IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, ONYANGO OTIENO, & VISRAM, JJ.A)

CIVIL APPEAL NO. 84 OF 2010

BETWEEN

REPUBLIC …….. APPELLANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY……. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J) dated 22nd February, 2010

In

H.C. MISC. CIVIL APPLICATION ELC. 7 OF 2009)

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JUDGMENT OF THE COURT

The appellant before the Court is **Sound Equipment Limited**. We shall hereinafter refer to it simply as "*the Appellant*." In 1994, the Appellant became the owner as lessee for a period of 99 years of land L.R. No. 209/12184 measuring approximately 2.107 hectares. About 2007, the Appellant wanted to put up what it called ten (10) town houses for residential purposes. The Appellant prepared and submitted drawings and specifications of the proposed houses to the City Council of Nairobi for approval. The approval was granted.

Thereafter, the Appellant was then obliged to comply with the provisions of the Environment Management and Coordination Act, 1999, hereinafter "the Act." That Act is administered by the National Environment Management Authority which is the respondent in the appeal. We shall hereinafter refer to it as "*the Authority*." Under the terms of the Act, the Appellant was required to carry out at its own expense an Environmental Impact Assessment Report and submit that report to the Authority. Rodger Rashid who was the Appellant's General Manager contended that the Appellant prepared the report and submitted it to the Authority. In his verifying affidavit dated the 28th January, 2009, Rashid did not say anything about the process which the Appellant employed in preparing the report. He merely stated that the report was prepared and submitted to the Authority and that upon its receipt, the Authority requested for further work to be carried out. The "*further work*" to be carried out were set out in the Authority's letter to the Appellant dated the 23rd May, 2007. A reading of that letter shows that the "further work" were really conditions which the Appellant would be required to comply with before starting construction and during the process of construction. The Appellant was required to accept those conditions before the Authority could approve its project and by its reply dated 28th May, 2007, the Appellant, through one known as Deepak Krishna wrote:-

"We refer to your letter dated 23rd May, 2007. We hereby confirm that we will comply by (sic) all the conditions as mentioned in your letter ref. No. NEMA/PR/5/2/2040."

Upon receipt of this letter the Authority, through its Director General, issued "ENVIRONMENTAL IMPACT ASSESSMENT LICENCE" dated the 28th March, 2008 and the conditions upon which the licence was issued were:-

"1. The licence is valid for a period of 24 months (time within which the project should commence) from the date hereof.

2. The Director-General shall be notified of any transfer/variation/surrender of this licence.

3. The proponent [i.e. the developer] shall ensure strict adherence to the Water Quality and Waste Management Regulations, 2006.

4. The proponent shall ensure strict adherence to the Environmental Management Plan developed throughout the project.

5. The proponent shall collaborate with EIA Expert(s) and the contractor(s) to ensure that proposed mitigation measures are adhered to during the construction phase and where necessary appropriate mending-up activities undertaken and a report of the same submitted to NEMA.

6. The proponent shall comply with the relevant principal laws, by-laws and guidelines issued for development of such a project within the jurisdiction of Ministry of Roads and Public Works, Ministry of Lands and Settlement, Ministry of Housing, Nairobi City Water and Sewerage Company and other relevant Authorities.

7. The proponent shall ensure that the development adheres to zoning specifications issued for development of such a project within the jurisdiction of City Council of Nairobi with emphasis on density requirement for the area.

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

9. The proponent shall ensure that environmental protection facilities or measures to prevent pollution and ecological deterioration such as solid and liquid management systems and landscaping are designed, constructed and employed simultaneously with the proposed project.

10. The proponent shall ensure that records on conditions of licences approval and project monitoring and evaluation shall be kept on the project site for inspection by NEMA's Environmental Inspectors.

11. The proponent shall submit an Environmental Audit Report in the first year of occupation/operation/commissioning to confirm the efficacy and adequacy of the Environmental Management Plan.

12. The proponent shall comply with NEMA's improvement orders throughout the project cycle."

The conditions contained in the Authority's Environmental Impact Assessment Licence were basically the same as those which were contained in the Authority's letter of 7th March, 2008 and which the Appellant had accepted by its letter of 10th March, 2008. The Licence with its conditions followed on 28th March, 2008.

According to the Appellant, upon receipt of the licence, it commenced construction of its proposed ten town houses and that, as at the time Rodger Rashid was swearing his verifying affidavit of 20th January, 2009,

"------. The construction had been proceeding in earnest and a substantial portion of the builder's work has been completed" – see paragraph 13 of the affidavit.

In paragraph 14, Rashid swore,

"THAT during the construction period, the Respondent's [i.e. Authority's] officers have visited the suit property regularly. The officers have never raised any complaint regarding the construction. I attach hereto a copy of the letter marked 'PR 10.' "

The letter marked "*PR 10*" was written to the Appellant by the Authority on 31st August, 2007. We note that this letter was written long before the licence was issued. The letter was in these terms:-

"This is in reference to our letter Ref. No. NEMA/PR/5/2/2040 dated 3rd August, 2007 in connection with the above subject.

Following my three (3) inspection visits to your property including the day when the Hon. Minister for Environment and Natural Resources visited the project site on 22nd August, 2007, the Authority is satisfied with what you have undertaken to protect the Mathare River that passes through your plot . We are satisfied that peging (sic) the riparian zone of the Mathare River has been properly marked. It is important to note that the boundaries of the wetland/riparian zone are clear and must not be encroached whatsoever during the life of the project.

In view of the above, the STOP ORDER issued by the Authority on 3rd August, 2007 is hereby lifted on condition that you uphold protection of the riparian zone.

Yours faithfully,

M.O. Mbegera.

FOR: DIRECTOR – GENERAL."

It is clear from the contents of this letter that there were obviously some problem or problems with the project. The magnitude of the problem or problems necessitated the visit to the site by the Minister and that was after the Authority had issued a "STOP ORDER" which we understand to mean the construction or proposed construction of the project had been stopped. One can infer from the contents of the letter that the problem was in connection with the Mathare River which runs through the Appellant's land. But according to the Appellant, the Minister's visit to the project was due to complaints raised by "*indignant residents*."

Listen to what Rashid said in his verifying affidavit:-

"8 THAT due to complaints by indignant residents, the then Minister for Environment and Natural Resources visited the suit property on 22nd August, 2007. I attended the meeting and the Minister asked the few complainants present to state their grievances. It clearly emerged that:-

(a) The complainants were keen to retain the suit property as vacant land notwithstanding those persons had fully developed their respective plots.

(b) The suit property was used by a few residents to take leisurely walks.

(c)The Applicant had fully complied with the conditions set out by the Respondent and the intended construction did not pose any danger to the environment. On the contrary, the construction was to enhance the environment.

9. THAT after the visit by the Minister, the Respondent authorized the construction to proceed. I attach hereto a copy of the authorization marked 'PR-6."

"PR6" is the letter whose contents we have already set out. Nowhere in that letter does the Authority list any complaint regarding leisurely walks or anything of that kind. The complaint dealt with in the letter was in connection with the Mathare River.

Be that as it may, on 20th January, 2009, the Authority wrote to the Appellant in these terms:-

RE: ENVIRONMENTAL RESTORATION ORDER FOR PROPOSED HOUSING DEVELOPMENT IN LOWER KABETE L.R. NO. 209/12184:

The National Environmental Management Authority issued an EIA Licence for the proposed housing development in Lower Kabete L.R. No. 209/12184 on 28th March, 2008. However it has come to the knowledge of the Authority that the project poses environmental threats which could not be reasonably foreseen at the time of the study and review.

Your attention is therefore drawn to the following provisions and requirements of the Environmental Management and Coordination Act (EMCA) 1999.

"64. (1) The Authority may, at any time after the issue of an environmental impact assessment licence direct the holder of such licence to submit at his own expense a fresh environmental impact assessment study, evaluation or review report within such time as the Authority may specify where –

(a)there is a substantial change or modification in the project in the manner in which the project is being operated;

(b) the project poses environmental threat which could not be reasonably foreseen at the time of the study, evaluation or review; or

(c)it is established that the information or date given by the proponent in support of his application for an environmental impact assessment licence under section 58 was false, inaccurate or intended to mislead.

(2) Any person who fails, neglects or refuses to comply with the directions of the Authority issued under subsection (1) shall be guilty of an offence."

You are therefore directed to:-

(i) cease construction activities on this site immediately;

(ii) undertake a fresh Environmental Impact Assessment (EIA) of the project activity you are currently undertaking to facilitate in depth evaluation of the potential impacts associated with the project and provide a forum for a comprehensive public participation with the affected interested stakeholders;

(iii) submit a letter of commitment to the Authority to the effect that you will comply with the above requirements within two (2) days from the date of receipt of this letter;

(iv) liaise with your EIA Expert and relevant agencies for relevant documents and advise.

Further NOTE that section 138 EMCA 1999 provides that ANY PERSON who fails to prepare an environmental impact assessment report in accordance with the requirements of this Act or gives false information commits an offence and is liable on conviction to imprisonment for a term not exceeding twenty four (24) months imprisonment or to a fine of not more than two (2) million shillings or to both such imprisonment and fine.

By a copy of this letter, the Provincial Director of Environment, Nairobi, is hereby instructed to liaise with the Provincial Police Officer to ensure full compliance with this order. You have the right of appeal against this order to the National Environment Tribunal.

Dr. A.M. Mwinzi

DIRECTOR GENERAL."

Upon receipt of the order the Appellant moved to the High Court under **Order 53** of the Civil Procedure Rules and the Law Reform Act and the Appellant first sought orders that:-

"(a) ----------

(b) Leave be granted to the Applicant by way of orders of certiorari and prohibition as set out in the statutory statement filed herein.

(c) The grant of leave to commence the suit do operate as a stay of the Respondent's [i.e. the Authority's] order directing the Applicant [i.e. the Appellant] to cease construction upon the applicant's property comprised in title No. 209/12184 Nairobi."

The summons for leave was accompanied by a statement of facts setting out the grounds upon which the Authority's order was to be challenged. The grounds of law, if we may so designate them listed were:-

(1) Abuse of Power

(2)Legitimate Expectation and unfairness.

(3)Failure to give reasons.

There was also the verifying affidavit of Rodger Rashid to which we have already referred.

The summons for leave was heard by P. Kihara Kariuki, J, on 29th January, 2009 and the learned Judge granted leave as was requested and the leave so granted was to operate as a stay of the Authority's order directing the Appellant to cease construction on its property. The order of stay was, however, made conditional upon the Appellant undertaking a fresh Environmental Impact Assessment of its project activity and submitting a report to the Authority within the next fourteen days in addition to liaising with the Appellant's Environmental Impact Assessment Expert or the relevant agencies as required in the Authority's letter of 20th January, 2009. Lastly it was ordered :-

"THAT the order of stay hereby granted shall be for a period of the next thirty (30) days from to-day during which period the Applicant shall file and serve its substantive notice of motion and fix a hearing date thereof on priority basis at the registry and such order of stay shall automatically lapse and be vacated accordingly unless expressly extended by the court before the expiry of the said thirty days."

The notice of motion pursuant to the leave was filed on 6th February, 2009. It asked for:-

"1. An order of certiorari do issue to bring to this Honourable Court for the purpose of being quashed, the Respondent order dated 20th January, 2009 directing the Applicant to cease construction upon the property comprised in title No L.R. 209/12184, Nairobi.

2. An order of prohibition do issue to prohibit the Respondent, its servants and/or agents and/or any other person from enforcing and/or purporting to enforce the Respondent's order dated 20th

January, 2009 directing the Applicant to cease construction upon L.R. 209/12184 Nairobi.

3. An order of prohibition do issue to prohibit the Respondent from canceling the Applicant's Environmental Impact Assessment License dated 20th March, 2008."

It appears from the record of appeal that the motion itself was based on the earlier statement of facts and the verifying affidavit of Rodger Rashid which had accompanied the chamber summons for leave. Right from the inception of its suit, the Appellant has always been represented by Mr. Fred Ngatia of M/s Ngatia and Associates, Advocates.

On the same date when the motion was filed, i.e. on 6th February, 2009, M/s Mereka and Company, Advocates filed their notice of appointment to act for the Authority and on the 11th February, 2009 they lodged, under a certificate of urgency, a notice of motion pursuant to **Order 53**, ***Rule 1 (4)*** of the Civil Procedure Rules and among the prayers sought in the motion were:-

"2. The order made on 20th January, 2009 granting the ex-parte Applicants leave to apply for orders of certiorari, prohibition be set aside.

3. The order made on 20th January, 2009 to the effect that such leave does operate as a stay of the Respondent's order dated 20th January, 2009 directing the ex-parte Applicant to cease construction upon the Applicant's property comprised in the Title No. 209/12184 be set aside.

4. Pending the inter-partes hearing of this application the Honourable Court be pleased to make an interim order of stay directed at the ex-parte applicants to stop further construction of the development project in Lower Kabete on LR NO. 209/12184."

In point of fact the orders granting leave which was to operate as a stay were not made on the 20th January, 2009 as erroneously stated in the prayers made in the Authority's motion; those orders were made on 29th January, 2009; it is the Authority's order stopping construction which was made on 20th January, 2009. Nevertheless on 16th February, 2009, Mr. Ngatia and Mr. Nganga did appear before P.K. Kariuki, J and a consent order was recorded by which it was agreed that:-

"(a) The Respondent's [i.e. the Authority's] notice of motion filed on 11th February, 2009 be treated as part of the respondent's response to the suit.

(b) The applicant's [i.e. Appellant's] replying affidavit and three other affidavits filed on the 13th February, 2009 be deemed to be a response to that motion.

(c) Leave be and is hereby granted to the respondent to file and serve a further affidavit on or before the 20th February, 2009.

(d) The applicant may, if it wishes to respond to the respondent's further affidavit by filing and serving a further affidavit on or before the 23rd February, 2009.

(e)Skeletal submissions and respective list and copies of authorities be filed and served on or before the 24th February, 2009.

(f) The applicant's motion filed on the 6th February, 2009 be heard inter-partes by any Judge at 10.30 a.m. on 24th February, 2009."

The motion was eventually heard before Wendoh, J on the 23rd September, 2009. By then the environmental impact assessment report which Kariuki, J had ordered to be prepared was already in the record but we do not know if the report was being prepared for the benefit of the court itself or to satisfy the order made by the Authority on the 20th January, 2009. We shall revert to this point in due course.

Having read the skeletal arguments and having heard counsel in their submissions, Wendoh, J summarized the issues which she thought she was being asked to resolve as follows:-

"1. Whether existence of an alternative remedy is a bar to Judicial Review.

2. Whether the Applicant's notice of motion is incompetent.

3. Whether NEMA has abused its power.

4. Whether the Applicant's legitimate expectation that Respondent would allow the Applicants to develop the project was breached.

5. Whether NEMA failed to give reasons for its decision.

6. Whether the Applicant is guilty of material non-disclosure."

The learned Judge then proceeded to resolve these issues in the order in which she framed them. On the first issue of an alternative available remedy, the Judge appears to have divided that issue into two segments, namely,

(i) whether the availability of such alternative remedy is an automatic bar to the grant of a judicial review order; and

(ii) whether an applicant for a judicial review order is bound to disclose in his or her application for an order that an alternative remedy does exist and then explain why an order for judicial review is being sought and the alternative remedy is not being pursued.

On the first segment of the issue, the Judge appears to have agreed that the existence of an alternative remedy cannot by itself, prevent a court from issuing a judicial review order. Having set out the submissions of the respective counsel on the question, the learned Judge stated at pg. 195 of the record: -

"-----. The law is that the existence of an alternative remedy is not a bar to commencement of Judicial Review Proceeding by an aggrieved party. This is because of the nature of Judicial Review remedies which do not deal with merits of the impugned decision but review the decision making process. I do agree with the finding [holding"] in REP V. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY [2006] KLR MSC APP 1222/06 where Emukule, J said:-

"*Regarding the availability of an alternative remedy, such as an appeal, whereas there are occasions when the court will require exhaustion of other remedies of procedures such as execution procedure under Civil Procedure Act (Cap 21, Laws of Kenya) and the Civil Procedure Rules made hereunder, the availability of such alternative remedy is not a bar to proceedings by way of Judicial Review. They have no concern with the merits of either of the Applicant's or Respondent's case. This court concerns itself with the review of the decision making process, not whether NEMA had authority to issue a stop order or notice, or whether, there is an appeal mechanism.' "*

The important thing to note in this aspect of the matter is that the learned trial Judge did agree that the availability of an alternative remedy is not, by itself, a bar to the grant of a judicial review order.

The learned Judge then moved to a consideration whether the Appellant had disclosed to the court at the leave stage that there was the alternative remedy of appealing to the National Environmental Tribunal created by ***section 125*** of the Act. The right of appeal is specifically provided for in ***section 129*** of the Act which is in the following terms:-

"129 (1) Any person who is aggrieved by:-

(i) a refusal to grant a licence or to the transfer of his licence under the Act or regulations made thereunder;

(ii)the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;

(iii) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;

(iv) the amount of money which he is required to pay as a fee under the Act or regulations made thereunder;

(v)the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may, within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal."

Section 129 (3) then gives the Tribunal the power to:-

"(a) confirm, set aside or vary the order or decision in question."

and by ***section 129 (4)***:-

"Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined."

Mr. Ngatia, for the appellant, did not contend before the trial Judge or before us that there was no right of appeal against the Respondent's order of 20th January, 2009; what Mr. Ngatia maintained before the trial Judge as well as before this Court is that in spite of the right of appeal provided under ***section 129*** of the Act the Appellant was entitled to approach the High Court by way of judicial review. The trial

Judge, as we have stated, agreed with that contention but went on to consider whether the orders sought should be granted and why those orders were preferred over the appeal process. She also held that the Appellant had not explained why the process of judicial review was preferred over the appeal process and having considered various authorities, both local and foreign, the Judge concluded as follows:-

"The Applicant did not make any attempt to demonstrate to the court that Judicial Review is a more effective and convenient remedy than the appeal. As to whether the procedure is quicker no doubt the Tribunal cannot be as busy as the courts and that would be a quicker mode of resolving such a dispute. Thirdly, the Tribunal is composed of several members who are well versed in environmental matter."

She continued:-

"Section 125 (c) and (d) of EMCA provides for who can be a member of the Tribunal and they are lawyers with professional qualification in Environmental law and two persons who have demonstrated exemplary academic competence in the field of environmental management. The Tribunal is therefore a specialized body that is acquainted with environmental issues and should have been given the first option to consider the matter. Failure by the applicant to disclose the existence of an alternative remedy and failure to demonstrate at permission stage why judicial review remedy was more convenient or effective disentitles the Applicant to the exercise of this Court's discretion to grant the order sought herein."

Against that conclusion the Appellant complaints in its Memorandum of Appeal:-

"1. The learned judge erred in law and in fact in not appreciating sufficiently or at all the complaints raised by the Appellant were founded on principles of public law and therefore not suitable for an appeal under the statute.

2. The learned Judge erred in law and in fact in holding that the Appellant did not disclose the existence of a remedy prescribed by the relevant statute.

3. The learned Judge erred in law and in fact in holding that the Appellant did not demonstrate that judicial review proceedings was more suitable than the statutory appeal process.

4. The learned Judge erred in law and in fact in not appreciating sufficiently or at all that the suitability of judicial review was considered and decided upon at the leave stage."

We agree with Mr. Ngatia that the issue raised in the Appellant's notice of motion were in the domain of public law. But we do not accept that once a matter falls within the public law domain, judicial review is the only way to litigate upon it or it must be through the judicial review process. As we pointed out earlier, Mr. Ngatia did not contend that the matter fell outside the jurisdiction of the Tribunal specifically created to deal with disputes concerning the environment. The Tribunal itself is a public body created by statute to administer the appeal process under the Act; it cannot deal with matters concerning private law for instance. The learned Judge was merely weighing the issue of whether the High Court was in a better position to deal with the matter than the Tribunal. She dealt with the speed or pace at which the Tribunal would be able to resolve the matter and compared that with the speed or pace which would be adopted by the busier courts. She dealt with the expertise available in the Tribunal as against the High Court and such like matters and having taken all those considerations into account, she concluded that the matter ought to have been dealt with by way of an appeal rather than by way of judicial review. The Judge backed up her decision with authorities such R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD [1993] 1 ALL E.R 530. HORSHAM DISTRICT COMMISSION, ex parte WENHAM [1955] 1 WLR 680; HARLEY DEVT INC V. COMMISSION OF INLAND REVENUE [1996] 1 WLR 727; R V. WANDSWORTH COUNTY COURT [2003] 1 WLR 475 and the local case of JAMES NJENGA KARUME V. CR, 192/1992.

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge.

Mr. Ngatia submitted on the issue of full disclosure that it was the Appellant who had attached to its application the letter from the Director –General of NEMA, and in that letter the Director-General had specifically pointed out to the Appellant the existence of the right of appeal to the Tribunal. Mr. Ngatia submitted that, that was sufficient disclosure of the availability of an alternative remedy. We agree with Mr. Ngatia on that point but we must point out that the learned Judge went on to consider whether exceptional circumstances existed which made it necessary to prefer judicial review over the appeal process. We do not accept that mere disclosure of an alternative remedy relieved the Appellant of its burden to demonstrate the suitability of judicial review over the appeal process.

Mr. Ngatia submitted that the issue of the suitability of the judicial review process having been considered and decided at the stage of granting leave, it was not open to the Judge to reopen it in her judgment. We do not think that contention can be right. The consideration at the leave stage is merely to see if an applicant has a prima facie case which warrants the granting of leave. As a matter of common sense, no conclusive and binding determination can be made on any point at the stage of granting leave. Accordingly grounds one, two, three and four in the Appellant's memorandum of appeal must fail.

Grounds 5 to 11 in the memorandum of appeal can be dealt with together as they involve the issue of public participation in the preparation of the Environmental Impact Assessment Report, whether the order stopping the construction of the project was a mitigation measure and an amending activity, whether the public had participated in the preparation of the EIA Report which resulted in the licence being granted, whether the public had complained about the project and such like matters. The issues framed and answered by the Judge in respect of these grounds were whether NEMA had abused its power, (Issue No.3); whether the Appellant's legitimate expectation that the Authority would allow it (Appellant) to develop the project was breached (Issue No. 4); whether NEMA failed to give reasons for its decision (Issue No. 5) and whether the Appellant was guilty of non-disclosure (Issue No.6). Issue No. 2 concerned the question of whether the Appellant's notice of motion was incompetent. That issue was resolved in favour of the Appellant and there is no cross-appeal on it; it does not accordingly lie for our decision.

On the remaining issues we think they must be looked at in the light of our finding, in agreement with the trial Judge, that the Appellant ought to have appealed to the Tribunal rather than coming to the High Court for orders of judicial review. So that whether he ought to have been heard before the stop order was made and the other remaining issues really fell by the wayside once the conclusion was reached that the appeal process was a much more efficacious and quicker way of resolving those issues than the process of judicial review. We must however, state that having looked at the evidence before the trial Judge, the written submissions before the trial court and before us and all other aspects of the appeal, we broadly agree with the learned Judge on her conclusions regarding the remaining issues. The Appellant must have been aware that there were serious complaints against its project, one of the complainants being the Water Resources Management Authority which had raised the probability of Mathare River being polluted by soil from excavation during construction and the possibility of effluence from the proposed septic tanks, seeping into the river. The Water Resources Management Authority could not simply be dismissed as "*an indignant neighbor*." Even if the Authority's stop order was not based on the complaint of the Water Resources Management Authority the Appellant was clearly aware of the existence of that complaint. We must point out that issues of environment do not merely concern the Authority and the party against which a complaint is raised. Such issues concern all Kenyans and that is why the Act provides for public participation. By its order directing the Appellant to stop construction and prepare another Environmental Impact Assessment Report, the Authority, even if it had previously failed to ensure adequate participation of the public in the previous report, was availing an opportunity to the Appellant to ensure the participation of bodies such as the Water Resources Management Authority, the Kabarage Estate Company Ltd., the Greenbelt Movement and any other interested persons and bodies . There was no evidence on the record to show that the Report prepared pursuant to the order of the court had called for the participation of such bodies and how their views had been accommodated. We are equally aware that such projects involve the expenditure of large sums of money on the part of the proponent but on this point, we can only repeat the remarks of Nyamu, J in ODERA & OTHERS V. NEMA, HMSC NO. 400 of 2006 (unreported) where the learned Judge stated:-

"The giving of an undertaking might affect the status quo yet in the view of the court, environmental injury or health concerns might not be adequately measured in terms of shilling, pence and pounds. The interplay of the situation before me reveals that there is just something more than consideration of financial loss here."

We must apply this observation in this appeal.

We have said enough we think, to show that we are for dismissing this appeal. Accordingly our order shall be that the appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 15th day of July, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR