



Maria & 5 others v Kuria & 5 others (Environment & Land Case 46 of 2021) [2022] KEELC 2925 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 46 OF 2021**

**MAO ODENY, J
JUNE 23, 2022**

BETWEEN

**PAOLO DI MARIA 1ST PLAINTIFF
ALESSANDRO LAMACCHIA 2ND PLAINTIFF
FRANCESCO LEPRI 3RD PLAINTIFF
ROSARIA RAFAELA BONETTI 4TH PLAINTIFF
ALBERTO DI MARIA 5TH PLAINTIFF
EDUARDO ZINNA 6TH PLAINTIFF**

AND

**ALICE M. KURIA 1ST DEFENDANT
SARAH W. KURIA 2ND DEFENDANT
AMERICAN TOWERS CORPORATION KENYA 3RD DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
DEFENDANT
COMMUNICATION AUTHORITY OF KENYA 5TH DEFENDANT
KILIFI COUNTY GOVERNMENT 6TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated 13th May 2021 by the Plaintiffs/Applicants seeking following orders:
 - a. Spent.



- b. Spent.
- c. Spent.
- d. That a permanent injunction does issue restraining the 1st, 2nd and 3rd Defendant/Respondents either by themselves/agents and or servants from constructions of the Base Transceiver Stations tower, at the 1st and 2nd Respondent property known as L.R. NO 2917 Malindi pending the hearing and determination of this suit.
- e. That an order compelling the 3rd defendant/respondent to immediately suspend any operation, activities of the base transceiver mast station/tower pending the hearing and determination of this suit.
- f. That the OCS Malindi to ensure compliance of the orders granted.
- g. That any other relief that this Honourable court may deem fit to grant.
- h. That the costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Plaintiff/applicants' Case

2. The Plaintiff/Applicant relied on the supporting affidavit sworn on 13th May 2021 by Paolo Di Maria wherein he deponed that he was at all material times one of the owners of Plot Nos. 2916 and 2911 Malindi both adjacent to Plot No. 2917 Malindi owned by the 1st and 2nd Defendants.
3. That on 5th May 2021 or thereabout, they noticed that the 1st and 2nd Defendant had allowed the 3rd Defendant to construct a Base Transceiver Station (BTS) on their plot which he estimated to be 24 meters to the boundary of the wall of the residential houses. The Plaintiffs then lodged complaints with the 4th and 5th Defendants on 10th and 11th May 2021 respectively but the Defendants never acted on the complaints.
4. It was the Plaintiffs case that the construction is illegal for lack of a properly issued Environmental Impact Assessment (EIA) license for failure of prior public participation and thereby causing a threat to the Plaintiffs' rights to a clean and healthy environment.

Defendants/respondents' case

5. The 3rd Defendant filed a replying affidavit sworn on 19th November 2021 by its Senior Legal Manager, Mark Lavi who deponed that sometime in the year 2021, the 3rd Defendant sought and obtained approvals from the 4th and 6th Defendants for the alleged construction.
6. He further stated that prior to the 4th Defendant issuing the EIA License, the necessary public participation exercise was conducted whereby the immediate neighbours completed public consultation forms. It was also his evidence that the construction was finalized and the prayer to stop the construction has long been overtaken by events.
7. The 4th Defendant filed a response vide a replying affidavit by Cecilia Nyambu, a Senior Environmental Officer who explained the mandate of the 4th Defendant under the Environmental Management and Coordination Act (EMCA) whereby it is tasked amongst other duties to issue EIA Licenses. That when the 4th Defendant received a letter from the Plaintiffs' advocates dated 10th May 2021 about the said construction, the 4th Defendant conducted an inspection thereon where they discovered that



the project was commenced without the EIA license from the 4th Defendant. Subsequently, the 4th Defendant ordered a halt to any further construction until the requisite license was issued.

8. Contrary to that order, the 1st to 3rd Defendants continued with construction which prompted the 4th Defendant to make arrangement for their arrest when it was served with the present proceedings on 18th May 2021.
9. The 5th Defendant filed grounds of opposition dated 10th November 2021 wherein it averred that the Plaintiffs have failed to establish the existence of any cause of action and that the proceedings are offensive to the doctrine of exhaustion.

Plaintiffs' submissions

10. Counsel relied on Articles 42 and 70 of *the Constitution* on the right to clean and healthy environment and stated that the Plaintiffs' rights have been violated by the construction of the mast which poses a health risk to the plaintiffs' and the residents.
11. Ms Metto also submitted that neither public participation was conducted nor an EIA Licence issued before the construction of the mast as required by law. Counsel further relied on Section 24 of the *Kenya Information and Communications Act* which requires one to apply and obtain a licence before operating a telecommunication as follows:-

24 Requirement of licence.

- (1) No person shall—
 - (a) operate a telecommunication system; or
 - (b) provide any telecommunication services, except in accordance with a valid licence granted under this Act.
 - (2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment to a term not exceeding five years, or to both.
12. Ms Metto therefore submitted that failure of the Defendants to apply and obtain a license was a violation of the Plaintiffs' right under Article 42 of *the Constitution*.

Counsel relied on the cases of *Ken Kasing'a v Daniel Kiplagat Kirui & 5 others* [2015] eKLR, *Douglas Onyancha Omboga & 3 others v Joseph Karanja Wamugi & 4 others* [2019] eKLR; and *Benson Ambuti Atega & 2 others v Kibos Sugar and allied Industries Limited & 4 others; Kenya Union of Sugar Plantation and Allied Workers [Interested Party]* [2019] eKLR and urged the court to allow the application as prayed.

3rd Defendant's Submissions

13. The 3rd Defendant largely submitted on the issue of jurisdiction which the court had already determined in a separate ruling.
14. On the issue as to whether the Plaintiff/Applicants have met the threshold for grant of injunctions, counsel relied on the cases of *Giella v Cassman Brown & Co. Limited* [1973] EA 358 and affirmed by the Court of Appeal in Civil Appeal No. 77 of 2012 *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and stated that the Plaintiffs have not established a prima facie case, demonstrated



- that they will suffer irreparable injury if the injunction is not granted, and if in doubt the court to rule on a balance of convenience in their favour.
15. Ms Okuta submitted that the three limbs must be considered sequentially and that a subsequent limb could only be considered if the previous limb is satisfied and relied on the cases of *Kenya Commercial Finance Co. Limited v Afraba Education Society* [2001] 1 EA; and *Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 others* [2014] eKLR.
 16. Ms Okuta also submitted that the Plaintiffs ought to have demonstrated with a degree of precision how their constitutional rights had been violated and that the fact that the licenses were issued post facto did not invalidate the same. Counsel cited the case of *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR where the Court held that where an E.I.A License is subsequently issued, that License is still valid.
 17. It was counsel's submission that the fact that the Plaintiffs herein failed to participate during the public participation did not in any way invalidate the public participation exercise that was conducted prior to issuance of the license and in line with regulation 17(2) of the EIA Regulations under the Environmental Management and Coordination Act and relied on the case of *Isaac Gitohi & 2 others v National Land Commission & 4 others* [2016] eKLR.
 18. According to counsel the scientific allegations on the effects of the project on their health was unsubstantiated and no evidence was placed before the court on the irreparable injury that the Plaintiffs will suffer.
 19. Ms Okuta cited the case of *Kenya Towers Limited v Maggie Wanjiku Gachau [suing as the representative of 199 others]* [2021] eKLR where the court noted that according to World Health Organization and the International Council on Non-ionizing Radiation Protection, there was no conclusive evidence that exposure from base stations had any adverse effects.
 20. Counsel submitted that the Plaintiffs have not met the threshold for grant of injunctions and that the balance of convenience tilts against the grant of the injunction due to the fact that the construction has since been finalized and that telecommunication towers operate in the public good thus a critical infrastructure in economic growth.
 21. In conclusion counsel submitted that the court cannot issue a permanent injunction at an interlocutory stage before hearing of the main suit and relied on the case of *Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib* [2018] eKLR.

4th Defendant's Submissions

22. Counsel for the 4th Defendant identified 3 issues for determination namely: whether the Plaintiffs have met the threshold for grant of injunctions; whether public participation as required by the EMCA, 1999 was properly adhered to by the respondents; and who is to bear the costs of the application.
23. Counsel relied on the case of *Giella v Cassman Brown* [1973] EA 358 and submitted that the Plaintiffs have neither demonstrated a case that their rights were infringed by the 4th Defendant nor shown any irreparable loss that they would suffer since the necessary approvals were issued and the impugned construction finalized. Further, that the 4th Defendant would suffer more reputational damage thus tilting the balance of convenience in the 4th Defendant's favour.



24. On the second issue, counsel submitted on the need and relevance of public participation in environmental impact assessment and quoted Principle 10 of the Rio Declaration of 1992 which provides as follows: -

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

25. Counsel also relied on Article 2(6) of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context on public participation which states that: -

The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

26. Counsel further cited the case of *Save Lamu & 5 others v NEMA & another* [2019] eKLR; where the threshold on what amounts to public participation as expounded in *Mui Coal Basin Local Community & 15 Others v PS Ministry of Energy & 17 others* [2015] eKLR.

27. Ms Lianza submitted that it was the 4th Defendant’s case that not every non-compliance of the EIA Licensing process vitiates the entire process where such flaws were not substantive which position was upheld and highlighted in the case of *Belize Tourism Industry Association v National Environmental Appraisal Committee & 2 Others* where the Court quoted a decision in the case of *Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority and the National Environment & Planning Agency* where the Learned Judge found that the consultation process was not flawed because an important part of the ESIA was not placed in the public domain and where the Court explained thus: -

...It does not follow...that flaws in the consultation process will necessarily mean that the decision should be quashed. It would seem that it depends on the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision -maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision...the Courts will examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy...”

28. Ms Lianza therefore urged the court to dismiss the application with costs.

5th Defendant’s Submissions

29. Counsel submitted extensively on the jurisdiction of the court which was heard and determined. On the issue as to whether the Plaintiffs are entitled to an order of injunction, counsel submitted that the Plaintiffs have not established a cause of action against the 5th defendant that would serve as a basis for injunctive orders



30. Counsel relied on the case of *The Siskina* [1977]3 All ER at p 824 where the court held that “a right to obtain an interlocutory injunction is not a cause of action, it cannot stand on its own, it is dependent on there being a pre-existing cause of action against the defendant’....”
31. Mr. Muchiri also submitted that from perusal of the supporting affidavit where the Plaintiffs depones that they had written complaint letters to the 5th Defendant for issuing licenses to the 3rd Defendant show that they are directed to the 4th Defendant NEMA and that there is no evidence of any complaint lodged against the 5th Defendant Communications Authority.
32. Counsel further submitted that the only license issued by the 5th Defendant to the 3rd Defendant is a Network Facilities Provider Tier 2 License dated 25th September 2018 for a period of 15 years.
33. It was counsel’s submission that the Plaintiffs have made a scientific argument as the basis for grant of injunction and cited international standards for Base Receiver distances and their carcinogenic effect but has not placed any expert evidence to support the allegations. Counsel therefore urged the court to dismiss the application with costs.

Analysis and Determination

34. The issues for determination are whether the Plaintiffs have met the threshold for grant of temporary injunctions and who is to bear the costs of the application.
35. The principles for grant of temporary injunctions are well settled and a party seeking such an order must establish a prima facie case against the Defendants with a probability of success, show that he or she will suffer irreparable loss/injury if the order is not granted and finally if the court is in doubt to rule on a balance of convenience.
36. In the case of *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another*. [2019] eKLR the court in deciding on an injunction application stated;

circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in a danger of being waste d, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”

37. The Applicant is under a duty to show or establish that the property in dispute or in issue is likely to be wasted/ damaged or alienated if the order is not granted.

The Applicants have sought for both temporary and permanent injunctions to restrain the Defendants from continuing with the construction of Base Transceiver Stations. I have perused the affidavits sworn by the parties together with the annexed photographs and notice that the construction has since been finalized. It seems that the Applicants came to court when the BTS had already been constructed or was under construction. The replying affidavits and the submissions by counsel are that there is nothing to restrain the Defendants from doing. Courts do not issue orders in vain.

In the case of *Habiba Ali Mursal & 4 Others V Mariam Noor Abdi*[2018] eKLR, the Court held as follows: -

On the issue as to whether an injunction should be issued, there is nothing to restrain as the respondent has already demolished the walls of the building. According to the photographs annexed to the application for contempt which I shall shortly herein after deal with, the



walls of the building have already been demolished and all windows removed. The entire building has been fenced and sealed using iron sheets. The applicants are not in the premises. The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one's right. It is never meant to prevent what has already occurred. It will therefore be futile to grant injunctive orders. I will therefore decline to grant any orders in the notice of motion dated 11th October, 2018 save for an order that the respondent shall meet the costs of this application. It is so ordered.”

38. The Plaintiffs case involves technical or scientific evidence to establish a prima facie case. He who alleges must prove by tabling evidence of the threats, violation or injury that he or she will suffer if an order of injunction is not issued.

39. The Plaintiffs herein alleged that the impugned construction was illegal on the fact that Environmental Impact Assessment License may have been issued illegally and that the base transceiver station constructed adjacent to their properties could cause a risk to their health. According to the Plaintiffs, the international recommended distance between such a station and any residential set up should be at least 500 meters whilst the 3rd Defendant's station herein is allegedly 2 meters from the Plaintiffs' residential houses.

The Plaintiffs have attached a copy of the map but the same does not entail the suit properties Plot No. 2916, 2911 and or 2917. There is further no survey report showing the proximity between the transceiver station and the Plaintiffs' properties.

40. As much as the court will not go into the merits of the case at this interlocutory stage, if the plaintiffs allege that they will suffer due to the base receiver's distance and that it will have a carcinogenic effect on themselves and marine life, such evidence ought to be brought forth to the attention of the court. This was not the case in this application.

41. On the issue of public participation and the issue of licensing by the 3rd Defendant it is on record that the 3rd Defendant confirmed that a license was issued in accordance with the regulations. The Plaintiffs have not established that they will suffer injury not capable of being compensated by way of damages.

42. In the case of *Wairimu Mureithi..Vs...City Council of Nairobi*, Civil Appeal No.5 of 1979(1981) KLR 322, the Court held that:-

However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

43. Similarly, in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR the court held that

the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

44. I have considered the application, the submissions by counsel, the relevant judicial authorities and find that the balance of convenience tilts in favour of not granting the injunction therefore the application for injunction dated 13th May 2021 is hereby dismissed with costs. Parties to take directions on the hearing of the main suit.



DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Rulingt has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

