



**Olago & another (suing on their behalf and on behalf of 26 other persons) v Njau & 5 others;
National Environment Management Authority (N.E.M.A) & another (Interested Parties)
(Environment & Land Case E224 of 2022) [2022] KEELC 3472 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E224 OF 2022**

**JO MBOYA, J
JULY 21, 2022**

BETWEEN

**SAMUEL OTIENO OLAGO 1ST PLAINTIFF
TAMARA EVGENIEVNA OLAGO 2ND PLAINTIFF
SUING ON THEIR BEHALF AND ON BEHALF OF 26 OTHER PERSONS**

AND

**PAUL MUNGAI NJAU 1ST DEFENDANT
AMERICAN TOWER CORPORATION KENYA LIMITED 2ND DEFENDANT
TIBYAAN ENTERPRISES LIMITED 3RD DEFENDANT
LIQUID INTELLIGENT TECHNOLOGY KENYA T/A LIQUID
TELCOM 4TH DEFENDANT
AIRTEL KENYA LIMITED 5TH DEFENDANT
NAIROBI METROPOLITAN SERVICES (NMS) 6TH DEFENDANT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
(N.E.M.A) INTERESTED PARTY
COMMUNICATION AUTHORITY OF KENYA INTERESTED PARTY**

RULING

1. Vide the Notice of Motion Application dated the October 29, 2022, the Plaintiff / Applicant has sought for the following Orders;



- i. (Spent).
 - ii. A Temporary Injunction do issue directed to the Defendants either by themselves, agents, workers, employees or whomsoever restraining and/or stopping them from carrying on any development, construction, commissioning operating and maintaining a Telecommunication Mass/Tower on the 1st Defendant's Property known as LR NO Nairobi Block 110/516 in Thome Estate, pending the hearing and determination of this Application Inter-Partes.
 - iii. A Temporary Injunction do issue directed to the Defendants either by themselves, agents, workers, employees or whomsoever restraining and/or stopping them from carrying out any development, construction, commissioning operating and maintaining a Telecommunication Mass/Tower on the 1st Defendant's Property known as LR NO Nairobi Block 110/516 in Thome Estate, pending the hearing and determination of the Main Suit.
 - iv. The OCPD Kasarani Police Station in liaison with any other Police Station or Police post within the locality where the Property Known as LR NO Nairobi Block 110/516 falls, to ensure that the orders issued herein are complied with to avoid any anarchy or chaos.
 - v. Costs of this Application be borne by the Defendants/ Respondents.
2. Upon being served with the Notice of Motion Application under reference, the 1st Defendant duly instructed an advocate to file a Notice of Appointment and indeed a Notice of Appointment was duly filed and served. Besides, the 1st Defendant also proceeded to and filed a Replying affidavit sworn on the July 8, 2022.
 3. On the other hand, the 2nd Defendant herein filed a Notice of Appointment as well as a Notice of Preliminary Objection, both dated the July 6, 2022. For clarity, the 2nd Defendant maintained that this Honourable Court was devoid and/or bereft of the requisite Jurisdiction to entertain and/or adjudicate upon the subject dispute.
 4. On her part, the 4th Defendant duly entered appearance and thereafter filed a Replying Affidavit sworn on the July 12, 2022.
 5. Other than the 1st, 2nd and 4th Defendants, the rest of the Defendants herein neither filed any Responses to the subject Application nor did same attend court and participate in the proceedings relating to the hearing of the subject Application.
 6. Nevertheless, the 1st and 2nd Interested Parties herein, filed Notices of Appointment of Advocate and thereafter same participated during the hearing of the subject Application.

Disposition by the parties:

i. Plaintiffs'/applicants' Case;

7. Vide the Supporting Affidavit sworn on the June 29, 2022, one Samuel Otieno Olago, hereinafter referred to as the deponent, has averred that himself together with one Tamara Evgenievna Olago, are representatives of 26 other Plaintiffs, who have an Interest over and in respect of the subject matter.
8. Besides, the deponent has averred that himself together with the rest of the Plaintiffs are residents of Thome Estate, within the city of Nairobi, which estate is situate within the neighborhood of LR No Nairobi Block 110/516, hereinafter referred to as the suit Property.



9. Further, the deponent has averred that LR No Nairobi Block 110/516 belongs to and is registered in the names of the 1st Defendant herein, who has lawful rights and/or interests thereon.
10. It is the deponent's further averments that on or about June 2022, same saw and/or established a Telecommunication Mast/Tower being erected within the compound of the 1st Defendant herein, which is comprised and/or forms part of the suit property.
11. Further, the deponent has averred that though same is a neighbor of the 1st Defendant herein, same was neither informed nor consulted over and in respect of the intended project touching on and/or concerning the erection of Telecommunication Mast.
12. Similarly, the deponent has averred that upon seeing the Telecommunication Mast being erected on the suit property, albeit without notice to and/or involvement of the residents of Thome Estate, same decided to confront the 1st Defendant and to ascertain whether the erection of the Telecommunication Mast had been duly approved and licensed.
13. Be that as it may, the deponent has stated that when he confronted the 1st Defendant, same did not exhibit and/or show unto the deponent any evidence of approval and/or licensed, authorizing the erection of the Telecommunication Mast.
14. Based on the foregoing, the deponent has averred that same was constrained to approach the 1st Interested Party herein to ascertain and/or authenticate whether the erection of the Telecommunication Mast, had been duly licensed or otherwise.
15. Other than the foregoing, the deponent has further averred that same was also able to confront the 3rd and 4th Defendants with a view to ascertaining whether same had procured and/or obtained any authorization to erect and or mount a Telecommunication Mast within the suit property and in any event, within the neighborhood of Thome Residential Estate.
16. The deponent further averred that when same confronted the 3rd and 4th Defendants, he (deponent) was availed and/or otherwise came across a document which only allowed the 3rd and 4th Defendants to lay Fibre Optic cables and not to mount a Telecommunication Mast/Tower in the area.
17. On the other hand, the deponent has averred that to the extent that the construction of the Telecommunication Mast was moving at an alarming speed, same approached the 1st Interested Party to intervene and avert the continuation of the erection of the Telecommunication Tower, pending the investigations and/or authentication whether the impugned erection had been licensed and/or approved.
18. Nevertheless, the deponent continued and averred that despite his endeavors and or entreaties to the 1st Interested Party, same was non-committal and otherwise exhibited apathy to intercede and address the Complaint.
19. Further, the deponent has also averred that same also approached the 2nd Interested Party with a view to ascertaining whether same (read the 2nd Interested Party), had authorized and/or licensed the construction the impugned Telecommunication Mast/Tower.
20. However, the deponent averred that yet again the 2nd Interested Party herein appeared to be oblivious of the erection of the Telecommunication Mast within Thome Residential area.
21. On the other hand, the Deponent stated that the 2nd Interested Party also pointed out that same is not involved in the licensing and/or approval of erection of Telecommunication Mast.



22. Be that as it may, the deponent has averred that arising from the various investigations and inquiries that same conducted and/or undertook, it was apparent that the Telecommunication Mast was being mounted, albeit without the requisite license and/or approvals from the relevant Authorities.
23. Further, the deponent has contended that the erection of the impugned Telecommunication Mast, shall radiate and/or remit radioactive waves, which are disposed to cause and/or occasion Environmental Degradation and in particular, that the radioactive wave are known-cause of Cancer.
24. In the premises, the deponent stated that the erection of Telecommunication Mast, prior to and/or before of acquisition of the requisite Environmental Impact Assessment License and in the absence of Public participation, the impugned actions are a threat to the Plaintiffs' Rights to Clean and Healthy Environment.
25. In the circumstances, the deponent implored the Honourable Court to intervene and avert further Construction of the Telecommunication Mast and thereby protect the Plaintiffs' Rights as enshrined vide Articles 42 and 70 of the Constitution, 2010.

ii. Response by the 1st Defendant/respondent

26. The 1st Respondent herein filed a Replying Affidavit sworn on the July 8, 2022 and in respect of which same admitted, acknowledged and reiterated that he is the registered owner of LR No Nairobi Block 110/516, situated within Thome Estate in Nairobi.
27. Further, the deponent herein has averred that on or about the April 1, 2022, same entered into and executed a Lease Agreement with the 2nd Defendant/Respondent over and in respect of a portion of the suit property.
28. On the other hand, the deponent herein has also stated that the 2nd Defendant herein intimated vide the Lease Agreement that same were keen to mount and/or erect a Telecommunication Mast, for purposes of operating Telecommunication infrastructure within the area.
29. Other than the foregoing, the deponent has also averred that the 2nd Defendant assured him that same would procure and obtain all the requisite licenses and approvals, before commencing the erection of the intended Telecommunication Mast.
30. Similarly, the deponent has averred that after entering into and executing the Lease Agreement with the 2nd Defendant, same proceeded to and cut down assorted trees, which were growing and/or standing within the area that was leased and/or demised to the 2nd Defendant herein.
31. Notwithstanding the foregoing, the deponent has averred that when the Plaintiff herein approached him and enquired whether the erection of the Telecommunication Mast had been approved and/or licensed, same escalated the Complaint to the 2nd Defendant herein, who undertook to address and/or undertake the Complaint.
32. Nevertheless, the deponent has also averred that shortly after he escalated the Plaintiffs' Complaint to and in favor of the 2nd Defendant, some Representatives of the 2nd Interested Party, namely, NEMA visited his house and he connected the said Representatives of NEMA with the Plaintiff herein.
33. However, the deponent herein has proceeded to and averred that despite leasing a portion of the suit property to and in favor of the 2nd Defendant, the erection of the impugned Telecommunication Mast, was not being carried out by himself.



34. In the premises, the deponent has averred that the procurement of the requisite licenses and/or approvals, if any, was not his responsibility but the responsibility of the Proponent of the impugned Telecommunication Mast.
35. Based on the foregoing, the deponent has thus contended that the orders sought cannot therefore issue as against himself, merely for being the registered owner and/ or Proprietor of the suit property.

iii. Response by the 2nd Defendant/respondent

36. On behalf of the 2nd Defendant herein a Notice of Preliminary Objection dated July 6, 2022, was filed and/or lodged with the court.
37. For the avoidance of doubt, the Notice of Preliminary Objection, raised the following Grounds;
 - i. The Jurisdiction of this Honourable Court has not been invoked properly by dint of Sections 125, 126 and 129 of the *Environment Management and Coordination Act*, 1999.
 - ii. This Suit relates to a Decision that was made by National Environment Management Authority and as such, it should be heard and determined by the National Environment Tribunal in the first instance. To this extent, the law is now well established vide the Court of Appeal in *Kibos Sugar Limited versus Benson Ambuti Adega & Others (2020)eKLR* and *Iton Towers (K) Ltd versus Ken Kasinga & Others (2016)eKLR*.
 - iii. The Application dated the July 29, 2022 and filed herein is thus Bad in law, defective and an abuse of the court process and the same ought to be dismissed with costs.

iv. Response by the 4th Defendant/respondent

38. On behalf of the 4th Defendant herein, a Replying Affidavit was filed and the same was sworn on the July 12, 2022.
39. For clarity, it was deponed that the 4th Defendant herein was commissioned to lay Fiber Optic Cables within Thome Residential area and pursuant to the commission, the 4th Defendant proceeded to and constructed the 3rd Defendant herein to carryout and/or undertake the works relating to the laying of the Fiber Optic Cables.
40. Further, it was averred that the laying of the fiber optic cables was duly licensed and approved by the requisite relevant authorities and hence the works relating to the laying of the Fiber Optic Cables was lawful.
41. Finally, it was averred that the laying of the fiber optic cables, which was undertaken by the 3rd Defendant, albeit on behalf of the 4th Defendant, was duly completed and the 3rd and 4th Defendants vacated the site.
42. In the premises, it was therefore stated that the 3rd and 4th Defendants have therefore been wrongly joined and/or impleaded in respect of the foregoing matter.

Submissions by the Parties;

43. The subject Application came up for hearing on the July 18, 2022, when same was canvassed and/or argued vide Oral Submissions.



44. On behalf of the Plaintiffs, it was submitted that the impugned Telecommunication Mast was being constructed and/or erected within Thome Estate, which is a Residential area, albeit without the requisite licenses and/or approval having been obtained beforehand.
45. Secondly, it was also submitted that the erection and/or construction of the impugned Telecommunication Mast was also being undertaken before Public participation and/or involvement of the Residents of Thome Estate, either as by law required or at all.
46. Thirdly, it was submitted that the impugned Telecommunication Mast/ Tower is disposed to remit radio-active waves, which are a known cause of Cancer and in the premises, the residents of Thome Estate, shall be exposed to Environmental Degradation and unclean Environment.
47. Further, it was submitted that the erection and/or construction of the impugned telecommunication mast, was also being undertaken on and/or within the suit property, without the requisite change of user having been procured and/or obtained in line with the Provisions of [Physical Planning and Land Use Act](#), 2019.
48. Other than the foregoing, it was also submitted that to the extent that no License and/or approvals had been procured and/or obtained from the relevant Authorities, inter-alia National Environment management Authority and the City Government of Nairobi, the subject Complaint falls within the Jurisdiction of this Honourable Court.
49. In any event, it was also submitted that this court is seized of the requisite original Jurisdiction to interrogate and address all matters, pertaining to and/or concerning breach, violation and or infringement of the Right to Clean and Healthy Environment.
50. Based on the foregoing submissions, Learned Counsel for the Plaintiffs therefore contended that the Reliefs sought are justifiable and thus ought to be granted, with a view to protecting the Plaintiff's Rights to a Clean and Healthy Enviroment.
51. On his part, Counsel for the 1ST Defendant submitted that the 1ST Defendant is merely the owner and/or proprietor of the suit Property and hence the fact of such ownership alone, cannot necessitate the orders sought being granted as against him.
52. Further, it was submitted that pursuant to and by dint of the provisions of Section 58 of the EMCA Act, 1999, it is the proponent of the project, who is mandatorily required to procure and/or obtain the requisite licenses and not the registered owner of the land.
53. In the premises, the 1st Defendant contended that both the Application as well as the suit do not raise any reasonable cause of action as against himself.
54. On behalf of the 2nd Defendant, it was submitted that the issues at the foot of the subject suit and the Application touched on and/or concerned issues that fall within the jurisdiction of the National Environment Tribunal, pursuant to and by dint of Section 129 of the EMCA Act, 1999.
55. At any rate, Counsel for the 2nd Defendant further submitted that NEMA had issued the requisite approval and/or license for purposes of the erection of the impugned Telecommunication Mast/ Tower.
56. Be that as it may, the Learned counsel for the 2nd Defendant admitted and/or conceded that no License and/or approval issued by NEMA, if any, has been exhibited and/or availed to the court.
57. In a nutshell, the 2nd Defendant implored the court to find and hold that the Court was devoid and/or bereft of the requisite Jurisdiction, to entertain and/or adjudicate upon the subject dispute.



58. In support of her case, the 2nd Defendant invited the court to take cognizance of the decisions, inter-alia *Kibos Sugar Limited versus Benson Ambuti Adegga & Others (2020)eKLR* and *Iton Towers (K) Ltd versus Ken Kasinga & Others (2016)eKLR*.
59. On her part, Learned Counsel for the 1st Interested Party submitted that NEMA is indeed authorized and mandated to issue the requisite Environment Impact Assessment Report, but in respect of the subject matter same had not come across any such Environmental Impact Assessment License.
60. Further, counsel submitted that following the filing and lodgment of the subject suit, NEMA has commissioned a team to visit the site but no Report has since been generated and/or availed.
61. On his part, Learned Counsel for the 2nd Interested Party, have submitted that the 2nd Interested Party is never involved in the licensing and/or approval of the erection of the Telecommunication Mast/Tower, as well as the impugned Telecommunication Mast.
62. At any rate, Learned Counsel for the 2nd Interested Party submitted that the 2nd Interested Party had been wrongly joined and/or sued in the subject matter.

Issues for Determination

63. Having reviewed the Notice of Motion Application dated the June 29, 2022, the Supporting affidavit thereto and the Responses by and/or on behalf of the Respondents and the Interested Parties; and having taken into account the Oral submissions on behalf of the Parties, the following issues are pertinent and are thus germane for Determination;
 - i. Whether this Honourable Court is seized and/or possessed of the requisite Jurisdiction to entertain the subject suit and by extension the Application.
 - ii. Whether the Plaintiffs/Applicants have established a Prima Facie case with overwhelming chances of success.
 - iii. Whether the Plaintiffs/Applicants are disposed to suffer Irreparable loss.

Analysis and Determination:

Issue Number 1

Whether this Court is seized and/or possessed of the requisite Jurisdiction to entertain the subject suit and by extension the Application.

64. The 2nd Defendant/Respondent has contended that this Honourable court is devoid and bereft of Jurisdiction to entertain and/or adjudicate upon the subject dispute, inclusive of the Application for Temporary Injunction.
65. Having raised the question of Jurisdiction, it is therefore important and/or paramount for this court to interrogate the issue as to whether the court is seized of the requisite Jurisdiction to adjudicate and/or to entertain upon the subject dispute.
66. Suffice it to state and observe, that the question of Jurisdiction is paramount and is otherwise a threshold issue, which once raised, must be determined at the onset and before indulging into the Issues of Merit or otherwise.
67. Based on the foregoing, the starting point to unlocking the Jurisdictional question is therefore an understanding of what constitutes Jurisdiction and how does Jurisdiction arise.



68. To be able to understand and appreciate the meaning and tenor of Jurisdiction, it is therefore appropriate to take cognizance of the decision of the Supreme Court Of Kenya, in the case of [Republic versus Karisa Chengo & 2 others \[2017\] eKLR](#), where the Court observed as hereunder.

(35) In the above regard, we note that in almost all the legal systems of the world, the term 'jurisdiction' has emerged as a critical concept in litigation. Halsbury's Laws of England (4th Ed) Vol 9 at page 350 thus defines 'jurisdiction' as 'the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.' John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:

' By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given'.

From these definitions, it is clear that the term 'jurisdiction', as further defined by [The Black's Law Dictionary, 9th Edition](#), is the Court's power to entertain, hear and determine a dispute before it.

69. Other than the foregoing, another succinct definition of or discourse on what constitutes Jurisdiction was espoused in the case of [Phoenix of EA Assurance Company Limited versus SM Thiga t/a Newspaper Service \[2019\] eKLR](#), where the Court of Appeal stated as hereunder;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.

70. Premised on the foregoing, it is now appropriate to explore the dispute before hand and to ascertain whether indeed the impugned activities, touching on and/or concerning the erection of the Telecommunication Mast/Tower, in the absence of the requisite Environmental Impact Assessment License Approval falls within the purview of this court.

71. First and foremost, it will be recalled that though the Plaintiffs herein contended that no Environmental Impact Assessment Study was conducted and/or carried out, prior to and/or before the commencement and the erection of the telecommunication mast, neither the Defendants nor the



Interested Parties herein have exhibited and/or displayed any such Report, to controvert the deposition by the Plaintiffs herein.

72. On the other hand, it suffices to observe, that none of the Respondents and the Interested Parties, have also availed and/or displayed the requisite Environmental Assessment License, issued by NEMA, in line with the provisions of Section 58 of the Environment Management and Co-ordination Act, 1999.
73. Notwithstanding the foregoing, counsel for the 2nd Defendant contended and or submitted, albeit form the bar that an Environmental Impact Assessment License had been procured and obtained by the 2nd Respondent.
74. However, despite the submissions from the bar, Learned counsel for the 2nd Defendant was not able to avail and/or exhibit a copy thereof.
75. Be that as it may, it must be pointed out that if NEMA had issued the requisite Environment Impact Assessment License, to and in favor of the 2nd Defendant, to authorize the erection and or mounting of the impugned Telecommunication Mast, such a license would no doubt be under the custody and care of the 2nd Defendant herein.
76. Consequently, where the existence of such a licensed is questioned, it behooves the 2nd Defendant to exhibit and/or display same.
77. Notwithstanding the foregoing, it is also appropriate to state that the law also requires the Proponent of a project, in this case the 2nd Defendant, to also mount an appropriate Board and/or Signage, displaying inter-alai, the Environmental Impact License Details, if any, granted by the Authority.
78. However, in respect of the subject matter, no evidence of any such Board, containing the details in respect of the EIA license, if any, was displayed and/or availed.
79. In any event, if there was any such board, same would have been mounted within the precincts of the impugned Project and essentially, on the suit property, belonging to and registered in the names of the 1st Defendant/Respondent.
80. To my mind, if there was ever such a board, containing the requisite details, including the Environmental Impact Assessment License number, the 1st Defendant herein, would have easily alluded to same and/or referred the Plaintiff/Applicant to such a Board, containing the requisite licenses and/or approval.
81. Contrarily, the Plaintiff herein, who has adverted to the fact that upon seeing the erection of the impugned Telecommunication Mast, he went to the premises of the 1st Defendant, would also have seen and/or witnessed, the notations pertaining to the Approvals and Licenses, if any.
82. In my considered view, the reason why no EIA License has been displayed and/or exhibited, by the 2ND Defendant/ Respondent or any of the other Parties, is because none was procured and none exists.
83. Put differently, if any such license had hitherto been procured and obtained, nothing would have been easier than same being availed to court, to rebut and or controvert the claims on behalf of the Plaintiffs.
84. To the extent that no Environmental Impact Assessment License was procured and obtained, it is my finding that the Plaintiff herein could not therefore access the Jurisdiction of National Environment Tribunal and/or lodge any complaint thereto.
85. Suffice it to note, that National Environmental tribunal, which is established vide Section 125 of the EMCA 1999, is conferred with Appellate Jurisdiction over and in respect of Decisions of National Environmental Management Authority.



86. Consequently, where National Environment Management Authority has not made any Decision, inter-alia, granting or refusing the license sought, the Tribunal herein would have no Jurisdiction to entertain an Original Complaint pertaining to and/or concerning threat to and/or violation the Rights to Clean and Healthy Environment.
87. To underscore the import of the foregoing submissions, it is appropriate to take cognizance of and in any event, to reproduce the provisions of Section 129 (1) of the EMCA 1999, which provides as hereunder;
129. Appeals to the Tribunal
- (1) Any person who is aggrieved by—
- (a) A refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
 - (b) The imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;
 - (c) The revocation, suspension or variation of his licence 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.
88. In the premises, where there is a Complaint pertaining to and/or concerning a threat to a Clean and a Healthy Environment and where the proponent of a project has failed to procure and obtain the Environment Impact License, in accordance with the law or at all, the persons aggrieved and or threatened with such violation, are at liberty to approach the court for appropriate Reliefs and/or intervention.
89. Consequently, to the extent that no license and/or decisions had been issued and/or made by NEMA, the Plaintiff herein could therefore not be expected to approach National Environmental Tribunal, either as submitted or at all.
90. To the contrary, the Plaintiffs herein correctly approached this Honorable Court in exercise of its Jurisdiction as granted vide Section 3(3) of the Environment Management Co-ordination Act, 1999.
91. For convenience, the provisions of the said Sections of the EMCA, 1999 (Supra) provides as follows;
- (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
92. In view of the foregoing, I come to the conclusion that this Honourable court is seized and possessed of the requisite Jurisdiction to adjudicate upon and entertain the subject application



as well as the suit herein. Consequently, I am inclined to assume Jurisdiction, that lawfully belongs to this Honourable court.

93. Whereas a court without jurisdiction must down its tools at the earliest opportune moment, it is worthy to state that a Court with Jurisdiction must not forsake and/or abdicate its Jurisdiction, merely because one of the Parties doubts and/ or Disputes the court's Jurisdiction to handle the dispute in question.
94. If such were to happen, then the court will be guilty of dereliction of duty, which is by itself as dangerous as assumption of Jurisdiction where non-exists. In a nutshell, Jurisdiction is provided for and/or established either vide the Constitution or the enacting Statute.
95. In this regard, the ascertainment of the Jurisdictional limit of this court must be discerned from the provisions of Article 162 (2) (b) of the Constitution, 2010 as read together with Section 3(3) of the EMCA Act and Section 13(2) of the Environment and Land Court Act, 2011.
96. In short, the observation by the Supreme Court of Kenya vide the case of Samuel K Macharia v Kenya Commercial Bank Ltd & Another (2012)eKLR, is succinct and apt, in underscoring the source and/or origin of jurisdiction of a Court. For clarity, the Supreme Court observed at paragraph 68 as hereunder;

(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.

Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

97. Based on the forgoing observation, the Preliminary Objection dated the July 6, 2022, is not only premature and Misconceived, but same is also legally untenable.

Issue Number 2;

Whether the Plaintiffs/Applicants have established a Prima facie case with Overwhelming chances of success.

98. The salient and pertinent Complaints ventilated by the Plaintiffs herein, touched on and/or concerned the fact that the impugned Telecommunication Mast/Tower has been erected and/or better still, is being erected on the suit property albeit without prior Environmental Impact Assessment Study, having been undertaken by the Proponent of the project.



99. Similarly, the Plaintiffs herein have also contended that there having been no Environmental Impact Assessment study, no Environmental Impact Assessment license, could therefore issue and/or be granted.
100. Thirdly, the Plaintiffs have also contended that the telecommunication mast, which is the subject of the Complaint is being erected within a Residential area, albeit without Public participation and/or involvement, having been undertaken by the proponent of the impugned project.
101. For the avoidance of doubt, it is appropriate to underscore that public participation is one of the National Values and Principles of Governance espoused vide Article 10 of the Constitution, 2010.
102. Other than the foregoing, it is also appropriate to recall that the procurement and/or issuance of Environment Impact Assessment License is a mandatory requirement prior to the commencement and/or undertaking of a project, like the one before hand.
103. To underscore the foregoing observation, it is imperative to take cognizance of Section 58 of the Enviroment Management Co-ordination Act, 1999, which provides as hereunder;

58. Application for an Environmental Impact Assessment Licence

1. Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an 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.
- (2) 2) 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 subsection (1), that the intended 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 prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.
- (4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.
- (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.
- (6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.



- (7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.
 - (8) The Director-General shall respond to the applications for environmental impact assessment license within three months.
 - (9) Any person who upon submitting his application does not receive any communication from the Director-General within the period stipulated under subsection (8) may start his undertaking.
104. To the extent that issuance and/or procurement of the License is not only a mandatory requirement, but a prerequisite, which must be obtained before the commencement of the proposed project, like the one beforehand, it then means that no such Project can be commenced and/ or undertaken in the absence of such License.
105. In the premises, a failure to procure and/or obtain same, similarly, constitutes a Criminal offense.
106. Consequently, in respect of the subject matter, it would be safe to find and hold, until an EAI license is availed, the impugned Telecommunication Mast was being carried out illegally.
107. Based on the foregoing, I come to the conclusion that the Plaintiffs herein have established and/or proven a Prima facie case with overwhelming chances of success and thus entitled the issuance of the Orders of Temporary Injunction.
108. To this end, it is appropriate to adopt and restate the definition of what constitutes Prima facie case as was underlined vide *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125*, where the Court of Appeal at page 137 held:-

' So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'

Issue Number 3

Whether the Plaintiffs/Applicants are disposed to suffer Irreparable Loss.

109. The Plaintiffs herein have deposed inter-alia that the impugned Telecommunication Mast/Tower is disposed to remit and/or release radio-active waves, whose Emission is likely to occasion Environmental Degradation, in Thome Residential area, which is inhabited by the various residents.
110. On the other hand, there is also other averments that the Telecommunication Mast which is disposed to remit radioactive waves, is likely to expose the Plaintiffs and the residents of Thome Estate to Cancer.
111. Though no Expert Report has been attached and or annexed, the threats caused by radioactive waves, if any, cannot be wished away.
112. In any event, it is also worth stating that the deposition alluding to the Plaintiffs/Applicants being exposed to the Adverse effects of the radio-active waves and the fact that same is a known cause of Cancer, was neither rebutted nor controverted vide any Affidavit Evidence.



113. At any rate, while dealing with threat to Clean and Healthy Environment and particularly, where the impugned activity is likely to occasion Environmental Injustice, whose consequences are not fathomable at the onset, the Honourable Court is called upon to apply the Precautionary principles.
114. In this case, it would not be safe and/or sound to allow the impugned Telecommunication Mast to continue and/or be constructed, despite the fears that have been raised by and/or on behalf of the Plaintiffs herein.
115. For clarity, to do so will be tantamount to exposing the Plaintiffs herein to terminal Diseases, whose impact, consequences and/ or effects may be irredeemable.
116. In short, it is my finding and holding that the Plaintiffs herein have established and/or exhibited that same are exposed to suffer Irreparable loss, unless the orders sought are granted.
117. To vindicate the foregoing, it is appropriate and imperative to take cognizance of the dictum in the case of *Nguruman versus Jan Bonde Nielson & 2 Others (2014)eKLR*, where the court observed as hereunder;

‘If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit ‘leap-frogging’ by the applicant to injunction directly without crossing the other hurdles in between.
118. In view of the foregoing, there is no gainsaying that the Plaintiffs have met and/or established the conditions to warrant the grant of the orders sought.

Final Disposition:

119. Having reviewed the issues for determination that were enumerated elsewhere herein before, it is now appropriate to make the final and dispositive orders as pertains to the Application dated the June 29, 2022.
120. In a nutshell, it is my finding and holding that the Application under reference is meritorious.
121. Consequently, I make the following orders;
 - i. The Preliminary Objection dated July 6, 2022 be and is hereby Dismissed with costs.
 - ii. The Application dated the June 29, 2022 be and is hereby allowed in terms of prayers 3 and 4 thereof.
 - iii. Costs of the Application be and are hereby awarded to the Plaintiffs/Applicants and same to be borne by the 1st, 2nd and 6th Defendants/Respondents as well as the 1st Interested Party.
 - iv. The 1st Interested Party be and is hereby ordered and or directed to commission an Inspection in respect to the impugned Telecommunication Mast/Tower and where appropriate, to ensure that suitable and/or appropriate action, inter-alia, restoration is taken in line with Section 117 of the EMCA, 1999
 - v. Subject to undertaking the requisite Inspection in line clause (iv), the 1st Interested Party shall compile and file an appropriate Report relating to the circumstances under which the



Impugned Telecommunication Mast/ower was commenced without EIA license and the report to be lodged in court within 30 days from the date hereof.

122. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

In the Presence of;

Kevin Court Assistance

Mr. A S Kuloba for the Plaintiffs/Applicants

Mr. Kabugu for the 4th Defendant/Respondent

Ms. Sakami h/b for Ms. Majune for the 1st Interested Party

Mr. Mbaji for the 2nd Interested Party

No appearance for the 1st, 2nd and 3rd Defendant/Respondent

