



**Kiarie v Safaricom (K) Limited (Environment & Land Case  
353 of 2019) [2022] KEELC 2904 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2904 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 353 OF 2019**

**MD MWANGI, J  
JUNE 28, 2022**

**BETWEEN**

**MARY WANGARI KIARIE ..... PLAINTIFF**

**AND**

**SAFARICOM (K) LIMITED ..... DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff's case is as stated in her plaint dated 7<sup>th</sup> November 2019. She avers that she is the owner of the parcel of land known as plot No. 2516/4 at Dandora within Nairobi County.
2. The Defendant, Safaricom (K) Ltd, who is a provider of mobile telecommunication services has erected a communication mast with all associated equipment in a plot adjacent to that of the Plaintiff; the plot number 42415B, since the year 2005. The Plaintiff accuses the Defendant of encroaching the said plot which she insists is a public parking/play area.
3. The Plaintiff alleges that the Defendant's Base Transmitter Station (BTS) is a cause of nuisance to her, to wit: Smoke from the generator; Noise from the generator; Vibrations from the generator; Storm water diversion; Harmful radio waves; Obstruction of sunlight; and Diversion of sewer to her premises.
4. The Plaintiff alleges that besides being a nuisance, the Defendant's activities border on fraud and illegality. She has particularized the alleged acts of fraud and illegality including erecting the BTS without approval from the County Government and on public utility land, erecting the BTS without NEMA license and non-compliance with the Environmental (Noise and excessive Vibrations) regulations of 2009 amongst others.
5. The Plaintiff claims that the actions by the Defendant have exposed her and her tenants to harmful radiation levels. The harmful radiation have put the Plaintiff and her tenants at the risk of contracting



cancer, sleeping disturbances, hearing problems, headaches, disturbed cognitive performance and infertility.

6. The Plaintiff further alleges that the nuisances from the Defendant's BTS have cost her loss of rental income because tenants keep on moving out of her rental premises as a result of the nuisances from the BTS. She has therefore suffered loss and damage.
7. The Plaintiff further accuses the Defendant of negligence for erecting the BTS contrary to international standards, statutes and regulations. She asserts that the BTS has caused diversion of storm water to her premises.
8. The Plaintiff further accuses the Defendant of ignoring her complaints to relocate the BTS to another 'undisputed' parcel of land.
9. The Plaintiff prays for:-
  - a. General damages for nuisance.
  - b. Special damages for lost of rental income.
  - c. A mandatory injunction directed at the Defendant to cease operating the Base Transmitter Station erected on the plot adjacent to plot number D2516, D2515 and D2417 forthwith and the structure be demolished.
  - d. Costs of the suit.
  - e. Interest on (a) and (b) at current market rates.
  - f. Any other or further relief that the court may deem just and fit to grant.

### **Response by the Defendant**

10. The Defendant through its statement of defence denied the Plaintiff's claim in its entirety. In particular, the Defendant avers that it legally occupies the Plot No. 42415B on which the mast/communication satellite has been constructed. The Defendant affirms that it conducted due diligence on the parcel of land before occupying the same.
11. Further, the Defendant denies causing any form of nuisance as alleged. The Defendant too denied the particulars of fraud and illegality as averred by the Plaintiff in her plaint.

### **Evidence Adduced before the Court.**

12. The case proceeded to hearing in open court. The Plaintiff testified in her case and also called a doctor who also testified in support of her case. The Defendant only called one witness.
13. The doctor who testified in the Plaintiff's case, one Dr. George Kung'u confirmed that he was a registered medical practitioner. He is the holder of a Bachelor of Medicine and Surgery degree and a Post Graduate Diploma in sexually transmitted infections, both from the University of Nairobi.
14. The doctor explained that on examining the Plaintiff he found out that she had high blood pressure and mental stress. She was still undergoing treatment. He concluded or formed the opinion that the Plaintiff was affected by smoke, noise and vibrations from a Safaricom booster erected at her residence. The Plaintiff was still on treatment from headaches, tinnitus, dizziness, chest pains and difficulties in breathing. The doctor recommended the removal of the booster from the Plaintiff's residence.



15. On cross-examination, the doctor confirmed that he only met the Plaintiff on the date that he examined her. He is not the one who had been treating her. He therefore majorly relied on the history given by the Plaintiff. She only presented him the medical treatment notes from Baraka Medical Centre which he had not even attached to his report.
16. In the report, the doctor had indicated the time of the accident to be May 2005. He stated that he got that date from the treatment notes from Baraka Medical Centre.
17. The doctor confirmed that he did not visit the residence of the Plaintiff to verify the location of the booster or to assess the level of the smoke, noise and vibrations coming from the booster as alleged by the Plaintiff.
18. The doctor confirmed that he had never treated any other patient with similar symptoms, as those of the Plaintiff in this case, caused by a Safaricom booster. He affirmed that it was possible for the injuries suffered by the Plaintiff to have been caused by something else other than a Safaricom booster.
19. Finally, the doctor confirmed that his specialty in the field of medicine was the treatment of sexually transmitted infections (STIs).
20. In re-examination by the Advocate for the Plaintiff, the doctor clarified that the intensity of noise that would cause the kind of injuries complained of by the Plaintiff would have to be very high. The smoke too would have to be quite thick and over a long time.
21. The Plaintiff in her testimony adopted her witness statement filed in court on 18.2.2020. The Plaintiff averred that before filing this suit in court, she had lodged complaints with the defunct City Council of Nairobi at their offices in Dandora. She had also been to Defendant's offices but she was unable to meet any officer of the company. So, her complaints were not addressed necessitating the filing of the suit.
22. The Plaintiff reiterated that the plot on which the Defendant's booster is built is a public utility plot, - a public parking. On her plot, the Plaintiff stated that she has constructed a flat - which has both commercial and residential units which she has leased out to tenants. She stated that the Defendant did not consult her at all before erecting the booster on the plot adjacent to hers.
23. On cross-examination, the Plaintiff stated that she built her flat in the 1980s and finished in the 1990s. In total she said that she has 50 units within the building. On the ground floor, there are 6 tenants who run businesses.
24. The Plaintiff stated that out of the 50 units, she could not tell exactly how many were unoccupied, though she is the one who collects the rent. She too could not tell how much rent she collects from the building.
25. The Plaintiff testified that she started suffering as soon as the booster was erected in the year 2005. It was her testimony that her tenants do not stay for long in her building allegedly because of smoke emitted from the Defendant's BTS and the noise. She however was not aware of any tenant who had suffered health wise as a result of the nuisances from the BTS.
26. The Plaintiff reiterated that the plot on which the booster is erected is a public parking. She stated that she had a map of the area that showed that the plot is a public park. She did not produce the map as an exhibit in her case.
27. The Plaintiff denied that the National Environmental Authority (NEMA) had ever sent inspectors to the site as alleged by the Defendant. She too vehemently denied that NEMA had given the Defendant a clean bill of health.



28. The Plaintiff expressed an opinion that the booster is too near her premises(s) though she could not say exactly how near. Due to the vibrations from the booster, the Plaintiff alleged that her building had developed cracks.
29. The Plaintiff confirmed that she had not attached any receipts showing the amount of rent charged. All that she could confirm was that all the 6 units on the ground floor were fully occupied.

### **Evidence on behalf of the Defendant**

30. The Defendant called one witness, Ms. Valentine Cheruiyot, a Senior Officer in the Defendant Company in charge of environmental compliance and regulatory monitoring. She adopted her witness statement dated 17<sup>th</sup> January 2022 as her evidence in chief.
31. The Defendant's witness explained that the erection of the BTS, the subject of this case was necessitated by the need for efficient communication network in the locality which is a high density area comprising of both commercial and residential zones. The Defendant identified the appropriate site and approached the owner of the plot No. 42415, one Wycliffe Omusaka who agreed to rent it to them. They entered into a lease agreement for the specific purpose of constructing the BTS.
32. At the time the station was established in the year 2005, no environmental impact assessment was conducted because there was no legal requirement for it. The regulations had not been operationalized by then. Before the regulations came into operation,
33. In the year 2009 however, and pursuant to the provisions of section 31(1)(a) of the regulations, ongoing projects established before the regulations were required to conduct 'Environmental Audit Studies' in order to bring them under the regulatory regime. The Defendant undertook an environmental audit study on the station in December 2009. The report was presented to NEMA on 9<sup>th</sup> December 2009. Subsequently the Defendant has conducted such audits in 2012 and 2017. A further one is due in the year 2022.
34. In the year 2012, following complaints by the Plaintiff concerning noise and vibrations, NEMA deployed a team of environmental inspectors on 5<sup>th</sup> July 2012 to investigate the allegations by the Plaintiff. Their findings were communicated to the Plaintiff through a letter dated 16<sup>th</sup> July 2012. NEMA in the said letter confirmed that the Plaintiff's allegations were unverifiable.
35. The Defendants witness was categorical that none of their boosters, including the one the subject matter of this suit, emit smoke. They are closely monitored. Further that the BTS is connected with electricity from Kenya Power & Lighting Company (KPLC). The generator, that allegedly cause the noise, vibrations and smoke complained of by the Plaintiff only serves as a back-up in case of prolonged blackouts. The witness therefore denied that they had exposed the Plaintiff to any risk.
36. Under a directive from NEMA, following persistent complaints by the Plaintiff, the Defendant in the year 2017 commissioned an independent auditor accredited by NEMA to conduct an audit of the BTS concerning noise and vibrations. The result of the audit was that the BTS was found to be producing noise within acceptable limit. The vibrations on the other hand were within the stipulated guidelines as they were even below the regulatory limits.
37. The witness further asserted that at the time BTS was designed, the Defendant ensured that the facility was not erected on the sewer line, drains or pipes and that it does not generate noxious substances hazardous to health.



38. On cross-examination, the Defendant's witness confirmed that the reports they had filed in support of their case predate the year 2019, before the Plaintiff's case was filed.
39. DW1 confirmed that the site on which the booster is expected is leased property. Their landlord is one Wycliffe Omusaka though they had not attached the lease as one of their documents.
40. DW1 affirmed that they had identified a potential risk of higher thermal sensitivity upon a certain population group such as those who are frail and elderly when they came into close contact with the antennae of the booster which is at the highest point to reduce the chances of anyone, other than the authorized persons to come into contact with it. She was categorical that people living near the BTS were safe from any hazards.
41. According to DW1 the internationally recognized and or recommended distance between masts and homes was 1.5 to 2.0 Meters. She stated that fears generally raised against boosters were misinformed and not based on any scientific evidence.
42. The witness re-affirmed that the generator on the site and that allegedly caused the noise, vibrations and smoke was merely for back-up in case of black-outs because the principal source of power for the station was electricity supplied by KPLC.
43. In conclusion, DW1 stated that the Defendant was in the near future set to become a 'net-zero organization' by the year 2030. In place of generators, they were planning to make use of batteries that would be 'super silent'.

#### **Court's Directions**

44. Upon conclusion of the hearing, the court directed parties to file and exchange written submissions. Both parties complied and the court has had the opportunity to read the submissions.

#### **Issues for Determination**

45. Having carefully analyzed the pleadings in this matter, the evidence adduced and the submissions by the parties, this court is of the view that the issues for determination are:-
  - a. Whether the Defendants Base Transmitter Station (BTS) is erected on public land.
  - b. Whether the Plaintiff has established the alleged nuisances against the Defendant.
  - c. Whether the Plaintiff has established the nexus between the alleged nuisances and the damage to her health.
  - d. Whether the alleged damage to the Plaintiff's building is attributable to the vibrations from the BTS.
  - e. Whether the Plaintiff has made a case for loss of rental income.

#### **Analysis and Determination**

##### **a. Whether the Defendant's BTS is erected on public land.**

46. This is an issue that the Plaintiff raised in her plaint. At paragraph 7 of her plaint, the Plaintiff particularized the acts of fraud and illegality against the Defendant to include, 'erecting a base transmitter station on public utility Land and erecting a base transmitter station on a road reserve'.



47. In her testimony, the Plaintiff reiterated that the Defendant's BTS is on a public parking. She affirmed that she had lodged complaints with the defunct City Council of Nairobi, the predecessor in title to the County Government of Nairobi.
48. Under the current constitutional set up, public land (other than the land vested in the National Government under the Provisions of Article 62) is vested in and held by a County Government in trust for the people resident in the County. The Plaintiff alleges that the land on which the Defendant's BTS is erected is a public parking; meaning that it is vested in the County Government of Nairobi.
49. It would have greatly helped the Plaintiff's case if she had joined the County Government of Nairobi in this case either as a Defendant or an Interested Party to shed light on the ownership of the property on which the Defendant's BTS is erected. The Defendant's evidence was to the effect that they are tenants of one Wycliffe Omusaka. He too was not joined as a party in this case.
50. Further, the Plaintiff has alleged that the erection of the BTS on the said plot has caused the diversion of storm water into her property. Once again, 'the management of storm water in built-up areas' is one of the responsibilities of the County Governments under the fourth schedule to *the Constitution* (Distribution of functions between the National Government and the County Governments). If that allegation were true, the County Government of Nairobi would be answerable.
51. Apparently, the Plaintiff had filed a separate case being Nairobi HCCC 542 of 2008 seeking various prayers regarding the alleged illegal occupancy of the land on which the Defendant's BTS is situated. This information is disclosed in the plaint. However, the suit was dismissed for want of prosecution. Earlier on, as is evident from the record of the court, the Defendant had raised a Preliminary Objection in this suit making reference to that earlier suit. The Preliminary Objection was however dismissed by the court.
52. The Plaintiff having accused the Defendant of encroaching into a public parking was bound to prove the allegation. The law is well settled on this aspect. He who alleges must prove. Sections 107 and 108 of the *Evidence Act* are clear on that.
53. The kind of proof required would have come in the form of a search of the subject property or evidence of an officer of the County Government of Nairobi, or the Director of Survey backed up with a Survey map. The Plaintiff did not avail such kind of evidence.
54. What the Plaintiff availed as evidence was an alleged notice by the then City Council of Nairobi addressed to 'the occupier of the Public parking' and dated 24<sup>th</sup> May 2005 – 'PE 10'. The notice is in referenced, "RE: Illegal Development/encroachment On Plot D2516, D255, & D2448." It is not addressed to anyone in particular. The Notice at paragraph 2 required whomever it was meant for to, within 48 hours "to show course" why demolition or prosecution should not be invoked.
55. At paragraph 3, the notice required whomever it was meant to, to report to the Assistant Director at Dandora H.D.D. office equipped with the following documents;
  - i. Proof of ownership.
  - ii. Valid beacon certificate.
  - iii. Approved building plans.
  - iv. Plan fee vouchers.
  - v. Survey fees voucher.



- vi. Inspection sheet.
- vii. Amalgamation authority.
56. The alleged notice cannot be proof of the alleged illegal occupancy. The outcome of the “show course” has not been disclosed. Whether anyone was prosecuted or not is not known. If the notice was in reference to the plot on which the BTS the subject matter of this suit is erected, then it is obvious that it was not demolished as threatened in the notice. One can safely assume that ‘course’ was shown.
57. Secondly, from the Plaintiff’s pleadings and evidence the BTS is erected on plot number 42415B. That plot number is not mentioned in the alleged notice.
58. The court’s finding is that the Plaintiff has not proved the allegations that the Defendant has encroached into a public parking.

**B. Whether the Plaintiff has established the nuisances complained of against the Defendant.**

59. The Plaintiff in her plaint was categorical that the Defendant’s BTS is the cause of the nuisances stipulated therein, namely:
  - i. Smoke by the generator.
  - ii. Noise by the generator.
  - iii. Vibrations by the generator.
  - iv. Water diversion since the land on which the BTS is erected is a Public area (Public parking/ play area) by reason of interference with the natural drainage.
  - v. Harmful radio waves.
  - vi. Obstruction of sunlight.
  - vii. Diversion of sewer to the Plaintiff’s premises blocking her entrance and that of her tenants.
60. As a consequence of the alleged nuisances, caused by the Defendant’s BTS, the Plaintiff at paragraphs 9, 10 & 11 of her plaint pleads that the ‘Defendant’s actions have exposed her and her tenants to harm and loss of livelihood’. The Plaintiff avers that the Defendant has exposed her to harmful radiation levels as it has constructed the BTS merely 30 meters from her residential house which is contrary to international standards of 500 meters. She therefore avers that the harmful radiation levels have exposed her to the risk of cancer, sleeping disturbances, hearing problems, headaches, disturbed cognitive performance, and infertility.
61. The Plaintiff further alleges that the Defendant’s actions causing the nuisances alluded have cost her loss of livelihood as her flat has minimal occupancy. Prior to the erection of the BTS, the Plaintiff alleges that her flat enjoyed full occupancy. She has 50 residential units, earning her rental income of Kshs. 4,000/- each and 5 business units earning her Kshs. 6,000/- each.
62. The Plaintiff therefore prayed for general damages for nuisance, special damages for lost rental income and a mandatory injunction directed at the Defendant to cease operating the BTS forthwith and the structure demolished.
63. In determining this issue, the court has keenly considered the testimony of the Plaintiff and the rejoinder evidence by the Defendant. The Defendant’s witness explained that the BTS is connected to electricity from the KPLC. The generator that is alleged to be the cause of the nuisances complained



of by the Plaintiff is a mere backup which is only switched on in case of power failure. So, the primary source of power for the BTS is electricity.

64. If the generator is the cause of the noise, smoke and the vibrations complained of, then that only happens when there is a power failure. The generator is only switched on when power fails. The Plaintiff did not testify on the frequency of the power failures.
65. The Plaintiff in her submissions relied on the definition in the book by 'Winfield and Jolowiz' at page 494, where 'private nuisance' is defined as unlawful interference(s) with a person's use and enjoyment of land. A person is entitled to bring a cause for private nuisance if she, "has suffered invasion of some proprietary or other interest in land".
66. Further, the Plaintiff also cited the case of *Lyford Gitari Leonard -vs- Weru Tea Factory* (2017) eKLR where the court made reference to the definition in 'Clerk & Lindsell On Torts', 18<sup>th</sup> Edition at page 973 that, "any act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, then it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land, then it is a private nuisance".
67. On its part, the Defendant relied on the case of *Nakuru Industries Ltd -vs- S.S. Mehta & Sons* (2016) eKLR which in defining a nuisance quoted 'Clerk And Lindsell On Torts' (7<sup>th</sup> edition) at P. 1354 where nuisance was defined as,

"An act or omission which is an interference with or disturbance of or annoyance to a person's rights used or enjoyed with land. It is caused, usually when the consequences of a person's actions on his land are not confined to the land, but escape to his neighbour's land causing an encroachment and causing physical damage or unduly interfering with the neighbour's use and enjoyment of his land."
68. The court in the above cited case went ahead to distinguish between nuisance and trespass and stated that:

"The tort of nuisance is distinguishable from that of trespass. This is because trespass is actionable per se, without any proof of damage whereas in a claim for nuisance, there must be proof of some damage."
69. In the instant case, the Plaintiff complains about the noise, smoke and vibrations emanating from the Defendant's generator. As I have already stated, the Plaintiff has not adduced any evidence to prove the frequency of black outs which lead to the switching on of the generator. Further and more importantly, no evidence was presented to the court as to the intensity of the smoke, the noise and vibrations. The reports presented by the Defendant indicate that such noise, smoke and vibrations (if any) were within allowable limits.
70. In Kenya, the Noise and Excessive Vibration Pollution Control Regulations provide the limit on permissible noise levels. The Plaintiff did not avail evidence to prove that the Defendant's BTS violates such regulations and or to contradict the Defendant's evidence in the reports presented.
71. The other allegation by the Plaintiff was that the Defendant's construction of the mast on a public parking had caused the diversion of storm water to her property. The court has already made a finding that the Plaintiff has not proved that allegation against the Defendant. Secondly, no evidence has been adduced to support the allegation of the Defendant having diverted the storm water. Thirdly, and has already been discussed above, it is the responsibility of the County Government in charge of the area



to manage storm water in built up areas. The County Government should take responsibility for such action if it was proved.

72. Although the Plaintiff in her Complaint alleged blockage of sunlight, she did not offer any evidence on this alleged violation. She did not even mention even once in her testimony. Further from the pictures produced in evidence, the layout of the structure supporting the booster would cause very minimal obstruction of the sunlight if at all.
73. There was also no evidence adduced that the Defendant has blocked the sewer to the Plaintiff's premises. Actually in her testimony, the Plaintiff did not mention anything about the sewer.
74. The most damning allegation by the Plaintiff against the Defendant is that of exposing her to harmful radio waves putting her at the risk of contracting cancer amongst other woes. This in my view is an allegation that needed to be backed up by scientific evidence. No such evidence was adduced. The Defendant's witness dismissed the allegation as merely based on rumours and misinformation with no basis. The witness further stated that their booster was within the internationally recognized distance from the Plaintiff's premises.
75. In answering the question why in one of the reports presented the Defendant's employees were required to wear protective gear, the witness clarified that it is only those who come into close contact with the antennae of the booster who were at a minimal risk hence the need for protective gear to manage the risk. The antennae is mounted at the highest point of the BTS, either on top of storey buildings or as in this case on top of the structure constructed for that purpose, to minimize the risk. All the residents who live near the BTS are otherwise safe.
76. The court finds that the Plaintiff has not discharged the burden of proof which was squarely upon her to prove the nuisances alleged against the Defendant. On the other hand the Defendant has sufficiently explained that its operations are within the set standards and all risks were minimal.

**C. Whether the Plaintiff has established the nexus between the alleged nuisances and the damage to her health.**

77. The Plaintiff in her case called a Dr. George Kung'u Mwaura who was the maker of the medico-legal report dated 28.9.2018. The Doctor testified that he had examined the Plaintiff and further relied on the medical history given by the Plaintiff. He had also relied on treatment notes from Baraka Medical Centre which was one of the clinics where the Plaintiff had been treated. The date of accident on the medical report was indicated as May 2005.
78. Though the Plaintiff had been treated at two other clinics, Buruburu ACK Medical Centre and Dandora Health Centre, the Doctor stated that he was only shown the treatment notes from Baraka Medical Centre.
79. On the treatment given, the Doctor indicated that the Plaintiff had been treated with antibiotics, analgesics, high blood pressure drugs and anti-stress drugs.
80. The Doctor's finding, diagnosis and opinion was that the Plaintiff was affected by smoke, noise and vibrations from a Safaricom booster erected at her residence. She was still undergoing treatment for headache, tinnitus, dizziness, chest pains and difficulties in breathing at the time he examined her. For her to recover, the Doctor recommended the removal of the booster from her residence.
81. The Defendant vigorously opposed the Doctor's findings. In its submissions, the Defendant averred that the Doctor did not submit a medical-scientific analysis to justify his findings and conclusions. Further, the Defendant pointed out that the Doctor in cross-examination admitted that he had not come into



the close vicinity of any BTS and only saw them from a far. The doctor stated that he was not aware whether the BTSs produced any smoke, made any vibrations or produced any noise capable of causing the kind of injuries suffered by the Plaintiff.

82. I must point out that the Doctor who was called as a witness by the Plaintiff was casual and lackluster. He did not make any efforts to justify his conclusions. He did not even attempt to verify the medical history given to him by the Plaintiff. He did not insist on seeing all the treatment notes. This would have helped in verifying the medical history given by the Plaintiff and establishing the probable cause(s) of the ailments suffered by the Plaintiff. Surely, and as the doctor noted in his report, the Plaintiff was being treated for high blood pressure and stress. Were the two conditions caused by smoke, noise and or vibrations from the BTS? The Doctor did not establish the nexus between the two.
83. It is noteworthy that the Doctor did not even visit the residence of the Plaintiff to establish that the Safaricom booster was in her residence as alleged. How then could he make a conclusive finding that the booster needed to be removed from the Plaintiff's residence for her to recover without establishing its location, the intensity of the noise or the vibrations complained of by the Plaintiff?
84. Finally, the Doctor stated that his specialty was Sexually Transmitted Infections (STIs). He, in his own words, confirmed that he had not treated any other person with conditions similar to the Plaintiff's caused by 'nuisances from a communication's booster' or even come across any other patient with similar complaints. How then did he gain the expertise to authoritatively make the kind of opinion and conclusions he purported to give in this case. He had neither the experience nor the specialized training to enable him intelligently make an opinion.
85. In my opinion the doctor was therefore unsuitable to testify as an expert in this kind of case. He in fact admitted that the conditions the Plaintiff was suffering from could have been caused by anything else other than the 'nuisances' from the Safaricom booster. This court finds the Doctor's opinion illogical as it is not supported by any scientific or factual basis. His report is of little use if any, in establishing the nexus between the alleged nuisances and the Plaintiff's medical condition.
86. The opinion of an expert is worthless, unless founded upon a substratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. (*Stephen Kanini Wang'onduru -vs- The Ark Ltd* (2016) eKLR).
87. I have said enough on this issue. In conclusion, the court's finding is that the Plaintiff has not established the nexus between the alleged nuisances and the alleged damage to her health.

#### **D. Whether the damage on the Plaintiff's building is attributable to the vibrations from the BTS.**

88. The Plaintiff alleged that the vibrations from the Defendant's BTS are the cause of the cracks on her building.
89. In my opinion, the Plaintiff needed to prove 2 things: -
  - i. That there were indeed cracks on her building.
  - ii. That the cracks were a direct result of the vibrations from the BTS or that they were accelerated by the vibrations.
90. The Defendant in response to the Plaintiff's allegation stated that they had conducted a study as a result of the numerous complaints from the Plaintiff. The study or internal audit was done by an expert certified by NEMA. In its submissions, the Defendant submitted on the report 'DE 8' which found out that the vibrations by the generator at the Defendant's BTS was 0.21 cm/s and was unlikely to



cause damage to any building. Vibrations that would cause damage as alleged by the Plaintiff would have to be in the range of 10-15 cm/s.

91. The Plaintiff did not present any evidence to contradict the report by the Defendant. The Plaintiff did not present any expert report to support her allegations.
92. The court's conclusion is that the Plaintiff has not established that the damage to her building first and foremost existed and if deed, that it was caused by vibrations from the Defendant's generator at the BTS.
93. One curious observation in the report produced by the Defendant at page 168 of the Defendant's bundle of documents was that even when the Defendant's generator was switched off, the noise level in the area where the Plaintiff's building is situated was above the regulatory limits. This was attributable to various other activities and sources in the area as noted. This is a serious indictment on the regulators of pollution in this country.
94. It is the high time that regulatory authorities including the County Governments and NEMA took up their mandates to control air pollution, noise pollution and other public nuisances with the seriousness it deserves. Otherwise, there is not justifiable reason why a County Government or any other regulator for that matter should not be held liable for failure and or omission to execute its statutory or constitutional mandate by anyone who suffers loss and damage as a consequence of such a failure and or omission.

#### **E. Whether the Plaintiff has made a case for award of loss of rental income.**

95. The Plaintiff in her submissions correctly described her claim for loss of rental income as 'special damages on lost rental income'. The law on special damages is well settled to the effect that, special damages need to be pleaded before they can be awarded; further, they must also be strictly proved before they can be awarded.
96. The Court of Appeal in the case of *Coast Bus Ltd-vs-Sisco E. Murunga Danyi & 2 others*, Civil Appeal No. 192 of 1992 restated the position in the following terms: -

“We would restate the position (that) special damages must be pleaded with as much particularity as circumstances permit”.
97. Addressing a situation similar to what is before me, where a party merely listed special damages without proof and expected the court to allow them, the court of Appeal in *Capital Fish Limited –vs- Kenya Power Lighting Company Limited* (2016) eKLR, re-affirmed the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. The court was categorical that it is not enough for a party to throw an 'abstract figure' to the court with a mere statement that....'this is the loss the Appellant suffered.....please award it to the Appellant.' Credible documentary evidence must be adduced to prove the pleaded special damages.
98. In *David Bagine Vs Martin Bundi* (1997) eKLR, the Court of Appeal cited the Judgment by Lord Goddard CJ. in *Bonham Carter vs Hyde Park Hotel Limited* (1948) 64 TLR 177), where he stated that:

“The Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.”



99. In the case of *Kenya women Finance Ltd vs Martha Wangari Kamau* (2021) eKLR, Justice Chacha Mwita cited with approval the Nigerian case of *Union Bank of Nigeria PLC -Vs- Albaji Adams Ayabule & Another* (2011) JELR 48225(SC) (SC 221/2005(16/2/2011), Mahmud Mohammed, JSC, delivering the judgment of the supreme court of Nigeria stated that:

“I must emphasize that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a Plaintiff....Therefore, as far as the requirements of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.”

100. Indeed, special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit (*Capital Fish Ltd-Vs- KPLC*(2016) eKLR).

101. In her testimony, the Plaintiff could not state with precision the amount of rent she collects from the premises yet she stated that she is the one who collects the rent. She was unable to specify the actual occupancy level of her flat. She did not therefore prove the alleged loss of rental income.

102. In a nutshell, the plaintiff did not strictly prove the special damages claimed, neither did she plead them with specificity as required by law. The Plaintiff in this case has failed the test. Her claim for special damages in the form of rental income therefore fails.

### **Conclusion**

103. The conclusion is that the Plaintiff has not proved her case against the Defendant on a balance of probabilities. She is not therefore entitled to any of the prayers sought in her plaint. Her case therefore fails in its entirety and is hereby dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE 2022**

**M.D MWANGI**

**JUDGE**

In the Virtual Presence of:-

Ms. Mugo for the Plaintiff

Ms. Mose for the Defendant

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**

