REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 97 OF 2001

RODGERS MUEMA NZIOKA & 2 OTHERS……..PLAINTIFF

VERSUS

TIOMIN KENYA LIMITED…….……..…..DEFENDANT

RULING

From the affidavit of the second plaintiff Frank Mutua Nguatu sworn on 8.11.2001 is an annexture entitled "Final Report" which is an Environmental Impact Assessment of titanium Mining in Kwale District May 2000 prepared by named scientists organised by a coalition of nongovernmental and community organisations interested in the project to mine titanium in Kwale. The report says in part, Kwale is an administrative district of Kenya lying on the south coast of the country between longitude $38^0$31 and $39^0$31 East, and latitudes between latitudes $3^0$30 and $4^0$45 South. It borders on the Republic of Tanzania on the North East of that country and adjoins Mombasa Town. It is 8322 Km in area and 62 Km. About (0.73%) of its area is covered with either fresh or salty water and from its waters fish and drinking water for humans and animals depend. On its Coastline runs 3 to 5 Km of Living coral reef and a coastline with mangrove swamps.

It says on page 6 thus:-

"In the Vumbu-Maumba area the titanium ore deposits constitute about 5.7% of the Magarini sediments the concentration reduces southwards to 3% in Nguluku area. The titanium deposits mainly occur in aliments and retile with specific gravity of 4.72 and 4.2 to 4.3 respectively. The zirconium containing mineral in this case is zircon, which has a specific gravity of 3.9 to 4.7. The specific gravity shows that these are heavy minerals and hence are deposited at similar sites through sedimentation in reverine, laccestrie and marine water.

"The Msambweni complex of mineral deposits has about 2.8 million tonnes of ilmenite. 1.0 million tonnes of tutile and 0.6 million tonnes of zircon. They occupy an area which is about 3 Km Long, 2 Km Wide and are generally 25 to 40 m deep. First the Iimenite contains up to 47.9% titanium oxide. Iron contents is also high being about 51.1% and there are low levels of calcium, magnesium and manganese. Secondly the native is a high-grade source of titanium containing about 96.2% of the metal, finally zircon in Msambweni contains about 66.0% of zirconium."

Tiomin Kenya Ltd. the defendant here is a local company, incorporated in Kenya and is a fully owned subsidiary of the Candanian Company called Tiomin Resources Incorporated of Canada. It has taken up licences to prospect for the above mineral and now is poised to mine. It is at this stage that the local inhabitants the majority of whom are the plaintiffs have filed a case against the said mining company in a

representative capacity.

The substantial case has two main prayers, first, an injunction to restrain the plaintiffs from carrying out acts of mining in any part of land in Kwale District and secondly a declaratory order that the mining being carried in Kwale is illegal and thirdly for general damages. The suit was filed on 27.2.2001 and this was filed simultaneously with a Chamber Summons of same date for injunction under order 39 rr (1)(2) of Civil Procedure Rules for order that the Court do restrain the defendant from undertaking any action of mining on any land in Kwale district. Supporting affidavits are by Rodgers Muema Nzioka sworn on 27.2.2001, Frank Mutua sworn on 27.2.2001, further affidavit by Rodgers M Nzioka sworn on 19.3.2001 and lastly by Munyalo Sombi and some other supplementary affidavits.

They state that they act on behalf of other plaintiffs who are mere ordinary rural farming inhabitants of the area of Kwale now designated for mining. From there they say they have eked a living enabling them to support themselves and that they have boreholes there from where they draw water, that when titanium was discovered there the plaintiff mining company promised a reasonable compensation to land owners on giving their land, that the inhabitants would be relocated to some other place and that there would be no acquisition until Land Control Board had consented. It is the concern of the applicant that notwithstanding the understanding the defendants have arm twisted the inhabitants and caused them to accept very low compensatory rate of Ksh 9000/= per acre for re-allocation and Ksh 2000/= per acre per year in rent. The applicants are sorely apprehensive that the excavation of titanium is likely to trigger multifarious environmental and health problems. They have relied on the researched report rendered by scientists from the Kenyatta University which is annexed to their affidavit of support.

In his arguments the counsel for the plaintiffs says his clients are not opposed to the mining but want their environment and health to be secure. They want the mining company to give them reasonable compensation and to settle them in a new place to build schools and hospitals there and to be resettled like it was done by the Japanese Electric Development Project in Sondu Miriu River in Nyanza, Kenya. Counsel argued that the defendant is operating illegally in various ways, that Tiomin Resources Inc of Cananda is the prospecting licence holder yet it is Tiomin Kenya Limited doing the prospecting and or mining. That in their drafted Environmental Impact Assessment Report (para 29 CF 170) the area of activity is said to be 5 sq km. Yet the area is actually 56 sq km. That the respondents have started using the land before obtaining consent of the owners and also consent for change of user under section 26 of the Land Control Act Cap 302, that the foreign company Tiomin Corporation of Canada fully owns Tiomin Kenya Limited and therefore any land transaction involving such a foreign company being controlled transaction ought to get presidential exemption. (He refered to sections 22 & 26 of Land Control Act Cap 302). That the defendant has not drawn a comprehensive resettlement plan, nor shown what plan it has put into place to avoid the effects of exposed titanium, to redress radioactivity, or sulphurdioxide pollution, or dust pollution. That the defendant Company has not submitted appropriate Environmental Impact Assessment Plan and has not been licenced under section 58 of EMC Cap 8 of 1999 and therefore its activities are illegal. The applicants quoted several authorities from the *Compendium of Judicial Decisions on Matters Related to Environment UNEP/UNDP* and discussed the provisions of EMC Act No 8 of 1999.

From these arguments the applicant relies on the principle of *Giella vs Cassman Brown Co Ltd* (1978) EA 358 to show that they have a *prima facie* case with probability of success and that the environmental damage likely to be occasioned cannot be adequately compensated in damages but if court is in doubt to decide the matter on a balance of convenience. Mr Ochwa, learned counsel for the defendant assisted by Mr Ogola and Mr Mogaka opposed this application relying on 4 affidavits of Collin Forbes and 322 annextures. The affidavits are sworn variously on 6.3.2001, 16.3.2001, and 23.4.2001. The case for the defendant from the affidavits and arguments of counsel is that they are not mining but in fact are merely prospecting and that the terms “mining” and “prospecting” are distinct in meaning within the Mining Act Cap 306 of the Kenya Laws and that the Commissioner of Mines and Geology has infact issued special licences No 157, 158, 170 and 173 to the defendant. That the licences can be assigned to a nominee. Referring extensively to the licence CF3 counsel argued that the defendant has duly complied with the terms of the licence given to it under the Mining Act Cap 306 and that there is nothing that it has done which is not authorised by the provisions of that Act. That Tiomin Kenya Limited the defendant company

is agent of Tiomin Resources Inc. of Canada and so licences Numbers B/7295/9025 are being assigned to Tiomin Kenya Limited and in any case Mining Act Cap 306 allows prospector to act through an agent. The defendant says that the special licence contains all the conditions a prospector licensee is required to observe and there is no alleged breach of those conditions and in fact a government provincial sdministration officers have been supervising its operations.

The defendant says that the application is premature because what is being done so far is merely testing compliance with prospecting terms of the licence yet applicants say that they are mining. With regards to the ill effects of titanium the defendant claims that there is no evidence that harmful effects have been so far experienced and that defendant has not even as yet obtained mining licence. The defendant demonstrated how it has met all the time with the local provincial administration officers and the local people affected and discussed the relevant issues like that of compensation and the issuance of title deeds and explaining to the local people the companys' initiatives in those meetings of land owners who in fact had signed their consent, he said they ought to be estopped from being party to this suit and from disclaiming the amount they had accepted in compensation through written contracts of transfer with knowledge of valuation done by Fairlane Valuers Limited. The defendant argued that the plaintiffs are mere squatters and lack proprietary interest and should be none-suited. The defendant has already prepared and submitted Impact Assessment Report to the government using all available material. I have been referred to several authorities on this matter by counsel for the parties who both argued this case with erudition and circumspection and the Court is obligated to them for their thoroughness. The application is for prohibitive injunction and normally in exercise of its general jurisdiction the Court goes by the traditional principles enunciated by the Court of Appeal per Spry Ag JA in *Giella vs Cassman Brown & Co Ltd* (1973) EA 358.

First the position is that granting of interim injunction is an exercise of Judicial Discretion and in East Africa those conditions for granting of interlocutory injunction are now settled as I have stated above. The question may well be asked if legal cases based on environment are to be resolved on any distinct principles but the answer is that if there is distinct law of environment it is not exclusive, and most environmental disputes are resolved by application of principles of common law like law of tort, property, injunctions and those principles of administrative law, but the applicable law is the statute law which in this case is The Environmental Management and Co-ordination Act No 8 of 1999 (thereinafter referred to EMC). It is imperative to resort to this statute to decide whether the claimant not only has entitlement to an action but a case for injunction with probability of success. section 3(1) of the EMC Act provides:-

"3.(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements on segments of the environment for recreational, education, health, spiritual and cultural purposes.

(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to –

(a) prevent, stop or discontinue any act or omission deleterious to the environment;

(b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;

(c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

(d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

(4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action'–

(a) is not frivolous or vexatious; or

(b) is not an abuse of the Court process.

(5) In exercising the jurisdiction conferred upon it under subsection (3), the High Court shall be guided by the following principles of sustainable development;

(a) the principleof public participation in the development of policies, plans and processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international co-operation in the management of environmental resources shared by two or more states;

(d) the principles of intragenerational and intergenerational equity;

(e) the polluter-pays principle; and

(f) the pre-cautionary principle.

The provisions show that this Court is empowered by the section quoted to adjudicate on the matter and has wide powers to effect, redress, but the complainant ought to show that his rights or any of them reserved in section 3(1) of the EMC Act Cap 8 of 1999 is contravened.

That entitlement is stated as follows:-

Every person in Kenya is entitled to a clean and healthy environment and has the duty to safe guard and enhance the environment.

3(2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

And "element" is described in section 2 of the same

Act as:

"any of the principal constituent parts of the environment including water atmosphere, soil, vegetation climate sound, adour aesthetics fish and wildlife."

It means that anybody who is entitled to these elements have a right to prosecute his cause in court. It would therefore not support the argument that some of the plaintiffs do not have sufficient entitlement to bring the case to court or that they have no title deeds or that they are squatters. More section 11(2) of EMC says that plaintiff does not need to show that he has a right or interest in the property environment or land alleged to be invaded. That seems to be the law.

After observing these preliminary matters the main issue I see in this case is that for the applicants to show a *prima facie* case they ought to show that what the defendants are proposing to do is unlawful. Injunction cannot be applied to restrain what is lawful.

The defendants have shown that whatever they have done has been under licence properly issued in accordance with the provisions of Mining Act Cap 306 of the Kenya Laws and when they came to do what is yet not done they will likewise have to be licenced and there is no evidence that they are threatening to act outside the law. They have also submitted researched professional Environmental Impact Assessment Report under section 58 of the Environmental Management Co-ordination Act No 8 of 1999 under that Act. Everybody that intends to do anything under second schedule to the Act inclusive of mining, quarrying and open cast extraction of precious metals, gemstones, metalliferous ores, coal, limestone, dolomite, stone and slate, aggregate sand and gravel, clay, exploration for the production of petroleum in any form and extracting alluvial gold, with use of mercury and processing of minerals reduction of ores and minerals, smelting and refining of ores and mineral etc before such undertaking submit a project report to the National Environment Management Authority in the prescribed form then the proponent of the project is to submit an Environmental Impact Assessment Study and Report to enable the Authority to determine the effect and impact of the project on the environment. It is an offence punishable with 24 months imprisonment per section 138 of the EMC Act No 8 of 1999 not to do so. It is the defendants case that it has prepared and submitted its contents to the Authority but the Authority has not replied. Under section 58(9) if Director General fails to reply in 3 months then the applicant may start his undertaking not withstanding but this may need circumspection. The defendants/respondents have not shown that they have submitted their project report and their Environmental Impact Assessment Report. They displayed the EIAR but no evidence of project report, which does appear to be prerequisite to the submission of the Assessment Report. It may be the reason why the defendant has not taken up the liberty under section 58(9) to proceed with the project unilaterally.

If the defendant has not fulfilled the requirements of section 58 of EMC Act 8 of 1999 then it is immaterial that it is licensed under Mining Act Cap 306 because section 58 of the same EMC Act Cap 8 of 1999 provides that:

“58(1) Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

Proponent must comply with section 58 of EMC Act. But even had this not been provided, I would hold it as a matter of statutory interpretation that the EMC Act No 8 of 1999 being a more recent Act must be construed as repealing the old Act where there is inconsistency.

If the defendant has obeyed the terms of the Mining Act Cap 306 as it appears can his acts be avoided by the later Act? In this case the defendant has in effect acted as though on the later Act but has equally complied with the old Mining Act Cap 306 but where it conflicts with EMC Act 8 of 1999 I think EMC Act 8 should prevail. Two judicial pronouncements (one local another English) strengthen my view here:-

“that where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal.”

It is not possible to read compliance in the old Mining Act Cap 306 when it is an offence in the later EMC Act No 8 of 1999 to fail to submit approved Impact Assessment Report. The two Acts cannot stand together unless the sections of the later Act are made to prevail over those sections of Cap 306 that are parallel to the new Act. Those that sanction what the new Act condemns are to be regarded as repealed.

In the Kenyan decision of Harris J in *Karanja Matheri v Kanji* [1976] KLR 140 the judge after finding that Land Control Act (Cap 302) was passed on 11.12.1967 and came into operation on 12.12.1967 and

that Limitation Act (Cap 27) was passed on 19.4.1968 and by section 1 was deemed to have come into operation retrospectively on 1.12.1967 said;

"Accordingly, the later of the two Acts came into operation first a factor which must in the application of the principle of interpretation that in the case of conflict, the later two statutes in date of enactment may be regarded as constituting an amendment of the earlier....." I think the position now with regards to the interpretation of the entire Cap 306 is that where it is inconsistent with Act No. 8 of 1999 the later Act must prevail.

Section 58(2) of EMC Act 8 of 1999 states:

"The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the authority being satisfied after studying the project report submitted under sub-section 1, that the intending project may or is likely to have or will have a significant impact on the environment so directs."

(3) The environmental impact assessment study report prepared under the sub-section shall be submitted to the authority in the prescribed form giving the prescribed information and shall be accompanied by the prescribed fee."

section 59 provides that the authority after being satisfied as to the adequency of an environmental impact assessment study evaluation or review report, issues an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. It is imperative that a project like the Kwale project where the effect of uranium and titanium a radioactive mineral whose effects to environment does affect not only environment but health ought to pass through evaluation stated in EIA is stated elsewhere as

"The EIA is a structured process for gathering information about the potential impacts on the environment of a proposed project and using the information, alongside other consideration to decide whether the project should or should not proceed, either as proposed or modifications."

(See *Confirmation of Judicial decisions on matters related to environment National Decision* Vol 1 pp 78)

The EMC Act describes it as follows:- section 2

"Environmental impact assessment" means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment;" section 58(5)

"Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorised in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and may be inspected at reasonable hours by any person on the payment of a prescribed fee."

Although the respondents say they had submitted EIA this is not clear because if they had then they would have started the project after 3 months of Director-General failing to respond (see sections 58, SS 8 and 9 of EMC Act No 8 of 1999) but this can only be done if they had submitted "a project report." Their failure to take advantage of the action granted in the Act creates a reasonable presumption that they have not submitted the correct report timeously.

Submission of both Project Report and Environmental Impact Assessment is crucial and failure to do so is a criminal offence under section 138 of the Act. Without delivery of these studies any project that affects environment like the present mining project cannot be assessed. Its potential danger can be as vast and as gruesome as can be imagined nor can it be positively contained within principle of sustainable

development. In fact without these assessments the project is against that principle of sustainable development as it was argued that this project is an investment and is beneficial, but this is not near to saying that no changes can be made on environment. Yet sustainable principle in the law of environment means not having less economic development, or preserving environment at all cost but what is required is as it was as stated by Leeson in "*Environmental Law*" a Text Book, that:-

"What it does require is that decisions throughout society are taken with proper regard to their environmental impact."

The writer further states that conservation of natural resources extends beyond the immediate environment to global issues so that principles to be observed such as -

(a) Decision to be based on the best possible scientific information and analysis of risk.

(b) Where there is uncertainty and potentially serious risks exist, precautionary measures may be necessary.

(c) Ecological impacts must be considered, particularly where resources are none renewable or effects may be irreversible

(d) Cost implication should be brought home directly to the people responsible in the polluter pays principle, are considered in the Report because such assessment and interrelation of a ray of disparate factors require the evidence from EIA to support a sound judgement.

A case based on facts that support any project without that assessment cannot be able to qualify in *Giella vs Cassman Brown Ltd* test.

The issue of damages compensating anyone does not arise because environmental damage is not only an individual loss but intrinsic in the globe. Although the principle of polluter pays may be argued in aid of the second principle of *Giella Versus Cassman Brown Ltd* but again without EIA it cannot be assessed.

The implication of the phrase is that the cost of preventing pollution or of minimising environmental damage due to pollution should be borne by those responsible for the pollution, but that does not guarantee that payment will be adequate. There are some environmental damages that are irreversible, again you need EIA to make a determination on that.

But environmental cases arise from disparate problem and sources. They are unique and in most cases novel, there are no recognised general principles of application, except that with time this will logically follow with sophistication of application, but for now courts must apply what is provided for under section 3 of EMC Act 8 of 1999 and although elements of the common law are of application such as injunction laws tort and criminal law, the environmental statute has provided certain statements of principles which I believe in a purely environmental case like this one needs to be considered for application if necessary in conjunction or if appropriate in exclusion of old principles. Here I rely on the old principles in conjunction with the statutory principles I am enjoined to take into consideration.

Those general principles described in the Act fall into two categories without being distinct. On the book of *Environmental Law* by John Dleeson [talking of a similar English statute] page 34 the writer states:-

"On the one hand there is the predominantly environment centered view where remedying the pollution or preventing its occurance is the primary aim. This category includes the concepts (like) "the polluter pays" and sustainable development. The second approach is centred more on the economic and/or technical practicallity of any remedy. Within this category are to be found "best practicable means, and best available techniques not entailing excessive cost."

So regarding the first principle of polluter pays, it is necessary to use the term to cover obligation on any person to conduct their affairs in an environmentally sympathetic fashion .. anyone conducting activity

ought to be aware of and accept responsibility for the environmental consequences of that activity, with regards to sustainable development. Constructive view of the phrase should be development that meets the needs of the present without compromising the ability of future generation to meet their own needs. (hence intergenerational equity and intragenerational equity). For the best practicable means one would like to consider whether one has or can do what is practicable in terms of prevention or reduction where the defendant has discharged the obligation bestowed on him the nuisance or pollution may be allowed to continue." Again Leeson adds in the same book,

"The application of this principle to existing activities precludes cessation of the business or process because of its environmental impact ... The defination and interpretation of the phrase is therefore important in determining the extent of the obligation to remedy and the consequent degree of pollution permitted in a particular situation."

On consideration of these principles in an environmental case it is not advisable exclusively to apply simpliciter the old principles of injunction because whereas activity may be objectionable and ought to be stopped by injunction yet applying the principle in the statute of best practicable means, it would be still a defence under the Law of Environment that the defendant has done what he can practically do to prevent and or reduce the nuisance or pollution and may still continue with the activity in a manner not resulting in cessation of the objectionable activities because of its environmental impact.

In my judgement I would say that the breaches of environmental statute should be looked at without exclusive trappings of equity in applying the law of injunction under Environmental Management and Co-ordination Act No 8 of 1999 but to apply them with close adherence to what the statute law prescribes. Section 3 prescribes general principles of application by the Court in adjudicating over this kind of case. First the court is given wide discretion to make such orders by issuing such writs or give such directions as it may deem appropriate including an order to restore the degraded environment.

In normal traditional consideration for injunction the *Giella vs Cassman Brown & Co Ltd* (1978) EA 358 one has to prove that his legal rights has been unlawfully invaded. Here he does not need to show all that, because under the EMC such person whose rights would be prejudiced, under section 3 of Act 8 of 1999 any one.

"Shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendants acts or omission has caused or is likely to cause him any personal loss or injury provided that such action is not frivolous or vexatious, or is not an abuse of courts process."

That is a departure from the application of *Giella vs Cassman Brown* because here he may not be having any material legal right."

Here the Court is to be guided by principles of public participation, cultural and social principles and principles of international co-operation, principles of intergenerational and intragenerational equity, polluter pays principle and precautionary principles.

Environmental Impact Assessment Report is a requirement of law under section 58 of EMC and is important. The establishment of any undertaking or works that interrupts nature in any way always possesses certain inevitable forms of impact on its surrounding so it is by studying the report when it is possible to assess their effect and therefore determine whether the project should be determined, allowed or stopped or be raised.

The purpose of EIA is to enable resolution to be made on known facts regarding environmental consequences .

In USA the Supreme Court there has adopted the approach, that what is to be proved is mere breach of the statute. In the case of *Atchison Topeka & Santa Fe Sailway Co v Callaway 3*92 F Supp 610 (DDC 1974) 420 US 908, 95 Sup ct 826 (1975). The Court has approved granting of an injunction without a balancing of the equities in order to give effect to declared policy of Congress embodied in legislation.

And in the case in the United States District Court for the District of Columbia Civil Action No 75 – 1040 *Sierra Club National Audibon Society: Friend of the Eearth Inc International Association of GameFish and Conservation Commissioners vs William T Coleman Jr Norbert Tiemann*.

The Court said:-

"A number of courts have previously considered the requirement for a preliminary injunction in the case of

an alleged deficiency in compliance with National Environmental Policy Act (NEPA) 42 USC para 4321 which is equivalent to our (Environmental Management and Coordination Act No 8 of 1999)

The Court said:-

"That this Court agrees that when ..... federal statutes have been violated it has been a long standing rule that a court should not inquire into the traditional requirement for equitable relief."

In this USA case the Court found that the defendant (developer) (Federal Highway Administration) had made 3 breaches in complying with NEPA requirements. [Similar to our EMC]

The Court found that they started building highway before decision is taken on statement were began when such ought to have been made only after decision makers had fully adverted to the environmental consequences of the action.

In this case the defendant has started work without submitting a project report to the authority. Secondly it has not presented to the satisfaction of the authority an Environmental Impact Assessment Report against section 58 of the EM & C.

So the question to be asked is what environmental factors has the proponent of the project taken into account? None.

This is crucial because in making a decision on environmental case as herein the Court is to be concerned not so strictly with harm to the environment but rather the failure of decision makers to take environmental factors into account in the way Environmental Management and Coordination Act No 8 of 1999 prescribes. (Particularly that Environmental Impact Assessment Report.) Therefore even if one relied on the principle of *Giella vs Cassman Brown* a case would still be made out.

As for balance of convenience it is admitted that environmental degradation is not necessarily individual concern or loss but public loss so in a matter of this kind the convenience not only of the parties to the suit, but also of the public at large is to be considered so that if the injunction is not issued it means that any form of feared degradation, danger to health and pollution will be caused to the detriment of the population, whereas if I do not refuse injunction only the investor will be kept at bay but life will continue for the population safely without risk.

It is better to choose the latter other than the former.

A court has in applying the principle of balance of convenience to take into account consideration of the convenience not only of the parties but also of the public at large.

At this stage not all the facts are in and final decisions cannot be made, but on the balance of probabilities I think the applicants have made a case for injunction which I hereby grant with cost to them.

Dated and delivered at Mombasa this 21st day of September, 2001

A.I. HAYANGA

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JUDGE