REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Application 7 of 2009

IN THE MATTER OF AN APPLICATION BY SOUND EQUIPMENT LIMITED FOR ORDERS OF CERTIORARI AND PROHIBITION

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999

REPUBLIC ..... APPLICANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY..... RESPONDENT

EX PARTE..... SOUND EQUIPMENT LIMITED

JUDGMENT

Sound Equipment Ltd, is the owner of LR 209/12184 and in the year 2007, being desirous to erect 10 Town Houses on the property, submitted to the National Environment Management Authority, (hereinafter referred as NEMA) an Environmental impact Assessment (EIA) Report in accordance with the Environmental Management and Coordination Act, (hereinafter referred to as EMC Act). The Applicant complied with all the conditionalities given by NEMA and commenced the project. However, later on 20/1/09 NEMA ordered the Applicant to cease construction and directed to undertake a fresh EIA for reasons that the project poses environmental threats which were unforeseen at the initial study. The applicant challenges that decision.

The issues for determination are:

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 applicant filed the notice of motion dated 10/2/09 supported by a statutory statement and verifying affidavit of Rodger Rashid, the General Manager of the Applicant dated 28/1/09 and a further affidavit dated 21/9/09. The Applicant also filed submissions and a list of Authorities on 10/5/09. The Applicant's counsel was Mr. Ngatia.

In opposing the motion Dr. Muusya Mwinzi swore a replying affidavit dated 23/2/09 and the notice of motion dated 10/2/09 in which NEMA sought to have the orders of stay granted to the Applicant set aside, submissions and a list of authorities filed in court on

25/2/09.

Whether the existence of an alternative remedy is a bar to Judicial Review:-

It was NEMA's submission that there is a remedy available to the Applicant by way of appeal to the Tribunal set up under S.125 of the EMCA. That the Applicant has a duty to demonstrate that these are exceptional circumstances that necessitate him to come by way of Judicial Review instead of pursuing the remedy under the Act. Mr. Ngatia, counsel for the Applicant submitted that the existence of an alternative remedy is not a bar to one commencing Judicial Review proceedings. 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 the merits of the impugned decision but review the decision making process. I do agree with the finding in ***REP V NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (2006) KLR MISC APP. 1222/06)*** where J Emukule 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 thereunder, the availability of such alternative remedy is no bar to proceedings by way of judicial Review. The reason for this is explained by the foregoing paragraphs of this ruling is to be found in the nature of the remedies 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 of the decision making process, not whether NEMA had authority to issue a stop order or notice, or whether there is an appeal mechanism ....."***

Section 125 of EMCA establishes the National Environmental Tribunal and S 129 sets out the mandate of the Tribunal. It reads as follows;

> ***"129 (1) Any person who is aggrieved by:-***
>
> ***a refusal to grant a licence or to the transfer of his licence under the Act or regulations made thereunder;***
>
> ***the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;***
>
> ***the revocation suspension or variation of his licence under this Act or regulations made thereunder;***
>
> ***the amount of money which he is required to pay as a fee under the Act or regulations made thereunder;***
>
> ***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.***
>
> ***(2) .....***
>
> ***(3) upon any appeal, the tribunal may:-***
>
> ***(a) confirm set aside, or vary the order or decision in question;***
>
> ***(b) ……***
>
> ***(c) ……..***
>
> ***(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."***

The Tribunal is given wide powers under S 129 (3) on the remedies to grant including an injunction under R (4). The Applicant's licence had been stopped or suspended and he could have appealed pursuant to S 129 1 (c).

I have read the court record and the Applicant's pleadings and nowhere did the Applicant disclose to the court that there is an alternative remedy of appeal available to them under S 129 of the EMCA. Nowhere has any reason been given as to why the Applicant preferred Judicial Review to the appeal process under the Act. I have referred to the wide powers granted to the Tribunal under the Act. In ***R V BIRMINGHAM CITY COUNCIL ex parte FERRERO LTD (1993) I ALL ER 530,*** the court held:

> ***"where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure it was only exceptionally that Judicial Review would be granted. 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 statutory appeal procedure was suitable to determine***

it".

In HORSHAM DISTRICT COMMISSION ex parte WENMAH (1995) I WLR 680 (QBD) pg. (706) the court observed;

> "***It is of course trite law that when Parliament has provided an alternative remedy, it is only in an exceptional case that Judicial Review should be granted ...***
>
> ***... it is common place that in proceedings like these, all material matters must be placed before the judge who is being invited to grant leave ex parte. How could it be right not to draw the court's attention to the alternative statutory remedy or to explain why this was thought to be inadequate."***

There is a wealth of authority that where there is an alternative remedy, the Applicant seeking leave of the court to commence Judicial Review proceedings must disclose that there is an alternative remedy and should demonstrate the exceptional circumstances under which he seeks Judicial Review instead of the remedy provided by statute. The Applicant never made effort to demonstrate that Judicial Review was a better mode of redress than an appeal to the Tribunal and especially that the principle expressed in the above 2 cases has been upheld in many other cases. In ***HARLEY DEVT INC V COMMISSIONER OF INLAND REVENUE (1996) IWLR 727 R V WANDSWORTH COUNTY COURT (2002) EWCA CIV 1728 (2003) IWLR 475*** the courts said that permission to claim Judicial Review should not be granted when a suitable alternative remedy is available. In REP ***V LAMBERTH LONDON BOROUGH COUNCIL*** (2006) UKHL 10 (2006) 2 AC 265, Lord Bingham said

"referring to the principle that if other means of redress are conveniently and effectively available to a party, they ought ordinarily to be used before resort to Judicial Review". In Michael Fordham's Book"**Judicial Review Handbook, fifth Edition,** he observes that Judicial Review is a remedy of last resort (see ***R V IMMIGRATION APPEAL TRIBUNAL IWLR 1445).*** Back home, the Court of Appeal has held the same view in ***JAMES NJENGA KARUME V CR 192/1992***

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. Order 53 cannot oust clear Constitutional and Statutory provisions."***

That is the law.

Halbury's Laws of England 4th Ed. VOl I (1) sets out the facts that the court needs to take into account when deciding whether or not to grant Judicial Review order in lieu of an alternative remedy. They are

1. ***"Whether the alternative remedy will resolve the question in issue fully and directly.***
2. ***Whether the statutory procedure would be quicker, or slower than the procedure by way of Judicial Review;***
3. ***Whether the matter depends on some particular or technical knowledge, which is more readily available to the body;***
4. ***Lastly the court should bear in mind the purpose of Judicial Review and the essential differences between appeal and Judicial Review."***

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 matters. S 125 (c) and (d) of EMCA provides for who can be a member of the Tribunal and they are; lawyer 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 this 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 orders sought herein.

Whether the notice of motion is incompetent;

It is the Respondent's contention that the notice of motion is incompetent because the facts are contained in the statement of facts, but not the affidavit, contrary to Order 53 Rule 4 Civil Procedure Rules. I have seen the statement and indeed there are facts contained therein. Order 53 Rule 1 (2) requires that the statutory statement contain the names and description of the Applicant, the relief sought, and the grounds that are relied upon. In the case of ***SILVANO ONEMA OWAKI V COMMISSIONER GENERAL KENYA REVENUE AUTHORITY CA 45/2000***, the Court of Appeal held that the facts are supposed to be in the affidavit not the statement. In the instant case, though there are some facts in the statement, that does not render the notice of motion incompetent because the application is supported by facts contained in the verifying affidavit and a further affidavit. It is only in a scenario where all facts contained are contained in the statement and there are no facts in the affidavit that such a statement can be struck out. This court will strike out the facts contained in the

statement and rely on the facts in the affidavits. That objection must fail.

Whether the applicant abused its power

The impugned decision is contained in the letter dated 20/1/09. The crux of the decision under challenge is:-

> ***"…. You are therefore directed to***
>
> ***Cease construction activities on the site immediately.***
>
> ***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 and interested stakeholders;***
>
> ***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.***
>
> ***Liaise with your EIA Expert and relevant agencies for relevant documents and advice.***
>
> ***Further note that S 138 of 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 to commission to imprisonment for a term not exceeding twenty four (24) months or to a fine of not more than two (2) million shillings or both such imprisonment and fine.***
>
> ***By 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 these orders.***
>
> ***You have the right of appeal against this order to the National Environment Tribunal.***
>
> ***Signed***
>
> ***Dr. A. Mwinzi***
>
> ***DIRECTOR GENERAL***
>
> ***"......"***

There is no doubt that NEMA had given an approval of the project but it was dependant upon conditions. The conditions are contained in the letter of 7/3/08. Though there had been complaints from neighbours of the Applicants over the said project that they had not been informed, and the Minister visited the scene on 31/8/07, NEMA allowed the Applicant to go ahead with the project. A licence was also issued on 28/3/08. The licence does contain 12 conditions. Dr. Mwinzi on the other hand had deponed that in line with the '***RIO Declaration'*** of 1992, principle 10, and Regulation 17 of the Impact Assessment (Audit) Regulations, 2003 which underscores the importance of public participation in environmental issues: NEMA wrote to the Applicant the letter dated 9/5/07 (RR 3). He deponed that at that stage, NEMA relied on the report given by the Applicant in its EIA report and that it is on the basis of the Applicant's report on public participation that the Applicant's application was granted. That under S 64 (1) of EMCA, NEMA still retained power to order for a remedying of any actions by the Applicant and the fact were that the licence was issued did not stop NEMA from exercising its supervisory powers. That the Applicant having accepted the conditions in the letter of 7/3/08 (RB 7 & 8) he cannot deny NEMA's mandate under the Act. After issuance of the licence several people have come up with complaints e.g Kibarage Estate Co. Ltd, by letter of 30/1/09 (AMMI), the Greenbelt Movement and the Water Resources Management Authority (WRMA) on related environmental issues. That when the Applicants came to court, they should have disclosed these concerns and the said EIA report was to enable the WRMA satisfy itself that the Applicant complied with the WRMA Rules, 2007 and any mitigation measures to be undertaken. It was also denied that WRMA is an indignant resident as described by the Applicant but it has a statutory mandate to supplement NEMA's mandate. It is denied that the decision was indefinite as ?Regulation 10 (1) gives time lines and the halting of the licence for purposes of procuring another EIA report does not mean cancellation of the licence. It is the Applicants argument that the Act does not give the Respondent power to stop a construction. Section 64 (1) under which the Respondent issued the order of 20/1/09 provides as follows;

> ***"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 substantial change or modification in the project or in the manner in which the project is being operated;***
>
> ***b. The project poses environmental threat which could not be easily foreseen at the time of the study, evaluation or review; or***
>
> ***c. It is established that the information or date given by the Respondent in support of his application for an environmental impact assessment licence under S 58 was false, inaccurate or intended to mislead".***

It was Mr. Ngatia's argument that the Respondent has no power under the Act to stop the construction but only ask for another study. I have earlier considered the reasons why the Respondent made the above order. The public had not been involved in the process before issuance of the licence as required by the law and the public have raised complaints that should be addressed. The Applicant in his replying affidavit does concede that indeed Regulations 21 and 22 of the Environmental (Impact Assessment Audit) Regulations mandates the Respondent to invite comments from the public.

These Rules are made pursuant to section 59 of Environmental Management Act which provides for publication of Environmental impact Assessment. S 59(1) reads

> ***"Upon receipt of an environmental Impact Assessment study report from the Respondent under S 58 (2), the Authority shall course to be published for the successive weeks in the Gazette and in a news paper circulating in the area or proposed area of the project or notice which shall state***
>
> ***(a) Summary description of the project***
>
> ***(b)The place where the project is to be carried out***
>
> ***(c) The place where the environmental impact assessment study, evaluation or review report may be inspired; and***
>
> ***A time limit of not exceeding sixty days for the submissions of oral or written comments environmental impact assessment study, evaluates or review inspected.***
>
> ***(2) ..."***

Regulations 21 and 22 go on to detail the procedure on public participation. Mr. Mwinzi deponed that another manner of public hearing is through questionnaires issued to people in the neighbourhood of the proposed project and getting their comments. By the letter of 9/5/07 (RR 3) NEMA addressed the Applicant but indicated the necessity of public participation over plot LR 209/12/04. It is not clear how NEMA later issued the licence without that important process of public participation being undertaken. Had due process been followed, the complaints that have been raised would not have arisen at this stage because they have been addressed at the preliminary stage. By the impunged decision the Respondent intends to comply with the law and cannot be said to have abused its power.

Whether the complaints made by the stakeholders are trivial In the letter addressed to the Applicants by WRMA dated 30/1/09 (AMM1) some of the concerns of the Authority are that the Applicants had not shown how excavated soils would be prevented from entering the river and that the position of the septic tank was likely to flood during high flows leading to pollution of the river and it was noted to be unacceptable. Kabarage Estate Co. Ltd vide its letter to NEMA dated 15/5/08 indicated that the project was situate on a wetland, that there was inadequate provision of sewerage etc which were really the same concerns as those raised by WRMA.

WRMA is a body created under S 7 of the Water Act, 2002. Its powers and functions are provided for under S 8. The powers and functions of the Authority are inter alia

> ***" (a) to develop principles, guidelines and procedures for the allocation of Water resources.***
>
> ***(b) to monitor, and from time to time re-assess the national water resources management strategy***
>
> ***(c)***
>
> ***(d) to regulate and protect water resources quality from adverse impacts***
>
> ***...."***

It is apparent from the above provisions that the Authority is directly involved in issues of environmental conservation and specifically water, and works therefore well hand in hand with NEMA where issues of water are concerned. It can not be a busy body in questioning the Applicants projects as respects water issues.

S 59 EMCA recognizes application of the R10 DECLARATION (1992) Principle 10. The principle states:

> ***"environmental issues are best handled with participation of concerned citizens at the relevant level."***

In the European Union 5th Environmental Action Programme (1993 – 2001) the same principle is reflected. It states

"Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped."

As pointed out earlier, Reg. 17 of the Rules made under EMCA envisages public participation in environmental issues. That is the basis upon which the Greenbelt Movement, Kabarage Estate Company Ltd and the WRMA questioned NEMA's issuance of the licence to the Applicant and whether it was within the law. These views cannot be ignored or wished away as indignant residents.

The question that begs is, does the fact that NEMA issued a licence without complying with the law as regards public participation prevent or bar the Respondent from issuing a stop order under S 64 (1) of EMCA? Mr Ngatia counsel for Applicant, submitted that S 64 only gives the Respondent power to order for another study at the Respondents expense but can not stop a project. The impugned decision reads in part:

"You are therefore directed to cease construction activities on this site immediately;

Undertake afresh 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,

Submit a letter of Commitment to the Authority to the effect that you will comply with the above requirements within two – 21 days from the date of receipt of this letter

Liaise with your EIA Expert and relevant agencies for relevant documents and advise.

...."

The above direction is not indefinite. It is subject to the Applicant complying with the conditions contained the letter. From a reading of S 64 and the powers of the Respondent granted thereunder, it would necessitate the suspension of the project in order to comply. For example unders 64 (1) (a) where there is substantial change or modification in the project there would be need to suspend the project to ascertain what exact change and how the project can be back on course. Under 64 1 (b), where the project is a threat to the environment, there would be need to suspend it before a final decision can be made whether it can proceed or not. There is no doubt that the provisions of the law were not complied with prior to the issuance of the development licence by NEMA. The purpose of the order by the Respondent was to enable the Applicants comply with the law by allowing public participation. There is no indication in the licence that it has been cancelled. The licence issued to the Applicant was conditional and not absolute. NEMA reserved for itself a supervisory role during the continuation of the whole project as mandated by S 9 of EMCA. S 9 sets out the objects and functions of NEMA to be general supervision and co-ordination over all matters relating to the environment as the principal instrument of Government in implementation of all policies relating to the environment. Some of the conditions contained in the license issued pursuant to the Respondents objects are:-

"3 The proponent shall ensure strict adherence to the Water Quality and Waste Management Regulations 2006

(4) ....

(5) the proponent shall collaborate with the EIA Experts 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."

In issuing the impugned order, NEMA was trying to put in place mitigation measures and undertaking mending activities specifically, the requirement of public participation so that the project could proceed in compliance of the law. I do not agree that NEMA was abusing its power but was acted within its mandate within the Act.

The Applicants blame the failure to call for public participation on the Respondent and that the complaints were addressed by the Respondent. It is a blame given between the Applicant and NEMA. Ignorance of the law is no defence in Kenyan Law and it takes two to tango. If the Respondent failed to comply with the law in failing to insist on calling of public participation in the project, the Applicants should have insisted on it. The letter of 9/5/09 clearly shows that the Respondent was intent on complying with the law and asked the Applicant to provide for public participation. If it was not done and a Licence was issued, the Applicant cannot turn round and blame it all on the Respondent got failure to comply with the law. They are both in it. Estoppel cannot operate against breach of clear provisions of the law. The Respondent cannot be estopped from enforcing or complying with the law just because they acted outside the law.

Legitimate expectation:

The Applicant contends that their term legitimate expectation was breached in that they had acted on express representations of the Respondent to commence and carry on with the project and by asking for a fresh EIA due to undisclosed threats was unfair. A legitimate expectation can not arise where the Respondent had acted contrary to, ie the law. The law requires that public participation be undertaken. The Respondent had only considered the Applicants position but not the public interest that was at stake in failing to insist on Public participation. By the impugned, decision, the Respondent was now trying to amend that anomaly which was within NEMA's power to do. Legitimate expectation is all about fairness. Every person expects to be treated fairly by the decision making body. In this case, the

Respondent had a duty to treat both the Applicants and the public that would be affected by the project fairly. By calling for another EIA, and public participation, the Respondent was acting fairly because the complains raised by the Interested Parties would now be addressed. The Applicants legitimate expectation was not breached as it is all about balancing of rights of all the parties involved.

As this court observed in ***PETER BOGONKO V NEMA HM 181535/05*** Judicial Review is a public law remedy and this court has to weigh the rights of individuals against the public interest. The public raised complaints about the project that the Applicants were undertaking and the fact that they had not been given a hearing, the Respondent could not ignore that. In the case of ***MARITIME ELECTRONIC CO. LTD vs. GENERAL DAIRIES LTD QB 27*** the court said of estoppel.

> ***"The underlying principle is that the crown cannot be estopped from exercising its powers, whether given in a statute or common law when it is doing so in the proper exercise of its duty to act to the public good, even though this may work some injustice or unfairness to the private individual. It can however, be estopped when it is not properly exercising its powers but is misusing them and if it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without contravening benefit to the public".***

In the case of ROWLAND ***V ENVIRONMENT AGENCY (2003) EWCA GV 1885 or (2005) CH I*** at page 96 the court said that,

> ***"Courts should be slow to fix a public authority permanently with the consequences of a mistake .... particularly when it would deprive the public of their rights."***

In the instant case the Respondent, seems to have made a mistake of not ensuring public participation in the project before a licence was issued to the Applicant. There are now complaints about the project and the Respondent cannot be held up to that mistake while the rights of the public are compromised. The law can not allow an individual to retain a benefit which is the subject of the legitimate expectation, if creating or maintaining that benefit is beyond the power of the public body or officer.

Again in R V DEPARTMENT FOR EDUCATION AND EMPLOYMENT ex parte BEGBIE (2000) I WLR 1115 at pg. 1127 the court said;

> ***"where the court is satisfied that a mistake was made by the Minister or other person making the statement, the court should be slow to fix the public authority permanently with the consequences of the mistake."***

In the instant case, by issuing the impugned order, the Respondent did so in the proper exercise of its duties for the public good. If the project proceeds and interferes with the river, it is the public that will suffer. The likely environmental harm that may result if another EIA report is not availed is much greater than the consideration of financial, loss to the Applicant which would be a smaller price to pay, the event being irreversible, environmental interests at loss. In the case of ***ODERA & OTHERS vs. NEMA HMISC 400/06*** J. Nyamu said "***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***." In other words, the court was saying that the threats to the environment can not be easily compensated in monetary terms. In this case, the court cannot just consider the financial loss of the Applicant's properties alone but must balance all interests and consider what environmental injury might be suffered that will affect the public at large.

Material Non-disclosure:

Michael Fordham QC in his book **Judicial Review Handbook fifth Edition** states that, Judicial review claimants have always been under an important duty to make full and frank disclosure to the Court of material facts, and known impediments to judicial review (e.g. alternative remedy, delay, adverse, authority, statutory ouster).

The Respondent accuses the Applicant of failure to disclose the alleged environmental impacts that could not have been foreseen before the project commenced. It is on record that the neighbour of the Applicant in Kabarage 6th (AMM) and the W.R.M.A. raised concerns about the project interfering with the riparian reserve. The letter ANMI is dated 30/1/09. Rodger Rashid in his affidavit alleges that the WRMA only complained on 30/1/09 after this application had been already filed but that is not correct. The letter of 30/1/09 refers to earlier correspondence over the same issues in a letter of 10/11/08 and the Applicants were directed on the immediate action they were supposed to take. What is contained in those letters are the threats that were supposed to be addressed by the Applicant.

The Respondent alleges that the Applicant is guilty of material non disclosure and should not be entitled to the remedies of Judicial Review. Orders which are discretionary and he who seeks them should come with utmost good faith. They did not disclose the fact that environmental issues had been raised regarding the project. In ***R V LANDS REGISTRAR KAJIADO & OTHERS HMISC 1182/2004*** J. Nyamu held that failure to disclose material facts is fatal to the ex-parte order obtained. The Respondents had written to the Applicants raising environmental concerns on the project in 2008. Similarly, the Kibarage Estate Residents had written to the Applicant that the project was likely to interfere with the water course. The Applicants should have disclosed to the court that NEMA's decision which was now under challenge arose as a result of the said complaints. That was very vital to the case. Failure to disclose these facts disentitles the Applicant to the exercise of this court discretion to grant the prayers sought herein.

Giving of Reasons:

I need not repeat what I have stated above. However I must state that a decision maker is expected to give reasons for his decision. The Applicant alleges that no reasons were given but I hold the contrary view,

In the Instant case, NEMA gave reasons for the suspension of the project – complainants have been named by interested parties and the law had not been fully complied with in the first instance in public participation and they need to address it.

After considering all the submissions and evidence, this court is of the view that the application is unmerited for all the reasons stated in this judgment. The notice of motion dated 5/2/2009 is hereby dismissed with costs.

Dated and delivered at Nairobi this 22nd day of February 2010.

R.P.V. WENDOH

JUDGE

Present:

Mr. Orwa and Mr. Macharia Holding brief for Ngatia for Applicant

Mr. Ngugi holding for Mr. Nganga for Respondent

Muturi: Court Clerk