REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.334 OF 2017

MAHMOOD SHARIFF ALI & 10 OTHERS.....PLAINTIFFS

-VERSUS-

SAFARICOM LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion dated 3rd August 2018 the Defendant/Applicant seeks orders that the Plaint dated 15th September 2017 be struck out for want of original jurisdiction, for being frivolous, vexatious and otherwise an abuse of the court process and that the costs of the Application and the suit be borne by the Plaintiffs jointly and severally.

2. The Application is brought under Section 1A, 1B, 3 & 3A of the Civil Procedure Rules and is premised on the following grounds:

> **1. The Plaintiffs' suit complains about the authorization given to the Defendant by the Communications Authority of Kenya (CA) and by the National Environmental Management Authority (NEMA) to construct a Base Transceiver Station on land known as MOMBASA/BLOCK XX/139.**
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> **2. Both the Communications Authority and National Environmental Management Authority were expected to hear and consider the safety concerns raised by the Plaintiffs through this suit.**
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> **3. If the Plaintiffs believe, rightly or wrongly, that either NEMA or the CA have not addressed those concerns in giving approvals to the Defendant, they have a statutory right to address those grievances.**
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> **4. Section 102A of the Kenya Information & Communications Act No. 2 of 1998 requires a grievant to lodge that complaint with the Communications and Multimedia Appeals Tribunal established under Section 102 of the Act. Similarly, Section 129 of the Environment and Co-ordination Act 1999 requires a grievant to lodge a complaint with the National Tribunal established under Section 125 of the Act.**
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> **5. In light of Section 102A of the KIC Act and Section 129 of EMCA, the Environment and Land Court does not have original jurisdiction to hear and determine this dispute. The court's jurisdiction, if any, is appellate over the decision of the two Tribunals.**
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> **6. The suit is an abuse of the court process for ignoring and sidestepping the clear and adequate statutory dispute resolution mechanism and for occupying the court with technical issues reserved those specialized tribunals.**

3. It was submitted by Mr. Kongere, learned counsel for the Defendant that this court lacks jurisdiction to entertain the matter as the Plaintiffs' complaint is the authorization given to the Defendant by the Communications Authority of Kenya (CA) and the National Environmental Management Authority (NEMA) to construct a base trans receiver station because those bodies allegedly did not hear and consider the safety concerns raised by the Plaintiffs. Mr. Kongere submitted that there are certain statutory procedures to address such grievances and pointed out that in the case of a licence issued by the CA, Section 102A of the Kenya Information and Communication Act requires such a complaint to be referred to the Tribunal established under the said Act, while Section 129 of EMCA provides that any person aggrieved by a decision made by NEMA is required to lodge an appeal to the Tribunal established under Section 125 of EMCA. He stressed that it is not only the Applicants for a licence who would go to the tribunal, but every person affected by that decision. Mr. Kongere relied on the case **Mutanga Tea & Coffee Company Ltd –v- Shikara Limited & Another (2015)eKLR.** It was his submission that the Environment and Land Court would only have appellate jurisdiction after the tribunal has made a decision. His reasoning is that the tribunal is required to deal with the matter at the first instance because of the complex scientific effects emitted by such installation. He also relied on the case of **Republic –v- National Environmental Management Authority (2011)eKLR**.

4. Mr. Kongere further submitted that the Application is not defective as submitted by the Plaintiffs because there is no affidavit to support it. He pointed out that they are not seeking to rely on evidence and Order 2 Rule 15 (1)(b) and (d) is applicable. He urged the court to strike out the suit with costs to the Defendant.

5. The Plaintiff opposed the Application through the Grounds of Opposition dated 15th August 2018, which were in the following terms:

a) **That the Application filed by the Defendant is not grounded on any evidence by a supporting affidavit in accordance with Order 51 Rule 4 of the Civil Procedure Rules 2010.**

b) **That the Application made under Order 2 Rule 15 (1)(b) and (d) is frivolous, vexatious and an abuse of the court process.**

c) **That the Defendant's Application offends the provisions of Order 2 Rule 15 Sub-rule (3) of the Civil Procedure Rules 2010.**

d) **That the Environment and Land Court has inherent and exclusive jurisdiction to hear and determine the facts and issued (sic) in question pursuant to Section 13 (3) of the Environment and Land Court Act; and Section 3(3) of the Environment Management and Coordination Act.**

e) **That this Honourable court has (sic) is guided by specific laws and Rules which are applicable in this matter. The Environment and Land Court Act; and the Environment and Land Court Rules.**

f) **That Section 129 of the Environment Management and Co-ordination Act empowers the Tribunal to hear and determine appeals from persons with *locus standi* before it, whom are persons who have been before the National Environmental Management Authority; Committee of the Authority or the Director General of the Authority and have been aggrieved by the decision of these three bodies, thus this suit would be ultra vires before the Tribunal.**

g) **That the Communications and Multimedia Appeals Tribunal under Section 102A is empowered to make decisions with respect to matters concerning media enterprises; media publications and journalists thus incompetent to hear land disputes.**

h) **That the Notice of Motion dated 3rd August 2018 be dismissed with costs.**

6. Ms. Maiga learned counsel for the Plaintiffs submitted that this court has original and inherent jurisdiction to hear and determine matters relating to clean and use of the environment. She submitted that the court (Komingoi j) had earlier on 15/2/18 dealt with the issue of jurisdiction. It was her submission that Section 102A of KICA limits the people who can raise complaints to journalists, adding that the Plaintiffs have come to court on issue of setting up of transmission on an area they reside in. That the Plaintiffs will be exposed to radioactive material which may cause various diseases. Counsel submitted that the issue touches on the environment and those living around it and that the court has a duty to hear disputes on clean and health environment. The Plaintiffs' counsel urged the court to dismiss the Application.

7. I have considered the pleadings and the submissions made. The main issue in the Application is whether the court has jurisdiction to try the matter. In the case of owners of **Motor Vessal "Lilian S" –v- Caltex Oil (Kenya) Ltd (1989) IKLR 1** Nyarangi JA held as follows:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. In the suit herein, the Plaintiffs seek permanent injunction barring the Defendant or its agents, servants and/or employees from erecting and/or installing the base trans-receiver station on MOMBASA/BLOCK XX/139 at Sargoi Kipande area in Mwembe Tayari near Uhuru Gardens and/or within a radius of 500M of the property known as MOMBAS/BLOCK XX/139 and general damages plus costs of the suit. It is pleaded *inter alia* that the Plaintiffs are residing opposite plot number MOMBASA/BLOCK XX/139 wherein the Defendant seeks to erect and/or install a base trans-receiver station. That in line with Environmental (Impact Assessment and Audit) Regulations, the Defendant caused its agents Mazingira Limited to seek consent of the neighbors so as to allow the Defendant to erect the said Base Trans-receiver Station. That after consultations, the Plaintiffs refused to give consent because they feared that it will expose them to health risks.

9. From the pleadings filed there is no doubt that the dispute between the Plaintiffs and the Defendant revolves around the question of installation of a Base Trans-receiver on plot number MOMBASA/BLOCK XX/139 which neighbours the plot the Plaintiffs are residing in. It is evident that in accordance with Environmental Management and Coordination Act (EMCA) 1999 and Environmental (Impact Assessment and Audit) Regulations, an Environment Impact Assessment (EIA) project Report was carried out after public consultation and/or participation of members of the public including the Plaintiffs. Safety concerns associated with radiation was the problem as appears from the present suit. Nonetheless, it appears NEMA reviewed the EIA Report and licensed the project and the Defendant wanted to proceed with the proposed project but the Plaintiffs objected hence the filing of this suit.

10. Section 58 of the Environmental Management and Coordination Act as read with the second schedule requires any person undertaking, among others, a project involving an activity out of character with its surrounding, or a structure of a scale not in keeping with the surroundings or entailing major changes in land use to first undertake an environment impact assessment. Under the Environmental (Impact Assessment and Audit) Regulations 2003, in undertaking an environment impact assessment, all persons likely to be affected by the project must be consulted. Any person aggrieved by the Director- General of NEMA or of any of its Committees has a right of appeal to the National Environment Tribunal under Section 129 (2) of EMA, which may confirm, set aside or vary the impugned decision and make such order as it may deem fit. A decision of the Tribunal is under Section 130 appealable to the Environment and Land Court. The real question then becomes whether an aggrieved party can ignore the elaborate provisions in the EMCA and resort to this court, not in an appeal as provided,

but in the first instance.

11. In the case **of Mutanga Tea & Coffee Company Ltd –v- Shikara Limited & Another (2015)eKLR**, the Court of Appeal stated:

> **"This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER OF THE NATIONAL ASSEMBLY –V- KARUME (supra) was a 5(2) (b) Application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the constitution. In granting the order, the court made the often quoted statements that:**
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> **Where there is a clear procedure for the redress of any particular grievances prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed:**
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> **(see also Kones –v- Republic & Another ex-parte Kimani Wa Nyoike & 4 Others (2008) 3 KLR (ER) 296)". It is readily apparent that in those cases the court was speaking to issues of the correct procedure rather than of the correct forum for the resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court."**

12. The court of Appeal went on and stated:

> **"We are therefore satisfied that the learned Judge did not err by striking out the appellants' suit and Application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159 (2)(c) and the very *raison d'etre* of the mechanisms provided under the two Acts."**

13. Being guided by the above Court of Appeal decision which no doubt is binding on this court, I do find and hold that the Plaintiffs' suit against the Defendant is improperly before this court. The upshot is that the Defendant Notice of Motion dated 3rd August 2018 is merited. Consequently, the Plaintiff's suit is hereby struck out with costs to the Defendant.

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of July 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Sinonik holding for Kongere for defendant

Ngonze holding brief for the Matheka for plaintiff.

Yumna Court Assistant

C.K. YANO

JUDGE