REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. E027 OF 2020

ALI ATHMAN HASSAN.....PLAINTIFF

-VERSUS-

1. SAFARICOM LIMITED

2. NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY (NEMA).....DEFENDANTS

R U L I N G

1. The Plaintiff instituted this suit vide a **Plaint** dated **11th December, 2020** seeking among other declarations that the 1st Defendant's **Base Transceiver Station (BTS)** erected next to the Plaintiff's **Plot No.7049 Section II, Mainland North** was causing him nuisance by producing excessive noise and hazardous air and in addition to that, the **Base Transceiver Station** was the cause of environmental pollution.

2. The Plaintiff averred that he was operating a retail shop which he was forced to close owing to the aforementioned nuisance and he has suffered loss of Kshs.4,214,919/= which he now claims as special damages. The Plaintiff, faults the 2nd Defendant **National Environment Management Authority (NEMA)** for failing to take steps to stop the nuisance despite the numerous complaints he made to the 2nd Defendant.

3. The Plaintiff also annexed an **Environmental Audit Report** compiled by **Mazigira Limited** which had confirmed that the noise produced by the 1st Defendant's **Base Transceiver Station** was a cause of nuisance to the Plaintiff and his family. The said report was also analysed by **Prudent Environmental Consultants Limited** who confirmed the nuisance caused by the 1st Defendant's **Base Transceiver Station** and the recommendation that the 2nd Defendant together with **Communication Commission of Kenya** had failed to undertake their obligations to monitor the activities by the 1st Defendant which cause the nuisance.

4. Contemporaneous with the **Plaint**, the Plaintiff filed an application by way of **Notice of Motion** dated 11th December, 2020 seeking a temporary injunction to restrain the 1st Defendant from operating the **Base Transceiver Station (BTS**) which comprises a mast and a generator at its site in Mtopanga opposite the Plaintiff's residence on **Plot No.7049 Section II, Mainland North** pending the hearing and determination of the suit.

5. The application was brought on the grounds set out on the face thereof and on the **affidavit** of the Plaintiff sworn on **11th December, 2020**. The affidavit reiterates the averments in the **Plaint** as summarised above and the same need not be repeated.

6. The Plaintiff's application was opposed by the 1st Defendant through a **Notice of Preliminary Objection** dated **22nd January, 2021** and the **Replying Affidavit** sworn by the 1st Defendant's **Senior Litigation Manager, Daniel M. Ndaba,** on **24th May, 2021**. The grounds taken out in the **Notice of Preliminary Objection** are that; the matter was wrongly filed before this court contrary to provisions of **Article 162(2)(b)** and **165(5)** both of the **Constitution of Kenya**, that the proceedings offend the provisions of **Section 13** of the **Environment and Land Court Act;** that the jurisdiction of the court has been prematurely invoked as stated under **Section 129(1) (2)** of the **Environment Management and Coordination Act;** and lastl, that the dispute revolves around a decision made by **National Environment Management Authority (NEMA)** which should be heard and determined by the **National Environmental Tribunal** at the first instance.

7. In the **Replying Affidavit**, the 1st Defendant contends that it had taken over the **Base Transceiver Station** from **Econet Wireless Kenya Limited** on **14th September, 2018** upon executing a lease agreement of even date. That **Econet Wireless Kenya Limited** and leased the parcel of land and put up the **Base Transceiver Station** sometimes in **November, 2009** and for eleven (11) years, the **Base Transceiver Station** has been running without any complaint save for the one now made by the Plaintiff. That contrary to the averments by the Plaintiff,

the 2nd Defendant had carried out an **Environmental Impact Assessment**, compiled an audit report and thereafter issued to **Econet Wireless Kenya Limited** an **Environmental Impact Assessment Licence** dated **7th May, 2010**. That notwithstanding, when the Plaintiff complained about the environmental pollution, the 1st Defendant retained **Mazigira Limited** to carry out an environmental audit report for the **Base Transceiver Station** in Mtopanga. After the exercise, **Mazigira Limited** availed an **Environmental Audit Report** dated **28th May, 2018** which confirms that the noise levels and smoke emanating were within the permissible range and that the alleged harmful electromagnetic fields were within the internationally accepted standards unlike the report the Plaintiff presented to court which the 1st defendant terms as misleading.

8. According to the 1st Defendant the question of whether the **Base Transceiver Station** does emit hazardous pollutants is one of technical evaluation of the **Environmental Audit Report,** an issue which is entrusted to the **National Environment Tribunal** under the **Environmental Management and Coordination Act** as this court lacks the expertise to address on the issue. In addition to that, the 1st Defendant averred that the dispute revolves around matters of environmental use which by dint of **Article 162 (2)(b)** of the **Constitution** are entrusted to the exclusive jurisdiction of the **Environment and Land Court** and not this court. Therefore, the only remedy for the Plaintiff in this event would be to withdraw the suit and file it in a court with jurisdiction or in the alternative comply with the doctrine of exhaustion. Lastly, according to the 1st Defendant, the plaintiff is underserving of the injunctive orders being sought because the **Base Transceiver Station** was erected for the entire good of the community and cannot be cut off upon complaints by a single party.

9. The application was argued by way of written submissions. The Plaintiff filed his submissions on **21st June, 2021** and having read through the same, the plaintiff reiterates his depositions in the **Replying Affidavit** with an addition that **Environment Management and Co-ordination Act** only kicks in when the complaint is about the right to clean and healty environment but not when the cause of action is based on a tort of nuisance like this one. He also thinks that the **Environment Management and Co-ordination Act** does not use mandatory terms so as to preclude the court from addressing disputes such as the one at hand. Further, the Plaintiff was of the view that if the court finds the matter would be better addressed before the **Environment and Land Court**, then the interest of justice would call for an order transferring the matter to the said court instead of dismissing the same.

10. On the other hand, the 1st Defendant/Respondent filed its submissions on **17th June, 2021** and highlighted three issues for determination which are; whether the high court has the jurisdiction to entertain the suit, which court has the original jurisdiction to entertain the matter and lastly whether the Plaintiff is entitled to the injunction being sought. The submissions on the three issues are well captured in its **Replying Affidavit** as summarised in the preceding paragraphs.

ANALYSIS AND DETERMINATION

11. This Court has considered the application dated **11th December, 2020** together with the affidavit filed in support thereof. The court has also considered the 1st Defendant's **Notice of Preliminary Objection** and **Replying Affidavit in Opposition** to the application as well as the parties' respective submissions and authorities cited in support thereof. In my humble view, there are only two substantive issues for determination as follows;-

a) Whether the court has jurisdiction to determine the Olaintiff's suit; and if so,

b) Whether the Plaintiff has made a case granting the orders for injunction as sought.

a) Whether the court has jurisdiction to handle the matter

12. When the issue of a court's jurisdiction to hear and determine a matter is raised, the court seized of the matter is then obliged to decide the issue right away based on the material before it. This is so because, jurisdiction of a court is everything and without it, a court has no power to make even one more step and there would be no basis for a continuation of proceedings. A court acting without jurisdiction is doing so in vain and all it engages in is a nullity. (See the case of **The Owners of the Motor Vessel Lillian 'S' –vs- Caltex Kenya Limited (1989) KLR 1).**

13. The challenge on this court's jurisdiction to handle the present matter is two pronged. The first limb of objection is based on the doctrine of exhaustion. The 1st Defendant strongly submits that the plaintiff has not exhausted remedies under the **Environment Management Co-ordination Act** especially under **Section 129(1) & (2).** That since the Plaintiff was challenging the installation and effectiveness of the 1st Defendant's **Base Transceiver Station**, then the dispute ought to have been referred to the **National Environment Tribunal** which is better equipped with the expertise in assessing the environmental impact of the **Base Transceiver Station**. As such the 1st Defendant submits that this court ought to down its tools.

14. On the other hand, the Plaintiff contended that he was not consulted on the installation and management of the **Base Transceiver Station** and he seeks declaration that the sound produced by the **Base Transceiver Station** as well as the gases emitted were not only a cause of nuisance to him and his family but also a pollution to the environment and the ozone layer. The Plaintiff further submitted that the **Environment Management Co-ordination Act** does not expressly preclude a litigant from pursuing a claim for nuisance before the High Court. He was of the view that the **Environment Management Co-ordination Act** would take precedence when the right claim concerns the right for clean and healthy environment.

15. The dispute before this court is that the 3rd Respondent licensed the 4th Defendant's mining activities without inviting the Respondent to

participate. The prayers sought are declaratory orders that the activities of the 4th Defendant at Kapsaret area is a flagrant breach of a safe and healthy environment as envisaged by **Article 42** of the **Constitution**. The Plaintiff also seeks for a permanent injunction against the Defendants restraining them from licencing or carrying out quarrying activities.

16. I have considered the provision of **Section 129** of the **EMCA** which states as follows;

> ***(1) Any person who is aggrieved by—***
>
> ***(a) A refusal to grant a license or to the transfer of his license under this Act or regulations made thereunder;***
>
> ***(b) The imposition of any condition, limitation or restriction on his license under this Act or regulations made thereunder;***
>
> ***(c) The revocation, suspension or variation of his license under this Act or regulations made thereunder;***
>
> ***(d) The amount of money which he is required to pay as a fee under this Act or regulations made thereunder;***
>
> ***(e) 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) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.***

17. Under **Section 129** of the E**nvironmental Management and Co-ordination Act** as reproduced above, the **National Environment Tribunal** is set up to hear and determine appeals arising from the decisions made by authorities given powers under the Act including the decisions by **National Environmental Management Authority**.

18. Further, in the case of **Joseph Ojwang' Oundo –vs- National Environment Management Authority & 8 Others [2015] eKLR**, the court held;

> ***"The court in Wainaina Kenyanjui's case (ibid) acted since there was no decision that could be subject of appeal. In this case there was a decision made by NEMA of granting the Respondents license to carry on with activities of constructing the Sugar Company at Busia. The Plaintiff came to question the authenticity of the license and the procedure of issuance. In this case therefore, the right arena to air the dispute was in the National Environment Tribunal which under Section 129 of the EMCA is accorded power to hear and determine appeals arising from the decisions made by authorities given powers under the Act.***
>
> ***To my mind therefore, it would be inappropriate for the plaintiffs to address issues of license in this court whereas they have not exhausted the available statutory remedy which is provided under section 129 of the EMCA."***

19. In this matter, the pleadings placed before court clearly shows that the Plaintiff is not challenging the process under which the 1st Respondent was issued with the impact assessment license to operate the Base Transceiver Station. The Plaintiff laments about the irritating noise and vibration produced by the generator together with the gases he describes as hazardous. In my view, these noises and gases have no nexus with the decision of allocating the 1st Defendant a license to operate the **Base**

Transceiver Station.

20. The provisions of S**ection 129** of the **Environmental Management and Co-ordination Act** do not oust the court's jurisdiction to hear and determine a claim for redress of violation or threat to rights or fundamental freedom relating to a clean and healthy environment as the claim by the Plaintiff appears to be.

21. The claim in this suit appears to be for damage caused to the Plainitff and his family by the noises and gases emitted by the 1st Defendant's **Base Transceiver Station.** It would be a misdirection to make a conclusion that the issues raised by the plaintiff can only be severed to be heard by the **National Environmental Tribunal** and not this Court. I am of the view that the issue of a right to a clean and healthy environment can only be determined before a court hence the objection that the dispute ought to have been referred to the **National Environmental Tribunal** fails. The present case also differs with the case of **Mohmood Shariff Ali & 10 others –vs- Safaricom Limited [2018]eKLR,** which has been relied on by the 1st Defendant in that the claimants in the former case were directly objecting the decision by **National Environmental Management Authority (NEMA)** to issue the license for construction of a transmitter Receiver station and as such they sought Defendant to be permanently restrained from constructing the **Transmitter Receiver Station** as opposed to the present case where the Plaintiff's claim is anchored on the right to a clean and healty environment.

22. The second limb of the objection is that a claim for an alleged environmental pollution is a reserve of the **Environment and Land Court** by dint of **Article 162** of the **Constitution** and the recourse would be for the Plaintiff to withdraw the suit and file it before the **Environment and Land Court**. The 1st Defendant lays emphasis that once a matter is filed before a court without jurisdiction the matter is a nullity and cannot even be transferred to the right court. The Plaintiff on the other hand submitted that the claim is much of a tort of nuisance and this court has original jurisdiction to deal with all civil tort claims. In any event, the Plaintiff submitted that it would be justiciable for the court to transfer the suit to **Environment and Land Court** rather than dismissing it.

23. In my view, nuisance is said to occur when one shows injuries done to his property or to his rights over the property. In this respect, in his book on general principles of property law, the celebrated scholar, **Gustav Mullar** explained that a landowner or occupier may not use his or her property in a way that causes unreasonable discomfort or harm to his/her neighbours.

24. Therefore, from whatever angle one looks into the dispute at hand, that is either from the angle of Plaintiff asserting his right to a clean and healthy environment or from the point of it being a cause of action based on tort of nuisance, the inevitable conclusion is that the dispute revolves around the use of the two neighbouring parcels of land; one occupied by the Plaintiff as his residence and the other by the 1st Defendant where the Base Transceiver station is erected. Thus, in my view that is a preserve of the **Environment and Land Court**.

25. I am in agreement with the submissions that the jurisdiction of a Court is conferred either by the Constitution or by Statute. In this case, the Constitution by **Article 162(2)** commanded the Parliament to establish a Court with the status of a High Court to hear and determine disputes relating to the environment and use, occupation and title to land. The **Environment and Land Court Act** was duly enacted and **Section 13 (1)** thereof has given **Environment and Land Court** original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2)(b)** and they relate to *inter alia*, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues.

26. What is clear in this suit is that there is a dispute regarding the used parcel of land leased by the 1st Defendant/Respondent where the Base Transceiver Station is erected and the dispute falls among the ones listed and preserved to the exclusive jurisdiction of the **Environment and Land Court** under **Section 13(1)** of the **Environment and Land Court Act.**

27. Nonetheless, although this Court does not have the jurisdiction to hear and determine the dispute herein, this Court has the residual jurisdiction to do justice in all circumstances. In the circumstances, I fully agree with my brother Joel Ngugi J. in the case of **Pamoja Women Development Programme & 3 Others –vs- Jackson Kihumbu Wangombe & Another [2016]eKLR** that the High Court is still vested with the inherent authority and inherent (incidental) jurisdiction to transfer certain suits which have been filed in good faith in the High Court to Equal Status Courts even in the absence of a specific statutory text bequeathing such powers to the High Court. This is in keeping with the Constitutional commandment to do substantive justice without undue obsession with technicalities.

28. In the premises, I would consequently exercise the inherent jurisdiction of the Court and direct that the present suit be transferred to **Environment** and **Land Court in Mombasa** for hearing and determination on priority basis. For those reasons the court makes the following orders;

> ***a) The present suit to with Mombasa High Court Civil Suit No.E027 of 2020 shall be transferred to the Environmental and Land Court in Mombasa for hearing and determination.***
>
> ***b) Costs shall be in the cause.***

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kongere counsel for 1st Defendant

No appearance of other counsel and parties

Court Assistant - Gitonga