REPUBLIC OF KENYA
IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI
TRIBUNAL APPEAL NO. NET/30/2008

KENYA TOURISM FEDERATION……APPELLANT

VERSUS

DIRECTOR GENERAL, NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY (NEMA)……1ST RESPONDENT
OL KEJU RONKAI LIMITED……2ND RESPONDENT
EMUNY MARA CAMP LIMITED……3RD RESPONDENT

RULING ON PRELIMINARY OBJECTION

1. By Notice of Appeal dated 3rd September 2008 and filed in the Tribunal the same day, the Appellant, acting through the law firm of Hamilton, Harrison & Mathews, on its own behalf and on behalf of its member associations appealed against the 1st Respondent's grant of an Environmental Impact Assessment (EIA) licence to the 2nd and 3rd Respondents for reasons, among others, that:

    (i) the 1st Respondent failed to revoke or suspend the licence granted to the 2nd and 3rd Respondents as requested by the Appellant by letter dated 14th July 2008 by which the Appellant informed the 1st Respondent that the area where the development in question was being located is an ecologically-sensitive area, being a habitat for the endangered Black Rhino which is a species protected under the Convention on International Trade in Endangered Species of Flora and Fauna (CITES) and that the area, where the Respondents had begun construction is not the one allocated to them by Narok County Council;

    (ii) the 2nd and 3rd Respondents failed to comply with the 1st Respondent's approval conditions, namely: that the 2nd and 3rd Respondents adhere strictly to an Environmental Management Plan (EMP) developed throughout the project cycle (condition No. 3) and that the 2nd and 3rd Respondents ensure that during the construction phase, project operations adhere to The Factories (Building, Operations and Works of Engineering Construction) Rules (Legal Notice No. 40 of 1984);

    (iii) the 1st Respondent failed to issue a Stop Order against the 2nd and 3rd Respondents under section 67 of the Environmental Management and Co-ordination Act (EMCA) of 1999;

    (iv) the Minister's moratorium freezing developments in the Maasai Mara Ecosystem is still in force;

(v) continued development in the Maasai Mara Ecosystem in the absence of a Management and Development Plan would have long-term adverse impacts on the ecosystem; and that

(vi) the 1st Respondent had placed the 2nd and 3rd Respondents' application on hold, pending the gazettement of Maasai Mara Management and Development Plan and lifting of the Moratorium by the Minister for Tourism but subsequently and before the lifting of the Moratorium and development of the Plan, issued an EIA licence in favour of the development in question.

2. For the reasons stated, the Appellant sought, from the Tribunal, an order stopping the development in question, revocation of the EIA licence issued by the 1st Respondent to the 2nd and 3rd Respondents and a restoration order directing the 2nd and 3rd Respondents to restore the site in question, specifically, the habitat and breeding ground for Black Rhinos to its original form.

3. The 1st Respondent, through the law firm of Mereka & Company Advocates did, on 13th November 2008, filed Reply in which it denied the Appellant's allegations, stating, among other things, that:

(i) the appeal is defective because Kenya Tourism Federation had not authorized its filing;

(ii) the Tribunal lacks jurisdiction to hear and determine the appeal because there was no decision made by NEMA or any of its officers or committees on the alleged breach of its development approval conditions and on this basis, the 1st Respondent reserved the right to raise a preliminary objection to the appeal;

(iii) the Appellant's request to the 1st Respondent to revoke or suspend the 2nd and 3rd Respondent's EIA licence had to be first reviewed by the Standards and Enforcement Review Committee before the Committee advises the 1st Respondent on revocation or cancellation, but the 1st Respondent had not received any advice from the Committee to revoke, cancel or suspend the EIA licence issued to the 2nd and 3rd Respondents, and therefore, the 1st Respondent could not act *suo moto* on the request in view of section 67 of EMCA. Therefore, the appeal was pre-mature, misconceived and the Tribunal lacks jurisdiction to hear it, more so because failure by the said Committee to respond to the Appellant could not constitute inaction;

(iv) under section 129 of EMCA and Rule 4(2) of the National Environmental Tribunal Procedure Rules (Legal Notice No. 191 of 2003) (herein after, Tribunal Rules of Procedure), the appeal is time-barred in so far as it was filed on 3rd September 2008, seeking revocation of an EIA licence issued on 14th January 2008;

(v) the Ministry of Tourism issued a Moratorium on developments in the Maasai Mara ecosystem in August 2006 while the 2nd and 3rd Respondents' EIA licence application was submitted on 22nd May 2006, therefore, the Moratorium did not apply to the 2nd and 3rd Respondents' EIA licence application. In any case, the 1st Respondent consulted with the Ministry of Tourism and was informed that the Moratorium did not apply to the development in question;

(vi) The Appellant did not file any objection to the development in question during the EIA process. Therefore, the appeal was an afterthought and a belated attempt to re-open the review of the EIA whose approval process was conducted strictly in accordance with the law;

(vii) The 2nd and 3rd Respondents confirmed in writing their willingness to comply with EIA licensing conditions; and that

(viii) The appeal was brought in bad faith because some of the Appellant's members are in competitive businesses to the development in question.

4. For the reasons stated, the 1st Respondent contended that it was entitled to the costs of the appeal.

5. The 2nd and 3rd Respondents filed their Response to the appeal through the law firm of Lumumba, Mumma and Kaluma Advocates on 29th September 2008. In their Reply, the 2nd and 3rd Respondents contended, among other things, that:

(i) the appeal is fatally defective in form and substance and does not provide a basis in law upon which the Tribunal could grant the orders sought;
(ii) Kenya Tourism Federation lacks the *locus standi* to institute the appeal;
(iii) there is no decision by NEMA or any of its officers or committees on the alleged breach of the 2nd and 3rd Respondents' EIA licence conditions that can form the basis of an appeal to the Tribunal;
(iv) the appeal is time-barred, having been filed more than sixty days after an EIA licence was issued to the 2nd and 3rd Respondents;
(v) issues concerning the possible impacts of the development in question on the Rhino and other environments in the area have been determined in the EIA process and cannot be re-opened; and that
(vi) the 2nd and 3rd Respondents have fully complied with all legal requirements pertaining to the proposed development.

6. Subsequent to the filing of pleadings as aforestated, the Respondents did, on 17th November 2008 raise Preliminary Objections based on matters averred in paragraphs 2, 3, 4-6, 13 and 18 of the 1st Respondent's Reply to the appeal, seeking an order to strike out the appeal.

7. The Preliminary objection was heard on 18th November 2008. At the hearing, the Appellant was represented by Mr. Murugara of Hamilton, Harrison & Mathews Advocates, the 1st Respondent by Mr. Ng'ang'a of Mereka & Company Advocates and the 2nd and 3rd Respondents by Professor Albert Mumma, assisted by Ms. Pamela Samba.

8. For the 1st Respondent, Mr. Ng'ang'a challenged the appeal on grounds that: the Tribunal lacks jurisdiction to entertain the Appeal as filed; the Appellant is a stranger to the matters in question because it was not a party to NEMA's process of approval of the development in question and therefore lacks capacity to file the Appeal; and that the Appeal is time-barred.

9. Mr. Ng'ang'a argued that the Tribunal lacks jurisdiction to entertain the appeal because it has been brought under section 129(2) of EMCA, yet there is no decision by NEMA or any of NEMA's committees or officers which could form the basis of an appeal under the provisions of law. He stated that the Appeal was based on the 1st Respondent's refusal to suspend or revoke an EIA licence issued to the 2nd and 3rd Respondents, yet, before NEMA acts as requested, it would have to be advised by the Standards and Enforcement Review Committee (SERC) established under section 70 of EMCA which had not issued any decision since the Appellants' revocation or cancellation request was forwarded to it on 14th July 2008. Mr. Ng'ang'a maintained that the SERC is an independent body authorized to exercise advisory powers donated to it under section 67 of EMCA and that it exercises such powers independently of NEMA. It had not yet advised NEMA on whether or not to revoke the EIA licence at issue and NEMA, he asserted, cannot act *suo moto*. In any case, Mr. Ng'ang'a argued, the SERC is required under section 70 of EMCA to sit once in every 3 months and that the Appellant wrote to it on 14th July 2008 seeking a cancellation or revocation of the 2nd and 3rd Respondents' EIA licence. Three months from that date would lapse on 14th October 2008. Therefore, the Appellant's appeal filed on 3rd September 2008 was pre-mature.

10. Mr. Ng'ang'a further argued that the Appellant is a stranger to NEMA's process of issuing an EIA licence to the 2nd and 3rd Respondents because it was not a party to the Environmental Impact Assessment (EIA) Study process, neither was it a party to the process of issuing the EIA licence in question. He stated that the Appellant did not, at any time object to the EIA Study Report or process or make a comment, despite the 1st Respondent's advertisement of the Report and process in print media and in the Kenya Gazzette. Therefore, it was not a party to the eventual decision by NEMA to approve the EIA Study Report in respect of the development in question and issue a licence for it and is a stranger that lacks capacity to file the appeal. In support of the 1st Respondent's case, he produced as authority, Nairobi High Court Miscellaneous Application No. 391 of 2006 (*In the Matter of an Application by Overlook Management Limited and Silver Sand Camping Site Limited for Judicial Review and Orders of Certiorari and Prohibition* and *In the Matter of the National Environment Tribunal at Nairobi*, Tribunal Appeal No. NET/06/2005), stating that according to the decision in that case, the Appellant was a stranger to the whole EIA study process and the process of issuing the 2nd and 3rd Respondents with an EIA licence, neither was it a party aggrieved by NEMA, having not appeared or made representations before NEMA and was therefore a stranger lacking

locus standi to appeal. Mr. Ng'ang'a argued that as a stranger, the only recourse available to the Appellant was to file a case in the High Court under section 3 of EMCA, more so because the Appellant stated in its Notice of Appeal that the appeal was brought under sections 3(3) and 126(2) of EMCA.

11. Mr. Ng'ang'a also argued that the appeal was founded wrongly on section 126(2) of EMCA and therefore, is misconceived because that section does not confer jurisdiction; it only provides for modes of conduct of proceedings by the Tribunal. He maintained that no other provision than section 129 of EMCA confers jurisdiction on the Tribunal and that having founded the appeal on the wrong provisions of law, the appeal is misconceived and should be struck out.

12. Mr. Ng'ang'a also argued that the appeal is time-barred because it was filed on 3rd September 2008, more than three months after the 2nd and 3rd Respondents were issued with an EIA licence on 14th January 2008. Therefore, the appeal was filed after the stipulated 60 days and was in contravention of the Tribunal Rules of Procedure, specifically, Rule 4. He stated that under Rule 7 of the said Rules of Procedure, the Appellant could apply for enlargement of time, but it never did and the Tribunal could not, of its own, enlarge time in the absence of an application to that effect.

13. Mr. Ng'ang'a also argued that the Appellant lacks capacity to file the appeal because it states in its Notice of Appeal and Statement that it is a society registered under the Societies Act, yet the appeal has been filed in its name. He argued that a society registered under the Societies Act cannot sue in its own name. Suits can only be brought in the name of its members or officials. He produced, as authority, the decision in High Court Miscellaneous Application No. 427 of 2005 (*In the Matter of an Application by Simu Vendors Association for Prerogative Orders of Judicial Review* and *In the Matter of the Local Government Act – Simu Vendors Association v. The Town Clerk, City Council of Nairobi & the Minister of Local Government*), stating that according to the decision in that case, a society registered under the Societies Act is an unincorporated body and does not have the capacity to sue or to be sued in its own name in legal proceedings. He also submitted the High Court's decision in Civil Appeal Case No. 764 of 2007 (*Abdinoor Dima Jillo (Suing as the Secretary for and on behalf of Damesa Association v. County Council of Isiolo & 4 Others*) in which it was also ruled that an association established under the Societies Act is permitted to sue and can be sued, but in the name of office bearers and not in the name of the society itself. He urged the Tribunal to find that a suit cannot be entertained in the name of a registered association. In his view, a suit wrongly filed in the name of a registered association is a suit that never existed and cannot be entertained. On these bases, Mr. Ng'ang'a urged the Tribunal to strike out the Appeal. He stated that if the Appellant wished to pursue any claim, it could only do so in the High Court, under section 3(3) of EMCA.

14. Professor Mumma for the 2nd and 3rd Respondents fully associated himself with and adopted Mr. Ng'ang'a's arguments in support of the Preliminary Objection. He argued that procedural justice should be observed because it determines the consequences of an appeal to the Tribunal on a developer. He stated that under section 129(4) of EMCA, one

needs only file a Notice of Appeal against a development to obtain a stay of a development activity without having to justify the merits of an appeal, yet the effects of an order of stay is to halt expensive development activities, without any justification by the Appellant. Therefore, it was important to observe procedural justice. On that basis, he argued that no decision had been made under section 129(2) of EMCA. He stated that there could not have been a decision made by the 1st Respondent because its decision was predicated on the decision of the SERC, which had not made any decision. Therefore, the appeal lacks basis. He further stated that on NEMA's part, there could not have been a failure to revoke or suspend a licence before the SERC's advice to NEMA. In the absence of SERC's advice, any decision by NEMA would be in breach of the law. In any case, if any party were to raise issues with NEMA's failure to respond to a revocation or cancellation request, that party could not be the Appellant because the Appellant was not a party to NEMA's EIA processes in relation to the 2nd and 3rd Respondents. It neither raised objections, nor made comments on the proposed development. Therefore, once an EIA licence was issued, the Appellant could not ask for it to be cancelled.

15. Professor Mumma further stated that it was possible for the Appellant to participate in protection of the environment in the Tribunal, but it could only do so as an intervener under the Tribunal Rules of Procedure upon furnishing relevant documents. He further stated that the Tribunal should not assume that everyone who emerges to file an appeal against a developer has legal capacity to do so. On that basis, he stated that Kenya Tourism Federation, the Appellant in this case, would not fit in the terms of a third party to the proceedings, unless it first brought its constitution to allow a determination of its objectives in order for the Tribunal to decide whether or not its objectives are compatible with environmental conservation. Without any showing of a recognizable interest in the matter at hand, the Appellant could only raise any issues of concern with the Public Complaints Committee on Environment (PCC).

16. Further, Professor Mumma stated that the appeal was an attempt to re-open an EIA licence issue that had been concluded. Moreover, the Appellant sought an order that could not be granted in law. It sought an order to permanently cancel or revoke the 2nd and 3rd Respondent's EIA licence, yet according to the applicable provisions of law, a licence can only be suspended for a maximum of up to 24 months to enable a developer to prepare a management plan. Therefore, the Tribunal lacks jurisdiction to issue an order permanently revoking an EIA licence already granted and directing the 2nd and 3rd Respondents to restore the location of the development to its original form.

17. Professor Mumma also submitted that the appeals to the Tribunal must be filed within 60 days of the date of decisions complained about. If a party fails to file an appeal within time, it is permitted to apply to the Tribunal for enlargement of time but in the present case, the Appellant failed to make such an application. Moreover, he stated, Kenya Tourism Federation is not an incorporated entity at all and cannot bring an appeal in the Tribunal in its name. Therefore, the appeal is time-barred and should be struck out.

18. In response to the arguments presented against the appeal by Counsel for the Respondents, Mr. Murugara for the Appellant stated that the Respondents had not

complied with Rule 9 of the Tribunal Rules of Procedure which requires notices of preliminary objections to be filed in the Tribunal within thirty days of the date a party objecting was notified of the appeal.

19. Further, Mr. Murugara stated that what Counsel for the Respondents put forward to the Tribunal as matters of preliminary objection were matters for the Tribunal to inquire into when it conducts a hearing and cannot be determined in a preliminary application.

20. In response to arguments that the Appellant lacks locus standi to sue because it has sued in its name rather than the names of its members or officials, Mr. Murugara, faulted the authorities cited by Counsel for the Respondents on the basis that the authorities deal with civil suits in ordinary courts of law, which are governed by the Civil Procedure Rules, unlike appeals filed in the Tribunal, which are governed by the Tribunal's Rules of Procedure. He stated that the Tribunal is not bound by technicalities in law; neither can it be bound by strict procedural requirements.

21. Further, he denied assertions that Kenya Tourism Federation, the Appellant herein lacks capacity to sue, stating that the Federation has made representations before the Tribunal before, but objections to its appearance have never been sustained. He cited the Tribunal case Number NET/07/2006 (*Narok County Council & Kenya Tourism Federation v. National Environment Management Authority (NEMA), Ben Kipeno, Kenya Investment Authority & Others (*Interested Parties*))* in which the Federation was the 2nd Appellant. He argued that at the time the case was deliberated upon and a decision made thereon, Professor Mumma, Counsel for the 2nd and 3rd Respondents was a member of the Tribunal and agreed that the Federation could appeal to the Tribunal in its own name on behalf of its members. Therefore, Counsel cannot now be heard to argue that the Federation lacks jurisdiction to file an appeal in the Tribunal on behalf of its members. Mr. Murugara maintained that the Tribunal must have a good reason to depart from its previous decision in NET/07/2006 that the Federation has capacity to file appeals in the Tribunal on behalf of its members.

22. Regarding Mr. Ng'ang'a's contention that the Tribunal lacks jurisdiction to entertain the appeal because NEMA had not made any decision that could be appealed, that the SERC too had not made any decision and that in any case, the SERC is a committee that functions independently of NEMA, Mr. Murugara stated that his careful reading of section 70 of EMCA which establishes the SERC indicates that the SERC is a committee of the Authority, meaning, it is a committee of NEMA and therefore, the right person to be sued is NEMA.

23. In response to the argument that no decision had been made that could be the subject of an appeal, Mr. Murugara stated that Kenya Tourism Federation wrote to the SERC, and by extension, NEMA on 14th July 2008, asking it to suspend or revoke the EIA licence issued to the 2nd and 3rd Respondents on the basis that the location where they had begun construction works was not the one allocated to them by Narok County Council and that the area was ecologically sensitive, being a habitat and breeding ground for the Black Rhino. In the letter, the Federation gave the SERC one week within which to respond, in

view of the urgency of the matter. The SERC did not, and has not responded at all. Mr. Murugara stated that the SERC's failure to respond by issuing a written decision was itself a decision that could be appealed in the Tribunal under section 129(2) of EMCA. He said that the Federation could not have waited beyond the seven days it gave the SERC to make a decision because the SERC sits only once in three months. Mr. Murugara further stated that because the SERC failed to make a decision, the Federation brought the matter concerning the 1st Respondent's issuance of a licence to the 2nd and 3rd Respondents under section 126(2) and 3(3) of EMCA for the Tribunal to investigate.

24. Regarding the contention by Counsel for the Respondents that the only avenue for redress of any grievances that the Federation might have is a case in the High Court under section 3(3) of EMCA, Mr. Murugara stated that a person aggrieved by an EIA licence issued by the 1st Respondent has various remedies. Such a person may file a case in the High Court, but without prejudice to any other remedies for redress available under EMCA and has a choice to either file a case in the High Court or an appeal in the Tribunal.

25. Mr. Murugara also addressed the Respondents' Counsels' argument that Kenya Tourism Federation is a stranger to the EIA licensing processes and to the issuance of the EIA licence in question because it did not object to the issuance of the licence in the first place. Mr. Murugara first stated that one of its members, the Ecotourism Kenya was a party to the EIA study and EIA licensing process and therefore the Federation was not a stranger, but added that the Appellant was not in the Tribunal to argue Ecotourism's objection to the issuance of an EIA licence to the 2nd and 3rd Respondents. Further, he stated that the Federation had not filed the appeal against the issuance of an EIA licence to the 2nd and 3rd Respondents, but that the appeal was filed because the 2nd and 3rd Respondents had breached the EIA licence conditions by commencing construction works on the wrong site, which happens to be a habitat and breeding ground for endangered Black Rhinos and that the Appellant would show, through evidence that it has an interest in environmental conservation just like any other environmental organization. He stated that showing of the Appellant's environmental objectives is not a matter that can be determined in a Preliminary Objection. It can only be determined by evidence, in the course of hearing the appeal.

26. Regarding the Appellant's capacity to file the appeal, Mr. Murugara further argued that a distinction has to be drawn between appeals filed in the Tribunal and cases filed in the High Court. He stated that Rule 8 of the Civil Procedure Rules regarding capacity to sue applies with regard to suits in the High Court but not appeals filed in the Tribunal. He asserted that the Tribunal cannot determine which parties can come before it and that on environmental matters, any aggrieved person can file an appeal in the Tribunal. Moreover, Mr. Murugara stated, EMCA provides that any aggrieved person can file an appeal and that any person includes any body of persons, including registered associations. He further stated that strict rules regarding who can bring an appeal to the Tribunal should not be followed and that rules regarding who can bring an environmental claim should be relaxed and presented, as authority, two cases to show that the trend shows a relaxation of rules regarding who can bring a claim in an environmental matters, namely: Transkei Supreme Court Case No. 1672/95 (*Wildlife Society of Southern Africa*

and Others v. Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others) and Mombasa High Court Civil Case No. 97 of 2001 (*Nzioka & 2 Others v. Tiomin Kenya Limited*). He stated that according to decisions in the two cases, a society should have *locus standi* on environmental matters. In any case, Mr. Murugara stated, the appeal was brought pursuant to section 67 of EMCA and filed under section 126(2) of the same statute.

27. Regarding the contention that the appeal is time-barred, Mr. Murugara stated that for the Appellant, time began to run on 21st July 2008, at the expiry of the one week within which the SERC was requested and expected to respond, and not 14th January 2008 when the EIA licence was issued.

28. In closing, Mr. Murugara stated that the Appellant was in the Tribunal pursuant to section 76 of EMCA and that the appeal had been filed under section 126(2) of EMCA and that the Tribunal had jurisdiction to investigate the matter and make a decision, especially where the matter raised was purely environmental. He stated that the Appellant was not opposed to the 2nd and 3rd Respondents' development and that it would have no problem if the development is moved to the approved and appropriate location, away from the Black Rhino breeding ground. He asserted that it was appropriate for the Appellant to ask the Tribunal for a restoration order because such an order would be appropriate to restore the habitat and breeding ground of the Black Rhino, which is an endangered species. He urged the Tribunal to reject the Preliminary Objection and proceed with hearing of the appeal.

29. Counsel for the Respondents did have a chance to respond briefly to Mr. Murugara's arguments. Mr. Ng'ang'a's response was that: the Appellant's Counsel agreed to hearing of the Preliminary Objection on the date it was argued and was precluded from arguing that the application was not filed within 30 days as required by the applicable rules; that it cannot be argued that the Tribunal is not bound by technicalities because the Tribunal is bound by rules of law and it had not been shown that laws of procedure do not apply to the Tribunal; that rules of procedure are hand-maiden of justice and the Tribunal's investigation of matters presented to it must be within the law; the fact that the Tribunal has rendered a decision allowing Kenya Tourism Federation to appeal in the past does not mean that the Tribunal cannot re-consider the issue concerning the Federation's capacity to appeal and can shut its eyes to the authorities presented on locus standi; the Tribunal's previous decisions in which the Federation participated as Appellant can be vacated; and that Counsel for the Appellant's contention that SERC is a committee of NEMA as urged indicates that Counsel did not read EMCA "wholesomely." If he did, he would have noted that SERC functions independently of NEMA, NEMA is not in full control of it and that its decisions bind NEMA.

30. Mr. Ng'ang'a also argued that appeals cannot be filed in the Tribunal under section 126(2) of EMCA. He stated that section 126(2) of EMCA only states what the Tribunal can do once an appeal is filed but that the present appeal could only be filed under section 129(2) of EMCA, in which case, time to file appeal began to run when the Appellant

learnt about the 1st Respondent' decision to issue an EIA licence to the 2nd and 3rd Respondents, which was in June of 2008.

31. Professor Mumma also had a chance to respond to Mr. Murugara's Reply. He stated that rules of procedure are meant to be complied with, otherwise the Tribunal would not be doing justice to Kenya's legal system; it is not true that the Tribunal upheld the Federation's capacity to appeal in NET/07/06 because the Federation's capacity was objected to; capacity to file an appeal must be decided on a case-by-case basis because there is no rule of law which states that every party can appeal; rules of procedure matter, otherwise there would be no Tribunal Rules of Procedure; if the Appellant's objective is an inquiry into matters concerning the EIA licence in question, it should forward a complaint to the PCC; Narok County Council's issuance of a Stop Order against the 2nd and 3rd Respondents' development is a matter that cannot be considered in the Tribunal; and that a party must be someone who is lawfully before the Tribunal and not just any of the 34 million Kenyans. For the reasons stated, Counsel for the Respondents urged the Tribunal to dismiss the appeal.

32. The Tribunal has carefully considered all arguments presented before it in the Preliminary Objection brought on behalf of the Respondents. The Tribunal notes that a Preliminary Objection must be based on points of law only, whose determination would fully dispose of an appeal and make further consideration of matters presented unnecessary. Any matter requiring further investigation and matters that can only be determined by evidence cannot be presented in a preliminary objection. With that in mind, the Tribunal proceeds to consider and to rule on the points of Preliminary Objection raised as hereunder:

33. The Tribunal has considered the argument by Counsel for the Appellant that the Preliminary Objection was not presented in a timely manner as required by the applicable Tribunal Rules of Procedure, having been filed more than thirty days after the appeal was filed. The Tribunal agrees with Counsel for the Respondents that having agreed to presentation and hearing of Preliminary Objections and having fully participated in the hearing thereof, Counsel for the Appellant is precluded from raising objection to the timing of the application. Therefore, the Tribunal proceeds to consider arguments raised in the Objection.

34. It has been argued that the Appellant lacks locus standi to file the appeal for reasons that there is no decision by NEMA that could form the basis of an appeal, that the Appellant is a stranger to matters concerning the issuance of the 2nd and 3rd Respondents with an EIA licence and that the Appellant, being a registered association, cannot appeal in its own name.

35. Counsel for the Respondents argued that no decision has been made by NEMA or any of its officials or committees that could form the basis of an appeal to the Tribunal. In response, Counsel for the Appellant maintains that subsequent to NEMA's issuance of an EIA licence, the Appellant, under section 67 of EMCA, requested the SERC to suspend or revoke the licence for reasons, among others, that the 2nd and 3rd Respondents had

commenced construction works in the wrong place, which is also a habitat for the endangered Black Rhino and that in view of the urgency of the matter, the Appellant gave the SERC seven days within which to respond, but it never did. Counsel for the Appellant maintains that failure to respond by the SERC constitutes a decision by the SERC, which, in his arguments, is a committee of NEMA and that in the circumstances, NEMA is the right party to sue for SERC's failure to respond. Out of these arguments, a number of questions emerge, whose answers shall constitute the Tribunal's decision on the same.

36. First, the issue whether or not a party has *locus standi* to file an appeal is a matter of law that has been properly argued in the Preliminary Objection. The key questions arising are: whether failure by the SERC to respond within seven days as requested constitutes a decision that can be appealed to the Tribunal. A decision can be described as a determination made after consideration of the facts and the law. Usually, an agency's decision has to be final to constitute the basis of an appeal. However, in this case, the SERC did not at all respond to the Appellants letter to act within seven days thereof. It was not denied that until the time the Preliminary Objection was argued in the Tribunal, the SERC had not responded to the Appellant's letter of 14th July 2008. In those circumstances, did the SERC's failure to make a decision amount to a decision? The Tribunal's answer is, yes, considering that the SERC did not at all respond to the Appellant's letter of 14th July 2008, it can be, and is understood that the SERC decided not to respond to the request to suspend or revoke the 2nd and 3rd Respondent's EIA licence. The decision not to respond to a request expressly made as a matter of urgency, which request also expressly indicates the urgency of the environmental matter at hand, is a decision not to act as authorized by section 67 of EMCA, which can be appealed to the Tribunal. The Tribunal has carefully considered the argument that it was not proper for the Appellant to ask or expect SERC to act within one week as requested. The Tribunal takes the contrary view, that in view of the urgency of the environmental matter raised by the Appellant, it was not unreasonable for it to ask the SERC to respond within one week, more so because the SERC sits only once in three months. The SERC should have, at least, responded to state why it would or would not act as requested by the Appellant. Had the Appellant waited for three months to elapse before concluding that the SERC would not act on its request at all, the Appellant's claim would have been time-barred. A related and equally pertinent matter is whether NEMA is the proper party to be sued for SERC's decision not to act as requested by the Appellant.

37. Counsel for the 1st Respondent argued that under section 70 of EMCA, the SERC is constituted to act independently of NEMA and that NEMA is bound by decisions of the SERC and cannot act to suspend or revoke an EIA licence until the SERC advises it to do so. Later, Counsel for the 1st Respondent stated that although SERC is a committee of NEMA, it should be considered as a body acting independently of NEMA and therefore, NEMA cannot be sued for its decisions. In determining whether the SERC is or is not a committee of NEMA, the Tribunal has carefully considered the provisions of section 70 of EMCA, which provide for the establishment of the SERC. Section 70 (1) of EMCA explicitly states that:

"There is hereby established a Standards and Enforcement Review Committee to be a committee of the Authority."

38. Clearly, the SERC is, in law, a committee of the Authority. What is the "Authority"? The Authority is defined in section 2 of EMCA in the following terms, "Authority" means the National Environment Management Authority established under section 7;" There can be no doubt in law or in fact that the SERC is a committee of NEMA and that for its decisions, including a decision not to act on a particular matter, NEMA is the proper party to appeal against, regardless of the binding nature of SERC's decisions on NEMA. Therefore, in the present appeal, NEMA was properly joined as the 1st Respondent.

39. In their objection to the Appellant's capacity to file the appeal, Counsel for the Respondents also argued that the Appellant is a stranger to matters concerning the 1st Respondent's issuance of an EIA licence to the 2nd and 3rd Respondents because the Appellant did not forward objections or comments for or against the proposed development during the EIA study process. The Tribunal has carefully considered the matter in light of the Respondents' submissions and also in light of the Appellant's Counsel's response. In the Notice of Appeal and documents subsequently filed in support thereof, it is expressly indicated that the Appellant is acting for itself and on behalf of its named member associations. One of the members of the Appellant indicated in the Appeal is Ecotourism Federation. Counsel for the Appellant stated that Ecotourism Federation participated in the EIA study process for the development in question. To that extent and to the extent that the Appellant is, in this appeal, acting on behalf of Ecotourism, among others, it is not a stranger to matters pertaining to the issuance of an EIA licence to the 2nd and 3rd Respondents.

40. Further, the Tribunal has considered argument by Counsel for the Appellant that in law, any person aggrieved by an environmental matter arising out of the issuance of an EIA licence can appeal to the Tribunal and the Respondents' Counsels' arguments that any person cannot be any of the 34 million Kenyans or anyone else who has not participated in the EIA process. On these matters, the Tribunal is guided by section 129(2) of EMCA which makes provisions for appeals against decisions of NEMA and its committees. That section states that unless otherwise expressly provided in EMCA, decisions of the Director General of NEMA, NEMA and committees of NEMA may be appealed to the Tribunal, without any indication that only certain persons may appeal and not others. There is no provision in EMCA that limits appeals to the Tribunal to only persons who have participated in the EIA or EIA study process. The Tribunal's position is strengthened by section 126(2) of EMCA, which states, in part, that "The Tribunal shall, upon an appeal made to it by **any party**….[emphasis added]." Clearly, any party who has environmental concerns arising out of a decision of the Authority, its Director General or committees can appeal to the Tribunal. Counsel for the Appellant submitted authorities, including Supreme Court Case No. 1672/95 (*Wildlife Society of Southern Africa ad Others v. Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*) and Mombasa High Court Civil Case No. 97 of 2001 (*Nzioka & 2 Others v. Tiomin Kenya Limited*), which indicate that the trend of judicial decisions in Kenya and in other jurisdictions is to expand, rather than restrict *locus standi*. Moreover, under

section 3(3) of EMCA *locus standi* has been expressly expanded. *Locus standi* could not have been expanded only for the High Court and not the Tribunal which has been created expressly by the same law expanding it. If that were the case, nothing would have been easier than for the Legislature to state so expressly.

41. The other argument related to the Appellant's capacity to sue is that as a registered association, it can only sue in the name of its members or officials. While Counsel for the Respondents presented court decisions on suits in the High Court by or against associations stating that such suits shall be filed in the name of members or officials of the associations, Counsel for the Appellant stated that Kenya Tourism Federation is properly before the Tribunal and that in past proceedings, it has been permitted to act in the same capacity. The Tribunal takes the position that as authorized by EMCA in the provisions cited above, any aggrieved person can appeal. Therefore, Kenya Tourism Federation can be considered as a person or body aggrieved by SERC's decision not to act on its request, in an appeal against that decision to the Tribunal. The Federation can also appeal in a representative capacity, for and on behalf of its members. There is nothing in EMCA or any other law or regulation that prohibits aggrieved persons from being represented by lawyers or some other representatives in an appeal to the Tribunal. Authorization of representation by persons other than lawyers in appeals to the Tribunal is also necessarily implied from the language of Rule 2 of the Tribunal Rules of Procedure, which expressly states that:

> "appellant" means a person who makes an appeal to the Tribunal under section 129 of the Act, and includes a duly authorized agent or legal representative of that person."

42. In light of the express provisions of the applicable Rule of Procedure, the named associations can be represented by their umbrella association, namely, Kenya Tourism Federation. For the reasons explained, the Tribunal finds no justification to vary its decision to allow the Federation to appeal on behalf of its member associations in NET/07/06 aforementioned. The Tribunal finds that the issue whether or not the Federation is, by its objectives, permitted to raise environmental concerns requires investigation of the Federation's constitution, which can only be done in a full hearing. Such an investigation is not appropriate in a Preliminary Objection.

43. The other point of Preliminary Objection which was properly presented to the Tribunal regards time within which the appeal was filed. While Counsel for the Respondents argued that the appeal was filed under section 129(2) and therefore ought to have been filed within sixty days of NEMA's issuance of an EIA licence to the 2nd and 3rd Respondents, a fact which the Appellant knew about by June of 2008, Counsel for the Appellant argued that the appeal was not against the issuance of the EIA licence, and that it was a matter against SERC's refusal to act on the Appellant's request to suspend or revoke the EIA licence in question brought under section 126(2) of EMCA, for which time began to run on 21st July 2008, at the end of the one week within which to act that the Appellant gave to the SERC. The Tribunal notes that the appeal is against SERC's decision not to act on the Appellant's request and not against the 1st Respondent's grant

of an EIA licence to the 2nd and 3rd Respondents, *per se*. That fact was not rebutted by Counsel for the Respondents whose arguments in that regard focused more on the contention that the Appellant knew of the grant of an EIA licence in June of 2008 and ought to have appealed within 60 days of the issuance of the EIA licence. The Tribunal notes that appeals on the nature presented to it by the Federation can only be brought under section 129(2) of EMCA, in so far as it was an appeal against SERC's decision not to act on its request. Such a claim cannot be and was not presented as a referral for mere investigation under section 126(2) of EMCA. Therefore, the Tribunal considers submission by Counsel for the Appellant that the appeal is filed under section 126(2) of EMCA as an argument that indicates lack of proper appreciation of the applicable law. As Mr. Ng'ang'a rightly pointed out, section 126(2) of EMCA makes provisions for matters of procedure, once an appeal has been presented to the Tribunal. However, it would be too harsh and unfair to visit lack of proper appreciation of the law on the part of Counsel on his client who seeks to raise environmental concerns in an appeal to the Tribunal. Moreover, even Counsel Murugara himself towards the conclusion of his arguments stated, perhaps without consideration of his earlier statements, that the appeal was filed under setion129 of EMCA.

44. Having concluded that the appeal was and could only be filed under section 129(2) of EMCA, the Tribunal turns to consider the issue of time limitation. Was the appeal filed out side of the 60-day period allowed in law? It was contended for the Respondents that filing the appeal on 3rd September 2008, more than 60 days after the EIA licence in question was issued, without any application to extend time within which to appeal, was in breach of EMCA and applicable Rules of Procedure. On the other hand, Counsel for the Appellant contended that the appeal against SERC's decision was filed within time. Considering that the appeal is not against the issuance of the EIA licence, but rather, against SERC's decision not to act on the Appellant's request within one week, which expired on 21st July 2008, the Tribunal agrees with Counsel for the Appellant that the mandatory 60-day period began to run on 21st July 2008 and would expire on 21st October 2008. Therefore, the appeal which was filed on 3rd September 2008 was filed within time.

45. The Tribunal has also considered the argument by Counsel for the Respondents that the only avenue open to the Appellant to address its claim was a suit in the High Court under section 3(3) of EMCA because the Appellant was not a party to the EIA processes in respect of the development in question, or a complaint to the PCC. The Tribunal agrees with Counsel for the Appellant that depending on the nature of a claim, a party aggrieved by a matter concerning the environment which arises out of the issuance of an EIA licence is not limited to filing a case in the High Court under section 3(3) of EMCA, neither is such a party obligated in any way to merely complain to the PCC. It is the Tribunal's view that filing an appeal to the Tribunal is the appropriate way to address a grievance arising out of a decision of a committee of NEMA, which SERC is, as authorized under section 129(2) of EMCA. Such an appeal may be supported by arguments based on section 3, or even section 3 (3) of EMCA, without any implication that a matter presented by way of appeal to the Tribunal and supported by arguments

based on section 3 of EMCA should have been presented as a case to the High Court under section 3(3) of EMCA.

46. For the reasons explained, the Tribunal, unanimously, finds that the Respondents' Preliminary Objections lack basis in law and accordingly, fail.

DATED AND DELIVERED AT Nairobi this 4th day of December 2008.

Mr. Donald Kaniaru……Chairman

Dwasi Jane……Member

Stanley Waudo……Member

Joseph Njihia……Member

Tom Ojienda……Member