



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC APPEAL NO. 66 OF 2018**

**KENYA TOWERS LIMITED.....APPELLANT**

**=VERSUS=**

**MAGGIE WANJIKU GACHAU**

**(suing as representative of 199 others..... RESPONDENT**

*(An Appeal from the Ruling of Honourable E.K Usui (Senior Principal Magistrate) delivered at the Magistrate's Court at Nairobi (Milimani Law Courts) on 6<sup>th</sup> August 2018)*

**JUDGEMENT**

1. This is an appeal arising from a ruling delivered from an interlocutory application filed in Milimani Chief Magistrates Court in civil case No.4336 of 2018. The Appellant, Kenya Towers Limited had moved into Nyayo Embakasi Estate where it was set to put up six (6) Base Transceiver Station in six courts within the estate. This followed approvals from National Environment Management Authority (NEMA), National Construction Authority (NCA), Kenya Civil Aviation Authority (KCAA) Nairobi City County (NCC) and National Social Security Fund (NSSF).

2. Before the Appellant could start construction of the base stations, the Respondents who are house owners and occupiers within the six courts namely court Nos.117,295,328,480, 566 and 812 which are on LR No.9042/179 moved to court and filed Milimani Chief Magistrate Civil Case No.4336 of 2018 against the Appellant and Lidcom Limited which is a management Company managing Nyayo Embakasi Estate. The Respondents who were two hundred in number filed a Notice of Motion dated 7<sup>th</sup> May 2018 in which they sought interlocutory injunctive orders and mandatory orders. When the application was placed before the court on 7<sup>th</sup> May 2018, an ex-parte injunction was granted restraining the Appellant from proceeding with erection of the six Transceiver Base Stations.

3. The Respondents' application was heard inter partes and a ruling delivered on 6<sup>th</sup> August 2018 allowing the same. This is what triggered this appeal where the Appellant has raised the following grounds of appeal: -

***a) The Learned Magistrate erred in law and fact in finding that the Respondent's Notice of Motion Application dated 7<sup>th</sup> May 2018 had satisfied the test for grant of an interlocutory injunction.***

***b) The Learned Magistrate erred in law and fact at page 4 of the Ruling where the Magistrate made assertions that "Anyone who cares to know is already aware of such danger posed by items that cause radiation" and failed to appreciate and consider that an injunctive relief is discretionary and such discretionary power is to be exercised judicially and not on a whim or capriciously.***

***c) The Learned Magistrate erred in law in solely relying on the Respondent's un-corroborated internet based research and failing to consider and appreciate the evidence submitted by the Appellant from the World Health Organization (WHO), the authoritative sources on matters of radiation on the environment, and in so doing, erred in finding that the Respondent had demonstrated a prima facie case.***

***d) The Learned Magistrate erred in fact and law in failing to consider the extensive consultations with the Respondent's representatives; the Nyayo Embakasi estate Residents, the Respondents' Association and Messrs Kiragu & Mwangi management Agents, the Management Company of the Respondents.***

***e) The Learned Magistrate erred in fact and law in failing to consider the approvals and permits issued to the Appellant by the National Social Security Fund (NSSF), the Nairobi City County(NCC), National Construction Authority (NCA), the Kenya Civil Aviation Authority (KCAA) and the National Environment Management Authority(NEMA).***

***f) The Learned Magistrate erred in fact and law in failing to find that the Application was filed in utter abuse of court process, there being a similar cause filed by the same parties at the National Environment Tribunal in Tribunal NET No.008 of 2018 Philip Bosire & 199 Others Vs Kenya Towers Limited & 3 Others.***

4. The parties to this appeal were directed to file written submissions in respect of the appeal. The Appellant was given 30 days within which to file and serve submissions. The Respondents were given 30 days within which to file submissions upon being served. These directions were given on 31<sup>st</sup> October 2019. The Appellant filed submissions on 2<sup>nd</sup> December 2019. The Respondents did not file any submissions.

5. I have gone through the submissions by the Appellant vis-a-vis the grounds of Appeal raised by the Appellant. A look at the grounds of appeal shows that there is only one issue for determination. This issue is whether the trial magistrate correctly applied the principles for grant of injunctions. This being a first appeal, I am under obligation to re-evaluate the material put before the trial court in order to ascertain whether the trial court properly exercised its discretion in granting the injunction.

6. It is the Appellant's contention that the trial Magistrate did not address her mind to the materials put before her in arriving at the decision to grant the injunction against the Appellant. The Appellant took issue with the trial magistrate's observation in the ruling where she stated as follows: -

***"Anyone who cares to know is already aware of such danger posed by items that cause radiation".***

The Appellant argues that the trial Magistrates' observation shows that she did not apply her mind judiciously but she did it whimsically or capriciously.

7. The Respondents had contended that the Transceiver Base Stations which were to be erected within the estate were likely to emit radiation which is known to cause cancer, Neurone behavioral symptoms, sleeping problems, cognitive performance and infertility among men. The Respondent argued in their application that the Appellant was going to put the Transceiver Base Stations 30 meters away from their houses when the internationally agreed distance is 500 meters away from houses.

8. The Respondents had relied on a research by the Centre for Electromog Prevention as justification for their opposition to the erection of the Transceiver Base Stations. The Respondents also relied on medical reports by one of them who had been diagnosed with brain tumor for which she had to go for expensive treatment outside the country. The Respondents had also argued that they were not consulted before a decision was arrived at to allow the Appellant to put up the six Transceiver Base Stations.

9. The Appellant in the appeal argues that the trial magistrate failed to consider the fact that the World Health Organization had published materials showing the acceptable levels of radiation which will not be harmful. These materials were placed before the trial magistrate but she did not consider them but instead relied on the materials from Centre for Electromog prevention which were availed by the Respondents.

**10. The Appellant also argued that the trial magistrate failed to consider that the Respondents' application was an abuse of the process of the court in that the same Respondents had filed an appeal before the National Environment Tribunal being NET No.008 of 2018 Philip Bosire & 199 Others Vs Kenya Towers Ltd & 3 Others.**

11. The Appellant also argues that the trial Magistrate did not consider the fact that the Appellant had carried out extensive consultations with the Nyayo Embakasi Residents Association (NERA) and had also consulted the Management Company. The trial magistrate did not also consider the fact that the Appellant had obtained all approvals including NEMA which had found that the project was not going to have any significant negative environmental impact.

12. I have duly considered the submissions by the Appellant. From the impugned ruling, it is clear that the trial magistrate relied on the research by Centre for Electromog Prevention. This is a Californian based organization which works to protect public health. It does research on the effects of wireless networks as regards the effects of radiation which is emitted from the base stations from the cell towers. It is important to note that this is a non-profit organization which is against erection of cell towers in the neighborhood. This organization even encourages parents to prevail upon school heads not to allow installation of wireless routers at their children's schools. The organization singles wireless devices like WI-FI. This is an organization which is not likely to give an objective analysis of the wireless devices.

13. The World Health Organization is mandated to give guidelines on the permissible levels of radiation. The Appellant placed material from the world Health Organization and the International Council on Non -Ionizing Radiation Protection (ICNIRP) which have concluded that there is no conclusive evidence that exposure from the base stations has any adverse effects. The trial magistrate did not address herself to these reports from acclaimed international organization with no bias.

14. Whereas there was evidence placed before the trial magistrate that the Appellant had consulted officials of Nyayo Embakassi Residents Association and the Management Company, the trial magistrate in her ruling observed that not all residents were consulted. Where there is an Association formed to cater for the interests of the Residents and where there is a Management Company, it will be absurd for one to require that each and every individual has to be consulted. The officials of the Residents' Association and the Management Company speak on behalf of the Residents.

15. The trial Magistrate appears to have been persuaded by the condition of one of the Respondents who had stated that she had a brain tumor. The Magistrate observed that the medical report showed that she was dying. I have gone through the medical reports. There is nowhere it is stated that the brain tumor was as a result of exposure to radiation. It was therefore wrong for the trial magistrate to make a finding that the Respondents had established a prima facie case.

16. When NEMA gave its approvals to the project, there must have been an Environmental Impact Assessment Report which preceded the grant of the licence . It was therefore wrong for the trial magistrate to order that another study report be carried out for purposes of the main hearing of the suit. It is therefore clear that the trial magistrate did not exercise her discretion based on the material which had been placed before her. Failure to exercise her discretion properly led her to fall into error. I therefore find that this appeal must succeed. I allow the same with the result that the ruling delivered on 6<sup>th</sup> August 2018 is hereby set aside. In place thereof, I make an order dismissing the Notice of Motion dated 7<sup>th</sup> May 2018 with costs. The Appellant shall have cost of this appeal as well.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JUNE 2021.**

**E. O. OBAGA**

**JUDGE**

In the Virtual presence of:-

M/s Aoko for Kimaru for Appellant

Court Assistant: Steve

**E. O. OBAGA**

**JUDGE**