REPUBLIC OF KENYA

NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI

Tribunal Referral Net 2/3/2005

1. JAMII BORA CHARITABLE TRUST

2. JAMII BORA CHARITABLE TRUST REGISTERED TRUSTEES.....APPELLANTS

VERSUS

1. DIRECTOR GENERAL NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

2. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY…..... RESPONDENTS

RULING

1. By a Notice of Appeal filed on 11th March 2005 the Appellants herein lodged an appeal against the decision of the Respondents dated 14th January 2005 by which the Respondents refused to issue the Appellants with an Environmental Impact Assessment (EIA) Licence. The Appellants asked the Tribunal to set aside completely the said decision, to order that an EIA licence for the Appellants' project do issue forthwith, and to award costs of the Appeal against the Respondents.

2. In a Memorandum of Appeal lodged with the Notice of Appeal, the Appellants gave the following grounds for the Appeal:

(a) The Respondents had erred in law by not giving their decision within the mandatory three months after receiving the EIA Study Report;

(b) The grounds cited by the Respondents for refusing to grant the licence had no basis in law or in fact. The grounds relied on by the Respondents in refusing to grant an EIA licence were that (i) the majority of the local community, lead agencies and stakeholders had expressed strong objection to the project; (ii) the project site lies within the wildlife migratory corridor and dispersal area; (iii) the future cumulative impacts of the project are uncertain given the enormity of the project; (iv) the proposed mitigation measures will not adequately address the anticipated potential environmental impacts of the project; (v) the EIA Study Report did not offer any alternative sites for comparison purposes; and (vi) the project is not environmentally suitable since it will not enhance sustainable development and sound environmental management;

(c) In arriving at their decision, the Respondents had ignored the mandatory provisions of the law in (i)

failing to gazette the EIA Study Report; (ii) failing to properly set up a technical advisory committee on the Appellant's project; (iii) allowing the 1st Respondent, the Director General of the National Environmental Management Authority (NEMA), to participate in and take over the conduct of the proceedings of the public hearing held on 11th December 2004; (iv) holding the public hearing out of time and irregularly; and (v) generally breaching the provisions of the law.

3. The Respondents entered appearance and filed a Reply to the Memorandum of Appeal on 31st May 2005. The Reply stated that the Respondents intended to raise a preliminary objection to the Appeal on the ground that it was incompetent and to oppose the Appeal. The preliminary objection related to the joinder of the Director General of NEMA as a party to the proceedings, but in a ruling dated 1st July 2005, the Tribunal held that the joinder of the Director General was proper. In opposing the Appeal, the Respondent prayed that the Appeal be dismissed with costs to the Respondents and that the Tribunal should uphold the Respondents' decision not to issue the EIA licence.

4. In support of their opposition to the Appeal the Respondents: (i) denied communicating the decision on the EIA licence application after the mandatory three months; (ii) maintained that they had received strong objections from members of the local community, especially Kitengela Ilparakuo Landowners Association (KILA), from a lead agency, Kenya Wildlife Services KWS, and from a number of stakeholders; (iii) maintained that the site of the proposed project lies within the wildlife migratory corridor and dispersal area; (iv) maintained that they had taken into account the proposed mitigation measures; (v) argued that the project is not environmentally viable notwithstanding that there are other prior developments in the area; (vi) maintained that the location of the project is not suitable in that the free movement of wildlife in the area will be restricted, the culture and heritage of the Maasai will be negatively affected, the riparian ecosystem will be disrupted (vii) argued that the precautionary principle, the principle of sustainable development and sound environmental management had guided their decision; (viii) argued that it was the Appellants' responsibility to publish the EIA Study Report in the Gazette and that the Respondents had written to the Appellants to this effect; (ix) argued that the Technical Advisory Committee had been properly constituted; and (x) maintained that the public hearing had been conducted on time and procedurally.

5. On 19th July, 2005, during the hearing of the Appeal, an application was made verbally by Mr. Naikuni for leave to be given to a number of organizations to intervene in the proceedings as Interested Parties. Both the Appellants and the Respondents had no objection to the application, and the Tribunal took the view that, under section 3 of the Environmental Management and Coordination Act, (EMCA), the parties were entitled to participate in the Appeal. On the basis of these considerations, the application was granted by the Tribunal and the intervenors participated in the Appeal as Interested Parties. At the time when the application to intervene was granted, the Tribunal asked that the registration certificates of these organizations be availed. This was done with respect to some of the organizations, but not others.

6. The names of the organizations that participated in the proceedings as intevernors are:

(a) Kiserian-Isinya Pipeline Road Residents Association (KIPRRA);

(b) Duputo E Maa;

(c) Neighbours Initiatives Alliance (NIA);

(d) Kitengela Ilparakuo Land Owners Association (KILA);

(e) Kenya Wildlife Service (KWS);

(f) Friends of Nairobi National Park (FONNAP);

(g) Osupukuo Environmental Organization (OEO);

(h) The Wildlife Foundation;

(i) International Livestock Research Institute (ILRI); and

(j) Simba Maasai Outreach Organization (SMOO).

7. Mr. Macharia Njeru, Advocate, of the firm Macharia Njeru and Advocates represented the Appellants, Ms Anne Angwenyi, Acting Director of Legal Services, NEMA represented the Respondents and Mr. Lucas Naikuni, Advocate, of the firm of Naikuni, Ngaah & Company Advocates represented the Interested Parties in the proceedings.

8. The Appeal was heard between 23rd June 2005 and 2nd February 2006. The Tribunal held twenty three (23) sittings, and a total of forty (40) witnesses were called by the Parties. The Appellants called nineteen (19) witnesses, the Respondents called ten (10) witnesses and the Interested Parties called eleven (11) witnesses. The Tribunal visited the site on 2nd August, 2005 in the presence of counsel for both Parties as well as Counsel for the Interested Parties.

9. On the basis of the positions taken by the Parties, including the Interested Parties, and the evidence adduced before the Tribunal, the following issues arise:

(a) Whether the majority of the local community, lead agencies and stakeholders had expressed strong objection to the project;

(b) Whether the proposed project site lies within the wildlife migratory corridor and dispersal area, and if so, whether the location of the project at that site will materially adversely affect the local environment in general and wildlife in particular;

(c) Whether the mitigation measures proposed in the EIA Study Report are adequate to address the anticipated potential environmental impacts of the project;

(d) Whether the future cumulative impacts of the project are uncertain and, if so, whether there is in place an adequate framework for handling impacts of the kind that might arise; and

(e) Whether the Respondents breached legal requirements on the time limit for making a decision on an EIA application, on gazettement, on the establishment of a technical advisory committee, and on the public hearing and, the implication of the breaches, if any, for the validity of the decision of the Respondents.

The Project

10. The project in question is a proposal to construct 2,000 (two thousand) homes intended to house 2,000 families. Each house is designed for a family of up to five members, bringing the planned

total population of the proposed housing estate to 10,000 (ten thousand) people. The houses are to be constructed in phases over a three year period. A population of that kind would be equivalent to that of a small Kenyan town. On the basis of the 1999 census, the population of the proposed settlement is comparable to that of the other towns in Kajiado district: Ngong Township had a population of 12,000 people; Kiserian 16,500; Ongata Rongai 16,200; Isinya 6,000; and Kitengela 12,000. (See the 1999 Population & Housing Census: Counting Our People for Development, Volume 1, 2001).

11. The families to be housed in the proposed new town are to be drawn from members of a non-governmental organization, called *Jamii Bora*, which is registered as a Trust under the Trustees (Perpetual Succession) Act, Chapter 164 of the Laws of Kenya
12. Trust Deed dated 22nd November 1999, the Certificate of Incorporation of the Trust dated 1st December 2000 and the Deed of Appointment of Trustees dated 24th August 2001 were shown to the Tribunal. The Trust Deed states that the purpose of the Trust is "the alleviation and relief of poverty and enhancement of the living conditions of the residents of the Republic of Kenya through the provision of such self-help, credit, savings and other schemes and programmes as the Trustees may think fit…"

12. The Managing Trustee of Jamii Bora is a Swedish lady by the name Mrs. Ingrid Munro. During her professional career she held various senior positions in several organizations dealing with housing, among them the UN Centre for Human Settlements, currently UN Habitat in Nairobi. Following her retirement, along with a number of poor women from the slums of Nairobi, she founded the Jamii Bora Trust in order to provide these women with a way of improving their lives, and the circumstances of their families. Jamii Bora has grown steadily and now has about 112,000 members drawn from all over the Republic of Kenya. Many of these members reside within the slum areas of Nairobi, in particular Soweto, Kibera and Mathare, where the Trust first began its activities. It was said before the Tribunal that a sizeable number of members reside in Kajiado District.

13. According to the EIA Study Report, the housing project was conceived with the following objectives:

(a) To assist poor families from Nairobi's slums to move out of the slums and achieve their dream of better and secure housing in a good and well managed environment;

(b) To provide job opportunities and improve income generation for the families moving to the new town as well as for the local residents of Kisaju (the proposed location) by facilitating commercial and industrial development in the town;

(c) To provide the new and old residents of Kisaju with social and cultural amenities for a better life, such as a modern health centre, schools, sports facilities, playgrounds, churches, a cultural centre and administrative centers; and

(d) To develop an ecologically sound town with biological cleaning of liquid waste and a green town rich with trees and park areas.

14. Accordingly, the project is designed as an integrated, self-sustained housing estate. The design provides for low cost housing, with each house expected to cost about Kshs 150,000/-; a small and light industrial zone, a business and commercial centre; educational facilities; infrastructure; an administrative centre; and all the amenities ordinarily associated with a town, including utilities

and services, such as water and sewerage services, waste collection and disposal, street lighting, security; recreation and worship. There is provision also for a "Town Management Board." The developer's name for the project is "*Kaputiei (New) Town*." The development is, of course, not a "town" within the meaning of the Local Government Act, Chapter 265. Nevertheless, its description as a "town" does signify the developer's intention to develop a functional town. Plainly speaking the project constitutes a private town.

15. The location for the proposed project is a 293 acre (102.5 hectare) piece of land in Kaputiei, Kisaju Sub-location in Isinya Division of Kajiado District, known as Land Reference number Kajiado/Kisaju/58. This is a piece of private land, which the developer purchased in 2002 from three individuals who then owned it, Ziporah Naisenya, Nathan Kahara and L. Wambaa. A title deed, in the name of Jamii Bora Charitable Trust Registered Trustees, was issued by the Kajiado District Land Registry on 5th February 2002. The land had originally been agricultural land but, by letter dated 18th January 2002, Ol Kejuado County Council approved a change of its use from agricultural use to business cum residential use. These documents are annexed to the EIA Study Report at pages 189 and 190.

16. The location of the proposed project lies about 60 km to the south of the city of Nairobi off the main road from Athi River to Kajiado town. The location falls within the ecological zone known as the Athi Kapiti Plains, which is significant for its wildlife. It is bordered to the North by Nairobi National Park and to the South by the Magadi-Mombasa rail line. Historically, the area was occupied predominantly by the Maasai community, who lived a nomadic pastoralist lifestyle. In more recent times, however, the growth of small towns which, functionally, are satellite towns of the city of Nairobi, has changed the demography of the area, leading to a more mixed population and lifestyle.

17. The Appellants submitted that the proposed project is a novelty in Kenya – representing the first known instance in which a sizeable town has been pre-planned in its entirety "on the drawing board" as it were. An ambitious endeavour of the kind proposed raises a wide range of complex issues for consideration, many of which were the subject of contention before the Tribunal, during the hearing of the project proponent's Appeal against the denial by the Respondents of the application for an EIA licence.

The Reception to the Proposal

18. In their letter dated 14th January 2005, refusing to approve the project, the Respondents stated that the majority of the local community, lead agencies and stakeholders had expressed strong objection to the proposed project. In the Reply to the Memorandum of Appeal, filed on 31st May 2005, the Respondents submitted that they did receive strong objections from the local community, especially KILA; from a lead agency, KWS; and from stakeholders, FONNAP, the KIPPRA, Usupuko Environmental Organization, the Wildlife Foundation (Kenya), ILRI, Neighbours Initiative Alliance, Simba Maasai Outreach Organization and Lucas Ole Naikuni.

19. As evidence of the objection of the local community, the Respondents pointed to letters dated 7th October 2004 and 10th October 2004 from the Secretary and Chairman respectively of KILA, which were produced before the Tribunal marked as DG2 (A) and DG2 (B), and the evidence of Moses Kipiro, Alex Pushati, Regan Ole Makui, Jackson Nasuka, Solomon Meki, Mary Kipurket, Samson Ole Timoi, and Councillor Julius Ole Ntayia.

20. The witnesses testified that initially they were happy about the project when they were told that it

would bring services and create jobs in the local area. But when they learnt that the project would introduce into the area people from the slums of Nairobi they became opposed to it. In their view, people from the slums of Nairobi had social and cultural attributes that were different from those of the local Maasai, and this would adversely affect the local culture and lifestyle, the local political equation, the local security and the local environment. These arguments were strongly supported by the witnesses of the Interested Parties.

21. The Interested Parties argued that this project was not a project for the Maasai people. Witnesses said in evidence that “housing is not a priority for the Maasai people.” They also argued that the project would interfere with the socio-cultural lifestyles of the locality, by introducing an influx of people of different cultures and backgrounds who would bring to the area drug abuse, rape, prostitution and other social ills, given, particularly, that some of the members of the Jamii Bora Trust, who intended to take up the houses, had, in the past, been criminals and prostitutes. The Interested Parties saw in the project a serious threat to continued survival of the Maasai community.

22. The Appellants strongly disputed the claim that the majority of the local community, lead agencies and stakeholders had expressed strong objection to the project. They asserted that, to the contrary, the majority of the genuine local community members and the majority of genuine and real stakeholders had expressed strong support for the project. They also contended that several lead agencies had given their approval to the project.

23. The Appellants’ view is that the term “local community” means residents of Kisaju sub-location. It was on this premise that they challenged the evidence of the people opposed to the project. They argued that these were not genuine local community members: they were either representatives of professional non-governmental organizations or persons who did not own property within the Kisaju sub-location, and whose association with the sub-location was tenuous. Only a very small number of people actually resident in the area had come forth to give evidence against the project, the Appellants argued.

24. According to the Appellants, the majority of genuine residents of Kisaju sub-location supported the project. The Appellants produced in evidence a Memorandum of Understanding, signed between the Appellants and the local residents of Kisaju sub-location, represented by their area Councillor on 17th August 2004 by which the developer promised to provide services and facilities like water, schools, employment and other benefits to the residents of Kisaju sub-location living outside the proposed housing estate. They also produced a petition in support of the project signed or thumb printed by nearly all the 500 land owners in Kisaju sub-location. The registration numbers of their parcels of land are shown alongside their signatures or, in some instances, thumb prints. They also produced letters written in support of the project by the local church leaders. These documents are annexed to pages 291 to 344 of the EIA Study Report. Several residents of Kisaju sub-location also testified before the Tribunal in support of project.

25. The Tribunal takes the view that, from an environmental perspective, the term “local community” cannot be restricted to residents of Kisaju sub-location. Given the key environmental concerns raised, the project’s implications for the continued use of the Athi-Kapiti Plains (also known as the Kitengela Conservation Area) as a wildlife habitat, of which Kisaju sub-location is only a small sub-set, properly speaking, the project’s locality is the whole of the ecosystem known as Athi Kapiti Plains. This is the area bounded by Mombasa Railway from Athi River to Konza to the east, former Enkarau-Ilman group ranches bordering Konza-Kajiado railway to the south, former Kipeto group ranch bordering Isinya Kiserian road to the west and Nairobi National Park to the

North. Towns within this area include Athi River, Kitengela, Isinya, Kiserian and Ongata Rongai and Ngong. This whole area comprises the project's local area, and it formed the area of study for the EIA Study as shown by the map attached to the EIA Study Report.

26. None of the parties presented evidence of the views of the residents of this bigger area, because, obviously, they understood the term "local community" differently from the definition of "local area" from an environmental stand point. The evidence before the Tribunal shows that opinion within Kisaju sub-location is divided. There are those in support of the project and those in opposition. Both views are strongly held, and both were vigorously put forth before the Tribunal. As people who will primarily be affected by the project, their views are relevant.

27. Those views were founded on concerns related to the risk of environmental degradation, and of adverse social and cultural impacts. Several examples were given of these risks. They included the risk of pollution of local watercourses; environmental degradation from uncontrolled disposal of solid waste, such as plastic bags, which would present a hazard to cattle and wildlife; a rise in crime; an increase in human-wildlife conflict; urban sprawl; and a disruption of the social cohesion in the area. Of particular concern was the fact that the members of Jamii Bora were not from the local area. The Tribunal has considered all of these issues in its ruling.

28. The weight to be given to the views of members of the local community on a proposed project, however, is, in the Tribunal's view, dependent on the pertinence of the environmental issues upon which these views are based. Views which are not founded on pertinent environmental concerns posed by the proposed project, however strongly held, should not be allowed to influence the outcome of an EIA licence application.

29. In the Tribunal's view the Respondents were not justified to give the weight which they appeared to have given in their decision to the views of those members of Kisaju sub-location who are opposed to the project. The Respondents did not make any effort to ascertain whether the views of those who expressed objection were representative of the views of a significant section of the local community. But crucially, the objections of the local community upon which the Respondents relied to deny the Appellants the EIA licence appeared to be unduly influenced by an objection to "outsiders" from the slums of Nairobi settling in the local area and, in their view, changing the demographic equation. By the same token, the local community members who support the project do so principally because it promises to introduce into the area social services and economic opportunities which they have longed for over many decades. These considerations, though understandable, are not environmental considerations, and should not be allowed to determine the outcome of an EIA licence application. In any case, the 1999 census shows that the population of Kajiado district is already mixed, and the Maasai constitute not more than 57% of the residents.

30. As evidence of the objection of the lead agencies, the Respondents pointed to the strong objections lodged by KWS which had written a letter dated 7th October 2004 to the effect that "KWS does not support the project as it has no conservation merit and is within the wildlife dispersal area and the traditional wildlife migration route to and from Nairobi National Park." The witnesses representing KWS also testified to KWS's opposition to the project.

31. The Appellants, on the other hand, pointed out that several lead agencies had given their approval to the project. The Ministry of Roads and Public Works, had written a letter dated 17th September 2004 and 11th November 2004 giving its approval to the road works that are part of the proposed project; by letter dated 11th October 2002, the Director of Water Development

approved an application to drill a borehole for domestic water supply as part of the project; Kenya Power and Lighting Company Ltd approved the developer's application for a power supply by letter dated 17th September 2004; the Physical Planning Department gave approval to the project by letter dated 24th September 2004; Olkejuado County Council approval as evidenced by notification of approval dated 22nd June 2004. These documents are annexed to the EIA Study Report at pages 191, 236, and 238 to 248.

32. Under section 60 of the Environmental Management and Coordination Act, 1999 (EMCA) and Regulation 20 of the Environmental (Impact Assessment and Audit) Regulations 2003, NEMA is required to take into account the views of lead agencies with regard to an EIA Study Report, which therefore are relevant considerations. Whereas KWS gave comments directly in response to the EIA Study Report, the support for the project upon which the Appellants relied arose out of applications by the Appellants for approvals which it is the mandate of the various lead agencies to grant. Apart from KWS and the Kajiado District Physical Planning Liaison Committee, the other lead agencies were not dealing with the EIA Study Report.

33. Clearly, a project whose key aspects have failed to obtain the approval of the regulatory agencies concerned is at risk of not getting off the ground. Therefore, the approvals granted by lead agencies to various aspects of a proposed project are relevant in considering the viability of the proposed project. In this respect, approvals for the construction of a road, for power supply, for drilling boreholes, for change of use are all relevant considerations in determining the likely viability of this project. What the Act and the Regulations call for from the lead agencies, however, are comments on the environmental issues within their mandate arising from the EIA Study Report. Apart from KWS, the lead agencies cited here did not expressly address these issues.

34. The objection of KWS relates primarily to the location of the proposed project. In a letter dated 15th February 2005 to the 1st Respondent and annexed to the Respondents' bundle of documents referred to as DG3(B) KWS stated as follows:

"(1) KWS is not against the proposed project. We do not approve of the location. (2) It is our strong recommendation that Jamii Bora be advised to relocate the project to suitable sites preferably Kibera or Mathare. (3) We would appreciate if the current project site is managed in a manner compatible to conservation."

As part of its consideration of the issue relating to the location of the proposed project, the Tribunal considers the weight to be given to the views expressed by KWS on the location of the proposed project.

35. The Respondents also cited objections from several stakeholders as a reason for denying the Appellants an EIA licence. FONNAP, KILA, the KIPRRA, Usupuko Environmental Organization, the Wildlife Foundation (Kenya), ILRI, Neighbours Initiative Alliance, and Simba Maasai Outreach Organization were cited as stakeholders who had objected to the project.

36. Marie Louise Poulley, a member of the KIPRRA, Simon Ole Timoi, a member of Duputo e Maa, and David Nkedienye, previously a member of the Wildlife Foundation, all testified against the proposed project. Additionally, the Respondents produced as part of their bundle of documents and marked DG5, a "Memorandum," which was an email bearing the names of these same organizations, and that of Lucas ole Naikuni, which had been sent on 12 December 2004 to NEMA, the Stromme Foundation (a Norwegian Organization providing funding support to the Jamii Bora Trust) and the Nation Media Group. The thrust of the objection by these stakeholders

to the proposed project was that, while its objectives were noble, its location was inappropriate, and it should be relocated, preferably to the slum areas of Nairobi.

37. The Appellants disputed the claim by these witnesses to represent the organizations they claimed to represent: none of them had produced any Resolution or other authorization to speak on behalf of these organizations and, according to the Appellants, it was clear that they were speaking only for themselves. Additionally, the Appellants challenged the validity of the “stake” these witnesses claimed to have in this project: Marie Louise Poulley was simply motivated by the desire to protect her hotel business, which thrived on the area’s perceived isolation; Simon Ole Timoi lived all the way near the Tanzanian border, and his claim that, as a Maasai, he had an interest in the welfare of Maasais wherever they lived lacked credence; and David Nkedienye was no longer a member of the Wildlife Foundation and could not represent it.

38. For its part, the Appellants relied on the support for the project by the Architectural Association of Kenya represented by Mohamed Munyanya, the Chairman and the Association of Micro Finance Institutions (AMFI) represented by Beatrice Sabana, the Chief Executive. Mr. Munyanya testified that it is the view of the Architectural Association that this project represents a model of affordable housing in Kenya which should be supported by the authorities and emulated by others, particularly in light of the Government’s policy of providing affordable housing to Kenyans. Beatrice Sabana testified that Jamii Bora is known and respected within the micro-finance fraternity. She argued that Jamii Bora’s initiative in providing housing to its members through micro-finance arrangements deserves support, since poor people, with no collateral, are not able to access financing through banks, and of necessity, depend on micro-finance arrangements to meet their investment needs.

39. The opinions of stakeholders with regard to the potential environmental impacts of a proposed project is a relevant consideration, which is provided for in section 59(2) of EMCA and Regulation 21 of the EIA Regulations. With respect to this project, opinion was divided between, on the one hand, those who would give primacy to the concerns related to the potential adverse impact of this project on the wildlife in the area and, on the other, those who consider that the pressing need for decent housing by the residents of the slum areas, which this project is designed to contribute to solving, is equally deserving.

40. In the Tribunal’s view, the role of the EIA process in this instance is to provide ways of balancing both concerns, in order to meet the need of the poor slum dwellers for decent housing without causing an undue adverse impact on the environment of the locality in which the proposed housing project is to be located. The Tribunal considers that the decision by the Respondents fell short of adequately balancing both concerns, and that the Respondents were not justified in preferring the views of those stakeholders who objected to the project without considering whether the objectives of the project, which all the objectors said were worthwhile, could be met in the absence of this project.

The Location of the Project

41. The second ground cited by the Respondents for denying the Appellants the EIA licence is that project site lies within the wildlife migratory corridor and dispersal area, and that the project will adversely affect the continued use of the area as a wildlife habitat. The witnesses who testified on behalf of the Respondents on this issue were Mr. Paul Gathitu, the Nairobi National Park Senior Warden between 2000 and 2004; Gideon Amboga, the current Senior Warden; Dr Samuel Kasike, an Ecologist; Mrs. Elizabeth Leitoro, the Community Development Officer; and Ms

Teresia Muthui, from the KWS GIS section. Documentary evidence was also produced in a bundle marked “Additional Documents Submitted by NEMA.” Among them is an undated draft document titled “*Nairobi National Park Ecosystem Management Plan, 2005-2010*” – Kenya Wildlife Service [hereinafter *The Draft NNP Management Plan*], which encapsulates the key points of the Respondents’ evidence on this issue.

42. The Respondents evidence was to the effect that the project site lies within an ecological zone known as the Athi Kapiti Plains (also described as the Kitengela Conservation Area, or the Kitengela Triangle), which is in Kajiado District. Its size has been estimated variously as ranging between 390 km2 and 450 km2. Much of this area acts as a habitat for wildlife. The Nairobi National Park, founded in 1948, and covering 117 km2 constitutes the centerpiece of the Athi-Kapiti ecosystem. The Park is home to over 100 mammal species and is an internationally acclaimed tourist attraction. The wildlife found in the Nairobi National Park disperse freely in the Athi-Kapiti Plains ecosystem. Two animals in particular, the zebra and the wildebeest, migrate seasonally to a calving zone located in the southern extremity of the Athi Kapiti Plains, specifically Kaputei North, which, on Figure 1 appearing at page 9 of *The Draft NNP Management Plan*, is shown to be adjacent to Kisaju sub-location, the project area.

43. At page 35 of *The Draft NNP Management Plan* it is stated that distribution and movements of wildebeest and zebra in the Nairobi National Park ecosystem are influenced by instinct, availability of food resources, breeding and the rainfall patterns. During the wet season, the animals use the Kitengela Triangle and the southern portion of the plains in North Kaputei. However, as the rainfall drops, wildebeest concentrate more and more to the northwest, in or immediately south of Nairobi National Park. Zebras seldom concentrate as much as wildebeest; instead they are broadly distributed. The wildebeest spend the rainy season calving in the southern section of the Athi Kapiti Plains, in the former North Kaputei group ranch, where the grass growth is productive and the nutrient contents are high.

44. The young wildebeest in their first year of life get a “guided tour” of the ecosystem to and from Nairobi National Park. This experience ensures that the knowledge of the migratory routes are imprinted on them and passed on from generation to generation. The Respondents gave evidence that in 2004 and again in 2005 KWS plotted this migration route using information gathered by the aid of geographic information systems technology (GIS) as well from members of the local community. Teresia Muthui used this information to plot a 2 km wide migratory route on two maps – which we shall refer to as *the June 2004 Map* and *the June 2005 Map*. According to the Respondents these maps show that the proposed Jamii Bora project lies within the wildlife migration corridor and dispersal area.

45. At pages 19 to 24 of *The Draft NNP Management Plan* it is noted that a general decline in wildlife numbers in the ecosystem has been observed over the past decade. The document attributes the decline in wildlife population to:

(a) Land use change in some areas of the Kitengela area from semi-nomadic pastoralism to industrial/commercial uses like flower farming, quarrying, and small settlements;

(b) Increase in human population and rising poverty levels in the Athi-Kapiti Ecosystem;

(c) Increase in land sales and sub-division of group ranches into private parcels;

(d) Increase in small fences along the traditional zebra and wildebeest migratory routes;

(e) Subsistence and commercial poaching occasioned by pilot cropping programme within the ecosystem;

(f) Occurrence of droughts, the latest one in the year 2000;

(g) Disease outbreak, e.g rinderpest, which in 1996/97 reduced the buffalo population by almost half; and

(h) Habitat change.

46. With regard to the increased human settlement in the wildlife dispersal area, the document elaborates that “human settlement along the Mbagathi River near Rongai and the development of the export processing zone next to Kitengela town has resulted in an increase in human population within the Kitengela settlement areas. The high population growth rate experienced in this area has been attributed to the emigration of people from neighbouring Machakos district and Nairobi city. The human population in the Kitengela area has more than doubled between 1989 and 1999.”

47. With regard to land sub-division and fragmentation it is said that: “Sub-division of land within the Kajiado area begun in 1984 following a shift in Government policy on group ranches that encouraged sub-division. The number of group ranches that had sub-divided rose from 7 in 1984 to 12 in 1990 to 22 in 1996 … Proximity to Nairobi city has accelerated land sales and fragmentation. The area is very attractive to those seeking residential plots, e.g the case of former Kitengela, Kisaju, and Embolioi ranches.” With increased land fragmentation through fencing and residential use in the Kitengela area in the last ten years, migratory routes are progressively being altered, although the migration/dispersal areas are still largely open and unfenced. According to evidence produced before the Tribunal, about 10% of the dispersal area in the Athi- Kapiti Plains has been blocked by fencing and other developments.

48. *The Draft NNP Management Plan* observes that the maintenance of the Park’s ecological integrity depends on wildlife access to the Kitengela-Athi Kapiti migration/dispersal area. The Park cannot support the variety and numbers of wildlife normally seen within it. The Park ecosystem can only be viable if the traditional wildlife migration routes are maintained. However there has been recent rapid land adjudication and sub-divisions and increased settlements without a coherent land-use plan, which has reduced the wildlife dispersal area.

49. *The Draft NNP Management Plan* sets out the objectives of Kenya Wildlife Service with regard to the long term future of Nairobi National Park to be “to ensure that the rich biodiversity resources are managed in an environmentally sound and sustainable manner while at the same time contributing to the economic development of the communities living adjacent to the Park and the entire Kenyan nation.” Towards this end, the wildlife migration and dispersal areas will be managed by:

(a) Collaborating with landowners and other conservation stakeholders in management of wildlife outside the park;

(b) Ensuring that the Kitengela wildlife migration/dispersal area is accessible to wildlife through the maintenance and expansion of the Wildlife Conservation Lease Programme;

(c) Encouraging and assisting communities living adjacent to the Park to benefit from wildlife based

activities on their land; and

(d) Minimizing human-wildlife conflicts outside the Park.

50. *The Draft NNP Management Plan* outlines the intervention measures which KWS proposes to take over the Plan period to achieve its management objectives:

(a) The southern section of the Park adjoins the former “Sheep and Goats” Ranch, which is a critical diurnal dispersal area as it is not settled and is free from fences. This section therefore needs to be left open for free movement of wildlife to and from the Park and the rest of the migration/dispersal lands beyond. KWS will pursue a conservation easement with the Ministry of Lands and where possible acquire the land. The 1.5 km2 parcel adjacent to the Park is legally under the Commissioner of Lands.

(b) The dispersal area should be managed as one unit with these migrants. If they are fenced out, they are likely to be fenced to extinction.

(c) The migration and dispersal areas are still fairly open and land fragmentation, which is the main threat to the viability of the dispersal areas, is accelerating. However, this can be forestalled. Where we cannot form conservancies or acquire the land in the dispersal areas, we will use the existing legal instruments to stop fragmentation.

(d) The Wildlife Conservation Lease Programme will be expanded as a short term stop gap measure to secure the dispersal area.

(e) Acquisition of land for conservation.

51. These measures can be summarized as follows: the acquisition of an easement over the Government owned former Sheep and Goat Ranch; collaboration with landowners to keep open the migratory routes and dispersal areas, through programmes such as Wildlife Conservation Lease Programme, enforcement of existing land use and management laws; and, where necessary, compulsory acquisition of private land.

52. Evidence was given by Elizabeth Leitoro, the KWS Community Development Officer of programmes undertaken by KWS designed to enhance community wildlife conservation in the Kitengela area, including plans to establish community conservancies, as well as schemes for the sharing of benefits arising from wildlife derived revenue with the local community, such as the construction by KWS of facilities, such as schools and boreholes for the use of the local community.

53. The Respondents gave evidence that KWS collaborates with a non-governmental organization, the Wildlife Foundation, which administers a “Lease Programme,” whose objective is to keep the area open for wildlife habitation by paying land owners a “lease fee” in exchange for an agreement by the landowners not to sub-divide, fence or farm the land. Detailed evidence regarding the Lease Programme was adduced by Regan Ole Makui, a Director of the Wildlife Foundation and David Nkedienye, formerly a Director of the Wildlife Foundation. The evidence showed that KWS does not itself run the programme, although the offices of the Wildlife Foundation are located within the KWS premises, and KWS supports its objectives.

54. The Lease Programme started in 2000 with funding support from Friends of Nairobi National Park and the Wildlife Trust, which is registered in the USA. Landowners apply to be registered on

the Programme, and once funding is obtained the landowners are paid US$4 per acre per annum, averaging to an annual payment of US$400 to US$800 per household. The area under the Programme stands at 8,600 acres involving 117 households. In order to achieve its objective of keeping the migratory route and dispersal area, the Programme's coverage needs to be expanded to cover the minimum area of 30 km2 (60,000 acres). The Wildlife Foundation is fundraising from among others, the Global Environment Facility, to be able to establish an endowment fund to support the Programme. According to the Respondents the Programme works well, a contention with which the Appellants strongly disagreed. (See paragraphs 63 and 64 below).

55. The Respondents argued that, because the project site lies within the migratory corridor and dispersal area, the proposed housing project will block the wildlife migratory route and threaten the continued use of the area by wildlife as a dispersal area, for which the area should conserved. The Respondents acknowledged the ongoing sub-divisions and change of use but argued that these were being addressed through a "Master Zoning Plan", which Ol Kejuado County Council was in the process of preparing. Evidence was given by Mr. Patrick Waweru, the Kajiado District Physical Planner, who stated that a land use plan titled "Kitengela-Isinya Zoning Plan" was currently in draft at the Council. The essence of this plan was to zone development areas and non-development areas. Kisaju sub-location, according to Mr. Waweru, was classified as a wildlife and pastoralism promotion zone.

56. The Interested Parties supported the position taken by the Respondents with regard to the location of the proposed project. Alongside KWS the Interested Parties argued that to introduce this project into the area would jeopardize the use of the area as a habitat for wildlife, threaten the continued viability of Nairobi National Park, increase human-wildlife conflict, increase the risk of poaching and undermine the Lease Programme. The Interested Parties therefore argued that the refusal of the EIA licence application was justified and should be upheld by the Tribunal.

57. The Appellants vigorously contested the Respondents' proposition that this project will have a material adverse effect on the migration and dispersal of wildlife in the Athi Kapiti ecosystem. The Appellants maintained that the evidence available showed that the project site lies outside of the wildlife migratory corridor. In so far as the dispersal area is concerned, the Appellants argued that, given the dramatic changes in land use that are already occurring in the Athi Kapiti ecosystem area, this particular project will not, on its own, materially adversely affect the status of wildlife in the area in ways that cannot be managed through the implementation of appropriate mitigation measures.

58. The Appellants' case was that they had relied on a map titled "Nairobi National Park and Proposed 2 km Buffer Along Kitengela Migratory Route" and dated June 2004, *the June 2004 Map*, which was given to the Appellants by KWS itself during the time they were carrying the EIA Study. This map is attached to the EIA Study Report at pages 155 and 355. On this map the Jamii Bora project is shown as being 4 km or so away from the wildlife migratory corridor. Subsequently, after the Appellants had filed this Appeal, and during the hearing, the Respondents applied to be allowed to introduce a map titled "Nairobi National Park Ecosystem Wildlife Distribution – June 2005 (Draft) – *the June 2005 Map*. This second map incorporates a wider area within the dispersal area, including not only the Jamii Bora project, but also other towns like Kitengela and the developments around it. According to the Appellants, *the June 2005 Map* was misleading and had been generated for no reason other than to shore up the Respondents argument that the project lies within the dispersal area, a proposition with which the Respondents strongly disagreed.

59. The evidence before the Tribunal showed that information upon which the maps were generated had been gathered at the request of Dr Robert Ndetei, an officer with KWS, and that it was gathered by field scouts from KWS with input from local community members. That much is confirmed by the maps themselves, which state the source of information to be, in the case of *the June 2004 Map*, SoK, KWS and the Wildlife Foundation, and in the case of the *June 2005 Map*, the Nairobi National Park Field Staff and Kitengela Community Representatives. In cross examination, it was admitted by Teresia Muthui who plotted the information on the maps, that the "community representatives" in question was, in reality, Benson Mutunkei, the Wildlife Foundation officer in charge of the Lease Programme. The Appellants argued that the information provided by Benson Mutunkei with regard to the existence and location of the migratory corridor and dispersal area, could not be relied on as the Wildlife Foundation was vehemently opposed to the Jamii Bora Project, and therefore had a vested interest in showing that its location lay within the migratory corridor and dispersal area.

60. The Appellants argued also that, with regard to the use of the area as a wildlife dispersal area, the numbers of wildlife had declined drastically. They pointed to KWS's evidence on this issue. Relying on a map titled "Animal Census: Kitengela Area – November 2002" which had been put in evidence by the Respondents, the Appellants argued that, during the 2002 census the animals which had been monitored, that is, wildebeest, impala, kongoni, Grant's gazelle, zebra, Thompson's gazelle, and ostrich, were not spotted in the Kisaju sub-location. The Appellants therefore maintained that, on the basis of the evidence available to them at the time of the EIA Study, the animal numbers in the entire dispersal area were small at best, and therefore they were entitled to conclude that the proposed project would not have a significant adverse effect on the use of the area as a wildlife migratory corridor and dispersal area. The Respondents had produced no evidence to justify any other conclusion.

61. Further the Appellants argued that, in any case, due to the massive uncontrolled sub-divisions and consequent rapid change of land use in the area from pastoralism to industrial, commercial and residential use, the use of the Athi Kapiti Plains as a wildlife migratory corridor and dispersal area was no longer viable. The Appellants called in evidence a surveyor, Mr. Joseph Mugo who testified that up to nearly 50,000 sub-divisions had already taken place in the Athi-Kapiti ecosystem area. This evidence was corroborated by the evidence of James Kamula of the East African Wildlife Society who submitted in evidence a document titled "A Survey to Determine the Availability of Land for Wildlife Migration in the Areas Bordering Nairobi National Park," which contained the results of a study carried out by East African Wildlife Society. At page 10 of this document there is a table showing the number of landowners in the former seven group ranches in the Athi Kapiti Plains which shows that, based on the information in the Kajiado District land adjudication department, as at March 2004, the registered landowners in the ecosystem stood at 42,305.

62. The Appellants saw no prospects of this trend being reversed. The sub-divisions and change of use are taking place in a policy vacuum of land use since neither the Government nor the local authority has a land use plan. The draft Master Zoning Plan, which Mr. Waweru had claimed was under preparation by Ol Kejuado County Council, had not yet been sent out for public consultation, as required by the Physical Planning Act, Chapter 286, and therefore, there was no telling whether the landowners in the area would accept it. Consequently, the proposal to designate Kisaju area as a wildlife and pastoralism promotion area might never be adopted for implementation. It could not therefore be the basis of decision making at this stage.

63. The Appellants were highly skeptical of the Lease Programme, upon which KWS placed faith as

the key plank of its community conservation programme. The Appellants challenged the validity of the leases that were produced in evidence. On the basis of evidence obtained from the Kajiado District Land Registry, the Appellants demonstrated that many of the parcels of land said to be under the Lease Programme have ceased to exist as single units following the sub-division of the land parcels which occurred either for purposes of sale of the land to third parties or upon the death of a title holder and inheritance of the land by dependents. With respect to Kisaju sub-location, almost all the land parcels listed as being on the Lease Programme had in fact been sub-divided. Given that the main objective of the Lease Programme was to save the lands from being sub-divided, the Lease Progarmme, in the Appellants view, was not viable.

64. The Appellants argued also that, on the basis of the evidence produced by the Respondents, 60,000 acres needed to be brought into the Lease Programme in order for this Programme to be able to secure the Athi Kapiti area migratory route and dispersal area. Presently, only 8,600 acres, had been registered under the Programme. Few large parcels remain intact and, given the far higher financial gains which landowners can obtain from sub-dividing and selling their land for residential and other purposes, few will be willing to take on the commitments of the Lease Programme. Therefore, the Appellants argued, this Programme had no realistic prospects of realizing its objectives in the foreseeable future.

65. The evidence before the Tribunal, including the site visit by the members of the Tribunal to the project site on 2nd August 2005, indicates that the Athi Kapiti Plains does serve as a wildlife habitat and a dispersal area for Nairobi National Park. Taking all factors into account, and having listened to the witnesses who testified on this issue, the Tribunal is inclined to believe that the migratory corridor lies more or less where *the June 2004 Map* placed it, approximately 4 km away from the project site, while the dispersal area covers a much wider area, including the project site. The Tribunal notes, additionally, that, despite the name “corridor”, the wildlife migratory corridor and dispersal area is not to be understood as being a fixed line, in the sense of a road, given the nature of wildlife movements.

66. Neither party gave comprehensive evidence on the exact nature of impact on wildlife in the area, adverse or positive, that might arise from the location of the project at the proposed site. The evidence that was tendered was premised on the assumption that, if it could be demonstrated that the project site lies within the migratory corridor and dispersal zone, the inevitable conclusion must be that the impact of the project on the wildlife in the area would be adverse. Whereas claims were made about the risk of poaching, no credible evidence was adduced to demonstrate why this incoming population would be more prone to poach wildlife than anyone else residing in the vicinity. Claims were made also to the fact that the migratory route would be blocked by the new settlement, but it was not demonstrated convincingly that there would be any less risk of blockage arising from the unplanned settlements and conversion of the area from pastoralism to commercial farming, industrial and residential use that is going on in the area. Equally, neither party gave evidence to demonstrate that wildlife is capable or incapable of adjusting to the new developments..

67. The Tribunal does not accept that a development on a 293 acre plot, within an ecosystem of between 390 to 450 km2, on its own, will spell the end of the ecosystem as a wildlife habitat. This is more so in light of the fact that there are already, within the same ecosystem, 6 other towns of a comparable, or even larger, population sizes. Further, unlike the proposed New (Kaputiei) Town, the other towns and settlements were not planned in advance and lack basic amenities such as sewerage systems, waste disposal arrangements and other facilities which are essential components of an urban settlement. In the Tribunal’s view the proposed new development offers

an opportunity to find ways of meeting the pressing demand for decent housing by residents of Nairobi and other nearby towns within a framework that provides systems for mitigating the potential adverse environmental impacts arising from human settlement within this ecosystem. It is much to be preferred to spontaneous unplanned settlements, which are going on unchecked within the ecosystem.

68. This conclusion is borne out by the High Court's decision in the case of *Peter K. Waweru v The Republic, Nairobi Misc. Civil Application No 118 of 2004,* delivered on 2nd March 2006, shortly after the Tribunal concluded hearings on the instant Appeal. Those who believe that, if the proposed Jamii Bora housing project is not implemented, then the Athi Kapiti plains will remain, as they see it, a pristine ecosystem, unspoilt by the impacts of urbanization, will find a reading of this High Court decision an eye opener.

69. The case arose out of a prosecution for the offences of discharging raw sewage into a public water source contrary to the Public Health Act, Chapter 282, and of failing to comply with a statutory notice to remove a nuisance. The alleged offenders were about 100 plot owners in Kiserian Township who have erected residential and commercial buildings on the plots. The buildings have septic tank for the disposal of wastewater to which the plot owners have connected underground pipes to act as overflow outlets. This causes the indiscriminate discharge of offensive smelling waste matters within the trading center, which flows out of various premises into open channels along the road to the Kiserian river, a source of drinking water. In answer to the charges, the plot owners pleaded that they are helpless without a sewage treatment plant, that the responsibility to construct one lies on the Ol Kejaudo county council and that, in any case, the area earmarked for the plant has been acquired for private use. In the words of the court, Kiserian township is:

"a ticking time bomb waiting to explode... We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as regards uncoordinated approval of development and the absence of sewerage treatment works."

70. The Tribunal is mindful of the real risk that, if decisive action is not taken in the near future, the Athi Kapiti Plains will not continue to function for long as a wildlife habitat and dispersal area for the Nairobi National Park. However, the Tribunal believes that the threat to the viability of the wildlife habitat arises, not from any *one* development, spontaneous or planned, but from the absence of an enforceable land use plan for the area, which has then allowed uncoordinated and unplanned sub-divisions and conversions of land use - from pastoralism to commercial, industrial and residential uses - to take place on individual plots without being accompanied by the development of the necessary common infrastructural and utility services.

71. The concept of a Zoning Master Plan which is being considered by the Ol Kejuado County Council is to be encouraged. If fully developed and implemented it will provide a framework for considering the future of the Athi Kapiti Plains in its entirety, in a way that will not unduly prejudice any one land owner. Clearly, developing such a Master Plan takes time, and some might argue that it is not proper to allow developments which cannot later be reversed to proceed in the meantime simply because a land use plan has not yet been developed. On the basis of this argument, it might be considered that an applicant for an EIA licence should not be granted the licence because, if and when the land use plan is adopted, the damage would have been done, and the development cannot be reversed.

72. The Physical Planning Act, Chapter 286, under which the proposed Zoning Master Plan would be

adopted caters for a situation in which it is considered that developments should be halted pending the preparation and adoption of a physical plan as a basis for development control:

"Section 23(1) provides that the Director may, by notice in the Gazette, declare an area with unique development potential or problems as a special planning area for the purpose of the preparation of a physical development plan irrespective of whether such an area lies within or outside the area of a local authority. Section 23(2) states that the Director may, by notice in the Gazette, *suspend for a period* of not more than two years, any development he deems necessary in a special planning area until the physical development plan in respect of such an area has been approved by the Minister." (Italics inserted).

73. Therefore, there is a legal framework available to the Ol Kejuado County Council which would enable it, if it so chooses, to suspend development in the Athi Kapiti Plains while a land use (or physical development) plan is being prepared. Neither the Council nor the Ministry in charge of land use planning has taken any steps to make use of this provision with respect to this area. In the absence of an official and gazetted suspension of development within the Athi Kapiti Plains ecosystem, or of a gazetted land use plan, each application must be considered on its own merits and demerits, and not on the general principle – whether or not meritorious - that developments within this particular area should be curtailed. Accordingly, a denial of an application for an EIA licence, without a clear demonstration that the proposed project poses a risk of causing potentially adverse environmental impacts that cannot be mitigated, would not be justifiable.

74. In coming to that conclusion, the Tribunal has taken into account the submissions of the Respondents to the effect that the fact that developments have taken place in the Athi Kapiti Plains wrongfully in the past is not a justification for allowing another wrongful development to take place: "two wrongs do not make a right," the Tribunal was told. Clearly they do not. In the Tribunal's respectful view, however, it is not wrong for a landowner to develop his land. What would be unlawful, would be for a landowner to develop his land without obtaining the required permissions and licences. The application for the licence must be considered in terms of the legislation that imposes the licence requirement. If those requirements are met, the development ought to be allowed to proceed, in which case, the development would not be wrongful.

75. On the basis of its consideration of the evidence that was adduced before it, the Tribunal concludes that the Respondents' were not justified to deny the Appellants an EIA licence on the ground that the project site lies within the wildlife migratory route and dispersal area, without demonstrating why the potential adverse impacts to which KWS had pointed, such as the risk of poaching and the potential blockage of the migratory corridor, could not be mitigated.

76. Whereas the Tribunal has concluded that the Respondents did not sufficiently justify their denial of the EIA licence application under this head, the Tribunal is not satisfied with the adequacy of the information that was provided by the Parties on one aspect of this issue. That the general Athi Kapiti area serves as a migratory corridor and dispersal area for Nairobi National Park is clear. What is less clear is whether, and if so, how the proposed project, in particular, will affect the future viability of the area as a migratory corridor and dispersal area. If it will, the possible mitigation measures were not fully elaborated on by the Parties. The Tribunal is of the view that information provided by the Parties on this point was insufficient.

77. Under section 62 of EMCA, NEMA may require a project proponent to carry out further evaluation or environmental impact assessment study and submit additional information for the purpose of ensuring that the EIA Study Report is as accurate and exhaustive as possible. The Respondents

did not make use of this provision to ask for further information from the applicant before denying the licence application. The Tribunal believes that further information on this particular point would assist in identifying the nature of mitigatory measures that might be required to minimize potential adverse impacts of this project on the ecosystem, if any.

78. In its letter dated 7th October 2004 to the Director General of NEMA submitting comments to the EIA Study Report, KWS identified mitigation measures which might be adopted to minimize potentially adverse impacts of the project. These include putting up a surveillance outpost manned by KWS and tagging some animals (in particular wildebeest and zebra) to ascertain the extent of the wildlife migratory corridor and dispersal area and to monitor the route to and from the Park. Both of these measures underscore the need for more information as a basis for decision making and action.

79. The Tribunal believes that these additional mitigation measures should be costed and adopted as an integral component of the Project, and catered for in the project budget since they would provide mechanisms for filling the information gap that has been identified. As more information is systematically gathered and scientifically analysed, the mitigatory measures proposed can be refined so that the problems identified can be targeted more accurately and addressed. In the Tribunal's view, in the context of this project, data gathering and analysis with regard to the nature of potential impact on the wildlife migratory corridor and dispersal area that might arise from this development and the adjustments needed to manage impacts, if any, is not a one-off exercise: it must be seen as a long term undertaking during the life of this project. In the Tribunal's view, the right of wildlife to occupy this habitat must not be compromised by the developments taking place in the area.

The Mitigation Measures

80. In denying the Appellants the EIA licence, the Respondents stated that the mitigation measures proposed would not adequately address the anticipated potential environmental impacts of the project. This ground for denial of the EIA licence was supported by the Interested Parties. Given the scope of the project, the environmental issues arising range widely. The Tribunal considers that the EIA Study Report comprehensively identified the environmental concerns which needed attention through the inclusion in the design of the project of mitigation measures.

81. The full list of issues and the proposed mitigation measures are at pages 39 to 63 of Chapter 6 of the EIA Study Report. They include political, socio-economic and socio-cultural impacts; crime; human wildlife conflict; drinking water supply; liquid and solid waste management and pollution control; and urban sprawl. Human-wildlife conflict, the potential for urban sprawl, and the disposal of waste water were particularly contentious before the Tribunal. The Tribunal has already considered issues arising relating to the impact of this project on wildlife in the context of its discussion of the location of this project, as well as issues arising from the settlement in the area of people perceived as outsiders.

82. The EIA proposed that the concern that an inflow of 10,000 people would alter the traditional voting patterns in the local area and introduce a potential for a clash of cultures and social disruption could be redressed through a process of voter education to encourage voters to focus, in choosing leaders, on issues and not on ethnic or clan affiliation. Resort could also be had to strengthened law enforcement agencies and community conflict resolution mechanisms, such as village elders to deal with these concerns as well as with crime. The mitigation measures related to the impacts on wildlife revolved around greater clarity in Government policy about the future of

Nairobi National Park, and an examination of the possibility of managing the National Park as a closed system. These issues have been the subject of findings by the Tribunal in the context of the Tribunal's consideration of the issues relating to the location of the project above.

83. As regards solid waste management, the construction of two sanitary landfills at sites which had already been identified, was proposed. The shortage of drinking water in an area classified as semi-arid was also identified as a problem. The EIA Study Report proposed that drinking water would be sourced from boreholes drilled both within the housing estate and, for the use of the local community members who do not reside in the estate, outside the estate. The EIA Study identified the high flouride content in the ground water in the area as a potential problem, and proposed de-fluoridization as a mitigation measure to bring the levels down to the recommended World Health Organization standard of 1.5 ppm. Solid waste management would be provided through sanitary landfills to be constructed within the estate, the sites of which had been identified. The concern that the landfills would be, in effect, dumpsites, arises from the confusion in the minds of many caused by the poor management of many landfills in Kenyan urban centers. There is no doubt that properly managed sanitary landfills are perfectly capable of dealing with solid waste management requirements of an urban settlement.

84. The EIA Study Report identified as a potential problem the likely mushrooming of unplanned settlements in the neighbourhood areas of the new town. Urban sprawl occurs particularly because of the lack of effective physical planning and development control systems around towns. It exacerbates the adverse effects of urbanization. In the case of this project, the contrast between a well planned and well managed housing estate co-existing in close proximity with an unplanned settlement lacking in basic facilities would be a most undesirable consequence of the proposed development. Leaving the issue wholly to the physical planning authorities to deal with will not suffice.

85. The statutory responsibility to control unplanned settlement lies with the local authorities. Such authorities, and Ol Kejuado County Council is no exception, face serious constraints in carrying out their statutory responsibilities. If urban sprawl is to be contained, the developers of this project will need to work with Ol Kejuado Council to put in place plans and systems to manage and control urban sprawl. This support should also be budgeted for and included as an integral aspect of this project. The Tribunal believes that this would further mitigate the potential negative environmental impacts that might arise from the project. Clearly, the containment of urban sprawl is not a one-off activity, but must be seen as a continuous undertaking during the life of the project which, in due course, should gradually be left to the local authority as its capacity to carry out its statutory duties improves.

86. The arrangements for waste water disposal was dealt with at length before the Tribunal. The liquid waste (sewage) is to be managed through a hybrid constructed wetlands facility which has been designed by Stroutel Afrique Engineering Consultants, whose civil engineer, Engineer Wilberforce Odhiambo gave evidence before the Tribunal. The facility is described at page 35 to 36 of the EIA Study Report. The Report indicates that the underlying principle of the design is that of realizing significant reductions in suspended solids, bio-degradable organics (e.g. COD and BOD) and removal of pathogens, nutrients, refractory organics, heavy metals and dissolved solids. At page 35 it is said to consist of:

"(1) An inlet/screening chamber to trap or filter out solid waste, plastics, and trash accompanying the waste water; (2) a lined balancing tank to facilitate sedimentation of sludge, stabilize flow throughput, enhance bio-degradation to miscible liquids, precondition waste and prevent the transportation of grit,

and ensure that only liquid waste goes into the gravel bed hydroponics (GBH); (3) two GBHs to significantly reduce the BOD, COD and total suspended solids in the waste through aerobic and anaerobic processes; (4) two facultative ponds to expose the waste to sunlight and air which would further enhance aerobic and anaerobic processes of waste water; (5) four maturation ponds whose plant habitat would absorb pollutants such as heavy metals, lower BOD, COD and total suspended solids, and also destroy pathogens in waste water; and (6) one balancing pond to serve as storage for treated waste water."

87. At page 34 it is said that the design incorporates a sewerage conveyance system consisting of:

(a) "Distribution and trunk sewers to collect sewage from the developed plots and convey it to the treatment plant;

(b) Sewage treatment plant developed to condition the sewage to WHO/Ministry of Health standards of not more than 25 mg/l BOD and 50 mg/l COD and 30 mg/l suspended solids;

(c) Outfall to discharge the treated sewage to the receiving waters, however the sewerage shall have a balancing pond from where part of the water can be recycled for watering trees and gardens and the rest flow into adjacent streams north and south of the town.

(d) Operation and maintenance of support facilities of buildings, plants and equipment."

88. The EIA Study Report states that, if properly built, maintained, and operated, constructed wetlands can effectively remove many pollutants associated with municipal and industrial wastewater and storm water. BOD will be reduced to 25 mg/l and COD to 50 mg/l, standards which represent Kenyan and World Health Organization standards. Examples of other constructed wetlands in Kenya were given to demonstrate that the proposed system has proved itself elsewhere to be an effective waste water treatment system. At page 60 of the Report, it is acknowledged, however, that discharge of excess waste water to local watercourses could harm organisms and animal habitat through the accumulation of solids and toxic substances and the depletion of oxygen through the decomposition of organic material. Discharges can arise also from an overflow from the wetlands during flooding.

89. The Respondents and the Interested Parties challenged this design. Mr. Robert Ndetei from KWS testified that he was a wetlands expert, and that, in his view, the plants to be grown in the facultative ponds would reduce the effectiveness of the facultative ponds because their roots would reduce the aeration of the ponds. Similarly, the plants to be grown in the GBHs would be difficult to manage, as access to the GBHs would be limited. In his view, ideally, the plants should be grown in the maturation ponds, although to do so would require extra land. He thought that, although in the initial years the design could work, its efficiency would diminish with time, as the vegetation in the ponds reduced aeration.

90. The waste water disposal design was challenged also on account of the fact that it incorporates an outfall to discharge the treated sewage into the two watercourses north and south of the town, notwithstanding that most of the treated water would be recycled for watering trees and gardens, and that, prior to the discharge, the treated water would have been treated to Ministry of Health and WHO standards of 25 mg/l BOD and 50 mg/l COD and 30 mg/l suspended solids. The risk of pollution of the receiving waters was stressed, particularly the fact that, in this water scarce locality, the natural watercourses are used as sources of drinking water by human beings, domestic animals and wildlife. The perception that people would be drinking water contaminated

with sewage would cause offence, even if, scientifically, it could be shown that the waste water had been treated to acceptable standards.

91. The weight to be given to objections based on the offence caused by perception of contamination was addressed in the New Zealand case of *Robert Te Kotahi Mahuta v The Waikato Regional Council & Anchor Products Ltd*, reported in the Compendium of Judicial Decisions on Matters Related to Environment: National Decisions, Volume II at page 214. Anchor Products Ltd sought consent to expand its dairy factory and install a gas fired cogeneration plant to supply energy to the milk processing plant. Among the objections to the application by the Maori people of New Zealand was the claim that there would be adverse effects of taking water from the river and discharging contaminants into it. Witnesses testified that there was no need for discernible physical adverse impacts - even the perception of contaminants flowing into the river would cause offence. The Environmental Court examined the practical difficulties of disposing of the liquid waste to land, which would have avoided the perception of contamination to the river, and ruled that “perceptions which are not represented by tangible effects do not deserve such a weight as to prevail over the proposal and defeat it.”

92. The Tribunal is of the view that the project proponent must apply all reasonably practicable measures to avoid contamination of neighbouring watercourses arising from the discharge of waste water. If there are additional practicable measures that can be taken, within reason, to avoid discharging the treated waste water to receiving waters, they must be adopted. In this regard the project proponent shall re-examine the waste water disposal design with a view to ascertaining the nature of adjustments that can be incorporated into it further to reduce the risk of contamination of watercourses through the discharge of waste water. The Tribunal observes that, prior to construction of the waste water disposal facility, should the design still comprise an outfall for discharge of excess treated water to the neighbouring rivers, a permit from the Water Resources Management Authority, established under the Water Act, 2002, will be required.

93. The Tribunal considers that, despite claims to the contrary by the Respondents and the Interested Parties, the mitigation measures which have been put forward to deal with the issues identified in Chapter 6 of the EIA Study Report are, on the whole, well thought out and capable of being implemented. The Tribunal listened to the experts who carried out the EIA Study, including Prof. Elijah Biamah as well as Eng. Wilberforce Odhiambo, who designed the waste water disposal facility. They impressed the Tribunal as being authoritative, and in matters of professional opinion, their testimony is to be preferred. The Tribunal sees no reason to conclude that the mitigation measures they have proposed would not be adequate to deal with the identified environmental concerns, notwithstanding that the proposed measures can be enhanced further along the lines which the Tribunal has indicated.

94. Should it happen that the project is not implemented in accordance with the statements made in the EIA Study Report, as was claimed before the Tribunal might happen, the Respondents have the power under section 67 of EMCA to suspend the licence until corrective measures are taken. Additionally, under section 68(4) the project proponent is placed under an obligation to take all reasonable measures to mitigate any undesirable effects not contemplated in the EIA Study Report. It should also be kept in mind that, notwithstanding the grant of an EIA or other licence or permit allowing an activity to be implemented, NEMA and other regulatory and enforcement authorities retain their powers to take enforcement action, where this is called for, to ensure that the licensed development activities do not cause negative environmental impact. In the Tribunal’s view, therefore, failure to identify potentially adverse impacts or even to provide adequate mitigation measures is not necessarily fatal to an application for an EIA licence.

The future of the project

95. The Respondents cited, as a basis for denying the Appellants the EIA licence, the ground that the future cumulative environmental impacts of the project are uncertain given the enormity of the project. In their written submissions to the Tribunal, the Respondents pointed to the uncertainties surrounding the future of the wildlife in the Athi Kapiti ecosystem, and the survival of Nairobi National Park. They argued that cumulative impacts arising out of the Jamii Bora project will have "disastrous consequences and cause serious injury and irreparable damage." The Respondents' lawyer urged the Tribunal to rely on the principle of precaution, which, it was said, requires "vigilance and prevention on account of the often irreversible character of damage to the environment and the limitations inherent in the very mechanism of reparation of this type of damage," quoting from the International Court of Justice Decision in The Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia, 1997, General List, No 92).

96. The Appellants described this ground for denying them the EIA licence as "vague, general, and not supported by any facts, evidence or material whatsoever." They contended that the future cumulative environmental impacts of the project were known and were addressed in the EIA Study Report, which showed that the proposed project would, in fact, improve an environment that presently is inhospitable, degraded and lacking in basic amenities. The project will introduce agro-forestry, recreational parks, health and educational facilities, infrastructure such as a paved road, electric power and drinking water supply, all of which would benefit the local population. The Appellants argued that they had relied on the best experts available in the country and there is available the required scientific knowledge and technology to deal with potentially negative consequences, if any arise.

97. During the proceedings before the Tribunal, doubt was cast on the viability of this project. Questions were raised by the Respondents and the Interested Parties as to how it can be expected that the poor people who make up the members of Jamii Bora will sustain the project. Describing the project as "donor driven," counsel for the Interested Parties argued that, once the donor leaves, the project, inevitably, will collapse, since the low income residents will be unable to keep it going without donor support. The Interested Parties argued that this was all the more likely as the residents, previously eking out a living as casual workers in Nairobi, would be unable to travel to and from Nairobi daily to earn a living and would therefore not manage to keep up with the payments for the housing and other services needed to maintain the project. They might, consequently, either sell the houses to the middle class and return to the slums or simply continue to occupy them without paying for the upkeep of the estate, waiting for another donor to come to their aid.

98. From the testimony of Mr. Maurice Mbegera, NEMA's Director of Compliance and Enforcement, and others, it became clear that both the Interested Parties and the Respondents had assumed that Jamii Bora was a foreign funded organization, and that this housing project was to be built using donor funds, after which the donor would withdraw and let the beneficiaries fend for themselves. When that happens, they argued, sewerage systems and solid waste management systems, educational and health facilities, drinking water supply and other facilities will collapse, leading to serious adverse environmental effects. They had also assumed that the occupants of the proposed housing estate earned a living as casual labourers in Nairobi's industrial areas and intended to commute to and from Nairobi to continue working as casual labourers in Nairobi. On the basis of those assumptions, the Respondents and Interested Parties saw the project as unsustainable and its future as uncertain.

99. In her evidence, Mrs. Ingrid Munro sought to explain the nature of the organization and the project concept and design. Jamii Bora has a Board of Trustees made up of six prominent individuals, four Kenyans and two non-Kenyans. The Managing Trustee, Ingrid Munro, is a Kenyan resident. The organization is a member driven organization registered in Kenya as a Trust. It strives to empower the poor to realize their potential through self-help and the provision of micro-credit. Members, the majority of whom are small scale traders running kiosks and hawking on the streets, make small regular contributions from their income towards a pool of funds from which other members may borrow money to invest in their small businesses. No collateral is required and the guarantee of repayment comes from the social pressure from other members: failure to repay threatens one's membership. From the testimony of Beatrice Sabana, Chief Executive of the Association of Micro Finance Institutions, micro-credit is the principal way in which poor people access credit.

100. The housing project was conceived of in order to provide the members with an opportunity to own their own houses in a decent environment, away from the slums. A key feature of the concept was affordability. The land needed to be spacious but at the same time not prohibitively expensive. Upgrading the slums in Nairobi was out of the question: the land is expensive, small and, in any case, not available for acquisition by a non-governmental organization to use for its members. The purchase price of the houses, at Kshs 150,000/- had to be low enough to enable the members afford to repay the monthly mortgage payments from the income derived from their trade. Only members who met pre-set criteria could qualify to be allowed to purchase a house: a non-member would not be eligible, and therefore the project could not be "hijacked" by the middle class. The relocated members, being traders, will continue with their trade in the nearby towns and villages and earn their living that way: there will be no need for them to commute to Nairobi daily.

101. From the evidence of Ingrid Munro, the key to the viability and sustainability of this project lies in the pooling of resources by many low income people, which enables them to build up a capital base that is substantial enough to be able to undertake a major housing project, such as the one proposed. Continued pooling of resources after occupation of the houses will enable the residents to meet the costs of maintaining the housing estate, including its facilities. In order to ensure that that happens, the project design provides for the establishment of a Management Board, which will be responsible for collecting and making payments and for running the services and maintaining the facilities. The Board will also procure experts at a fee to provide technical input.

102. The Tribunal sees no reason to doubt that this concept can work. Systems for pooling resources to meet common objectives as well as residents associations formed for purposes of maintaining housing estates are known in Kenya. What is proposed in this particular case is to apply known ideas and systems to meeting the housing needs of members. It is also worth remembering that the Jamii Bora Charitable Trust, as the applicant for the EIA licence, is responsible for ensuring compliance with the obligations of licence. It is a Kenyan, not a foreign, organization, registered under the Trustees (Perpetual Succession) Act. This Act requires that the appointment of every new trustee shall be certified by the Minister. Consequently, the Minister will at all times know the particulars of the Trustees who, ultimately, are responsible for ensuring the viability and sustainability of this project. The risk of the project's sponsor in future abandoning the project and leaving behind serious environmental damage does not therefore appear to be any more serious with regard to this project than with regard to any other project.

Alleged irregularities and breaches of the law

103. During the proceedings, and in their written submissions, counsel for the Respondents and the Interested Parties argued that the Appellants were not eligible to be issued with an EIA licence because they had not complied with certain requirements of the law, including their failure to give alternative locations for the project. They argued also that the planning permission which the Appellants had obtained from the Ol Kejuado County Council was irregular and invalid. In any case the Appellants had not yet obtained the consent of the Land Control Board which they required to change the use of the land from agricultural to commercial, and they had not yet surrendered the title deed for the land in exchange for a certificate of lease as required by the Registered Land Act, Chapter 300. The Interested Parties, through their counsel, submitted additionally that because the Appellants had failed to commence their project after the lapse of three months from the date of their application, they had waived their right to the licence.

104. For his part, counsel for the Appellants alleged that the Respondents had committed breaches of several legal and procedural requirements, which separately and cumulatively vitiated their decision not to grant the EIA licence. The breaches cited were failure to gazette the EIA Study Report; failure to set up a technical advisory committee on the Appellant's project properly; allowing the 1st Respondent, the Director General of the National Environmental Management Authority (NEMA), to participate in and take over the conduct of the proceedings of the public hearing; holding the public hearing out of time and irregularly; and purporting to determine the application after the mandatory three months.

105. Regulation 18 of the Environmental (Impact Assessment and Audit) Regulations, LN No 101 of 2003 of EMCA (the EIA Regulations) states that the EIA Study Report shall contain "an analysis of alternatives including project site…" The Respondents argued that the Appellants had not provided alternative sites for comparison. It was suggested that the alternative of implementing the project in the slums should be considered. For reasons already adverted to, upgrading the slums was not feasible. The developer therefore looked elsewhere. Before buying land in Kisaju, they had considered acquiring land in Thika as well as in Kiambu but they could not afford the land there, and bought this land when it became available.

106. The Tribunal does not consider that an analysis of alternative sites is always practicable. A developer cannot reasonably be expected to compare the potential impacts of developing a project on a site which he owns as against the potential impacts of developing the project on another alternative site, which he does not own. Such a comparison would not be meaningful, as the developer may well not be able to acquire the alternative site. Yet, a developer cannot be expected to acquire alternative sites for the sole reason of comparing the potential impacts of the proposed project on those alternative sites.

107. Counsel for the Respondents also argued that the planning permission which the Appellants had obtained was irregular. Evidence was given by the Chairman of Ol Kejuado County Council, Councillor Julius ole Ntayia and by Mr. Patrick Waweru, the Kajiado District Physical Planner that the title deed owned by the developer should have been surrendered in exchange for a certificate of lease, but this was not done; that the advertisement in the newspaper of the application for planning permission came after the actual planning permission had been issued; that the recommendations of the District Physical Planning Liaison Committee on the application for planning permission had been provided after the local authority had given its decision; and that a full meeting of the Council had not been held to consider the application for planning permission as required by the rules.

108. To these alleged irregularities counsel for the Appellants responded that the developer had applied for, and obtained, planning permission not once, but twice, because it had been noticed that the first time the application was made, it was not advertised. The process was therefore repeated a second time, hence the confusion in the minds of the Respondents' witnesses. According to the Appellants, there was

no irregularity at all, and the Appellants supplied a bundle of materials dealing with the application for planning permission, and change of use from agricultural use to commercial cum residential use as an annexure to the EIA Study Report at pages 204 to 207.

109. The Tribunal does not consider that it has to make a positive finding on these issues. As the Tribunal has had occasion to state before, in Nakummat Holdings Ltd v The National Environment Management Authority, Kenya Gazette No 85 of 9th December, 2005 Vol. CVII No 85 page 3027 at 3028, the Tribunal does not sit on Appeal from the decisions of physical planning authorities. That function has been vested by Part V of the Physical Planning Act, Chapter 286 in the relevant Physical Planning Liaison Committee. Remedies to deal with irregularities, if any, with regard to the planning permission that has been obtained, or an alleged failure to comply with mandatory statutory requirements, such as the requirement to surrender a freehold title deed in exchange for a certificate of lease, must be sought within the framework of the relevant laws dealing with those issues. In the same vein, in the Tribunal's respectful view, Regulation 4(2) of the EIA Regulations - which suggests that other licencing authorities may not issue licences under their own statutes unless the applicant has already procured an EIA licence - is *ultra vires* section 58 of EMCA.

110. The Appellants alleged that the Respondents had not given their decision within three months as required by regulation 23(1) of the EIA Regulations. The Respondents explained that they were awaiting the report of the Chairman of the public hearing held on 11th December 2004, and this report came after the end of the three month period. The application for an EIA licence was lodged by the Appellants on 15th September 2004, and the decision was delivered on 14th January 2005. In the Tribunal's view, there is an acceptable explanation for the delay in delivering the decision. To the Interested Parties submission that, in not carrying the project after the lapse of three months, the Appellants had waived their right to an EIA licence, the Tribunal would only note that the choice by an applicant for an EIA licence to await a formal communication of the Authority's decision cannot be held against the applicant.

111. The Tribunal has considered the argument that the Respondents did not properly set up a Technical Advisory Committee and is satisfied that the rules do not necessarily require that a Technical Advisory Committee be set up specifically for a project, and the use of an existing Technical Advisory Committee, as was done in this case, to consider an application, is not irregular. The Tribunal also accepts the Respondents' evidence that they did notify the Applicant of the Applicant's responsibility to advertise the application in the Gazette. The omission to advertise in this case cannot be blamed on the Respondents. With regard to the public hearing, the evidence that was adduced indicated that the Director General of NEMA attended and participated in the public hearing. A reading of regulation 22 of the EIA Regulations does not show that the presence and participation of the Director General at the public hearing is irregular, even if one might consider that it is not good practice, as it might constrain the conduct of the public hearing.

ORDER

112. On the basis of its findings on the issues arising, the Tribunal unanimously makes the following order:

(a) The Respondents' decision dated 14th January 2005 denying the Appellants an EIA licence for the proposed project be and is hereby set aside;

(b) An EIA licence be and is hereby issued for the Appellants' project, subject to the following conditions:

i. The project proponent shall incorporate, as an integral part of the project, a wildlife surveillance outpost, to be designed and operated in collaboration with KWS and other relevant stakeholders, and an arrangement for tagging some animals, in particular migratory ones such as wildebeest and zebra, to ascertain the extent of the migratory corridor and dispersal area in order to facilitate the monitoring of their movements to and from Nairobi National Park, and their response to the new housing development. This is in order to provide a system for data gathering on wildlife behaviour and to inform decision making about the action needed to minimize adverse impacts on wildlife;

ii. The project proponent shall examine what additional practicable measures can be taken to avoid discharging the treated waste water into watercourses, and shall incorporate into its wastewater treatment design such further measures as can be adopted which are practicable and cost effective. No direct discharges to watercourses shall be made without the permission of the Water Resources Management Authority under the Water Act, 2002. This is in order to minimize the offence caused by the perception that local watercourses risk being contaminated by discharges from the wastewater disposal system, as well as by an overflow from the system that may occur during floods. Further the project proponent shall ensure that technical experts are procured to manage the waste water disposal system;

iii. The project proponent, in collaboration with Ol Kejuado County Council and other relevant stakeholders, shall put in place, as an integral part of the management of the housing estate, plans and systems for controlling urban sprawl including the provision of reasonable and cost effective technical and administrative support to the County Council for this purpose. This is in order to minimize the risk of uncontrolled urban sprawl arising from this development;

iv. The project proponent, in collaboration with relevant stakeholders, shall set up systems for managing community relations and shall ensure that, as far as possible, the benefits of the project which have been planned for local community members, who are not members of Jamii Bora, are available on an equitable basis, to all members of the local community who wish to access them, regardless of the views they have expressed with regard to this project. This is in order to facilitate harmonious community relations and to reduce the prevailing tensions between the members of the local community who hold differing views with regard to the proposed project;

v. In implementing the project, the project proponent shall ensure that the Environmental Management Plan provided in the EIA Study Report is complied with, and shall also obtain all required permits, licences and authorizations under the relevant laws; and

vi. The project proponent shall ensure that information regarding the project and mitigation measures is availed to all relevant stakeholders in order to enable them make informed decisions about the project and to minimize misunderstandings with regard to what is intended.

113. The above conditions shall be and are hereby integrated into the EIA licence and NEMA shall act within its mandate under EMCA to monitor the compliance with these conditions during project implementation. The Tribunal notes that the EIA licence application fee of Kshs 600,000/- has already been paid to the 2nd Respondent by the Appellants. The receipt for this payment was annexed to the documents submitted by the Appellants in support of the Appeal. Accordingly, no further licence fees is payable for the licence granted herein.

114. The Parties, including the Intervenors, asked for costs to be awarded as part of the determination of the Appeal. The award of costs by the Tribunal is governed by rule 39 of the National Environment Tribunal Procedure Rules, LN No 191 of 2003. The Tribunal has taken into account the public importance of the subject matter of this Appeal, and the complexity of the issues which it dealt with.

Additionally, the issues argued by the Parties, including the Interested Parties, before the Tribunal were serious issues, requiring consideration by the Tribunal. Further, in the Tribunal's view, Parties conducted the Appeal with the seriousness it deserved. The Tribunal therefore does not see this as a fitting case in which to award costs against any Party. Each Party, including the Intervernors, shall therefore bear their own costs of the Appeal.

115. The Tribunal appreciates the diligent manner in which counsel for the Parties, including the Interested Parties, conducted the Appeal.

116. The Tribunal draws the attention of Parties to section 130 of EMCA.

Delivered in the presence of counsel for the Parties at Nairobi this 12th day of April 2006.

Donald Kaniaru …….. Chairman.

Jane Dwasi …….. Member.

Stanley Waudo ……... Member.

Joseph Njihia …….. Member.

Albert Mumma …….. Member.