

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO 71A OF 2022

ALI ATHMAN HASSAN.....1ST

PLAINTIFF

MINNIE MWAKA JUMA.....2ND

PLAINTIFF

MUNISA ALI ASMAN.....3RD

PLAINTIFF

ISSA ALI ATHUMANI.....4TH

PLAINTIFF

VERSUS

SAFARICOM LTD.....1ST

DEFENDANT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY (NEMA).....2ND

DEFENDANT

JUDGMENT

A. Plaintiffs' claim

1. By a plaint dated 11.12.2020 and amended on 16.10.2023 the plaintiffs, who are members of the same family, sued the defendants seeking the following reliefs;

- a) *A declaration that the 1st Defendant has caused a nuisance by emitting hazardous air and releasing excessive noise from its BTS to the neighbouring Plot No. 7049 Section II Mainland North belonging to the Plaintiff.*

- b) *A declaration that the 1st Defendant has polluted the noise and air around the Plaintiff's Plot NO. 7049 Section II Mainland North.*
- c) *A declaration that the plaintiffs have suffered loss, injury and or damage and are entitled to general damages.*
- d) *A Declaration that the 2nd Defendant has aided and/or breach abated the nuisance caused by the 1st Defendant and/or has acted in breach of the law in failing to prevent the 1st Defendant from causing the nuisance and or polluting the environment.*
- e) *Special Damages of 4,301,018.40 for loss of profit.*
- f) *Special damages of Kshs.30,000 paid to the valuer and the quantify surveyor.*
- g) *Special damages of Kshs.4,301,018.40 for repairs to the damaged house.*
- h) *Costs of this suit*
- i) *Any other relief that this suit may deem just to grant*

2. 1st plaintiff pleaded that at all material times he was the registered owner of Plot No. 7049 Section II Mainland North located in Mtopanga, Mombasa County on which he resided with his family members. It was pleaded that the 1st defendant operated a BTS communication facility (BTS) very close to the plaintiffs' property whereby it had stationed a diesel powered generator for use during power outages.

3. It was the plaintiffs' case that the 1st defendant's said generator produced excessive noise and smoke during its

operation and thus constituted a nuisance. It was also the plaintiffs' case that they had been exposed to harmful radiation, electromagnetic waves and vibrations from the BTS facility. The plaintiffs thus contended that as a result of the 1st defendant's conduct they had suffered loss and damage for which the defendants were liable.

4. In particular, the 1st plaintiff pleaded that his house had suffered cracks and some damage and that his business had also suffered closure due to the 1st defendant's environmental pollution. All the plaintiffs pleaded that they had suffered ill health such as loss of hearing, headaches, pain in the ears and eyes, and some form of allergies. The 1st plaintiff contended that he had suffered loss of business to the tune of Kshs. 4,214,919/= whereas repairs to his house would cost him Kshs.4,301,018.40.
5. The plaintiffs faulted the 2nd defendant for allegedly aiding and abetting the 1st defendant in committing environmental pollution. They also faulted the 2nd defendant for allegedly failing to carry out an environmental impact assessment before allowing the 1st defendant to construct the BTS facility. They also faulted the 2nd defendant for failing to

monitor and evaluate the 1st defendant's actions and take necessary remedial measures.

B. Defendants' responses

6. The record shows that the 1st defendant filed a written statement of defence dated 12.09.2024 denying liability for the plaintiffs' claim. It admitted the 1st plaintiff's ownership of Plot 7049 and conceded that it operated a BTS facility at an adjacent plot. It pleaded, however, that its operations were above board and that it had conducted an Environmental Impact Assessment Audit (EIA) and shared its contents with the plaintiffs.
7. The 1st defendant denied the allegations of pollution and denied that the plaintiffs had suffered any loss or damage as a result of its operations. As a result, it prayed for dismissal of the plaintiffs' suit with costs.
8. There is, however, no indication on record of the 2nd defendant having entered appearance or filed a defence to the action.

C. Trial of the action

9. At the trial hereof, each of the 4 plaintiffs testified on their own behalf. They each adopted the contents of their witness

statements as their evidence in chief. They did not, however, call any doctors or other expert witnesses but they produced the relevant documents and reports in their trial bundle without any objection by the 1st defendant who participated at the hearing.

10. On its part, the 1st defendant called one witness, Valentine Cheruiyot, to testify on its behalf as the sole witness. She adopted the contents of her witness statement dated 13.09.2024 as her evidence in chief. She informed the court that she was the Manager-Environment and Climate Change with the 1st defendant and that she held a bachelor's degree in environmental science.

D. Directions on submissions

11. Upon conclusion of the trial the parties were given timelines within which to file and exchange their respective submissions. The plaintiffs were granted 21 days to file and serve their submissions whereas the defendants were given a similar period to do the needful. The record shows that the plaintiffs filed initial submissions dated 25.06.2025 and supplementary submissions dated 25.08.2025. However, the

1st defendant's submissions were not on record by the time of preparation of the judgment.

E. Issues for determination

12. The court has noted that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination as stipulated in Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues from any of the following;

- a) *The allegations contained in the pleadings or answers to interrogatories.*
- b) *The allegations made on oath by or on behalf of the parties.*
- c) *The contents of documents produced by the parties.*

13. The court has perused the pleadings, evidence and documents in this matter. The court is of the view that the following are the main issues for determination herein;

- a) *Whether the plaintiffs have proved their claim against 1st defendant.*
- b) *Whether the plaintiffs have proved their claim against the 2nd defendant*
- c) *Whether the plaintiffs are entitled to the reliefs sought in the suit.*
- d) *Who shall bear costs of the suit.*

F. Analysis and determination

a) Whether the plaintiffs have proved their claim against the 1st defendant

14. The court has considered the material and submissions on record on this issue. The plaintiff contended that the 1st defendant was liable for air and noise pollution which had adversely affected their health. It was further contended that vibrations and radiation emanating from the BTS facility had also affected them adversely. The 1st defendant disputed the plaintiffs' claim and the evidence tendered in support thereof.

15. It was well settled that the burden of proof in civil cases primarily lies upon the claimant. Sections 107 and 108 of the Evidence Act (Cap 80) stipulates as follows on the burden of proof;

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

16. There is no doubt from the material on record that the 1st

residing with his family. There is also no dispute that the 1st defendant has rented a property near the plaintiffs' place of residence on which it operates a BTS facility. It was common ground that there is a road separating the 1st plaintiff's property from the property on which the 1st defendant operates its facility. What was not agreed was the size of the road and the distance between the BTS and the plaintiffs' house. However, the court believes that the distance is pretty short given that the two properties are separated only by a road.

17. The plaintiffs relied upon the 1st defendant's EIA report dated 28.05.2018 by Mazingira Limited (*Mazingira*) as well as their own report dated 23.10.2018 by Prudent Environment Consultants Ltd (*Prudent*). The court has noted that the report by Mazingira took into account measurements of certain parameters such as air quality, noise levels and radiation levels. The report indicated that those parameters were all within the acceptable legal limits both by international and national standards.
18. On the other hand, the report by Prudent did not contain the actual measurements of air quality, noise level or radiation level which are said to be above legal limits or dangerous to

human health. The report was largely a critique of the report by Mazingira but did not offer any alternative measurements of the parameters.

19. The report by Mazingira made reference Legal Notice No. 61 of 2009 the *Environmental Management and Co-ordination (Noise and Excessive Vibration Pollutions) (Control) Regulations, 2009* and concluded that noise levels at most measuring points were within the legal limits. The measurements on air quality were also taken by Mazingira and it was concluded that the quality complied with the *Environmental Management and Coordination (Air Quality) Regulations of 2014*. No contrary measurements were tendered by the plaintiffs in their report.
20. The court has also noted that the report by Mazingira took into account the actual measurements of non-ionizing radiation as shown at pages 39-40 of the report. It was concluded that those values were within the stipulated regulatory limits as recommended by the World Health Organization. Again, the plaintiffs did not tender any measurement to the contrary.
21. The court has considered the various medical reports which were tendered by the plaintiffs. There are 4 reports by Dr.

Doreen A. Asimba all dated 30.11.2018. All these reports merely replicated the complaints the plaintiffs presented to the doctor on first visit. Other than the medical examination done on the plaintiffs on the date of visit there was no further medical inquiry or investigation of the cause of their ailments. Of importance, the medical reports do not attribute any causal link between the plaintiffs' illness and the emissions from the backup generator or the BTS. The reports from Mombasa Hearing Centre do not also link the plaintiffs' condition to smoke or air pollution or even radiation.

22. The court has noted from the material on record that the 1st defendant's generator complained of was a **backup** generator which would only run in the event of a power outage. It was not a generator running on full time basis. During cross-examination by the 1st defendant's advocate the 1st plaintiff stated thus;

".....it is a backup generator which is utilized only during a power blackout. The generator is not turned on when grid power is available. The power blackouts are not frequent....."

23. The court is thus not satisfied that the occasional operation of a backup generator during power outages would cause the plaintiffs the kind of damage and illness alluded to. The

court is far from satisfied that the said generator would result into loss of hearing capacity as alleged by the 1st plaintiff. There is some evidence on record (and the plaintiffs conceded the same) that the 1st defendant took steps to divert the direction of the generator's exhaust pipe away from the 1st plaintiff's residence to mitigate the flow of smoke into his property.

24. It was the 1st plaintiff's case that as a result of vibrations from the 1st defendant's generator his house had developed dangerous cracks and thus suffered structural damage. In the support of his claim he produced a structural engineer's report dated 19.06.2023 by Eng. Prof. Richard Onchiri. The report indicates that upon inspection of the 1st plaintiff's house the engineer noted various types of cracks especially diagonal, horizontal and longitudinal cracks.
25. At page 6 of the report the engineer gave his opinion on the various types of cracks as follows;

"Diagonal Cracks in the walls indicate that the foundation may have shifted or settled. These cracks indicate a potential problem with the building structure. Diagonal cracks in walls indicate of deflection of the wall supports or foundation settlement or soil movement, they also appear when the building has a shallow foundation and there are

external vibrations which may lead to consolidation of the soil causing uneven settlement of the foundation.

Big, diagonal, or irregular cracks could indicate a larger structural issue. Diagonal cracks could mean that the foundation may have settled. The foundation depth being 900mm on clay soil as per the drawing provided means that any external vibration will automatically lead to settlement.”

26. On horizontal and structural cracks, he stated as follows;

“Horizontal cracks in reinforced concrete column observed to initiate mostly at the beam-column junction and on column face where tensile stress is large. Columns with inadequate moment resistance capacity insufficient reinforcements, or disposition of installed reinforcement are prone to horizontal cracking; due the effect of shear force and direct load and uniaxial bending. Horizontal cracks substantially reduce the shear strength of the column leading to a greatly increased risk of failure.

Structural cracks are normally seen in beams, walls and columns and slabs. These cracks directly affect the safety of the building: These cracks develop due to incorrect design, faulty construction, over loading, settlement of foundation due to external vibrations on shallow foundation or, effect of temperature variation, swelling of soil below the foundation.”

27. The plaintiffs engineer reached the following conclusions upon analyzing the information available to him;

“3:0 CONCLUSION

The information established after the investigation shows that the structure is deficient in structural stiffness. The foundation is shallow and has uneven settlement possibly due to external vibration”

28. At the trial hereof the 1st plaintiff stated thus during cross-examination;

“.....the BTS facility has a concrete fence around it. The fence has never been destroyed. It is still intact....my house has cracked as a result of the operation of the generator. I have an expert’s report on the cause of the cracks. I have a structural engineer’s report to that effect.....”

29. It is thus clear from the 1st plaintiff’s said evidence that he was referring to the report dated 19.06.2023 by his structural engineer. It is clear from the report that his house is structurally deficient because it has a **shallow foundation** and uneven settlement. The possible cause of uneven settlement was attributed to external vibration which may include, of course, vibrations from a generator. That may explain why the 1st defendant’s wall surrounding the BTS facility is intact despite being closer to the generator.

30. The court is thus of the view that the proximate or operative cause of the unsound structural foundation of the 1st

plaintiff's house was not the occasional vibrations of the generator. The occasional vibrations of the generator may have contributed to the uneven settlement but they could not possibly be the operative factor otherwise the 1st defendant's walls which are even closer to the generator would have cracked first.

31. The court finds it strange that settlement of the 1st plaintiff's building could not take place more than 14 years after its construction on the mere vibrations of a backup generator. The material on record shows that the plaintiffs' foundation was inspected in 2001 whereas the 1st defendant's generator was introduced in 2014 when the site was acquired. The court is thus not persuaded that the damage to the plaintiff's house was due to the operation of the 1st defendant's generator.
32. Since the court has found that the 1st defendant is not liable for the alleged air, noise and radiation pollution the court finds that it is not liable for the 1st plaintiff's closure of his shop. The court is satisfied on the basis of the material on record that the emissions from the 1st defendant's BTS facility were within the regulatory limits. The court is not persuaded that occasional vibrations from the 1st

defendant's generator during power outages would cause a reasonable businessman to close his shop indefinitely. As a result, the 1st defendant should not be held liable for the alleged loss of income or profit.

33. The plaintiffs raised an interesting issue in a bid to prove their claim. They contended that the 1st defendant was making use of CFC refrigerants in its Air Conditioning (AC) units to cool its equipment. It was the plaintiffs' case that the refrigerants were known to deplete the ozone layer hence the 1st defendant was liable for causing environmental pollution. The court is of the view that the depletion of the ozone layer is a climate change issue which is not the subject of the instant suit among the parties. The ozone layer is found high in the stratosphere and acts as shield to protect the earth from harmful ultra violet rays of the sun. It is not a protective layer around the plaintiffs' residence. Moreover, there is no credible material on record linking the plaintiffs' medical conditions to the alleged depletion of the ozone layer.

b) Whether the plaintiffs have proved their claim against the 2nd defendant

34. It is clear from the plaintiffs' claim that the 2nd defendant's liability was dependent upon the 1st defendant being found liable. This is because the plaintiffs' claim was that the 2nd defendant had aided and abetted the 1st defendant in committing the various violations pleaded in the amended plaint. Since the court has found that the plaintiffs have failed to prove their case against the 1st defendant then it would follow that the 2nd defendant cannot be faulted as well. If the plaintiffs considered that the 2nd defendant had improperly or irregularly authorized the BTS facility, then they were bound to follow the specific statutory mechanisms established under the Environmental Management and Coordination Act to challenge the relevant licence or permit.

c) Whether the plaintiffs are entitled to the reliefs sought in the suit

35. The court has already found that the plaintiffs have failed to prove their claim against the 1st and 2nd defendants on a balance of probabilities. It would therefore follow that the plaintiffs are not entitled to the reliefs sought in the plaint or any one of them.

d) Who shall bear costs of the suit

36. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason to depart from the general rule. As such, the 1st defendant shall be awarded costs of the suit. However, the 2nd defendant shall not be awarded any costs because it did not participate in the hearing.

G. Conclusion and disposal orders

37. The upshot of the foregoing is that the court finds and holds that the plaintiffs have failed to prove their case against the defendants on a balance of probabilities as required by law. As a consequence, the court hereby makes the following disposal orders;

a) The plaintiffs' suit against the 1st defendant is hereby dismissed with costs.

b) The plaintiffs' suit against the 2nd defendant is hereby dismissed with no order as to costs.

It is so decided.

Judgment dated and signed at Mombasa and delivered
virtually via Microsoft Teams on this **27th day of November,**
2025.

.....

Y. M. ANGIMA

JUDGE

In the presence

Gillian - Court Assistant

Mrs. Owino for the plaintiffs

Mr. Kongere for the 1st defendant

No appearance for the 2nd defendant