



REPUBLIC OF KENYA



**Kivuvani v Frederichs (Environment & Land Case E170 of 2023)
[2025] KEELC 1291 (KLR) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E170 OF 2023
CA OCHIENG, J
MARCH 17, 2025**

BETWEEN

ERICK KIVUVANI PLAINTIFF

AND

FRANZ FREDERICHS DEFENDANT

RULING

1. What is before Court for determination is the Defendant's Notice of Motion application dated the 2nd September 2024, brought pursuant to Order 40 Rule 2 of the Civil Procedure Rules, as well as Sections 1A, 1B & 3A of the *Civil Procedure Act*. The Defendant seeks the following orders;
 - a. Spent.
 - b. That a permanent injunction do issue restraining the Plaintiff/Respondent whether acting by himself or through his agents, servants or anybody acting for him or claiming right through him from redirecting storm water drainage from flowing into the natural drainage system by destroying culverts including manhole constructed by consent of the parties herein.
 - c. That a permanent injunction do issue restraining the Plaintiff/ Respondent from further destruction of the storm water drainage system and blockage of the passage of the water through his land.
 - d. That the Plaintiff/Respondent be compelled to open up the culvert drainage point that all waters drain safely away from the Defendant/Applicant's perimeter wall.
 - e. That an order for restoration of the destroyed manhole and culverts to their original state be issued.
 - f. That an order be issued to permit the use of opening holes in the perimeter wall for storm water drainage until the proper drainage system is restored.



- g. That the Defendant/Applicant be awarded costs of this application.
2. The application is premised on grounds on its face and the supporting affidavit of FRANZ FREDERICH S sworn on 2nd September 2024. He deposes that he owns land parcel number 2327/214 wherein he has constructed a perimeter wall separating his land and the Plaintiff's land parcel number 2327/215. He states that construction was in adherence to Nairobi City Council and National Environment Management Authority that approved construction plans. Further, under the supervision of a structural engineer, he instructed that wall holes/openings be fitted on both sides of the wall to allow extreme rainfall to drain naturally following the existing land scape.
 3. He avers that based on the topographical plan, the existing culvert for natural storm water drainage extended from Ushirika Road Valley site drain down, to Plot 2327/135 into the Plaintiff's land, upto the end of the existing culvert where the water was released to follow the natural direction. Further, that by consent of the Plaintiff, he extended the culvert, which was ending half way on the Plaintiff's land. He reiterates that he built a manhole for draining his storm water and the inflowing of 2327/135 and 136 through a small corner of his land.
 4. He claims that during the flooding of April/May 2024, the Plaintiff destroyed the man hole and the outgoing culvert on the other corner to block him from releasing storm water into the natural storm water passage without any notice but he restored it, after seeing the damage caused, which included collapsing of the perimeter wall.
 5. He contends that in August 2024, the Plaintiff destroyed the manhole and the outgoing culvert on the other corner to block him from releasing water into the natural storm water passage.
 6. The Plaintiff opposed the instant application by filing a replying affidavit sworn by ERICK KIVUVANI on 20th December 2024. He contends that Defendant's stone wall constructed between his property and the Defendant's parcel was defective and it has since collapsed. He claims that the said wall obstructed the natural flow of storm water, causing a blockage and as a result, storm water was redirected to his property while the Defendant's property remained unaffected.
 7. The application was canvassed by way of written submissions.

Analysis and Determination

8. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the following are the issues for determination: Whether a permanent injunction should issue restraining the Plaintiff or his agents from redirecting storm water drainage from flowing into the natural drainage system by destroying culverts including manhole. Whether a mandatory injunction should issue compelling the Plaintiff to open up holes in his perimeter wall including the culvert drainage point.
9. The Defendant in his submissions contends that the instant suit is a clear cut case that could be easily remedied by a permanent injunction which would restore the status quo by directing the Plaintiff to reconstruct the manhole and open up the blocked culvert drainage point. He argues that the Plaintiff is obligated to accept the natural storm water drainage patterns and has no legal right to alter the natural flow of storm water without obtaining the express consent of the affected parties. He reiterates that Section 111 of the National Environmental Management Act confers the court with powers to issue environmental restoration orders.
10. To buttress his averments, he relied on the following decisions: Bandari Investments & Co. Ltd v Martin Chiponda & 139 Others [2022] eKLR, Mailer Unisaa Karim v Edward Oluoch Odumbe



[2015] eKLR and Mburu v Kibara & 2 Others (Environment & Land Case 237 of 2021) [2022] KEELC 3226(KLR) and Tim Mwai, Carolyne Nasimiyu Lavatsa & Rima Teli v Extra Mile Limited [2018] KEELC 165 (KLR).

11. The Plaintiff in his submissions contends that the orders sought are of a permanent nature yet the substantive suit had not been heard. He argues that since the culverts are constructed on his property, the Defendant has no basis to complain about them. Further, that it is the Defendant's perimeter wall, which has caused defect to the drainage system.
12. To support his arguments, he relied on the following decisions: Kenya Power & Lighting Co. Ltd v Sherif Molana Habib [2018] KEHC 5027 (KLR).
13. In this instance, the Plaintiff had filed this suit vide a Complaint dated the 10th May, 2023 where he sought for the following orders:
 - a. An order of injunction directing the defendant to demolish the stone wall encroaching on the Plaintiff's parcel LR No. 2327/215 within such time as the Court may deem fit.
 - b. In the alternative to (a) above, the Plaintiff be at liberty to demolish the said stone wall at the Defendant's costs.
 - c. General damages.
 - d. A determination on the mesne profits payable to the Plaintiff as a result of the said encroachment.
 - e. Costs of this suit.
14. The Defendant opposed the suit by filing his Defence dated the 7th August, 2023 where he denied the averments in the Complaint except the descriptive. He highlighted that there has been a dispute between them culminating in a surveyor coming to the site. He denied encroaching on the Plaintiff's land and was insistent that he had no confidence in the survey report. He sought for this suit to be dismissed with costs. The Defendant has since filed the instant application seeking for the aforementioned orders.
15. On the first issue, the Defendant seeks a permanent injunction restraining the Plaintiff from redirecting storm water drainage from flowing into the natural drainage system by destroying culverts including manhole. It is not in dispute that both parties own their respective parcels of land and what is in dispute is the proper location of the boundary wall separating the two parcels of land. The Defendant claims the Plaintiff has blocked the walls and culverts culminating in the destruction of his perimeter wall, which fact is denied by the Plaintiff. I note the Defendant did not avail any evidence to demonstrate how the natural drainage system on his land is through the Plaintiff's parcel. I further note that the fulcrum of this suit actually revolves around Defendant's perimeter wall and a claim that it is faulty to the extent that it has been causing blockage. I opine that there will be need for viva voce evidence to be adduced by both parties to prove their respective allegations.
16. In Kenya Power & Lighting Co Limited v Sheriff Molana Habib [2018] eKLR the Court stated;

'A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.'



17. Based on the facts before me while associating myself with the decisions cited, at this juncture, I find that a prayer for a permanent injunction is premature as the Defendant has failed to tender adequate proof of his allegations.
18. As to whether the Defendant has established special circumstances to warrant issuance of a mandatory injunction compelling the Plaintiff to open up holes in his perimeter wall including the culvert drainage point to allow storm water drainage. I note the Defendant seeks for the Plaintiff to open culvert and holes which are actually on the Plaintiff's land. Further, the Plaintiff insists that it is actually the Defendant's stone wall constructed between his property and the Defendant's parcel, which was defective and has since collapsed. The Plaintiff has explained that it is actually the Defendant's wall which obstructed the natural flow of storm water, causing a blockage and as a result, storm water was redirected to his property. It is trite that for a party to seek mandatory injunction, there has to be special circumstances to warrant the granting of the said orders.
19. In *Nation Media Group & 2 Others v John Harun Mwau* [2014] eKLR, the Court of Appeal stated that:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”
20. From the facts before me while relying on the quoted decision, I opine that the Defendant has not provided proof nor any expert report that the natural drainage is through the Plaintiff's parcel of land, which the Plaintiff has interfered with, to his detriment, to compel the court to order him to give way pending determination of the dispute. It has emerged that the perimeter wall constructed by the Defendant has since collapsed. In the foregoing, I am hesitant to grant the orders of mandatory injunction as sought as there are no special circumstances demonstrated.
21. In the circumstances, I find the Notice of Motion application dated the 2nd September, 2024 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17th DAY OF MARCH 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Omagwa for Kibanga for Plaintiff

Ms Oloo holding brief for Ms Akello for Defendant

Court Assistant: Joan

