



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. PETITION NO. 102 OF 2017**

**Formerly ELC No. 211 of 2016 (Nairobi)**

**DOUGLAS ONYANCHA OMBOGA.....1<sup>ST</sup> PETITIONER**

**MATHEW MBABU.....2<sup>ND</sup> PETITIONER**

**COLLINS SERONEY ODHIAMBO.....3<sup>RD</sup> PETITIONER**

**JOHN OCHIENG OBONDI.....4<sup>TH</sup> PETITIONER**

**VERSUS**

**JOSEPH KARANJA WAMUGI.....1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**KENYA TOWERS LIMITED.....3<sup>RD</sup> RESPONDENT**

**COMMUNICATIONS AUTHORITY OF KENYA.....4<sup>TH</sup> RESPONDENT**

**PEMAN CONSULTANTS LIMITED.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. In the Notice of Motion dated 4<sup>th</sup> February, 2019, the 3<sup>rd</sup> Respondent is seeking for the following orders:

***a. Pending the hearing and determination of an Appeal filed at the Court of Appeal, this Honourable Court be pleased to stay execution of the Judgment/Decree of the Honourable Court (Hon. Justice O. A. Angote) delivered on 18<sup>th</sup> January, 2019 at Machakos.***

***b. The costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the 3<sup>rd</sup> Respondent's Manager, Regulatory and Legal, who has deponed that the 3<sup>rd</sup> Respondent is a Telecommunication's Tower Infrastructure Company and that the 3<sup>rd</sup> Respondent enables mobile operators to roll out and enhance telecommunication coverage in high growth markets by sharing and co-location of their equipment on towers that it owns.

3. The 3<sup>rd</sup> Respondent's Manager deponed that being dissatisfied with the Judgment of the court, the 3<sup>rd</sup> Respondent has filed a Notice of Appeal; that the 3<sup>rd</sup> Respondent stands to suffer substantial damage and loss to its business operations and reputation if an order of stay of execution is not granted and that the Petitioners may proceed to forcefully dismantle the Mobile Telephone Base Transmission Mast on a parcel of land known as Mavoko Town Block 49 (Kimbo)/52 that cost the 3<sup>rd</sup> Respondent approximately USD 80,000 to erect.

4. According to the 3<sup>rd</sup> Respondent's Manager, it has since leased the Mobile Telephone Base Transmission Mast on the suit land to two network operators, Airtel Networks Kenya Limited and Telkom Kenya Limited; that the said network operators stand exposed to be penalized by the Communication Authority of Kenya for subscriber interference and that the 3<sup>rd</sup> Respondent also stands exposed to claims

for service credits for site unavailability from the two network operators.

5. The 3<sup>rd</sup> Respondent's Manager finally deponed that the Mobile Telephone Base Transmission Mast on the suit land serves approximately 1 million subscribers in the Mavoko area and that the court found as a fact that the Mast does not have any health risk to the Petitioners.

6. In response, the 3<sup>rd</sup> Petitioner deponed that the Petitioners own the property in the neighbourhood of the 1<sup>st</sup> Respondent which by far exceed the value of the tower erected by the 3<sup>rd</sup> Respondent; that when the Petition was filed, the 3<sup>rd</sup> Respondent had just commenced the construction of the tower and was aware of their grievances and that the 3<sup>rd</sup> Respondent was aware of the possibility of the outcome of the Petition.

7. The 3<sup>rd</sup> Petitioner deponed that the 3<sup>rd</sup> Respondent has not offered any security for the orders sought and that in any event, the intended Appeal stands no reasonable chance of success.

8. Both the Petitioners and the Respondents' advocates filed written submissions and authorities which I have considered.

9. In its Judgment of 18<sup>th</sup> January, 2019, this court made the following orders:

***a. A declaration be and is hereby issued that the 3<sup>rd</sup> Respondent is in breach of the Petitioners' fundamental right to a clean and healthy environment.***

***b. Judicial review orders of mandamus are hereby issued compelling the 3<sup>rd</sup> Respondent to remove the telecommunication tower (base transceiver station) built on parcel of land known as Mavoko Town Block 49 (Kimbo)/52 within thirty (30) days of this Judgment.***

***c. The 3<sup>rd</sup> Respondent to pay to the Petitioners the costs of the Petition.***

10. The 3<sup>rd</sup> Respondent has since filed an Appeal challenging the decision of this court. In the meantime, the 3<sup>rd</sup> Respondent is seeking for a stay of execution of the Judgment pending Appeal. For one to be granted a stay of execution of an order or decree, he has to satisfy the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

***“(2) No order for stay of execution shall be made under sub rule (1) unless—***

***a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and***

***b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”***

11. It is not in dispute that the 3<sup>rd</sup> Respondent has leased the Mobile Telephone Base Transmission Mast to two network operators, Airtel Networks Kenya Limited and Telkom Kenya Limited with whom master tower agreements have been entered into.

12. It is also not in dispute that the Telephone Based Transmission Mast standing on the suit land is serving the residents of Mavoko in terms of telephone services and that if the tower is removed as ordered by the court, the telephone services to the public will either be terminated or interfered with.

13. Other than that the interruption in telephone communication in the event the tower is removed from the suit land as ordered by the court, the 3<sup>rd</sup> Respondent also stands exposed to claims of service credits for site unavailability, resulting into loss of future revenue and bad publicity. All these are likely to cause the 3<sup>rd</sup> Respondent substantial loss unless the orders of the court are stayed.

14. The Application by the 3<sup>rd</sup> Respondent was filed within one (1) month of the Judgment of the court. The Application was therefore filed within reasonable time. Considering that the dispute between the Petitioners and the Respondents is not of a pecuniary nature, and in the absence of evidence of the loss that the Petitioners are likely to suffer, I shall not order the 3<sup>rd</sup> Respondent to deposit security for the due performance of the decree.

15. In the circumstances, I find that the 3<sup>rd</sup> Respondent is entitled to a stay of execution of the Judgment of this court pending Appeal. However, in view of the orders of this court that the Petitioners' right to a clean and healthy environment has been breached by the 3<sup>rd</sup> Respondent, the 3<sup>rd</sup> Respondent should file the Record of Appeal within sixty (60) days and have the Appeal prosecuted expeditiously.

16. For those reasons, I allow the Application dated 4<sup>th</sup> February, 2019 in the following terms:

***a. Pending the hearing and determination of an Appeal filed at the Court of Appeal, this Honourable Court hereby issues a stay of execution of the Judgment/Decree of the Court (Hon. Justice O. A. Angote) delivered on 18<sup>th</sup> January, 2019 at Machakos.***

***b. The above order shall remain in force only if the Record of Appeal is filed within sixty (60) days of the date of this Ruling.***

*c. Each party to bear his/its own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**