



**Conte v Mutua (Environment & Land Case 112 of 2018)
[2023] KEELC 17809 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 112 OF 2018**

MAO ODENY, J

JUNE 8, 2023

BETWEEN

FELICATA CONTE PLAINTIFF

AND

ALFRED MUTUA DEFENDANT

JUDGMENT

1. By an Amended Plaintiff dated 4th February, 2021 the Plaintiff herein sued the Defendant seeking the following orders;
 - a. A declaration that the Defendant's water closet on Chalet No. 14 adjacent to the Plaintiff's dining room is a nuisance and ought to be relocated.
 - b. Costs and interest.
 - c. Any other of further relief that this Honourable Court may deem fit and just to grant.

Plaintiff's Case

2. PW1 Felicita Conte adopted her Witness Statement as her evidence in chief and produced the documents on the list of documents as exhibits Nos 1 to 9. She further told the court that she is the proprietor of Chalet No. 14 situate at Karibuni Villa on Plot No. 657 (Original No. 307/2) Mambrui and that the Defendant is her neighbor who is the proprietor of Chalet No. 13 in the said Karibuni Villas.
3. PW1 also testified that the Defendant commenced construction/ development of water closet/pit latrine on his chalet No. 13 but the same is being put up right next to her dining area in Chalet No. 14 and that when she raised a complaint about the same to the management of the village the



said development was stopped but it appears the stoppage was only temporary as the same has now resumed.

4. PW1 referred to exhibit 7 which is an Inspection Report on Public Nuisance between house No 13 (Defendant's) and house no 14 (Plaintiff's) which states at page 2 as follows;

“that the nuisance is as a result of the foul smell from the toilet of house No. 13 is likely to be high as the operations and usage of the toilet continue. That during the survey they noted another potential nuisance in the future, a septic tank just on the side of house No. 14 which may not be the operation of the house over time. The level of the nuisance will if not reverted deny the occupants of house no 14 the comfort of their house. The report further recommends that the owner of house no 13 should consider adjusting the plan and relocate the toilet in attempts to solve this nuisance to the occupants of house no 14. The report concludes by stating that the toilet in house no 13 is a nuisance to the occupants and users of the dining area in house number 14.”

5. PW1 also relied on exhibit 8 a Health, Safety and Sanitary Inspection report for Karibuni Villas by the County Government of Kilifi where the report noted at Page 2 as follows; -

“Foul smell emanating from the toilet of Villas 13 was noted at the time of inspection which is considered as public health nuisance according to cap 242 *Public Health Act* Sec. 118. Among the recommendations the report states, inter alia;-

The owner of house No. 13 to relocate the toilet, the owner of house No 13 to carry out the above health requirement recommendations to abate the nuisance of foul smell, dust and noise, pollution which are public health nuisance according to Cap 242 laws of Kenya.”

6. On cross examination, by counsel for the Defendant, PW1 told the court that she had never seen the surveyor's report dated 12th April 2018 and further stated that the toilet is located on the Defendant's property near her dining room.

Defence Case

7. DW1 Joseph Dzuya Ria adopted his Witness Statement as his evidence in chief on behalf of the Defendant. He told the court that he was the Defendant's caretaker and that the Defendant has owned and occupied the Chalet for over 5 years having purchased it in the year 2013. He testified that they had done renovations on the villa, added a balcony, a toilet and an extension on villa is No. 13 within Karibuni Villas in Mamburi.
8. It was his testimony that the renovations were done for a period of 3 months in 2018 but the Plaintiff complained in 2019. That the Plaintiff's villa is No. 14 is more than 10 meters and that the toilet is a wooden one attached to the building with a septic and drainage/sewerage system.
9. DW1 also stated that the Defendant obtained the requisite approvals for the renovations, expansions and additions from the relevant government authority in Kilifi County. According to him, the Plaintiff has her chalet designed the same way as the Defendant's chalet and in fact, most chalets in Karibuni Complex have similar styles and features.
10. It was DW1's evidence that the renovations are within the Defendant's own property and their positioning do not constitute any violation or enjoyment of the use of the Plaintiff's property and do not violate any laws or regulations as has been alleged by the Plaintiff.



11. On cross examination by Mr. Mwadilo, DW1 told the court that the management must give approvals for renovations, verbally or written and that the title allows the owner exclusive use of the property and he did not understand how the toilet was a nuisance to the Plaintiff.
12. On reexamination by Mr. Musau, he stated that the management gave the Defendant permission to carry out renovation and that the same management never complained about the renovations.

Plaintiff's Submissions

13. Counsel submitted that the Plaintiff has proved her case against the Defendant on a balance of probabilities and is therefore entitled to the prayers sought in the Amended Plaint. It was counsel's submission that Plaintiff's Exhibit No. 7 Inspection Report on Public Nuisance between House No. 13 and the No. 14 belonging to the Plaintiff clearly states that the nuisance as a result of the foul smell from the toilet of house No. 13 is likely to be high as the operations and usage of the toilet continue. According to him, another potential nuisance in the future was the septic tank just on the side of house No. 14 and that the level of the nuisance if not reverted will deny the occupants of house No. 14 the comfort of their house.
14. Mr. Mwadilo also submitted that the report further recommended that the owner of house No. 13 should consider adjusting the plan and relocate the toilet in attempts to solve this nuisance to the occupants of house No. 14. He further submitted that the foul smell emanating from the toilet of Villa 13 was also noted at the time of inspection which is considered as public health nuisance according to Cap 242 *Public Health Act* at Section 118.
15. Counsel submitted that the testimony of Joseph Dzuya Ria purportedly by virtue of an Authority to appear and give evidence on behalf of the Defendant should be disregarded as an Authority to Appear to Act on behalf of another is applicable only where there are more than one Plaintiffs or Defendants as per the provisions of Order 1 Rule 13 of the Civil Procedure Rules. That in this case the said Joseph Dzuya Ria is not a party to this case and was therefore not eligible to be given Authority by the Defendant to appear or act on his behalf hence the court should ignore such evidence.
16. Mr. Mwadilo also submitted that the Defendant's lease registered on 28th November 2000 and transferred to the Defendant on 12th May 2014 provides at page 3 that no structural alteration to the premises should be done and nothing that may be a nuisance to other Villas without a consent in writing.
17. Counsel submitted that the testimony of Joseph Dzuya Ria it is evident that the Defendant never obtained the consent of the company before embarking on the construction of the toilet.

Defendant's Submissions

18. Counsel identified three issues for determination; whether the Defendant's witness was a competent witness, whether the Plaintiff's claim can succeed against the Defendant and who ought to bear the costs.
19. On the 1st issue for determination, counsel relied on Order 1 Rule 12, Oder 1 Rule 13(2), Order 7 Rule 5(b) and Order 9 Rule 2 (a) and submitted that the Defendant's list of witnesses and Witness Statement were duly registered in court and served upon the Plaintiff and that there has never been any objection on the competency of the Defendant's witness to testify.



20. Counsel relied on the cases of Grace Monica Aketch Onyango v Arthur William Ogwayo & Another [2020] eKLR and John Kamau Gachina v Sofia Salim Karama [2016] eKLR on competency of witnesses to give evidence with authority.
21. On the 2nd issue as to whether the Plaintiff's claim can succeed against the Defendant, counsel submitted that the Plaintiff has not proved her case as the Defendant lawfully and procedurally obtained approvals from all relevant authorities before embarking on the development.
22. That the Defendant has not in any way breached the terms of the lease because if he had, the Management company would have placed a complaint or warning and that the Plaintiff has not substantiated how she will incur loss and damage due to the construction of the ultramodern toilet and in any case, by the time of hearing of the Plaintiff's case, the construction was already complete and the Plaintiff did not specifically exemplify any losses or damages she had incurred.
23. Counsel submitted that the Plaintiff seeks to limit the right to property that the Defendant enjoys and is guaranteed under Article 40 of *the Constitution* and the reason advanced by the Plaintiff in a bid to limit the Defendant's right cannot be sustained.
24. Counsel relied on Article 40(2) submitting that the right to property is one of the rights that cannot be limited under Article 24 and cited the case of Embakasi Management Limited & 8 others v Imperial Bank Limited (In Receivership) & another (Civil Appeal 113 of 2019) [2022] KECA 7 (KLR).
25. It was counsel's further submission that the Plaintiff has not met the criteria set out under *the Constitution* on limitation of the right to property and the nuisance allegedly created by the construction of the ultramodern toilet cannot meet the criteria as it has not been substantiated and that the makers of the reports produced by the Plaintiff were not called to interrogate the findings in the reports.

Analysis and Determination.

26. The issue for determination is whether the Plaintiff has proved that the toilet built on Chalet No. 13 belonging to the Defendant is a nuisance by producing foul smell.
27. The suit herein resolves around a dispute between the Plaintiff and the Defendant, the Plaintiff is the proprietor of Chalet No. 14 in the development known as Karibuni Villas while the Defendant is her neighbor the proprietor of Chalet No. 13 in the same Karibuni Village.
28. The Plaintiff contends that the Defendant has commenced further and additional development to his said premises particularly a water closet/pit latrine right next to the Plaintiff Chalet which she alleges is a nuisance and producing foul smell hence health hazard to the Plaintiff and her guests.
29. The Defendant on the other hand asserts that he obtained the approvals for the renovations, expansions and additions through the appropriate relevant construction authorities and that the said renovations do not constitute any violation of the Plaintiff's right and that the Chalet must contain a toilet as per the provisions of the *Public Health Act*.
30. Nuisance is defined in Clerk & Lindsell On Torts 18th Edition Page 973 as:

“..... any act of omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land, when it is a private nuisance”



31. This calls for a look of the rule in *Rylands v Fletcher* that imposes strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land. It was formulated in the English Case of *Rylands Vs Fletcher* [1861-73] ALL ER REP 1.

32. In that case, the Defendant had employed contractors to build a reservoir on his land. While building it, the contractors discovered a series of old coal shafts and passages under the land filled loosely with soil and debris, which joined up with Plaintiff's adjoining mine. Rather than blocking these shafts, the contractors left them and as a result the Defendant's reservoir burst and flooded the Plaintiff's mine causing damage. The court held that:

“We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences.”

“If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage.”

33. The Defendant built a toilet 5 meters close to the Plaintiff's house which was confirmed by the Public Health Inspectorate and the County Health, Safety and Sanitary Inspection report for Karibuni Villas by the County Government of Kilifi where the report noted at Page 2 as follows; -

“Foul smell emanating from the toilet of Villas 13 was noted at the time of inspection which is considered as public health nuisance according to cap 242 *Public Health Act* Sec. 118. Among the recommendations the report states, inter alia;- The owner of house No. 13 to relocate the toilet, the owner of house No 13 to carry out the above health requirement recommendations to abate the nuisance of foul smell, dust and noise, pollution which are public health nuisance according to Cap 242 laws of Kenya.”

34. This nuisance was confirmed by two government agencies who are mandated to inspect, evaluate and give recommendations. These reports were not challenged by the Defendant; therefore, they remain valid. The Defendant has not shown that they complied with the recommendations to abate the nuisance of the foul smell as per the *Public Health Act* Cap 242 of the Laws of Kenya. The acts of the Defendant have caused damage to the Plaintiff.



35. Article 42 of *the Constitution* specifies that every person has the right to a clean and healthy environment, and Article 70 empowers any person who alleges that a right to clean and healthy environment has been or is likely to be denied, breached or violated to apply to a court for redress. It further provides that such person need not demonstrate that they had suffered loss or damage.
36. The Environment Management and Coordination Act (EMCA) on the other hand at Section 3 (3) of the EMCA stipulates that;
- “If a person alleges that the right to clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest to apply to the Environment and Land Court for the redress and the Environment and Land Court may make such orders, issue such writ or give such directions as it may deem appropriate to-
- a. Prevent, stop or discontinue any act or omission deleterious of the environment
 - b. Compel any public officer to take measures to prevent or discontinue any act or omission deleterious of the environment
 - c. Require that any on-going activity be subjected to an environmental audit in accordance with the provisions of tis Act;
 - d. Compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
 - e. Provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”
37. The Defendant submitted that they had gotten all approvals to construct the toilet but this is not a defence to tackle the nuisance that occurred after the construction of the toilet together with the septic tank. The nuisance occurred upon completion and use of the toilet. It should also be noted that there were inspections after the completion and recommendations made to abate the nuisance.
38. I have considered the pleadings, the evidence on record and the submissions by counsel and find that the Plaintiff has proved her case against the Defendant on a balance of probabilities.
39. A declaration is therefore issued that the Defendant’s water closet on Chalet No. 14 adjacent to the Plaintiff’s dining room is a nuisance and ought to be relocated within 45 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

