



REPUBLIC OF KENYA

High Court at Machakos

Environmental & Land Case 281 of 2012

1. **ZEFF EKUMBO**
2. **ISAAC MUTHAMA MSAFIRI**
3. **JAMES MUTURI**
4. **PETER MUNYWOKI**
5. **CHARLES OMOLO**
6. **ROBERT OMOLO**
7. **NATAN OGADHO**
8. **CHARITY TAUTA**
9. **ROBERT NYAGAH**
10. **TIMOTHY MUTUNGA**
11. **ALOIS NDAMBUKI**
12. **DAVID MWANIA**
13. **MARTIN OBESA**
14. **STEPHEN MUCHIRI**
15. **WOKABI**
16. **ROBERT LEMERKATO**
17. **MARGARET INDIMULI**
18. **JANET OMULAI**
19. **SIDI WANJIRU**
20. **GIDEON GATIMI**
21. **ANN KIMANI**

22. **CHERUIYOT**
 23. **EDWARD OMBUI**
 24. **SHEILA MADAHANA**
 25. **LUCY AYODO**
 26. **JOSEPHAT MURIGI**
 27. **KARANJA**
 28. **DENNIS GATUKU** (All suing as members of
OLMEUT RESIDENTS WELFARE ASSOCIATION) PLAINTIFFS
- VERSUS**
1. **MR & MRS KARANJA**
 2. **SAFARICOM LTD. DEFENDANTS**

R U L I N G

Before me is a Notice of Motion dated 26th July 2012 filed by 29 named persons suing as members of Olmeut Residents Welfare Association as plaintiffs. The defendants are named as Mr and Mrs Karanja, and Safaricom Ltd.

The application was filed under The Environment and Land Court Act No. 19 of 2011 and Order 40 rules 1, 2, & 3 of the Civil Procedure Rules. The prayers are as follows:-

1. **THAT this motion be certified urgent, service upon respondents be dispensed with and it be heard ex parte in the first instance.**
2. **THAT a temporary injunction be and is hereby issued directed to the defendants by themselves, agents, servants or whomsoever from continuing to build and or operationalising the telecommunications mast on LR No. Kajiado/Olekasasi/970 until the hearing of this motion.**
3. **THAT a temporary injunction be and is hereby issued directed to the defendants by themselves, agents, servants or whosoever from continuing to build or operationalising the telecommunications mast on LR No. Kajiado/Olekasasi/970 until the hearing and determination of this suit or further orders of the court.**
4. **THAT there be such other or further orders as the court may deem fair and expedient to grant.**

It needs to be mentioned here that when the matter first came before the judge, the application was certified as urgent and prayer 2 was not granted. Therefore prayerS 1 and 2 have already been spent.

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn on 26th July 2012 by the first plaintiff Zeff Ekumbo.

The application is opposed. The 1st defendant Francis Njoroge Karanja, through counsel, filed a replying affidavit sworn by himself on 13th August 2012. The 2nd defendant, through counsel, filed an affidavit

sworn by Julius Bwoyele, its Access Network Rollout Manager, on 13th August 2012.

When the application came up for hearing on 15th August 2012, Mr Agina for the plaintiff did not appear in court, though the date was taken in his presence. Mr Ismael who appeared for the 2nd defendant and held brief for Mr Achach for the 1st defendant, urged that the application be dismissed on several grounds.

I will dismiss the application. The first reason is that neither the plaintiffs' counsel nor any of the plaintiffs appeared in court to prosecute the application. Secondly, it is clear to me that the orders sought if granted would be in vain. The documents and affidavits filed clearly show that the mast had been completed and had been operational since July 2012. That was before this suit and application were filed. The completion and operation of the mast cannot therefore be curtailed.

Thirdly, the plaintiffs have not demonstrated a *prima facie* case with probability of success. With the contents of the replying affidavits filed regarding the description and ownership of the plot no. 970 cited by the plaintiffs, which does not appear to belong to the 1st defendant as alleged by the plaintiffs, and the fact that the completion and operation of the mast which was done before these proceedings were filed, would have required the plaintiffs to controvert the same before they could be said to have shown a *prima facie* case with probability of success. They never filed further affidavits nor did they appear in court to argue the application. Showing a *prima facie* case is the first consideration for the grant of interlocutory injunctions as enunciated in **Giella –vs- Cassman Brown Ltd (1973) EA 358**. The plaintiffs failed to show a *prima facie* case. There is therefore no legal basis to grant them an interlocutory injunction.

For the above reasons, the application is hereby dismissed with costs to the defendants.

Dated and delivered at Machakos this **16th** day of **August** 2012.

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George Dulu
Judge

In the presence of:
Mutinda – Court clerk

N/A for Plaintiffs

Mr Kaluu holding brief for Mr Achach for 1st Defendant and Mr Isamel for 2nd Defendant.