Case Number:	Tribunal Referral Net 8 of 2006
Date Delivered:	24 May 2007
Case Class:	Civil
Court:	National Environment Tribunal - Nairobi
Case Action:	Decision
Judge:	Donald Kaniaru(Chairman), Jane Dwasi, Stanley Waudo, Joseph Njihia & Albert Mumma(Members)
Citation:	GITIRIKU WAINAINA & ANOTHER v KENAFRIC INDUSTRIES & ANOTHER [2007] eKLR
Advocates:	-
Case Summary:	**Injunction-**an application for injunction against the Defendants from operating their business on land number LR 336/8/Baba Dogo Estate/Nairobi until they stopped the flow of waste liquid, chemicals and noxious smell to the Plaintiffs land LR number 336/1059/Baba Dogo Estate Nairobi-where the parties in the dispute owned adjoining properties-the Plaintiffs had constructed a block of 33 flats for residential use in 1989-the defendants later constructed a factory on the same plot and started manufacturing footwear- claim by the plaintiffs that the defendants had constantly caused offensive waste liquid and chemicals to flow and pestilential gases, smells and vapors to come into and be on the Plaintiffs' premises causing a nuisance-whether an injunction could be issued **Nuisance** - public health - nuisance – claim by the plaintiffs that the defendants had constantly caused noxious and offensive gases, smells and vapors to come into the Plaintiffs' premises causing a nuisance- failure to comply with the public health regulations-where the defendants contended that the location of their factory premises was specifically designated for light industrial use and not for residential use and that

the City Council of Nairobi had granted planning permission for the construction of the factory- whether the principle of *volenti non fit injuria* applied -whether the Defendants' were guilty of nuisance- Public Health Act (cap 242)

Negligence-alleged negligence on the part of the Defendants who had failed to construct pipes, mains or other apparatus to keep the gases and effluent and ensure that they would not escape from the factory -plaintiffs claim that as a result of the nuisance and negligence of the Defendants, their property had been rendered unhealthy and uncomfortable to live in, and their families and tenants had suffered great discomfort, inconvenience, disturbance and health risks – whether the Defendants' had been negligent and their factory operations had caused offensive gases, smells and vapors to be emitted into the Plaintiffs' property and was the cause of the damage to the roof and walls

Damages –special and general damages- claim for damages for cost of repairs done to the building, which comprised the replacement of the galvanized iron sheet roof - lost rent arising from inability to rent out the ground floor rooms as a result of the contamination by effluent – where the defendants averred that it had in place a reasonable, proper and safe infrastructure for purposes of ensuring a safe and environmentally friendly waste disposal system- whether, given that the state of evidence adduced in the case, the defendants could be held liable for the damage to the roof of the Plaintiffs' block of flats and for the loss there by suffered by the Plaintiffs

Damages-Burden of proof-claim by the defendants that taking into account that there were other industries in the area it would have been hard to determine whether the corrosion of the iron sheets on the roof of the Plaintiffs' flats was as result of the gaseous emissions from the Defendants' factory-whether it was enough for the plaintiff to show that the defendant materially increased the risk of harm from a known source- whether a prima facie case against the defendant had been made on a balance of probabilities- where the defendant had not adduced evidence of his innocence – trite law that if each of several

	persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tort feasor is liable for the whole damage-whether the defendants were liable for damages **Environmental Tribunal-**jurisdiction- power of the tribunal to make a final determination of the issues in dispute between the parties, subject to the right of the parties to appeal to the High Court - sections 108, 126(2), 130 and 132 of the Environmental Management and Coordination Act, 1999 (EMCA)
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI

TRIBUNAL REFERRAL NET 8 OF 2006

GITIRIKU WAINAINA ……..……..…….....……..1ST PLAINTIFF

MRS GITIRIKU WAINAINA…….....…… 2ND PLAINTIFF

VERSUS

KENAFRIC INDUSTRIES…….....…….....……..…....1ST DEFENDANT

MANIL INDUSTRI…….....……..…… 2ND DEFENDANT

DECISION

1. This matter commenced as Civil Suit Number 738 of 2003, filed in the High Court of Kenya at Nairobi. On 30th May 2006, by the consent of the parties, Lady Justice Joyce Aluoch ordered that the suit be transferred to the National Environmental Tribunal for final disposal. Accordingly, on 5th June 2006, the file was sent to this Tribunal.

2. Following a preliminary review of the file, the Tribunal made a copy of the file available to National Environmental Management Authority (NEMA) to enable it consider whether the issues raised in the dispute were of such a nature as to merit a referral of the matter to the Tribunal for direction under section 132 of the Environmental Management and Coordination Act, 1999 (EMCA). By letter dated 13th July 2006, NEMA communicated its desire that the matter be dealt with by the Tribunal as a referral, which constitutes the first such referral.

3. Referrals to the Tribunal are provided for under section 132 of EMCA. This states that "when any matter to be determined by the Authority under this Act appears to it to involve a point of law or to be of unusual importance or complexity it may, after giving notice to the concerned parties, refer the matter to the Tribunal for direction."

4. The powers of the Tribunal on a referral are dealt with under section 126(2). This states that "the Tribunal shall, upon an appeal …or a referral made to it by the Authority on any matter relating to this Act, inquire into the matter and make an award, give directions, make orders or make decisions thereon …" Accordingly once seized of a matter, upon a referral or otherwise, the powers of the Tribunal include the power to make a final determination of the issues in dispute between the parties, subject, of course, to the right of the parties to appeal to the High Court under section 130 of EMCA.

5. In their Plaint filed on 17th July 2003 and amended on 6th January 2004 to join the 2nd Respondent - a related company which shares common directors with the 1st Respondent - the Plaintiffs sought:

a. An injunction against the Defendants from operating their business on land number LR 336/8/Baba Dogo Estate/Nairobi until they have stopped the flow of waste liquid, chemicals and noxious

smell to the Plaintiffs land LR number 336/1059/Baba Dogo Estate Nairobi;

b. Special damages of Kshs 925,200.00;

c. Punitive damages;

d. Such other relief as deemed just; and

e. Costs.

6. The defence was filed on 8th August 2003, and denied the claim in toto. The defence averred, additionally, that, in light of the provisions of EMCA, the High Court lacked jurisdiction to determine this dispute, which is vested only in the National Environmental Tribunal. The defence incorporated a counterclaim, but as this counterclaim was not pursued before this Tribunal, we say no more about it. On 3rd February 2005, Hon Justice Ransley ruled that EMCA did not take away the High Court's jurisdiction and, as already stated, the matter then came to this Tribunal for determination through a consent order.

7. The Plaintiffs were represented before the Tribunal by Mr Thiong'o of Ng'ang'a Thiong'o & Company Advocates, while the Defendants were represented by Mr Arwa of Rachier & Amolo Advocates. The Plaintiffs called 4 witnesses, the Defendants 2 and NEMA 2. The Tribunal also visited the site on 5th February 2007. NEMA was represented by Anne Angwenyi and Grace Kimani.

8. The evidence showed that the parties in this dispute own adjoining properties. On their property, the Plaintiffs constructed a block of 33 flats for residential use in 1989. Sometime between 1989 and 1990, following the construction of a factory on their plot of land, the Defendants started manufacturing footwear. In 1997, they started manufacturing confectionary in the same premises, but, in 2004, the confectionary plant was relocated to a newly constructed factory on a different site while the factory on the site adjoining the Plaintiffs' plot continued to manufacture footwear.

9. The Plaintiffs alleged in their amended Plaint that the Defendants have constantly caused offensive and pestilential gases, smells and vapours to come into and be on the Plaintiffs' premises causing a nuisance, which they particularized as follows:

a. Polluting the air with sulphur dioxide and hydrogen sulphide gases;

b. Exposing the Plaintiffs and their tenants as well as the public at large to noxious and dangerous doses of sulphuric acid;

c. Causing corrosion by emission of such harmful gases on the roof of the Plaintiff's property which is constructed using galvanized iron sheets;

d. Causing smelly air to be permanently emitted onto the Plaintiffs' property; and

e. Causing harmful and noxious effluent to be discharged from its factory and to flow intermittently into the Plaintiffs' property causing continued flooding of effluent and stagnation on the lower floor of the Plaintiffs' residential flats and damage to the building structure.

10. The Plaintiffs also alleged negligence on the part of the Defendants in that the Defendants failed to:

a. Construct pipes, mains or other apparatus to keep the gases and effluent and ensure that they would not escape from the factory;

b. Have a system of inspection which would detect or discover such leaks and escapes of effluent and gases onto the Plaintiffs' property;

c. Take any precaution or reasonable safety measure to ensure that its operations do not pose a danger and nuisance to the Plaintiffs and their tenants;

d. Take any steps to reduce excessive noise levels;

e. Comply with public health regulations;

f. Have any regard whatsoever to the environment and the maintenance of a sustainable, healthy, safe and compliant environment and habitat; and

g. Take any steps for the efficient and safe disposal of hazardous waste.

11. The Plaintiffs claimed that, as a result of the nuisance and negligence of the Defendants, their property had been rendered unhealthy and uncomfortable to live in, and they and their families and tenants had suffered great discomfort, inconvenience, disturbance, health risks and upset. The Plaintiffs particularized their loss as follows:

a. Cost of repairs done to the building, which comprised the replacement of the galvanized iron sheet roof - Kshs 354,000.00; and

b. Lost rent arising from inability to rent out the ground floor rooms as a result of the contamination by effluent - Kshs 571,200.00, all together, a total of Kshs. 925,200.00.

12. The Defendants denied causing the discharge of offensive and pestilential gases, smells and vapours; causing a nuisance; causing the discharge of offensive and harmful waste; causing flooding of, or damage to, the Plaintiffs premises; or being negligent. The Defendants averred that it had in place a reasonable, proper and safe infrastructure for purposes of ensuring a safe and environmentally friendly waste disposal system. Thus, the issues were joined.

13. The Defendants argued additionally, that the location of their factory premises was specifically designated for light industrial use and not for residential use and that the City Council of Nairobi had granted planning permission for the construction of the factory. In constructing a block of flats for residential use in this locality, the principle of *volenti non fit injuria,* applied and the Plaintiffs could not be heard to complain.

14. In evidence Mr Gitiriku Wainaina testified that contaminated effluent in different colours seep through the factory walls into his compound and that this has made the ground floor rooms damp and uninhabitable. Further the gaseous emissions from the factory's chimney has corroded the iron sheets on the roof of his flats forcing him to replace the iron sheets three times in the years 1999, 2001 and 2003. He testified that tenants in 15 units of the flats have left the premises, 11 of them due to corrosion of the iron sheets and four from the ground floor flats, which were damp.

15. During his testimony, Mr Wainaina also asked that the Tribunal order the Defendants to buy him out. The value of the flats was put at Kshs 5.3 million according to a 1st July 2003 valuation report

produced in evidence by Mr Christopher Mbindah, a registered land economist and land valuer, who had been asked by the Plaintiffs to carry out an open market valuation of the property.

16. Mr Wainaina produced in evidence cash sale receipts for the expenses of replacing the corrugated iron sheet roof totaling Kshs. 354,000.00 the details of which were as follows:

a. Receipt No. 121 dated 26th March 1999 for Kshs 83,000.00 for the purchase of iron sheets at Kshs 63,000.00; fissure board at Kshs 10,000/- and nails and gutter at Kshs 10,000.00 to which was attached a statement dated 26th March 1999 to the effect that the amount incurred as a labour charge for roofing and fissure board replacement was Kshs 38,000.00 bringing the total spent on this occasion to Kshs 121,000.00;

b. Receipt No. 151 dated 15th April 2001 for kshs 83,000.00 for the purchase of iron sheets at Kshs 63,000.00; fissure board at Kshs 10,000.00 and nails and gutter at Kshs 10,000.00 to which was attached a statement dated 15th April 2001 to the effect that the amount incurred as a labour charge for roofing and fissure board replacement was Kshs 30,000.00 bringing the total spent on this occasion to Kshs 113,000.00;

c. Receipt No. 141 dated 20th February 2003 for Kshs 85,000/- for the purchase of iron sheets at Kshs 63,000.00; fissure board at Kshs 12,000.00 and nails and gutter at Kshs 10,000/- to which was attached a statement dated 20th February 2003 to the effect that the amount incurred as a labour charge for roofing and fissure board replacement was Kshs 35,000.00 bringing the total spent on this occasion to Kshs 120,000.00.

17. The Plaintiffs' second witness was Dr Fredrick Otieno Oduor, a chemist working at the Chemical and Industrial Consultant Unit of the Department of Chemistry of the University of Nairobi. He testified that he had been commissioned by the firm of Ng'ang'a Thiong'o & Company Advocates to carry out an analysis of emissions and effluent from Kenafric Industries, the Respondent herein. Dr Oduor produced a written report dated 6th December 2006 which was put in evidence.

18. Dr Odour testified that on visiting the site on 8th December 2006, he found no evidence of emissions from the chimneys, nor any effluent to be sampled for chemical analysis and interpretation. He therefore decided to take pictures of the destruction that could have been caused by the alleged emissions from the factory. He produced in evidence pictures showing corroded rail gutter on the roof, corroded galvanized iron sheets, and corroded wall painting on the stairway.

19. Dr Oduor's conclusion was that the damage seen in sections of the buildings, as evidenced by the pictures, could have been due to corrosive emissions from the factory. He opined that these could have been sulphur dioxide, nitrogen dioxide and even carbon dioxide. In cross-examination Dr Oduor admitted that he could not tell the source of the emissions causing the corrosion but he was emphatic that its cause was the gases he had enumerated - sulphur dioxide, nitrogen dioxide and even carbon dioxide- : "I know the chemistry of corrosion," he maintained.

20. The Plaintiffs also called to give evidence Mr Owate Norman Wambayi, a Consultant on health, safety and environment and the Chairman of MICAS Limited the firm that had been commissioned in 2003 to assess the effects of pollution from the Defendants' factory on the Plaintiffs property. MICAS had produced a report dated 20th August 2003, which was produced in evidence.

21. Mr Wambayi sampled sulphur dioxide and hydrogen sulphide arising from the operations at the factory belonging to the Defendants. He collected the samples from three sites directly in the path of

gaseous emissions from the factory but from outside the factory as he was denied access to the factory premises. He carried out the analysis of the samples at the Institute of Nuclear Science, University of Nairobi laboratory. The results showed that the concentration levels of sulphur dioxide sampled were between 20 and 23 µg/m^3 as compared to World Health Organization (WHO) standards of 60 µg/$m^{3.}$ The concentration of hydrogen sulphide was with respect to one sample spot 5 ppm and with respect to the other two 6 ppm. He stated that a concentration of over 8 ppm represents the odour threshold, while a concentration of over 10 ppm is toxic for 8 hours.

22. Mr. Wambayi concluded that the levels of sulphur dioxide and hydrogen sulphide do not pose a potential human health hazard but represent a public nuisance. He opined that the damage to the galvanized iron sheet roofing could be due to corrosion by the gases. In evidence he maintained that it was not likely that the corrosion damage could have originated from another factory elsewhere, but conceded under cross-examination that the area, being an industrial area, and one exposed to mobile sources of sulphur dioxide from vehicular traffic, generally exhibited high levels of sulphur dioxide with a baseline level of about 5 µg/m^3.

23. The Respondent's first witness was Mr Tom Owino Oduor, the Chief Executive of the ECM Centre, the firm which, in 2003, had been commissioned to carry out an environmental audit of the factory by the Defendants herein pursuant to the requirements of the EMCA and the Regulations made under it. The ECM Centre is registered as an EIA Expert with NEMA under registration number 109, while Mr Oduor is registered with NEMA as an individual expert under registration number 0228. Mr Oduor had not, however, personally carried out the audit study in this case. This had been done by Dr Kariuki, also of the ECM Centre, who was not available to give evidence.

24. Mr. Oduor produced in evidence the Environmental Audit Report dated November 2004. The Plaintiffs argued that the Tribunal should not accept Mr. Oduor’s evidence since he is not the one who carried out the audit. In the view of the Tribunal, since it is the ECM Centre that had been commissioned to carry out the audit, any authorized employee of the Centre can produce the audit report.

25. The Report identified the wastes generated from the industrial processes at the factory to be sulphur dioxide and hydrogen sulphide, which it said, are “sucked out of the factory through vents and emitted into the air through chimney stacks (see p.17).” The report goes on to state at paragraph 3.4.2 that “the study tested the levels of sulphur dioxide and hydrogen sulphide and concludes that the emissions are negligible and within U.S.A. EPA and WHO limits.”

26. To the Environmental Audit report was annexed (Annex 2) a pollution study of Kenafric Industries Limited by The ECM Centre carried out in August 2003. This Report states that samples of sulphur dioxide and hydrogen sulphide were collected on 29th and 30th July 2003. Three of these samples were taken from the rooftop, two from the stacks and another two at the ground level on days on which both the confectionary and the rubber factories (for footwear) were operating normally. The wind direction was towards the factory when sampling was done. The Report noted that Central Glass Works is located in the vicinity while Kenya Breweries lies across the valley. There is also the busy Thika Road and some unofficial dumpsites around.

27. The result of the sulphur dioxide samples ranged from 30 to 60 µg/m^3 as compared to the WHO maximum allowable limit of 125 µg/m^3 for Europe and an EPA maximum allowable limit of 140 µg/m^3. The Report also stated that based on wind directions, one can surmise that there are significant external sources of the gas outside the factory, among them other industries and vehicular traffic. For hydrogen sulphide the results of the samples ranged from 2.01 ppm to 14. 10 ppm as compared to the EPA objectionable odour threshold of 10 ppm and a WHO allowable level of 10 ppm. These standards are

only for human health. The report notes that organic dumpsites are a major source of hydrogen sulphide.

28. The Defendants' 2nd witness was Mr Seeruirasan Gururayan, an electrical engineer by training who works as the project manager of the factory. He testified that the factory uses three boilers and has two chimneys of a height of about 22 metres that lead gases out of the factory, and that no gases are directed at the Plaintiffs' building. He pointed out that the roof of the factory itself is not corroded. He attributed the corrosion of the Plaintiffs' galvanized iron sheet roof to the quality of iron sheets used. Regarding effluent he stated that the factory drains this through a pipe, and not into the building belonging to the Plaintiffs, which is 2.5 metres away and is separated from the factory only by a perimeter wall.

29. NEMA's first witness was Mr Justus Kathenge, an Assistant Director in the Department of Forward Planning at the City Council of Nairobi. He testified that the approval for the construction of the residential flats was granted only on 10th September 2001 whereas the planning permission for the construction of a light industry on the Defendants' premises was granted 16th February 1996. The two developments fell within Zone 16, which is zoned for residential and light industrial use.

30. Samuel Munene, NEMA's second witness is a pollution control officer working with NEMA. Along with Mr Dickson Njora, a gazetted NEMA environmental inspector, he visited the site of the factory on 12th July 2006 and prepared an Inspection Report. The Report stated that no liquid effluents, apart from storm water, were being produced.

31. Gaseous emissions were however being generated and released into the environment through chimney stacks. The roof of the factory was not corroded but part of the roof where the boiler was housed was corroded and had gaping holes. The cause of this corrosion could not be ascertained since the boiler had been removed (during the transfer of the confectionary factory to another site). Roofs in the area were found to be generally rusted. It went on: "a three story flat belonging to Mr. Gitiriku had rusted roof except for one wing .... we learnt that this section of the house had been re-roofed two years ago after the iron sheets got corroded and started leaking."

32. The NEMA Inspection Report concluded as follows: "In this area there are two incompatible land uses next to each other … It is difficult to attribute the roof rusting in the area from emissions from the industry without further investigations … whether the present emissions had caused the rusting and corrosion of the iron roofs in the area can only be determined through an independent analysis."

33. Parties agreed to an expert to prepare an independent report. Subsequently, they obtained quotations for the conduct of an analysis, but they could not agree on how to meet the costs. Due to this, that is where the evidence rested, apart from the observations of the Tribunal members during the site visit, which largely reflected the evidence already availed to it.

34. In submissions Mr. Thiongo framed the issue for determination to be "whether the Defendants' factory operations caused offensive gases, smells and vapours to be emitted into the Plaintiffs' property and was the cause of the damage to the roof and walls." He submitted that on the basis of the evidence adduced, the Plaintiffs had established their case on a balance of probability and prayed for judgement against the Defendants as prayed in the Plaint.

35. Mr Arwa similarly identified the issue for determination to be whether the Plaintiffs had proved on credible evidence the allegations made against the Defendants. He submitted that the claim related essentially to a compensation for damage arising from alleged past pollution before the relocation of the confectionary. He submitted that the evidence showed that the pollution levels were within allowable

limits and that there was nothing to link the alleged corrosion on the claimants premises to the activities taking place in the factory: virtually all roofs in the area are corroded due to the presence of several industries and further the quality of the iron sheets on the Plaintiffs' roof had not been confirmed. Mr. Arwa further argued that the Plaintiffs had been unable to prove, in financial terms, the loss they sustained by reason of the corrosion of their roof.

36. In parting Mr. Arwa submitted that as the Plaintiffs were seeking compensation for alleged past pollution, rather than ongoing pollution, the orders they are seeking “are not related to environmental conservation but are in the nature of ordinary civil remedies which should be the preserve of the ordinary civil courts rather than the Tribunal .... the environment will not be better managed or conserved by the granting of the compensation order sought and it is for these reasons that we urge this Tribunal to dismiss this suit with costs.”

37. It suffices to dispose of Mr Arwa's last point that having come to this Tribunal through a consent order, it is not open to the parties to argue that the Tribunal is not the appropriate forum for the determination of the issues in dispute. But we might add also that, in our respectful view, a resolution of a dispute arising from past pollution can contribute significantly to enhancing present environmental conservation, not least because the Tribunal can, in appropriate cases, make an order for environmental restoration under section108 of EMCA.

38. NEMA (Grace Kimani) posed the issue for determination by the Tribunal in the following words: “Taking into account that there are other industries in the area, was the corrosion of the iron sheets on the roof of the Plaintiffs' flats as result of the gaseous emissions from the Defendants' factory"” The Tribunal considers this to be the central issue for determination in this dispute. Given the nature and state of the evidence adduced before it, the Tribunal is satisfied that the questions raised are sufficiently complex to justify the referral to it of this issue for determination and directions under section 132 of EMCA.

39. From the evidence adduced before the Tribunal, the following conclusions are drawn:

a. There are enhanced levels of sulphur dioxide and hydrogen sulphide in the atmosphere of this industrialized area, in which there are not only several factories, but also heavy vehicular traffic and unofficial dumpsites, all of which emit these particular gases;

b. The Defendants' industrial activities, particularly in the period between 1997 and 2004, when the Defendants manufactured confectionaries at this site, have contributed to the enhanced atmospheric levels of sulphur dioxide and hydrogen sulphide in the area;

c. The corrosion of the galvanized iron sheets used for roofing on the Plaintiffs' block of flats was caused by the gaseous emissions, more particularly sulphur dioxide and hydrogen sulphide;

d. The severity of the corrosion of the galvanized iron sheets used for roofing on the Plaintiffs' block of flats which necessitated the frequent repairs was partly the result of the quality of iron sheets the Plaintiffs used; and

e. On the evidence adduced, it is not possible to determine with precision the respective contributions to the corrosion of the iron sheets that arose from the industrial activities of the Defendants as opposed to that which arose from the enhanced levels of corroding gases in the general atmosphere in the locality.

40. The question that arises for the determination of the Tribunal is whether, given that the state of the evidence adduced in this case, the Defendants can be held liable for the damage to the roof of the Plaintiffs' block of flats and for the loss thereby suffered by the Plaintiffs.

41. In a suit for negligence and nuisance, such as this one, the claimant on whom the burden of proving the damage lies discharges the burden if he shows that, on a balance of probabilities, the act in question caused or materially contributed to the injury or damage. It is enough to show that the defendant materially increased the risk of harm from a known source. The case against the defendant is proved where a *prima facie* case has been made out against him on a balance of probabilities and he (the defendant) has not adduced evidence of his innocence. (Halsbury's Laws of England, 4th Edition, vol. 45(2) at para. 317).

42. Once a *prima facie* case has been made out, for the defendant to exculpate himself, he would need to adduce evidence to the contrary. Such evidence must be of sufficient cogence to demonstrate that the damage in question arose from a cause other than the defendant's act. It is not enough merely to point to the possibility that the damage arose also from the act of some other unspecified person.

43. As it is not necessary that the defendant be the only cause of the damage in question, the exculpatory evidence must go beyond merely showing that some other unspecified person also contributed to the damage. If some other such person did contribute, that person needs to be identified with sufficient particularity to enable the person concerned to be joined as a third party in the proceedings so that liability can be apportioned. If that is not done, the person sued shall bear the entire burden of compensating the injured party.

44. The Tribunal believes the applicable law in circumstances such as the present one to be as stated in Halsbury's Laws of England, 4th Edition, vol. 45(2) para 347): *if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tortfeasor is liable for the whole damage*."

45. Applying this principle of law to the present case, the Plaintiffs did demonstrate that, on a balance of probabilities, the Defendants' activities during the period in question contributed materially to the enhanced levels of corrosive gaseous emissions in this area that caused the corrosion of the galvanized iron sheets on the roof of the Plaintiffs' block of flats. The Defendants pointed to other sources of similar gaseous emissions, which together with their (i.e. the Defendants' activities) contributed to the enhanced levels of corrosive gases in the atmosphere in this locality.

46. But the Defendants stopped short of identifying any particular source or sources with sufficient particularity to displace the presumption that the Defendants, by mere dint of physical proximity to the Plaintiffs' premises, made a material contribution to enhanced level of the corrosive gaseous emissions about which the Plaintiffs are complaining. In the circumstances, the Tribunal finds that the Defendants are liable for the damage to the galvanized iron sheets used by the Plaintiffs on their block of flats.

47. In the Tribunal's respectful view, the Defendants' defence that the quality of the iron sheets used by the Plaintiffs was poor and that, because of this, the iron sheets used as roofing for their block of flats suffered corrosion while some other iron sheets used for roofing in the area, such as the iron sheets on the roof of the Defendants factory itself, did not suffer comparable corrosion, can be disposed of fairly briefly. It is no defence to a claim based on tortuous damage to property that the Plaintiffs' property would not have suffered such damage had the property in question been of higher quality.

48. The Plaintiffs claim for special damages was for an amount of Kshs 925,200.00. Of this Kshs

354,000.00 was for damage the replacement of the galvanized iron sheet on the roof. The balance was for lost rent. The Plaintiffs adduced no evidence to support the evidence of Mr Wainaina regarding the lost rent. Unsupported, Mr Wainaina's evidence on this point is not sufficient to support an award of compensation.

49. The Plaintiffs also did not adduce sufficient evidence to prove, on a balance of probabilities, that the Defendants' activities were a material cause of the dampness of the lower ground floor of the Plaintiffs' block of flats. The evidence adduced by the Defendants that they had a proper system for the drainage of the effluent from their premises was corroborated by the evidence of the officers from NEMA who visited the site. The Tribunal therefore declines to award any compensation for this claim as well.

50. The defendants had argued in their defence that in any case, the plaintiffs could not complain of the damage suffered on the basis of the principle of *volenti non fit injuria.* The evidence adduced showed that this area is zoned for mixed residential and light industrial use. Therefore, the principle of *volenti non fit injuria* does not apply.

51. In evidence the Plaintiffs asked the Tribunal to order that the Defendants purchase their property. However this prayer did not form part of the prayers in the Plaint or Amended Plaint. If the Appellant had wished to pursue this prayer the proper procedure would have been to apply to the Tribunal for leave to amend the amended Plaint further. This was not done, and therefore the Tribunal has no basis for making any order on this issue.

52. The Tribunal therefore unanimously decides as follows and makes the following order:

The Defendants are liable for the damage suffered by the Plaintiffs as a result of the corrosion to the galvanized iron sheets used for roofing the Plaintiffs' block of flats and are ordered to compensate the Plaintiffs by paying Kshs 354,000.00 which shall attract interest at the rate of 12% per annum from the date of the filing of the Plaint in the High Court until payment in full.

53. The parties asked the Tribunal for costs. Under rule 39 of the Tribunal Rules the Tribunal cannot award costs without hearing the parties on the issue of costs. The Tribunal therefore invites parties to address it on costs on a date to be agreed.

Delivered at Nairobi this 24th day of May 2007.

Donald Kaniaru……Chairman

Jane Dwasi……Member

Stanley Waudo……..Member

Joseph Njihia……Member

Albert Mumma……..Member