

**REPUBLIC OF KENYA**

**IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI**

**TRIBUNAL APPEAL NO. NET 03/05/2005**

**1. ADNAN KARAMA PETROLEUM LIMITED  
TRADING AS A.K. FILING STATION.....-APPELLANT**

***VERSUS***

**1. NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY .....-RESPONDENT**

**RULING**

1. By Notice of appeal dated 3<sup>rd</sup> May, 2005, the Appellant, through L. Wahome & Company Advocates appealed against an order issued by the Respondent to close a facility used as a petrol filling station on Plot. No. 37/262/7 located along Langata Road in Nairobi. The Respondent's close order, which led to this appeal, was communicated to the appellant by letter dated 4<sup>th</sup> March, 2005, following submission by the Appellant of an Environmental Audit Report on the facility and a site visit by the Respondent's officers.
2. The Appellant's grounds of appeal are that the Appellant was not given a chance to be heard before the close order was issued by the Respondent; that the appellant is fully licensed to operate the filling station for the year 2005; that the appellant stands to suffer irreparable damage if the close order issued is allowed to take effect; that the close order is illegal and unlawful as it does not conform to the mandatory provisions of law, especially the Environmental Management and Co-ordination Act (EMCA); that the issuance of the order was based on malice and amounts to victimization as the issuance was selective; that the order is too harsh and a breach of the appellant's rights to personal liberty, protection of property and investment rights; that the order is *malafides*; that it was actuated by unreasonable considerations and was *ultra vires* and illegal; that the order was ambiguous, unclear and not specified in a manner which could be understood and was therefore unenforceable; and that there is no likelihood that continued operation of the station jeopardizes the environment in any way.
3. Hearing of the matter was scheduled to commence on July 14, 2005 and all members of the Tribunal were present and ready to proceed. The Respondent was represented, not by in-house counsel, but by a firm of advocates, namely, Mohammed & Kinyanjui Advocates who were represented in the Tribunal by Ms. Jamilla Mohammed. The Appellant was represented by the law firm of L.Wahome & Company Advocates, but the

counsel, Mr. Wahome, was absent and sent a non-legal representative to inform the Tribunal that he was engaged in another case and to seek adjournment on his behalf. The matter was re-scheduled for hearing on August 1, 2005 after the Tribunal's direction that Appellant's counsel should furnish documents the Appellant wished to rely on and a list of witnesses before the next hearing date. On August 1, 2005, all members of the Tribunal were present and the Respondent was represented by Ms. Kinuthia from the Law firm of Mohammed & Kinyanjui Advocates. However, the matter had to be adjourned again because Mr. Wahome was absent and had asked Mr. Kithi, advocate, to hold his brief and seek the Tribunal's leave to withdraw from acting due to lack of instructions from the Appellant. Mr. Wahome had, reportedly, lost touch with Mr. Adnan Karama, the proprietor of the petrol station following Mr. Karama's arrest pursuant to a directive of the District Officer, Kibera. Having ordered Mr. Kithi to serve Mr. Karama with Mr. Wahome's application for leave to withdraw, the Tribunal set the leave application for hearing on August 5, 2005. On August 5, 2005, the Tribunal, in the presence of Ms. Kinuthia, the Respondent's counsel, granted Mr. Wahome leave to withdraw from acting and ordered that the proprietor of the petrol station who was absent, be served with a notice informing him that the matter had been scheduled for hearing on August 26, 2005 when the proprietor proceeded with his case on his own but subsequently hired the law firm of Madzayo Murima & Company Advocates which assigned Mr. Kithi to represent the Appellant. Therefore, at the request of the Appellant's counsel and subsequently the Appellant, the matter was adjourned three times before hearing commenced.

4. The Tribunal heard the matter on five occasions between August 26, 2005 and September 14, 2005. A total of seven witnesses, including the proprietor of the facility, Mr. Adnan Karama, testified. In addition to the Appellant's own testimony, Mr. Peter Kosmas Kamanda who runs a security firm operating in a building next to the Appellant's filling station and Mr. James Gichuhi Gichamba operating a business in the same building also testified in support of the Appellant's case. All these businesses are on one plot. The Appellant's environmental audit expert, Dr. G.N. Njuguna, did not appear to give evidence. The Respondent called to give evidence, Ms. Barbara Kenya, the District Environment Officer, Kibera Division, Mrs. Wilkister Magangi, the District Environment Officer, Dagoretti Division, Engineer Anthony Maina Kariuki, the Respondent's officer in charge of reviewing environmental impact assessment and environmental audit reports in the Compliance and Enforcement Division and Mr. Peter Ameyia Nyakundi, a geologist and an environmental impact assessment (EIA) expert from the Ministry of Energy, who had been assigned the responsibility of reviewing the Appellant's environmental audit report during the Respondent's process of review, which involved consultation with lead agencies.
5. The Tribunal visited the Appellant's filling station on August 29, 2005.
6. In evidence, the Appellant objected to the Respondent's order for closure of the business on the ground that the petrol business supports not only his livelihood, but also provides employment to a number of people who stand to suffer if it is closed. He explained that he took over the petrol station from a Mr. Jimmy Mwenja Komo who owed him some

money and upon the Tribunal's request, he produced a lease agreement dated 1<sup>st</sup> February 2003 between him and the said Komo, indicating that the interest sold was the residue of a lease for five years and three months beginning 1<sup>st</sup> September, 2001. The Appellant also produced a copy of a lease agreement between the seller and the owners of land on which the petrol filling station is located, whose terms were, among other things, that the leased premises would be used for the purpose of a business, namely a "fuel tank" whereby vehicles would refill from Langata Road, that is outside the plot on which the business is sited.

7. The Appellant denied that the petrol filling station did not have underground storage tanks as alleged by the Respondent, arguing that the Audit Report prepared by his audit expert indicated that there were underground storage tanks. For a forecourt, evidence was that the facility uses a tarmacked forecourt in front of the filling station which, in Mr. Adnan Karama's own words, was a "public pavement used for a forecourt." As a measure against the risk of fire, it was stated that the Appellant stops people from throwing cigarette butts near his filling station. It was also the Appellant's evidence that as a measure against the risk of fire, he keeps a fire extinguisher in the facility. Therefore, in the Appellant's view, the facility and its operations were in compliance with provisions of EMCA No.8 of 1999, the Petroleum Act, Cap. 116, the Physical Planning Act, Cap. 286 and other legislation that apply to petroleum activities in Kenya.
8. The Appellant also denied the Respondent's ground that the location of the facility was out of character with its surroundings, being in close proximity to residential houses, a bus stop, a butchery, an open restaurant (a *nyama choma place*) and therefore should be shut down. It was argued that petrol stations are never established in a bush and that all of them are adjacent to a road because that is where there is business. In the proprietor's estimation, the petrol station is located 50 metres from the bus stop. Other witnesses estimated the distance to be approximately 20 metres.
9. The Appellant expressed the belief that the Respondent was being used by multinational oil companies to drive him out of business, arguing that there were companies operating under worse conditions. Moreover, it was argued, there were small petrol dealers with similar petrol filling stations which the Respondent had not closed. A number of photographs of such petrol filling stations in various parts of Nairobi were presented to the Tribunal. The Tribunal took note of the photographs and emphasizes the need for the Respondent's urgent and consistent regulatory attention on petrol stations that may not already be complying with pertinent regulatory measures.
10. In the Appellant's view, what the Respondent should have done was to inform the Appellant of the provisions of EMCA and other laws that the facility and its operations breached and then specify conditions on which to operate, including measures the Appellant should undertake in order to bring the facility into compliance with the law. It was also the Appellant's contention that subsequently, the Respondent should then have given them reasonable time within which to comply, instead of ordering the facility to be shut down completely. In the Appellant's view, the 14 days the Respondent gave the proprietor to close down was a very short period of time.

11. The Appellant disputed that there have been numerous complaints from members of the public about the facility because no one has complained to the proprietor about the petrol station. A declaration with signatures solicited from employees of businesses operating within the same premises was presented to show that the signatories have not had any problem with the business and that they supported it. Witnesses testified that the Appellant went around asking people whether they had experienced any problem with the station and those who had not had any problem with the station signed the declaration. It was admitted that residents of the neighbouring estates and other users of Langata Road were not signatories to the declaration.
12. In the end, the Appellant requested the Tribunal to grant him time to put measures in place to bring his facility into compliance with the law even though in cross examination, the proprietor of the petrol station pleaded ignorance about all of the requirements that would bring his facility into compliance with the law.
13. Witnesses for the Respondent defended the decision to close down the facility on the basis of an Audit Report prepared by the Appellant's audit expert, complaints received by members of the public and the Respondent's officers' findings during visits to the Appellant's facility. It was the Respondent's evidence that the Audit Report prepared by the Appellant's expert presented a finding that the petrol filling station presented a major significant risk of harm to the environment and public health. Witnesses gave evidence that the Audit Report prepared for the Appellant was only recommendatory and did not indicate any aspect of the facility's operations that was right, which in their view, was a confirmation that the Appellant had not taken measures to ensure a safe and healthy environment.
14. Witnesses also testified that the existence of significant risk was confirmed when they visited the petrol station and found many 100-litre plastic containers with petrol in them, stored behind the petrol filling house. From the smell of the empty containers, they could tell that the content of the containers was petrol. They expressed the view that this presented a serious risk of fire. They also testified that they found a butchery and a cooking area within the same compound as the Appellant's petrol filling station and in close proximity and were concerned that the situation posed a public health risk.
15. Further, witnesses testified that they found that the Appellant's petrol filling station was not in compliance with requirements of EMCA, the Petroleum Act and other laws governing petrol stations. They testified that the Appellant's facility lacked a forecourt constructed in the manner required by law to prevent soil contamination and therefore presented a high risk of soil contamination. It was their testimony that the facility also lacked drains for petrol and petrol mixtures; neither did it have an interceptor into which petrol, in case of spillage and petrol mixtures, could be drained.
16. Further, the Respondent's witnesses faulted the ventilation system of the Appellant's facility, pointing that it comprised a ventilation pipe which seemed to be connected to an underground tank, but did not extend above the roof of the building structure constructed

above the tanks and there was no escape of petroleum vapour, creating a high risk of fire. It was also their evidence that the petrol filling station lacked a canopy to allow proper air circulation to safeguard the health of workers. They testified that during their two visits to the Appellant's facility, they noticed oil spills on the ground at the petrol station. They were, on one occasion, informed by the Appellant's employees that the facility used a nearby storm drain to drain untreated wastes from the petrol station. They testified that they found the Appellant's facility to be located very close to a bus stage and that this poses a danger of fire outbreak because pedestrians smoking along the side walk and on the Stage could throw down cigarette butts, thereby igniting fire.

17. On the basis of documents submitted before the Tribunal by the Appellant, it was the Respondent's evidence that the Appellant's facility was not in compliance with the law because what was produced as a certificate of compliance from the Director of Physical Planning lacked material particulars. It had no certificate number; approved development and approved plan numbers were missing; in the certificate, there was no reference to the documents submitted to the Director of Physical Planning and there was nothing to show what had been complied with; and it appeared to have been signed by an unauthorized person. The certificate was purportedly signed for the Director of Physical Planning but the name of the person who signed was not indicated. Moreover, Respondent's witnesses maintained, the filling station had no approved plans and expressed surprise that it was still in operation, even after so many orders were issued for its closure.
18. The Respondent's witnesses testified that their visit to the Appellant's facility was prompted by telephone calls from residents of the area and members of the public who complained that vehicles filling at the petrol station were obstructing pedestrians. Callers also complained about the smell from the petrol station and oil spillage at the nearby bus stop and that as the bus stage continues to be used by tankers delivering oil and vehicles filling at the station, pedestrians are pushed more and more into Langata Road. Witnesses testified that the complaints about obstruction were verified when Ms. Barbara Kenya visited the facility and found three *matatus* waiting to fill while a Metro Shuttle was behind them, trying to pick up passengers. They testified that they determined that there was a bus stage right by the petrol station because the place is marked by indentation from the road with broken lines.
19. The Respondent's witnesses denied that the Respondent is being used by multinational oil companies to drive the Appellant out of business and gave evidence that even well established petrol stations are being regulated by the Respondent. They gave the example of a well established petrol station on Kapiti Road that was recently penalized for allowing their storm drains to get clogged. They further explained that the Respondent is not selective in its regulatory duties and that other smaller petrol stations which, like the Appellant's, are not in compliance with the law are either being subjected to the legal consequences of their operations, or will be, once the district environment officers in the respective areas are notified or become aware of such situations.
20. It was also the Respondent's evidence that by letter dated February 11, 2005, which formed part of documents supporting the appeal, the Respondent's official pointed out to

the proprietor of the facility areas in which the Appellant's petrol station was not in compliance with the law. Witnesses emphasized that although the Appellant was asking for time to make improvements, the location of the filling station would not allow for improvement that would bring the petrol station into compliance with the law. They testified that the facility is too close to Langata Road; it currently uses a bus stage and a pedestrian side walk for parking of vehicles unloading and those filling petrol; it is too close to residential houses; it is also located at a high speed section of Langata Road, just after a round about and that there is hardly any room within the premises to construct a forecourt, drains, proper ventilation and that it has no room to allow vehicles to move in and out. It was the Respondent's testimony that because of these conditions, it was not only the Respondent that had ordered the petrol station closed but that orders to shut down operations had also been issued by the Ministry of Energy through its Permanent Secretary, the District Officer, Kibera, Nairobi City Council and the Office of the Provincial Commissioner by letter dated 30<sup>th</sup> May, 2005. Averments concerning orders for closure issued by the other government offices were not denied by the Appellant. Instead, the Appellant, through his counsel, Kithi, informed the Tribunal that the Appellant had been arrested in connection with an order for closure issued by the District Officer, Kibera.

21. During the hearing of the matter, it was stated and admitted by the Appellant's witness, Mr. Peter Kosmas Kamanda that there used to be a "*nyama choma*" place behind the building structure used as the filling station, but Mr. Gichamba, another of the Appellant's witnesses, testified that the *nyama choma* place was still in use. Adnan Karama, the proprietor of the petrol station, admitted that he could not chase or stop people from smoking near the petrol station. He also admitted that his facility did not have an interceptor for oil spill. It was also admitted that the Respondent gave the Appellant's proprietor a chance to be heard. The proprietor of the station, Mr. Adnan Karama, testified that upon receipt of the Respondent's letter dated 4<sup>th</sup> March, 2005, he visited Mr. Mbegera, an employee of the Respondent in the Compliance and Enforcement section and they held discussions in which aspects of the facility's operations that were not in compliance with the law were explained. The letter itself provides information to the same effect.
22. Pertinent issues arising for the Tribunal's consideration are: whether the Respondent gave the Appellant a chance to be heard; whether the Appellant's petrol station and its operations are in compliance with the law; whether the Appellant's petrol station and its operations pose actual and potential threats of damage to human health and the environment; whether the Respondent's notice to the Appellant to close down operations is *ultra vires* the Respondent's powers; whether in issuing a notice to the Appellant to close down operations, the Respondent was prompted by malice and bad faith; whether it is the Respondent that has the responsibility to carry out an environmental audit; whether the Appellant's facility and operations allow for implementation of mitigation measures to bring the Appellant into compliance with the law; whether it is reasonable for the Respondent to require the Appellant to close down the petrol station; and who pays litigation costs.

23. In addressing the issues, the Tribunal is not limited to EMCA, but has the authority to apply environmental law and policy in Kenya, including international law and policy to which Kenya ascribes, in accordance with Rule 38 of the National Environment Tribunal Procedure Rules, 2003, Legal Notice No. 191 of 2003. Being a framework law, EMCA is necessarily supported by sectoral laws, and in consulting lead agencies is appraised of such laws and policies.
24. The Respondent is a governmental regulatory agency established under EMCA and placed with a variety of responsibilities that are intended to ensure a clean and healthy environment for all persons in Kenya. Its responsibilities include carrying out surveys which assist in the proper management of the environment, initiating and evolving procedures and safeguards for the prevention of accidents which may cause environmental degradation and monitoring and assessing activities including activities carried out by lead agencies in order to ensure that the environment is not degraded by such activities.
25. In the process of carrying out its functions, the law allows the Respondent to utilize a variety of legal tools, including environmental audit. Environmental audit is a systematic evaluation of ongoing activities, projects and processes to determine how far they conform to any approved environmental management plan of the specific project and to sound environmental management practices. Environmental audits are provided for under Part VII of EMCA and the Environmental (Impact Assessment and Audit) Regulations of 2003, Legal Notice No. 101 of 2003. They provide a basis of the Respondent's authorization of continuation of activities, subject to specified conditions or stoppage of activities.
26. In deciding whether an activity conforms to sound environmental management practices and the nature of likely negative impacts, account must be taken of information provided in an environmental audit report, the status of the environment in which an activity is being undertaken, including the location, and legal requirements of the activity in question.
27. The Appellant did not deny the Respondent's evidence that the Respondent's officials visited the facility on two occasions during which they held discussions with the Appellant's staff, on the first occasion and with the proprietor himself, on the second occasion and the issues concerning operations of the petrol station and its closure were discussed before the order for closure was issued. The proprietor, Mr. Adnan Karama also admitted that he held discussions with Mr. Mbegera, one of the Respondent's officials in charge of compliance and enforcement in Mr. Mbegera's office during which matters concerning operations of his petrol station and its closure were discussed and he was given a chance to respond. Therefore, there was no due process that was not observed and accordingly, ground number 1 of the Appeal, namely that the Appellant was not given an opportunity to be heard, fails.
28. The Tribunal has also considered the Appellant's claim that he stands to suffer irreparable damage if his facility is closed down. The Tribunal notes that some loss, for

example, of jobs of the few employees of the Appellant might result from closure of the petrol station but holds the view that loss to the proprietor and anyone else dependent on the operations of his petrol station do not outweigh dangers to the public and the environment that the petrol station and its operations pose. The claim of irreparable damage can also not stand in view of the fact that the Appellant relocate and can re-constitute his petroleum operations elsewhere, in an appropriate location. The Tribunal notes that initially, the proprietor of the petrol station, Mr. Adnan Karama, was not an operator. He took over the petrol station to recover a debt owed to him by a Mr. Jimmy Komo. He may, in any case, very well have fully recovered the money owed.

29. There was also no evidence adduced whatsoever to prove that by ordering the Appellant's facility closed, the Respondent intended to victimize the Appellant, a small petroleum trader at the behest of multinational companies. Moreover, in his submissions, the Appellant's counsel did not at all mention malice on the part of the Respondent.
30. Evidence adduced before the Tribunal shows that the Appellant's operations are not only not in compliance with the law, they also pose significant risk of damage to public health and the environment. At page 18 of the Audit Report, the Appellant's environmental audit expert presents a finding of "major significant impacts." The finding is preceded on page 17 by a clear indication that "the operation of the petrol station will continue to expose it as a high fire risk activity." Further, on page 14, the expert presents a statement that fuel storage next to water supplies may contaminate the water.
31. The evidence before the Tribunal shows that the petrol station lacks a forecourt to prevent soil contamination with oil, lacks properly constructed underground petrol storage tanks, lacks a proper drainage system, does not pre-treat oil wastes before channeling them into a nearby storm water drain, that the facility lacks a canopy for proper air circulation, that the petrol station is too close to a bus stop, that the facility uses part of a public side walk and bus stop, that the facility lacks proper ventilation, that it is located on a high speed section of Langata Road close to a roundabout, that it obstructs pedestrians and vehicles on a section of Langata Road and that it presents a high risk of fire.
32. The proprietor, Mr. Adnan Karama, admitted that untreated wastes from the facility are drained into a nearby storm water drain. He also admitted that he cannot stop pedestrians on Langata Road from smoking or throwing cigarette butts near his petrol station, meaning that he cannot prevent the high risk of fire that his petrol station poses. He also admitted that when big trucks bring in petrol, they park along Langata Road and do not get into the facility, which implies that he uses part of a public road for his personal operations despite the high risk of fire it poses. He also stated that what he refers to as a forecourt for his petrol station could be called "a public pavement used for a forecourt," which rules out doubt that pedestrians and other users of Langata Road are affected by his operations. He also admitted that he has no idea how his underground tanks were constructed and that he did not have nor has he had any inspection certificate in respect of the tanks. He also stated that he knew about an interceptor "just the other day." It was even more surprising that although he kept a first aid box as the only first aid measure



against all the risks his facility pose, the proprietor, in his own words, did not know everything that should be contained in a first aid kit.

33. During the Tribunal's visit to the site, it was noted that the petrol station comprises a small building whose front wall borders a public side walk on Langata Road and from which petrol is dispensed from inside the building through a window which opens out to a public side walk. The effect is that vehicles which are refueling use the walk way as a forecourt and that is what the lease says the Appellant should do. The Tribunal also found that there is a bus stop very close to the building structure from which petrol is dispensed to the Appellant's customers; that trucks delivering oil at the station would block a large part of the road, thereby causing traffic jam and inconvenience to members of the public; that the side walk built for public use has been corroded as a result of the Appellant's activities; that the Appellant's facility shares a perimeter wall with residential houses; that there is no entrance for vehicles to the Appellant's petrol station from Langata Road and vehicles fill petrol from the road; that the petrol station lacks a canopy, neither does it have a forecourt; that what is referred to as a forecourt is actually a pedestrian walk; that there is a ventilation pipe from the appellant's underground petrol tanks that does not extend above the roof of the structure housing some two petrol dispensing machines; and that the petrol station has no drainage system. The Tribunal also noted in the lease agreement between the owners of Mawani House where the Appellant operates and Mr. Jimmy Komo, the person who sold the remainder of his lease to the Appellant, that the terms of the agreement include a clause to the effect that the petrol station "would be operated from Langata Road".
34. Further, the Tribunal finds that no evidence was adduced by the Appellant's witnesses, or anyone else to show that the Appellant's facility has not caused soil contamination, water pollution, air pollution and other negative impacts. The Audit Report prepared for the Appellant gives no indication of soil, water or other tests conducted to rule out the possibility of negative health and environmental impacts the facility may have caused. Moreover, G.N. Njuguna, the expert whom the Appellant's counsel, and earlier on, the proprietor promised to avail to explain the report, did not appear.
35. The Tribunal also finds that the Appellant was in breach of EMCA, the Petroleum Act and other laws governing dealings in petroleum products in Kenya. Rule 30(6) of the Petroleum Rules under the Petroleum Act requires petrol storage tanks to be fitted with a vent pipe leading into open air. On the contrary, the Appellant's vent does not extend above the roof of the structure he uses as a petrol station in which the vent is constructed, thus hindering petrol fumes from freely flowing and this poses a high risk of fire.
36. Rule 22 of the same Rules require that for petroleum tanks of a capacity of 100 gallons, the distance between one tank and another, as well as the distance between one tank and boundary installations or buildings should be between 15 and 50 feet, depending on the type of petroleum product sold. However, although the proprietor and witnesses indicated that the capacity of the Appellant's tanks are between 6000 and 9000 litres, the distances between the two tanks and the distance between the tanks and the boundary is less than 15 feet. In fact, the two tanks were adjoining. The Appellant produced an expired single


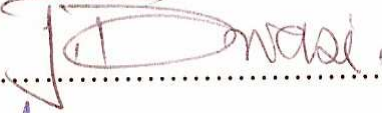



business permit from the City Council of Nairobi, which is not the licensing authority under the Petroleum Act.

37. The Tribunal finds that the certificate of compliance purportedly obtained from the Director of Physical Planning under the Physical Planning Act lacks material particulars. It does not indicate the approval plan number, approved sub-division and advisory plans and contains no special conditions certified in the notification of approval. No satisfactory evidence was produced to explain the absence of the material particulars. Therefore, the certificate of compliance fails to indicate what the petrol station is in compliance with. There was also no evidence tendered to show the type of business the premises where the Appellant operates were meant for, which is why the Tribunal asked to be shown a Deed Plan, but none was availed.
38. Most importantly, the Tribunal finds that the location of the Appellant's facility is inappropriate and its situation does not allow for necessary remedial measures to be taken to bring the facility and its operations into compliance with the law. The place is too small to allow for construction of a canopy, proper underground storage tanks, a proper drainage system and interceptor. Therefore, the deficiencies of the facility are not capable of being remedied, no matter how much time the Appellant is given and therefore, it is reasonable for the Respondent to require the facility to be closed down completely. Even if the environmental audit had been re-done, it would not have changed the decision to close down.
39. In submissions, the Appellant's counsel argues that the Respondent has no statutory authority to enforce laws governing petrol stations or to remove traffic obstructions. First, it is noted that allegations of the Respondent's lack of jurisdiction to apply other laws than EMCA was raised, for the first time, in the Appellant's counsel's submissions and the Respondent was never given a chance to respond to them during the hearing. Secondly, the Tribunal finds that the Respondent is not restricted to provisions of EMCA and that EMCA and other laws confer on the Respondent power to order facilities that pose threats of damage to the environment and public health to be shut down. The Tribunal draws the Appellant's attention to section 9 of EMCA, just to mention one of the relevant sections. Moreover, in the present case, there is no conflict between provisions of EMCA and the Petroleum Act. Even if there were, EMCA should prevail because under Section 148 of EMCA, other laws are subject to EMCA. Even if Section 148 did not exist, a more recent statute must be interpreted as repealing the older laws as correctly observed in the case of *Rodgers Muema Nzioka & 2 Others vs. Tiomin Kenya Ltd.* (High Court Civil Case No. 97 of 2001) submitted by the Respondent's counsel.
40. In submissions, the Appellant's counsel also argues that instead of ordering the petrol station to be closed down completely, the Respondent should have issued the Appellant with a restoration order. In this regard, the Tribunal draws Appellant's attention to section 108 (4) (c) and (d) of EMCA which state, in part, that an environmental restoration order may require a person on whom it is served to cease to take any action which is causing or may contribute to causing pollution or an environmental hazard.

41. In submissions, Appellant's counsel also, for the first time, raised the issue of the Tribunal's lack of jurisdiction to apply laws other than EMCA, arguing, in effect, that the Tribunal's application of laws governing petrol stations other than EMCA was outside of its mandate. In response, the Tribunal observes that this is a preliminary issue that the Appellant ought to have argued before the appeal itself was heard, as required by Rule 9 of the National Environmental Tribunal Procedure Rules, 2003, Legal Notice No. 191 of 2003. Having failed to raise the matter as a preliminary objection, the Appellant's counsel is precluded from presenting the argument in submissions. Further, the Tribunal can, under sections 129 (3)(b) and (c) and section 148 of EMCA apply other laws, including the Petroleum Act and the Physical Planning Act. For these reasons, the Appellant's counsel's argument of the Tribunal's lack of jurisdiction fails.
42. The Tribunal rejects the submission that under Section 68 of EMCA, it is the Respondent's obligation to conduct environmental audits. The Tribunal notes that the argument was presented for the first time in the Appellant's counsel's submissions and the Respondent did not have a chance to reply to it. Further, the Tribunal observes that section 68 of EMCA provides that "the Authority shall be responsible for carrying out environmental audit..." This does not imply that the Authority shall itself conduct audits. The Authority can ask proprietors of on-going activities to conduct environmental audits and ensure that they comply. The position is clarified by Rule 31 (4) (a) of the Environmental (Impact Assessment and Audit) Regulations, 2003, Legal Notice No. 101 of 2003, which states, "The proponent of an ongoing project shall undertake an environmental audit of the project within a period of twelve months from the date of publication of these Regulations." Under this Regulation, the Respondent has power to require the Appellant to conduct an environmental audit, as it did and as was acted upon by the Appellant through his expert Dr. Njuguna.
43. For the reasons explained, the Tribunal unanimously finds that the appeal fails and directs that:
  1. The proprietor of A.K. Filling Station should immediately cease operation which should have been strictly reserved following the issuance of the stop order.
  2. The Respondent should forthwith, take steps to enforce its notice to close down the Appellant's petrol station dated 4<sup>th</sup> March, 2005.
  3. The Tribunal was asked by the parties to award costs. The Tribunal invites parties to make submissions on costs on November 14, 2005 at 9 o'clock in the morning under Rule 39 (2) of the National Environmental Tribunal Procedure Rules, 2003, Legal Notice No. 191 of 2003. Following submissions, a ruling on costs will be given.
44. The Tribunal draws the attention of parties to the provisions of section 130 of the Environmental Management and Co-ordination Act (EMCA), 1999.

Delivered at Nairobi this 3<sup>rd</sup> day of November, 2005.

Signed:

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