET/23/2007 - *Hon. Beth Mugo & 7 Others v. Director General, NEMA and Silver Crest Enterprises Ltd.*, the Tribunal has had occasion to consider NEMA's approval of developments on the basis of project reports alone and stated the need for NEMA, in such circumstances, to consult with potentially affected persons.
40. In the cases cited in the foregoing paragraph, the Tribunal has stated that the purpose of the EIA procedure stipulated in EMCA and EIA and Audit Regulations is to assess the potential

impacts of a proposed project on the environment. As part of that assessment, the views of potentially affected members of the public is an important consideration, more so because section 3 of EMCA entitles every person in Kenya to a clean and healthy environment. Therefore, where, as in the present case, a proposed project could jeopardize this entitlement, potentially affected persons have a right to be informed of the application for an EIA licence on a timely basis and to have their comments taken into account in determining an application for development approval. The Tribunal has ruled in those previous cases, as it does in this case, that a procedure which allows a determination to be made by NEMA on an EIA licence application without taking into account the views of potentially affected members of the public goes against the provisions of EMCA, in particular, section 3(5) which enshrines the concept of public participation in the EIA and other decision making processes. In the cases cited, the Tribunal has ruled, as it does here, that NEMA is obliged to publicize any EIA licence application in all cases where it is minded to grant an EIA licence on the basis of a project report alone without the requirement of a full EIA study and to take the views of potentially affected persons into consideration.

41. The Tribunal notes that Principle 10 of the Rio Declaration on public participation which is law in Kenya as expressly incorporated in section of 3(5)(a) of EMCA underlines the importance of public participation, access to information and environmental justice and these should be consciously addressed.
42. The Tribunal finds it curious that in NEMA's process of approving the development in question, it did not at all consult with Kenya Wildlife Service, which is a key government agency with overall responsibilities over wildlife management in the country, regardless of the fact that the location of the proposed project borders Serengeti National Park in Tanzania.
43. The Tribunal further finds that some of the conditions placed in NEMA's approval letter dated 24<sup>th</sup> October 2008, for example, "recommended visitor capacity" (condition 3) require a full EIA study to determine the appropriate capacity. Also, NEMA, in its said letter, predicated its approval partly to adherence to zoning specifications of responsible local authorities without reference to any specific zoning requirements (condition 8). There is no indication that NEMA first ascertained whether or not any appropriate zoning requirement exists that would safeguard the survival of wildlife and their habitat in the face of negative impacts of the proposed development activities.
44. The Tribunal also notes that in its letter of approval of the 3<sup>rd</sup> Respondent's development dated 24<sup>th</sup> October 2008, it did require the 3<sup>rd</sup> Respondent to

“ confirm in writing, **(within a period of 30 days from date of receipt of this letter)** that the conditions shall be complied with prior to commencement of the project to enable the Authority process the Environmental Impact Assessment Licence.”

However, NEMA proceeded to issue an EIA licence the same day, without the 3<sup>rd</sup> Respondent's written confirmation that it would abide by the approval conditions NEMA had set. The effect of NEMA's conduct is that it did allow the 3<sup>rd</sup> Respondent to proceed with the development in question in whatever manner, without adhering to any environmental

safeguards at all and without due regard to the ecological sensitivity of the area in question. NEMA's conduct also renders the argument by its witness and Counsel that the development was approved on conditions that would ensure environmental safeguards nugatory. In the circumstances, NEMA's decision cannot stand and is overruled.

45. Accordingly and for the reasons explained in the foregoing paragraphs, the Tribunal, unanimously:



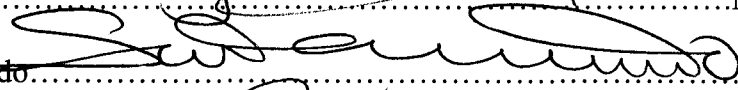

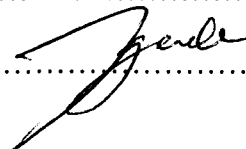
- (i) cancels EIA licence, registration number 0002276 issued by NEMA to the 3<sup>rd</sup> Respondent on 24<sup>th</sup> October 2008;
- (ii) in accordance with section 129(2) and (3) of EMCA and Regulation 9(3) of the EIA Regulations (Legal Notice No. 101 of 2003) directs the 3<sup>rd</sup> Respondent to stop any activity that may be proceeding on the site in question;
- (iii) directs the 3<sup>rd</sup> Respondent to conduct a full EIA study for the project in question in accordance with EIA and Audit Regulations; and
- (iv) directs NEMA to ensure that no activity takes place in the location in question pending the conduct of a full EIA study and its proper determination in accordance with the law.

46. NEMA is hereby directed to ensure that no activity takes place in the location in question pending the conduct of a full EIA study and its proper determination in accordance with the law.

47. The 1<sup>st</sup> Respondent asked the Tribunal to dismiss the appeal with costs. Parties are hereby invited to address the Tribunal on the issue of costs in accordance with Rule 39 of the Tribunal Rules of Procedure.

48. Attention of parties is drawn to section 130 of EMCA.

DATED and DELIVERED at Nairobi this 10<sup>th</sup> day of February 2010.

Donald Kaniaru..........Chairman  
Dwasi Jane..........Member  
Stanley Wando..........Member  
Joseph Njihia..........Member  
Tom Ojienda..........Member