REPUBLIC OF KENYA

NATIONAL ENVIRONMENT TRIBUNAL - NAIROBI

Tribunal Referral Net 07/2006

NAROK COUNTY COUNCIL…….……. 1ST APPELLANT

KENYA TOURISM FEDERATION…….…..…..……2ND APPELLANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

(NEMA).....1ST RESPONDENT

WASAFIRI CAMP LIMITED……...….....……2ND RESPONDENT

BEN KIPENO AND OTHERS

KENYA INVESTMENT AUTHORITY (KIA)…….....INTERVENERS

RULING

1. By their Notice of Appeal dated 26th April 2006, the Appellants Narok County Council and the Kenya Tourism Federation (hereinafter the Appellants) filed an appeal against NEMA, 1st Respondent, and Wasafiri Camp Ltd, the 2nd Respondent, (hereinafter the Respondents) challenging NEMA's environmental impact assessment (EIA) certificate of approval to the developer, the 2nd Respondent, as contrary to EIA Regulations. They requested the Tribunal to set aside the approval by NEMA and to order the 2nd Respondent not to continue any development activities at the project site. In their reply of 15th May 2006 the Respondents urged the Tribunal to dismiss the appeal with costs. The regulations are contained in legal Notice No. 101 of 2003, of Environmental Management and Coordination Act (EMCA), No. 8, of 1999. The developer had sought to construct a lodge / camp in the environs of the Maasai Mara Game Reserve; outside the Game Reserve.

2. Two Interveners sought and obtained authority to participate in the appeal as interested and affected parties. These were Ben Kipeno, and other four affected parties as landowners, namely Mr. Mutaka Ole Mpooya, owner of CIS Mara/Koiyaki/Daguruguruеti/280, Mr. Martin Ole Mariko owner of CIS Mara/ Koiyaki/ Daguruguruet/281, Mr. Korio Ole Naimodu owner of CIS Mara/ Koiyaki/ Daguruguruet/294 and Mr. Lesiomon Sale owner of CIS/Koiyaki/Daguruguruet/2601**.** They filed their notice on 15 May 2006 contesting the right of the Appellants and the Tribunal to deal with the appeal. The other interested party that also joined in the proceedings was the Kenya Investment Authority (KIA).

3. The 1st Appellant, Narok County Council, was represented by Moitalel Ole Kenta Advocate, of Kenta, Moitalel and Co. Advocates; the 2nd Appellant, Kenya Tourist Federation, by Senior Counsel Fred Ojiambo Advocate of Kaplan and Stratton; the 1st Respondent, by Mereka of Mereka and Co. Advocates; the 2nd Respondent, Wasafiri Camp Ltd, by the law firm, Robson Harris and Company Advocates; respectively by Mrs Jane Mwangi, Advocate (early stages of the hearing and preliminary objections); Maurice O. Makoloo, Advocate and Lazarus Odongo Ogembo Advocate which firm and team also represented the affected parties (as Interveners) in the proceedings. Finally the Kenya Investment Authority (KIA) was represented by Ms. Caroline Oyula of the Attorney General Chambers.

4. In the course of its hearings on 19th June, 22nd June, 27th July, 10th August, 18th August (site visit), 6th September, 19th September, 13th October and 14th November and 27th November 2006 (When the Counsels made their final submissions), the Tribunal heard witnesses as indicated herein. The 1st Appellant called the Clerk to the Narok County Counsel, Mr. Wilson Mwita Maroa; the Senior Game Warden Mr. Michael Koikai, Mr. Samson Parsimei Lenjirr. The 2nd Appellant called two witnesses, Mrs. Arundhati Inamdar–Willetts, EIA expert and Jonathan Briston Scott of BBC. The 1st Respondent called three Expert witnesses: Augustine Omwamba, geologist, working with Ministry of Water and Irrigation for 21years, the lead EIA expert, Dr. Ciira Kiiyukia, Lecturer at Jomo Kenyatta University of Agriculture and Technology (JKUAT) and Mr. Maurice Mbegera, Director, Compliance and Enforcement Department of NEMA. The 2nd Respondent called no witness but embraced the evidence of the 1st Respondent's witnesses. They had intended to call one witness, Ben Kipeno but ultimately did not call him. The interested parties called a community representative, Mr. Joseph T. Nabaala who read a statement. KIA did not call any witness.

5. The Tribunal and the team of lawyers and parties visited the project site on 18th August 2006 and saw the surrounding areas. It heard part evidence from the Senior Game Warden, Michael Koikai, who completed his evidence in Nairobi and also heard some statement, and received copies of the same, from the community representative.

6. In addition to witnesses, nearly all experts, called to the Tribunal to present evidence and clarify issues, all the Counsel in this matter generously presented bundles of documentation and materials in support of their respective positions. The materials included several statutes and legal Notices respecting some of the statutes: the Local Government Act, Cap 265; the Physical Planning Act, Cap 286; the Registered Land Act, Cap 300; The Land Control Act, Cap 302; The Investment Act, 2004 and amendments thereto; legal authorities from local and foreign jurisdictions; scientific books and articles, among others.

7. The 1st Appellant by a further Notice of Appeal dated 23rd June 2006, elaborated the grounds of appeal as indicated below (paragraph 8) specifying action appealed against as based on NEMA'S approval letter dated 8th March 2006, in particular conditions numbers 3, 4 and 5 namely:

"3. The proponent shall comply with the relevant principal laws, by-laws and guidelines issued for development of such a project within the jurisdiction of Narok County Council, Ministry of Tourism, Kenya Wildlife Service and other relevant Authorities.

4. The proponent shall ensure that environmental protection facilities or measures to prevent pollution and ecological deterioration such as waste disposal facilities are designed, constructed and employed simultaneously with the proposed project.

5. The proponent shall ensure that during the construction phase, the operation adhere to Legal Notice No. 40. The Factories (Buildings Operations and Work of Engineering Construction) Rules, 1984."

8. The grounds of appeal by the 1st Appellant dissatisfied with the first Respondent's decision in its 8th March

letter, stated as follows:- (i) that the 1st Respondent did not, within fourteen days after receipt of the EIA study report invite the public to make oral or written comments on the report by publishing in the Kenya Gazette and in a newspaper with nationwide circulation, and making announcements of the Notice in both official and local languages in a radio with nationwide coverage, (ii) that it did not hold any public hearing on the project or seek the participation of major stakeholders and affected persons such as the Appellant, Kenya Wildlife Service, (KWS), Kenya Association of Tour Operators (KATO) and others adding (iii) that they were neither consulted nor their 'no objection' requirement sought and obtained; (iv) that it did not address itself to the very issue of cumulative environmental impact the project would have on the environmentally very fragile Maasai Mara ecosystem before the approval; (v) that it ignored the advice of its own technical team that visited the area and strongly recommended against any interference with the natural status of the area which is a breeding area of the Leopard among other fauna; (vi) that the 2nd Respondent did not seek the views of persons who may be affected by the project during the process of conducting EIA study by posting posters in strategic public places within the area, publishing a notice in a newspaper with nationwide circulation, making announcements of the notice in both official and local languages in a radio with nationwide coverage and by holding public meetings with affected parties and communities; and (vii) that the 2nd Respondent, invoking the 1st Respondent's approval of EIA report, carried out unapproved development of Wasafiri Camp contrary to and/or without complying with the mandatory conditions contained therein. That is, (viii) without complying with the relevant principal laws, by-laws and guidelines operational within the jurisdiction of the Appellant and other relevant authorities. This statement was further elaborated in eight statements thus: carrying on the construction of the Camp without the consent of the area Land Control Board as to the leasing and change of user from agricultural to commercial purposes, carrying out said construction without first applying for and obtaining presidential exemption from the relevant provisions of the Land Control Act (Chapter 302 of the Laws of Kenya

9. asafiri Ltd.'s members are not all Kenyan citizens, carrying on the development of the project without first seeking and obtaining development authority and approval from the Appellant, carrying on with the said project without consultation with and approval of other lead Agencies, carrying the development without first seeking and obtaining a certificate of compliance and the approval of the Director of Physical Planning (per the Physical Planning Act, Cap 286); obtaining an investment certificate to develop a project within an environmentally fragile ecosystem without first fulfilling all the requirements of the relevant Kenyan statutes, drilling a borehole without authority from the Water Resources Management Authority (Water Act, 2002) and generally carrying on an illegal construction capable of causing irreversible pollution and ecological deterioration of the fragile Maasai Mara ecological system.

9. The 2nd Appellant also aggrieved by the 1st Respondent's decision in its letter of 8th March 2006, elaborated its grounds of appeal filed on 7th July 2006 contesting the decision thus: (i) that it approved the 2nd Respondent's EIA project report for the proposed Wasafiri Camp despite the fact that the project report did not comply with the requirements of the Environmental Impact Assessment and Audit Regulations, (ii) that it approved the said project report while it was aware that the report was not satisfactory as it did not provide a site plan showing all structures including staff houses, that public participation was not adequate as major stakeholders and affected persons such as KWS, the 1st Appellant, KATO and others were not consulted and the report did not indicate the cumulative environmental impacts of the project in the Maasai Mara ecosystem, (iii) that it made the said decision despite the fact that the 2nd Respondent did not take any measures to rectify the shortcomings of the project report when required to do so. That the 1st Respondent (iv) should have, in the circumstances, found that an Environmental Impact Assessment Study was necessary before issuing an EIA licence, (v) that the 1st Respondent failed to consider the ecological effect of the proposal on the Mara ecosystem, and (vi) in making its decision it completely disregarded the objections and views given to it by various stake holders and affected parties. It also (vii) ignored the recommendations of its technical team presented to it in the site visit report dated 8th February 2006. Thus it (viii) acted contrary to its objects and functions as prescribed in the Environment Management and Coordination Act (EMCA).

10. The 1st Respondent filed two replies dated 26th May 2006 and 29th June 2006. It denied each and every allegation, unless expressly admitted, and in particular contested that the 1st Appellant had locus standi to prefer an appeal under section 129 of EMCA. Additionally, it challenged that the Game Warden, as Appellant's representative, had powers to so proceed under the Local Government's Act, Cap 265. As filed, therefore, the 1st Respondent averred that the appeal did not disclose a reasonable cause of action as such an appeal was not contemplated under section 129(1) of EMCA. In the first response it averred that "it was satisfied as to the adequacy of the EIA project report and that all the relevant concerns by all stakeholders were borne in mind before the requisite approval was given subject to terms and conditions it considered appropriate and which the 2nd Respondent have confirmed acceptance."

11. In its response filed on 29th June 2006, the 1st Respondent avers that the procedure and steps followed in approving the 2nd Respondent's application for an EIA licence was proper in terms of the provisions of Regulations 9 and 10(2) of the EIA and Audit Regulations, 2003(Legal Notice 101); and as per Regulations 9 and 10(2), they do not provide for the conducting of a public hearing while a project proponent is preparing an EIA project report. Further, these Regulations (9 & 10(2)) do not provide for an advertisement of the EIA project report to call for public comments. It denied that it did not seek comments on the EIA project report from relevant lead agencies, and as in the first response of May 2006, reaffirms its satisfaction as to the adequacy of the EIA project report and the process effected thereto. During hearing on 10th August 2006 counsel for NEMA noted that the grounds of appeal for 2nd Appellant, to which they had not replied, were similar to those of 1st Appellant and therefore should be taken as responded to in the replies earlier filed which was not objected to.

12. The 2nd Respondents and Interveners, also referred to as the affected parties, filed their responses on 15th May 2006. The 2nd Respondent raised four preliminary issues objecting to the appeal which it termed incompetent on the ground that the Appellants have no locus standi or right in law to prefer an appeal under section 129 of EMCA. In addition it challenged the power of a Game Warden to prefer or file the appeal on behalf of the Narok County Council. (As stated in paragraph 14 below, this contention was upheld by the Tribunal in its Ruling on this preliminary objection of 22nd June 2006.) And in any case its appeal was based on false information, the Respondent concluded.

13. The affected party, one Ben Kipeno, whose land, along with another four land owners, has been leased for the construction of the proponent's project also aver in their pleading that the project is on private land leased for the purpose of constructing a lodge, and raise objections, on constitutional grounds. They state that the appeal "is not preferred for the legitimate purpose of preserving the environment." It is preferred "for the predominant and illegitimate purpose of advancing exploitative tendencies or practices of the parties who have brought pressure on the Appellants to lodge the Appeal." In a further submission of 19th June, 2006 the affected parties objected on constitutional grounds and on sanctity of private contracts and contested that the Appellants, as third parties to the contracts, had a basis in law to intervene in the appeal.

14. The 1st Appellant strongly contested the preliminary objections which the Tribunal had in accordance with its Rules of Procedure, Legal Notice No. 191 of 2003, to first address before turning to substantive considerations of the matter. The parties – 1st Appellant and the Respondents and affected parties – through their counsels orally and in writing addressed the Tribunal on 19 June 2006 on the issue of jurisdiction and preliminary objections. The Tribunal, on 22nd June, 2006 issued its Ruling which, while finding the appeal of the 1st Appellant prosecuted by a Game Warden incompetent, but capable of ratification by the Narok County Council if it so wished, found that the appeal could continue on basis of the appeal by the 2nd Appellant.

15. The 2nd Respondent on 8th August 2006 filed grounds of appeal in reply to Appellants' statements of grounds of appeal, after the determination of the preliminary objections. In detailed response, paraphrased

hereunder, the Respondent challenged the statement of grounds of appeal by the Appellants, each in turn. Respecting the first Appellant, the opening ground is challenged as "utterly incompetent and does not lie" as it treats the project report by EIA expert Ciira Kiiyukia & his colleague, Samuel Gaitungu, as an EIA study report which it was not, and therefore the challenge was to a wrong document. The Respondent avers it prepared and submitted to the 1st Respondent a project report with details as required in the Legal Notice, (LN 101 of 2003). Upon receipt of the project report, the 1st Respondent was not under statutory obligation to invite members of the public to make oral or written comments, or to advertise in media or radio in official or local languages. There was no obligation under the law to conduct a public hearing either, upon receipt of a project report, or to invite "major stakeholders" to participate in a debate.

16. With respect to grounds of appeal by both Appellants, the 2nd Respondent disputes what is averred about the "major stakeholders" or "affected persons", considers it unsustainable; and false; that the grounds do not constitute a dispute that can be adjudicated by the Tribunal as no clear environmental issues have been legitimately, procedurally and legally put forward to the Tribunal; that by their nature and content the statements of the grounds of appeal are "replaced with emotive and personal business interests disguised as environmental concerns that cannot hold vis a vis the benefit of expertise provided by an expert opinion on the impact of the environment"; avers that the qualifications of the EIA experts are legitimate and have not been challenged or called into question by the Appellants, and hence no basis had been laid in the grounds of appeal to discredit the project report.

17. Further, with respect to the 2nd Appellant's grounds of appeal, and generally the 2nd Respondent attacks them as "irrelevant and vexatious" and as "having no basis in law as no relief is sought" from the Tribunal, and introduces the matter of Investment Certificate applied for and obtained from the Kenya Investment Authority, subject to its compliance with laws relating to environment, health and security. The 1st Respondent, having considered environmental issues, approved the proposed development whereupon the KIA authorised implementations of the project. Thus the 2nd Respondent complied with the laws desired of it respecting environment, health and security. In particular having been issued with a letter of approval by the 1st Respondent, and accepted the terms thereof and addressed them, it was not required to undertake an EIA study, and hence the requirement to advertise, solicit public participation did not arise and all legal and environmental issues had been satisfactorily addressed. The 2nd Respondent finally states categorically that from the project report itself that "whereas there is likely to be some environmental impact in relation to the proposed development, there are and have been disclosed sufficient mitigation measures to deal with the same "as envisaged in EMCA. Further the letter of approval given to it by the 1st Respondent was "granted properly, legitimately, procedurally and in accordance with the law."

18. The 1st Appellant's witnesses explained the grievances of the Narok County Council which was aggrieved as a result of the 1st Respondent's decisions to issue an approval letter (8 March 2006) for the 2nd Respondent to continue with a development in the Maasai Mara, within the jurisdiction of the Appellant. It contended that the approval was issued prematurely "as the proponent was supposed to and should have strictly adhered to the Regulations", (Reg. 10(2); 10(3)) which was contested by the 1st and 2nd Respondents. The sentiments of the 1st Appellant were strongly reinforced by the Counsel of the 2nd Appellant. The witnesses for the 1st Appellant, (The Clerk and the Senior Warden) did not find the application to the Council regular. They had received an application by one, Ben Kipeno, on 6 February 2006 for approval of a development of a Camp, Wasafiri Camp, on parcel 295. The Council had not received any other application, and this was put on the agenda of and considered by the Game and Veterinary Committee of the Council on 22nd February 2006; Min No. 13/06, unconfirmed, indicated. The Clerk explained the process of approval of Minutes in the Council, by the full Council, a process he said had not been completed by the time of the hearing. He indicated unconfirmed minutes are not binding on the Council or any party. He confirmed that no plans to construct the Camp had been submitted to the Council and consequently none had been approved. Asked why the Council addressed Wasafiri Ltd –

rather than B. Kipeno, who had applied – while it had never submitted an application to it, he stated it was simply an oversight, and denied there was an approval for Wasafiri Ltd. He mentioned that the proposed construction – later initiated and obviously above ground level – had prompted several complaints and named several complainants – Governor's Camp, BBC Nature History Unit Broadcasting House, Cheli & Peacock and Ol Tome Safaris Ltd. There had been a discussion with someone from Wasafiri Ltd, but he did not remember who and no minutes were kept either. There was another irregularity: the EIA project report had not been received by the Council.

19. The Clerk stated that the development in question should indicate who the investors were, Kenyan, or non Kenyan and B. Kipeno had not so indicated. The Council only knew on 14th June 2006 on carrying out a search. The Clerk was stringently questioned by Counsel, but maintained that NEMA had had no contact with them. He stated that, applications to the Council are not transferable, say from Kipeno to another party, and that the approval for Kipeno was a campsite, and if he set up a company, it would have to apply for approval/permission a new. As to how other parcels were added, he explained it happened in the Committee by member whom he could not name; there had been no other applications except Kipeno's.

20. In raising other questions of approval process in the Council such as whether plans had been received or considered by the physical planning committee; change of use had been applied for and considered; issues of Land Control Board consent or exemption; ability to dispose and lease private land, it emerged that various processes had not been completed under respective laws as stipulated in the conditions of approval. While draft Agreements of Leases by Kipeno and others had been attached, they had hardly been processed; nor were they established to be actually valid.

21. The evidence given by NEMA, while stating that the Council was contacted was by no means unequivocal. Indeed a letter was, on the face of it, sent to lead agencies and undoubtedly the Narok County Council was one of the agencies. However, the letter was addressed to Mara County Council, obviously a mistake and no correction was produced in the Tribunal. In the view of the Tribunal, the Clerk and other Council officers would have no reason to deny receipt of the consultation on the EIA project report. Besides in its letter of 18 January 2006 to Wasafiri Ltd. NEMA acknowledged expressly that "public participation was not adequate as major stakeholders such as KTF, the Narok County Council and KWS were not consulted."

22. During the evidence given by other experts (Koikai, Lenjir), the visiting NEMA team saw a borehole drilled and operational; housing started and structures, construction for sewage noted; saw caves, fig trees. The caves were used by leopards as breeding areas, and fig trees for cover of the leopards, it was stated in evidence. It emerged that all that work had been carried out by the proponent, the 2nd Respondent, by late March 2006. The witnesses and Council were not aware that the EIA had been done, and on observing these developments the witnesses had reported to the Council. When last on site there was no construction in early April 2006; construction had taken place after **stop order** was issued on 26th April 2006 which the proponent denied.

23. The witness representing the Community read out a statement blaming the dispute on business competition in the place; thus it was not really environmental. He had written the statement drawing on views of the community representatives around. He admitted pertinent laws, including environmental, had to be followed. The community members had then signed. On record were differing views from the members of various communities. Some for and others against the development. From amongst the communities only Joseph Nabaala presented the statement and responded to questions from some Counsel and Tribunal members.

24. Other expert witnesses, Mr. Omwamba, Mr. Mbegera, Dr. Ciira Kiiyukia, Mrs. Willetts and Mr. Scott also

testified. Mr. Omwamba, the geologist, had surveyed and sited the borehole; he was not concerned, it was admitted, with environmental aspects but with water source and the quality of water. He, in fact, was unaware of the fig trees and their significance to leopards. Dr. Ciira, likewise, was unfamiliar with the area; its uniqueness to leopards, and the gorge. He did not note, and learn about their ecological significance in his (10.00 am to 3.00 pm) five or so hour visit. He talked to the people that were on site and to no experts on the Mara ecosystem or its ecology. The EIA project report was the first he had done on wildlife ecology and had not in fact toured around. He had not been back; was briefed by someone, not the proponent, and was next seized with the matter when requested to reply or respond to the NEMA letter of 31st January 2006 on the issue of cumulative impacts of the area. He had then summarised what was presented in his EIA project report in other words. He defended his EIA project report, while admitting he was not an ecologist and was not versed in Mara ecosystem. He was a food technologist. Mrs. Willetts and Mr. Scott, on the other hand, knew the area and its ecology; were passionate about it and concerned about the new development in the very unique place that ought not to be unduly disturbed. While they had not been there in the past two years or so, they considered the Mara ecosystem should be carefully analysed in the EIA study and largely preserved for posterity. Their evidence was unshaken, in the view of the Tribunal. Mr. Scott talked to his "Big Cats" works that he has authored summing up his observations for decades in the area, and the lead expert was apparently unaware of these.

25. Mr. Maurice Mbegera, for NEMA, testified on this matter, referring extensively to NEMA's letter of 8 March 2006, approving an EIA licence to the 2nd Respondent, with several conditions, NEMA sent a technical team of several experts to the site and the team made a report with the following recommendations:

i. The proponent acted illegally by sinking a borehole before NEMA approval;

ii. The management for 25 tents in such a place would be a great challenge given the rocky nature of the surface;

iii. This is s sensitive wildlife habitat and should **NOT** be disturbed in any way;

iv. The proponent should look for an alternative site within or without the 500 acres leased as far as possible from this habitat;

v. The expert to be summoned by NEMA to explain some false reports given in the report and for not doing **PCC** on such a sensitive project and for not advising the proponent properly. There was doubt as to whether he visited the site;

vi. NEMA to urgently raise the matter of mushrooming camps around the reserve with KWS, Narok County Council to ensure that important wildlife habitat around the reserve is not destroyed, and

vii. The proponent should provide a detailed site plan, undertake **PPC** involving all stakeholders.

Mr. Mbegera said that these, though not taken in every respect, were considered. The recommendations were, in any case, advisory to NEMA. By the team's visit, a borehole had already been sunk. The witness had, though he did not recall the date, also visited the site. NEMA had written to the proponent on 31st January 2006 asking for additional input, namely site plan showing all structures including staff houses, public participation was not adequate as major stakeholders and affected persons such as KWS, Narok County Council, KATO and others were not consulted and indicating to the cumulative environment impacts of the project in the Maasai Mara ecosystem which had been availed on February 21, 2006. NEMA had also received Dr. Ciira Kiiyukia's EIA project report and shared it as required by law. He denied that the report had not been fully considered and explained the

requirements of an EIA project report and an EIA study report, which have different consequences under the law, that is the Environmental Impact Assessment (and Audit) Regulations, Legal Notice 101 of 2003.

26. The Mara ecosystem had attained fame in wildebeest and other animals annual migrations into and from Tanzania that bring untold number of tourists and enormous financial resources, in addition to world fame not only to Kenya, East Africa and the Region. This heritage if threatened, would compromise the pillars of sustainable development in socio-cultural, economic and environmental sustainability. Any investments in the area, while welcome, must balance all interests on a sustainable basis: not just immediate financial benefits.

27. The Tribunal has, in the light of the appeal, arguments, evidence and material before it to determine whether NEMA, did fully comply with EMCA and its Regulations strictly in its letter of 8th March 2006 approving a grant of an EIA licence to the 2nd Respondent, Wasafiri Camp Ltd, to develop the project site.

28. The response to the above question should be able to dispose this matter which attracted two Appellants; two Respondents, and two interveners/interested parties – Ben Kipeno and others, and the Kenya Investments Authority (KIA). The matter is significant, attracting five distinguished Counsel, and several experts, and putting forward several interests at not only local level, but well beyond; entanglement of environmental considerations, investment, tourism, fauna and flora and ecosystem in an area described as unique, fragile ecosystem and acknowledged as of immense global attraction.

29. Both Appellants forcefully argued, and urged the Tribunal to agree, that NEMA did not strictly adhere to its Regulations. NEMA contends it did, and having followed all the steps, procedures, EMCA and its Regulations. It therefore was entitled to grant a letter of approval to the 2nd Respondent, Wasafiri Camp Ltd. In this respect the 2nd Respondent agrees with the 1st Respondent, as do the Interveners.

30. Should NEMA have asked for an EIA project report or a study report from the 2nd Respondent" It is not in dispute that what was presented to NEMA by the lead expert, Dr. Ciira Kiiyukia, on behalf of himself and his colleague, Samuel Gaitungu for the 2nd Respondent was an Environmental Impact Assessment Project Report. And as an EIA project report, the rigours stipulated in the Regulations of gazettement, radio announcements in official and local languages etc are not required. The report, though, would be submitted to lead agencies, among others (Regulation 9 (1) and 9 (2)). The Respondents and interested parties would, therefore, be and are correct in contesting the 1st Appellant's ground of appeal in this respect. Strictly on basis of an EIA project report all the measures outlined by the 1st Appellant need not have been undertaken.

31. However, the 1st Appellant has argued that this determination by NEMA was premature and a full EIA study should have been required of the proponent. This was also urged of the experts called by the Appellants given the sensitive and fragile nature and uniqueness of the Mara ecosystem whose ecological sensitivity NEMA acknowledged and which the Tribunal unhesitatingly accepts. They therefore invoke Regulation 10(2) and 10(3), and argue, quite rightly, that the full EIA study should have been determined. NEMA knows of the ecological sensitivity of the Maasai Mara ecosystem, no doubt, and so affirmed as of the 18th January 2006 in its letter to Wasafiri Ltd wherein it stated that " the EIA project report for the above mentioned development has <u>been reviewed and due to ecological sensitivity to the Maasai Mara area an EIA study is required</u>." Counsel for the 2nd Appellant was quite emphatic in paragraph 2.3 of his submission on 27 November 2006. [Underlining is for emphasis only].

"While, as it will be demonstrated later in these submissions, it is possible to analyse the project report so as to show that NEMA was correct in its ruling that the <u>project report had not met the required standard and was for rejection</u>, <u>as indeed it was rejected, that letter of 18th January, 2006 by itself alone is proof that NEMA had</u>

reviewed the project report and found that it did not comply with the requirements of the NEMA regulations. Therefore, perhaps more than anything else, this letter highlights the impropriety and invalidity of the purported approval given on 8th March, 2006."

32. In view of the above, the option of the letter by NEMA to Wasafiri Ltd., the 2nd Respondent on 31 January 2006 requiring a response on the shortcomings of the project report was not any longer open to NEMA, and Wasafiri Ltd., aware of the situation should, rather, have lodged an appeal as per Regulations 10 (4) and 46, which, unfortunately, it did not. Instead the 2nd Respondent, in its letter of 21 February 2006, replied to NEMA, by sending a report prepared by the lead expert on the point of cumulative environmental impact. The question to ask at this stage is: did the cumulative environmental impact report prepared and actually sent to NEMA constitute a response, though apparently accepted by NEMA" Expert witness Mrs. Arundhati Inamdar-Willetts was of the opinion that it did not. And independent of this opinion, the author of the report on this aspect confirmed that it was not really a new report or effort. EIA Expert Ciira Kiiyukia, in response to a question in the Tribunal, admitted that he prepared the report, which was simply a summary of what the EIA project report contained; there was no new information but rather it was the same substance clothed in different words. In the view of the Tribunal, the report did not properly constitute a report on the cumulative environmental impacts.

33. The Counsel of all the parties diligently prosecuted the various grounds of appeal; the adequacy and, format of the EIA project report, the process used or not used by the players; the consultations among the lead agencies and other interests, the laws and processes observed or not adequately observed and their effects. These laws were cited, as were Court cases from local jurisdiction and abroad. But having reached the finding and conclusion that an EIA study be carried out, should the Tribunal carry on further analysis of the issues and material and pronounce itself on the merits of the aspects" Would it serve a purpose at this point except interfere with the process of the EIA study report and the mandate and responsibility of NEMA" This it should not do. In the view of the Tribunal, the answer to the question is in the negative. No additional reinforcement to the conclusion that an EIA study report and the process provided by the law of EMCA and its Regulations is needed and NEMA should be let to do its work, and it is so let. The proponent, likewise, should be let to do its work on the EIA study report the way it is required to do as per the Regulations.

34. On one matter though, an observation should be made. That is on the Investment Certificate issued by the Kenya Investments Authority (KIA) that the Counsel for the 2nd Respondent and the Counsel for the KIA stringently sought to uphold. The certificate, no. 0105 of 2nd March 2006, was issued subject to observing environmental, health and security laws, as also argued by Counsel for the Appellants and indeed Counsel for KIA noted that to the extent environmental concerns are not met, KIA would respect that. In effect this Ruling has determined that a full environmental impact assessment study be carried out. Accordingly, the condition that the project should comply with the laws relating to the environment is yet to be met.

35. The Tribunal, having reviewed this matter, unanimously, makes the following orders:

(i) Sets aside and quashes the decision of NEMA contained in its letter of 8 March 2006 conveying its approval of the EIA Project Report to the 2nd Respondent for the development of Wasafiri tented Camp on parcels 295, 294, 296 and 2061, the project site, in Mara Division, Narok.

(ii) That the proponent do prepare a full Environmental Impact Assessment study report in accordance with EMCA and its Regulations, and until such a study is completed, its report submitted to NEMA and NEMA has made its determination thereon, directs that no further development activity takes place at the project site or its environs.

36. The Appellants have asked for costs of this appeal of the Respondents, and the latter have asked the same of the Appellants. Also asking for the costs of the Appellants is the Intervener, KIA. The other intervener, the affected parties, have not but rather have asked the Tribunal to refer the matter to the Attorney General for criminal offences to be preferred against the Appellants in the appropriate forum as the Tribunal has no such jurisdiction. In this respect, the Tribunal declines to award any costs and orders each party and intervener (KIA) to bear its own costs. The complexity, significance of the subject matter persuades the Tribunal to that effect. The Tribunal also declines to proceed as urged by the intervener, affected parties, in this matter.

37. The Tribunal draws the attention of the Parties and the Interveners to the provisions of Section 130 of EMCA.

38. Finally the Tribunal expresses its deep appreciation to all the Counsel for the Parties and the Interveners for their diligence in prosecuting this appeal.

Dated at Nairobi this **20th** day of **December** 2006

Donald Kaniaru ……. Chairman

Jane Dwasi ……. Member

Joseph Njihia ……. Member

Stanley Waudo ……. Member

Albert Mumma ……. Member