



Kigwe & another v Kenya National Highways Authority & 4 others (Environment and Land Case Civil Suit 930 of 2012) [2023] KEELC 18472 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 18472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 930 OF 2012
LC KOMINGOI, J
MARCH 16, 2023**

BETWEEN

JOSEPH WATHUA KIGWE 1ST PLAINTIFF

ROSEMARY WANJIRU KIGWE 2ND PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST DEFENDANT

CHINA WU YI COMPANY LIMITED 2ND DEFENDANT

ATHI WATER SERVICES BOARD 3RD DEFENDANT

NAIROBI WATER & SEWERAGE COMPANY LIMITED 4TH DEFENDANT

CITY COUNCIL OF NAIROBI 5TH DEFENDANT

JUDGMENT

1. By a plaint dated 30th November 2012, the Plaintiffs prays for judgement against the Defendants jointly and severally for:-
 - a. An order of injunction compelling the Defendants to reconnect the Plaintiffs' property being Land Reference No.209/5821/12 measuring half an acre and situate in the Parklands area along Forest Road and in between Kipipiri road and Akoth Aura Road and just next to the shell petrol station, together with the developments therein to the main sewer and ensure that the same is properly served by the Nairobi City's main sewer system.
 - b. General and special damages (to be compiled).
 - c. Costs of this suit plus interest at court rates.
 - d. Any other relief the Honourable Court may deem fit and expedient to grant.



2. It is the Plaintiffs' case that they are the registered proprietors as lessees of all that parcel of land known as land Reference No.209/5821/12 measuring half of an acre and that they have developed it with forty one (41) residential units at a cost of kshs.250 million, their investment in the property therein being kshs.375 million. They further stated that the sewer line to the said premises has always been connected to the main sewer line existing along Forest Road (Kipipiri Road-Akoth Aura Road) which was connected thereto long ago as the suit property has always been residential premises.
3. It is also their case that in in 2008, the 1st Defendant contracted the 2nd defendant together with various other Chinese companies to reconstruct and/or redevelop the then Thika Road and transform it to Thika Super Highway and that during the said construction, the main contractor of the Forest Road Stretch (the 2nd Defendant) destroyed and sealed part of the main sewer line and blocked the part serving the Plaintiff's premises.
4. They raised the issue with the 2nd Defendant who informed them that the blockage was temporary as it was necessitated by the need to develop an underground by pass from Thika Super Highway to join Forest Road.
5. They averred that as a result of the said development, they were forced to design a temporary system of dealing with their sewer since the suit property was fully rented out at the time with about close to 30 young families in occupation by contracting a Third Party to privately exhaust its sewer and clean it every six (6) days at a cost of kshs.25, 000/= per week.
6. They also averred that when the road was completed, the sewer line was not unblocked and when they inquired from the 2nd defendant, they were taken in circles and due to the sewer problem, majority of their tenants were forced to vacate and look for alternative houses to avoid the sewer smell which has caused them substantial loss and damages.

The 1st Defendant's case

7. The 1st Defendant filed the defence dated 16th January 2013. It denied allegations contained in the plaint and averred that the residential sewer lines were formerly connected to the DN 600/675 line running along Forest Road. It admitted that the road construction works were being undertaken by the 2nd Defendant under its supervision and the sewer relocation works were being undertaken by Funan Construction Company who were under the direct supervision of the 3rd Defendant.
8. It further contended that Funan Company Limited had been mandated to complete any outstanding works that had been contracted to them by the 3rd Defendant before leaving the site but it failed to reinstate the residential sewer line to the trunk sewer. It averred that the 4th Defendant issued instructions to Machiri Limited as a subcontractor to undertake the relocation works of the sewer line but it equally failed, prompting the 4th Defendant to instruct Nakuru Supplies as a subcontractor on 8th December, 2012 to carry out the works of the residential sewer line.
9. The 1st Defendant also contended that the issue of lack of connection of sewer lines to residential properties was brought to the attention of the supervising consultant in April 2012 whereas the site had been handed over to the 1st Defendant by the 3rd Defendant in March 2011 with the assurance that there were no sewer lines.
10. It contended that the 3rd Defendant gave it the go ahead to decommission the old sewer line and the same was carried out and the space was utilized by the 2nd Defendant to carry out the roadworks. It prayed that the suit against it be dismissed.



The 2nd Defendant's case

11. The 2nd Defendant filed a statement of defence dated 23rd April 2013. It denied allegations contained in the plaint. It admitted that it carried out construction of Thika Road under the 1st Defendant's supervision and contended that the sewer relocation works were being undertaken by Funan Construction Company who were under the direct supervision of the 3rd Defendant. It further contended that Funan Construction Company failed to reinstate the residential sewer line to the trunk sewer and the 4th Defendant herein issued instructions to Machiri Limited which also failed prompting the 4th Defendant to instruct Nakuru Supplies as a subcontractor on 8th December 2012 to carry out the works of the residential sewer line.
12. It also averred that it was the responsibility of the 3rd Defendant to ensure that all properties linked to the decommissioned sewer pipeline have been reconnected on the new pipeline.

The 4th Defendant's case

13. The 4th Defendant filed the statement of defence dated 25th April 2013. It denied the allegations contained in the plaint and contended that it exercised due diligence by making and/or facilitating plans and designs to construct a new sewer line and connection to reconnect all its customers whose water supply and sewer connections had been blocked by the 2nd Defendant due to the construction of the Thika Super Highway. It further contended that according to the plans, the sewer line was to run either under the road or next to the road but the contractor assigned the duty of constructing the said sewer advised the same be laid next to the road.
14. It averred that for the sewer to be laid next to the road, it was necessary that way eaves be acquired which is responsibility of the 3rd Defendant under the Water Act. It admitted that it has a responsibility for draining sewers within the City of Nairobi but contended that the sewer lines are owned by the 3rd Defendant and no action can be taken to alter the positioning of the sewer line or alter its structure without the consent of the 3rd Defendant and that if there was any loss or damage as alleged, it was not responsible for the same.
15. The 3rd and 5th Defendants did not file their respective statements of defence.

Evidence of the plaintiff

16. PW1, Jotham Kamau Wachira, the Plaintiffs' manager testified on 24th November 2021. His witness statement dated 2nd March 2020 was adopted as his evidence in chief. He stated that the plaintiff had heavily invested on the suit property and tenants had always occupied it prior to the sewer line disconnection. He further stated that as a result of disconnection, tenants deserted the premises to avoid the sewer smell.
17. He stated that vide this court's ruling dated 15th November 2013, the court entered a mandatory order of injunction against the 3rd Defendant by finding it responsible for ensuring that all the sewer lines were in place and are connected to the main trunk sewer. He added that the 3rd Defendant complied with the said orders in June 2015.
18. He also stated that the Plaintiffs incurred specific losses and damages as a result of the Defendant's negligence between February 2012 and June 2015 which included; loss of house rents arising from tenants leaving the premises; kshs.10,115,000/=, payments to 3rd Party to privately exhaust the sewer line and clean it weekly due to the disruption in the sewerage flow amounting to kshs.2,280,000/=, construction of septic tank at kshs.450,000/=.



19. When he was cross-examined, he stated he had no documents showing that he was the Plaintiffs' manager. He also stated that there is no copy of title in his documents. He further stated that there was no letter of engagement with the sewer cleaner who was paid kshs.25,000/= per week. He stated that the rent claimed is for vacant houses but there is no valuation report to show that the rent was as indicated and that though they have tabulated names of their tenants in court, the tenancy agreements are not in court. Pointed to a name of one of the tenants, he stated that there is nothing to show Robert Magare was paying kshs.42,000/= as there are no receipts.
20. When he was referred to the ruling dated 1st December 2013, he stated that it does not address the issue of damages as it only addressed the issue of reconnection of the sewer. Referred to the Plaintiffs' prayers in the Plaint, he stated that the prayers sought general and special damages (to be compiled) but special damages have not been compiled since 2012. Referred to Paragraph 13 of the Plaint in which the Plaintiffs averred that they were forced to contract a 3rd Party to exhaust and clean its sewer every week at a cost of ksh.25,000/= he stated that they did not particularize the damages they were seeking and that after compiling the losses they incurred, the Plaint was not amended.
21. When he was re-examined, he stated that he was the manager of the property at the time the sewer was disconnected Referred to the 1st Plaintiff's initial witness statement dated 30th November 2012. He stated that they do issue tenancy agreements to their tenants but they are not in court and that the tabulation is the actual data in terms of occupation.
22. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiffs' Submissions

23. They are dated 13th June 2022. They address the following issues;
 - a. Whether the Plaintiffs are entitled to special damages from the Defendants as a result of their failure to timely reconnect the Plaintiff's property to the main sewer line.
 - b. Whether the Plaintiffs are entitled to general damages from the Defendants as a result of their failure to timely reconnect the Plaintiff's property to the main sewer line.
24. Relying on the case of Nkuene Dairy Farmers Cooperative Society Limited & Nother v Ngacha Ndeiya [2010] eKLR, counsel for the Plaintiffs submitted that this court took cognizance of the fact that the Plaintiffs endured predicaments and tribulations due to the failure of the Defendants to promptly reconnect their property to the sewer line thus they are entitled to damages.
25. Counsel further submitted that the Plaintiff incurred loss of house rent of ksh.10,115,000/= which is calculated based on the actual loss of house occupancy and the prevailing market rent at the time and is tabulated from February 2012 when the Thika Road project was completed and June 2015 when the Plaintiff's sewer was reconnected. He further submitted that the claim of payment to 3rd Party to privately exhaust the sewer line amounted to kshs.2,280,000/= and that the Plaintiffs also incurred ksh.450,000/= for construction of a septic tank.
26. He relied on the case of Visoi Saw Mills Lt v The Attorney General [1997] eKLR and the case of Total (Kenya) Limited formerly Caltex oil (Kenya) Limited v Jevanams Limited [2015] EKLR to submit that the Plaintiffs are entitled to general damages and urged it to award kshs.6 million as well as costs of the suit considering that the 3rd Defendant did not oppose the claim.

The 3rd Defendant's Submissions

27. They are dated 29th June 2022. They addressed the following issues;



- a. Whether the Plaintiffs' proved and justified the award of the special damages pleaded?
 - b. Whether the 3rd Defendant's failure to file a defence entitles the Plaintiffs to the reliefs sought?
28. It was counsel for the 3rd Defendant's submission that the burden of proving a claim lies on the claimant but they did not satiate the said burden so as to warrant the award of special damages. He relied on Hahn v Singh, Civil Appeal No.42 of 1993 [1985] KLR to submit that special damages must be pleaded and proved. He added that the schedule prepared by the Plaintiffs setting out the purported loss of rental income, expenses for sewer removal and other expenses cannot be sufficient to prove the claim.
29. He also submitted that in the ruling of dated 15th November 2015, the court only granted the mandatory order of injunction but not the issue of quantum of damages. He submitted that where there is no evidence regarding special damages, the court cannot act in a vacuum. He cited the case of Swalleh C. Kariuki & another v Violet Owiso Okuyu [2021]e KLR.
30. On the issue whether failure to file a defence entitles the Plaintiffs to the reliefs sought, counsel submitted that the fact that a suit is not defended or challenged does not mean that the court will automatically grant the orders sought without interrogating the veracity of the evidence placed before it and determine the same on merit. He relied on the Supreme Court of Kenya's decision in Gideon Sitelu Konchella v Julius Lekany Ole Sunkuli & 2 others [2018]e KLR and the case of Bubul Investment Company Limited v Kassam Hauliers Limited [2021]e KLR, Babul investment Company Limited v Kassam Hauliers Limited [2021]e KLR.
31. I have considered the pleadings and the evidence on record. I have considered the written submissions and the authorities cited. The issues for determination are:-
- i. Whether the Plaintiffs have proved their claim for special damages.
 - ii. Whether the Plaintiffs are entitled to general damages.
 - iii. Who should bear costs of this suit?
32. The Plaintiffs contend that the main sewer line that serves their property known as Land Reference No.209/5821/12 and the developments thereon which are residential units was sealed to facilitate the construction of an underground bypass linking the Thika Super Highway to Forest Road causing their sewer to leak and loss of income as there was an exodus of tenants from their property fleeing the foul smell emitted by the blocked sewers. It further contended that due to the blockage, it incurred losses. The 3rd Defendant participated in the suit but it did not file a defence.
33. This Court's ruling of 15th November 2013 determined the dispute between the parties on the issue of liability as the court allowed prayer (a) of the Plaint. It found that the 3rd Defendant was liable for ensuring that there are sewer lines in place and that they are connected to the main truck sewer lines. The 3rd Defendant has since complied with the said ruling. The only issue pending determination is prayer (b) on special and general damages and prayer (c) on costs of the suit as between the Plaintiffs and the 3rd Defendant.
34. The Plaintiff claims special and general damages. In Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR, the Court of Appeal reiterated that it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit.



35. In *Jogoo Kimakia Bus Services Limited v Electrocom International Limited* [1992] eKLR, the Court of Appeal stated:-

“The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

36. In *Central Bank Of Kenya v Martin King'ori* Civil Appeal No. 334 of 2002, the Court held while citing *Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 Others* Civil Appeal No. 192 of 1992:-

“There can be no argument that the pleading particularised in the plaint was in the nature of special damages since these were damages relating to past pecuniary loss calculable at the date of the trial. The law on such pleading is now trite that the same must be pleaded with as much particularity as circumstances permit and it is not enough to simply aver in the plaint that the particulars of special damages are to be supplied at the time of trial. If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of the trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars”.

37. The Plaintiffs pleaded special damages in the plaint and averred that particulars would be provided but they did not amend their plaint to list the particulars. At paragraph 13 of the plaint, they claimed that they spent ksh.25,000/- every per week to exhaust and clean their sewer. PW1 claimed that cumulatively, the Plaintiff spent ksh.2, 280,000/= for that purpose. However, He produced receipts paid by Forest Court to Cintas's General but failed to establish nexus with the suit property and failed to show what the payments were for.

38. PW1 also told the court that the Plaintiffs incurred ksh.450,000/= for construction of a septic tank. He produced an invoice and petty cash voucher but the same had not been pleaded in the plaint.

39. PW1 also told the court that the Plaintiffs incurred loss of use as it lost rent income amounting to Kshs 10, 115,000/=. In support of the said unpleaded claim, he produced a tabulation of tenants showing that some rental houses on the suit land were empty. He just threw names of tenants at the court as it were without proving the Plaintiff's claim. There was no valuation report to show the rent as indicated nor tenancy agreements and receipts of the tenants tabulated. That evidence also fails as it was not pleaded.

40. In the case of *Swalleh C. Kariuki & Another vs Violet Owiso Okuyu* (2021) Eklr the court stated thus:-

“This court has carefully perused and evaluated the evidence presented in support of special damages by the Respondent. It emerges that, in cross examination, the Respondent conceded to not having receipts in support of the medical expenses clearly indicating that her bill at the hospital was paid but the receipts were at home

As in readily obvious, the documents presented in support of the Respondent's medical expenses are bills and not receipt as our case law requires. I thus find that the award of special damages in the sum of Kshs.327770 was erroneous and the same is set aside and substituted



with an award of Kshs.7,500 which was the only amount proved by evidence in accordance with the standards required in law”

I therefore decline to award any special damages.

41. This court on the ruling dated 15th November 2013 found that the 3rd Defendant was liable to reconnect the Plaintiff’s premises to the main sewer. I find that the Plaintiffs are entitled to general damages for the predicament they found themselves in as a result of the 3rd Defendant’s actions.
42. Counsel for the Plaintiffs has proposed Kshs.6,000,000/- as reasonable to compensate the Plaintiffs. He has also put forward the case of Watts & Another vs Morrow 1WLR 1421, 1446 where Bingham LJ asserted that;

“In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired, I am prepared to accept that they sound damages even though the cost of the repairs is not recoverable as such.”

He also relied on the case of Visoi Saw Mills Ltd vs The Attorney General [1997] Eklr where it was held:-

“But whether the claim is in contract or tort the only damages to which the appellant is entitled is a pecuniary loss; it is to put the appellant into as good position as it there had been no such breach or interference. Normally this would entitle the appellant to recover damages for the expenses caused by and gains foregone because of the breach of interference”.

43. I am guided by the above authorities and I award Kshs.500,000/= which I think is adequate compensation.
44. The 3rd Defendant was the authority responsible for ensuring that there are sewer lines in place and are connected to the main trunk sewer lines.
45. It is not in dispute that the 3rd defendant did not file any defence. I find that it ought to bear costs of this suit.
46. Accordingly, judgment is entered for the Plaintiff as against the 3rd Defendant as follows:-
 - a. General damages Kshs.500,000/-
 - b. Costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUARLLY AT KAJIADO THIS 16TH DAY OF MARCH 2023.

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L. KOMINGOI
JUDGE

In the presence of:-

No appearance for the Plaintiffs



No appearance for the 2nd Defendant

Mr. Ochieng for the 3rd Defendant present

No appearance for the 4th and 5th Defendants

Mutisya- Court Assistant

