



REPUBLIC OF KENYA



**Hassan v Safaricom Limited & another (Environment & Land Case
71A of 2022) [2022] KEELC 12569 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 71A OF 2022
NA MATHEKA, J
SEPTEMBER 27, 2022
FORMERLY HCCC E027 OF 2022**

BETWEEN

ALI ATHMAN HASSAN PLAINTIFF

AND

SAFARICOM LIMITED 1ST DEFENDANT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY
(NEMA) 2ND DEFENDANT**

RULING

1. The application is dated December 11, 2020 and is brought under order 40 rule 1 and 2 of the [Civil Procedure Rules, 2010](#), section 1A, B and 3A of the [Civil Procedure Act](#), chapter 21 of the Laws of Kenya seeking the following orders;
 1. This honourable court to certify this application as urgent and service thereof be dispensed with in the first instance.
 2. This honourable court do grant an order of injunction to the plaintiff/applicant against the 1st defendant/respondent restraining it from operating the Base Transceiver Station (BTS) which comprises a mast and generator at its site in Mtopanga opposite the plaintiff/applicant residence on plot No 7049 section II, Mainland North pending the
 3. This honourable court do grant prayer 2 above on interim basis pending the hearing and determination of this application.
 4. Costs of this suit.



2. It is based on the grounds that the 1st defendant /respondent is operating a Base Transceiver Station BTS at Mtopanga opposite the plaintiff/applicant's residence at plot No 7049 section II Mainland North. The said BTS emits hazardous gas that pollute the air around the plaintiff/applicant's house affecting his health, that of his wife and his children. The generator from the BTS vibrates and produces irritating noise that has affected the applicants hearing. Despite numerous complaints by the plaintiff/application, the 1st defendant has refused, neglected and or ignored rectifying the situation thereby continuing with the said nuisance which is harmful to the plaintiff/applicant. The 2nd defendant/respondent has abdicated it's work of oversight over the 1st defendant/respondent and has let the 1st defendant/respondent to continue operating the BTS without considering the harmful effects on the plaintiff/applicant and his family. It is in the interest of justice that this application be allowed to safeguard the health of the plaintiff/applicant and his family.
3. The 1st defendant's submitted that the High Court lacks jurisdiction to entertain this suit for three (3) reasons namely; the plaintiff's complaint is alleged environmental pollution and its effects on the plaintiff. Article 165(5) of the Constitution precludes the High Court from entertaining any question reserved for the Environment & Land Court. The Environmental Management and Co-ordination Act, 1999 has provided elaborate procedures for addressing grievances on alleged pollution of the environment. Therefore, even though courts ultimately have jurisdiction, the doctrine of exhaustion requires that the statutory grievance procedure be invoked before the court's jurisdiction is invoked. The plaintiff has presented two reports by experts who have taken divergent views on whether or not there is environmental pollution. That being a highly technical and specialized field, the doctrine of judicial abstention means the court should let the statutory bodies, comprised of experts, resolve the disputes in the first instance. That the 1st defendant has in fact not polluted the environment as alleged by the plaintiff or at all. That with the increasing growth in the use of mobile communication in Kenya, mobile telecommunication service providers such as the 1st defendant must expand their networks. That the expansion of the network provides additional capacity in areas that suffer from congestion or poor coverage thus the quality of the service provided is greatly enhanced. Quality of the service is monitored by the Communications Authority. Any service provider that offers services below the set standards is subjected to regulatory fines. That it is for those reasons that the 1st defendant acquired the Base Transceiver Station (BTS) erected on subdivision No 9908 (Orig No 4554/13) section II Mainland North from Econet Wireless Kenya Limited. That Econet Wireless Kenya Limited had leased the site pursuant to a lease dated November 5, 2009. When the term of that lease expired, the 1st defendant entered into a fresh lease dated September 14, 2018 (annexed and marked as DN-1 a copy of the lease dated September 14, 2018). That at the time of the 1st defendant taking over the BTS, Econet Wireless had already carried out an environmental impact assessment project report and submitted it to National Environment Management Authority (NEMA). That NEMA, upon reviewing that project report, issued an EIA license on May 7, 2010 subject to the conditions contained therein and in its letter dated April 29, 2009 (annexed and marked as DN-2 (a) & (b) respectively a copy of the EIA licence dated May 7, 2010 and NEMA's letter dated April 29, 2009). That other than the project report, from the 1st defendant's records, there was an initial audit report for the BTS carried out in the year 2014 and submitted to NEMA on April 9, 2014 (annexed and marked as DN-3 a copy of a letter dated April 9, 2014 confirming receipt of the initial audit report).
4. That the BTS has been in operation for over eleven (11) years without any complaint whatsoever. It is only the plaintiff who has complained for the first time in 2018. That when the plaintiff complained about environmental pollution in March 2018, the 1st defendant retained Mazingira Limited, an environmental expert, to carry out an environmental audit report for the BTS in Mtopanga. The environmental expert, though remunerated by the 1st defendant, is a professional



organization which carries out its work independently and professionally. That Mazingira Limited availed an environmental audit report issued on May 28, 2018. That the one presented by the plaintiff is unsigned and has several annotations which do not exist in the audit report submitted by Mazingira Limited (I annex and mark as DN-4 a copy of the environmental audit report dated May 28, 2018). That the plaintiff had raised three (3) complaints namely; (a) excessive noise from the generator; (b) excessive smoke from the generator; and (c) exposure to harmful Electromagnetic Fields (EMF). That from the audit report, the noise levels from the generator were found to be within the permissible range. It should be appreciated that humans have different noise tolerance levels. It may be that the plaintiff has very low tolerance levels; that however does not mean the noise is beyond the statutorily permissible levels.

5. That with regard to the smoke from the generator, it was found to be within the permitted air quality levels. However, purely to accommodate the plaintiff's request, the generator's exhaust pipe was relocated so that it faces away from the plaintiff's house. The relocation was done in the plaintiff's presence; a fact conceded to at "comment GN15" page 19 of the report presented by the plaintiff. That on alleged exposure to harmful EMF, the EMF levels were found to be within internationally accepted standards. The tests were in fact done in the presence of the plaintiff. That there is however a general misinformation or lack of information about EMFs among certain members of the public. This has been captured in the audit report by Mazingira Limited. That as is seen from the audit report, the EMF was measured with globally accepted instruments and against international standards detailed by the International Commission on Non-Ionizing Radiation Protection (ICNIRP).
6. That the qualifications of the environmental expert, and the competency of the experts at NEMA and CA is unquestionable. Since they have approved the BTS, it will be a strong and unusual thing for the court to substitute their expert views with its own in the absence of cogent and overwhelming evidence showing the experts are wrong.
7. This court has considered the application and submissions therein. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014)eKLR where the Court of Appeal held that;

"in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
8. These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"
9. In the case of *Mrao Ltd v First American Bank of Kenya Ltd*(2003) EKLK in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."



10. In the case of *Kenleb Cons Ltd v New Gatitu Service Station Ltd another*, (1990) eKLR where the court stated that;

"to succeed in an application of injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."

11. In the instant case the application is based on the grounds that the 1st defendant /respondent is operating a Base Transceiver Station BTS at Mtopanga opposite the plaintiff/applicant's residence at plot No 7049 section II Mainland North. The said BTS emits hazardous gas that pollute the air around the plaintiff/applicant's house affecting his health, that of his wife and his children. The generator from the BTS vibrates and produces irritating noise that has affected the applicants hearing. They seek an order of injunction to the plaintiff/applicant against the 1st defendant/respondent restraining it from operating the Base Transceiver Station (BTS). That the plaintiff/applicant complaints are excessive noise from the generator, excessive smoke from the generator; and exposure to harmful Electromagnetic Fields (EMF). The 1st defendant retained Mazingira Limited, an environmental expert, to carry out an environmental audit report who gave a report that they were within permissible levels. In the case of *Nation Media Group & 2 others v John Harun Mwau* (2014) eKLR where the Court of Appeal stated that;

"It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.

Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.'

12. The 1st defendant/respondent submitted that the BTS has been in operation for over eleven (11) years without any complaint and the plaintiff complained for the first time in 2018. I find that the plaintiff/applicant has not demonstrated that existence of exceptional and special circumstances in the instant case. Indeed, they seems to be conflicting reports from the experts on the pollution issue. It is on record that NEMA issued an EIA license on May 7, 2010 subject to the conditions contained therein and in its letter dated April 29, 2009 (marked as DN-2 (a) & (b) respectively a copy of the EIA licence dated May 7, 2010 and NEMA's letter dated April 29, 2009). I find that the mandatory injunction cannot be granted at this interim stage on the evidence of affidavits. I find the application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

