



**Ramogo & another v Integrity Holdings Limited (Environment & Land Case 173 of 2019) [2023] KEELC 20364 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20364 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 173 OF 2019  
BM EBOSO, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**JOEL RADUMA RAMOGO ..... 1<sup>ST</sup> PLAINTIFF**

**MARY ATIENO ONDORO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**INTEGRITY HOLDINGS LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The two plaintiffs are co-proprietors of land parcel number Dagoretti/Kinoo/6181 [parcel number 6181]. Erected on the parcel is a block of 32 residential apartments. Abutting the plaintiffs' land is land parcel number Dagoretti/Kinoo/5214 [parcel number 5214], owned by the defendant. At all material times, the defendant was undertaking construction of flats on its land. Aggrieved by the construction works, the plaintiffs brought this suit, seeking among other reliefs, a permanent injunctive order restraining the defendant against continuing with the construction works. One of the key issues to be determined in this judgment is whether the plaintiffs have made out a case to warrant issuance of a permanent injunction against the defendant. Before I dispose the issues that fall for determination in the suit, I will summarize the parties' respective cases, evidence, and submissions.

**Plaintiffs' Case**

2. Through their plaint dated 20/11/2019, the plaintiffs seek a permanent injunction restraining the defendant against continuing to undertake construction works on parcel number 5214; the sum of Kshs 140,000 per month from the date of filing suit until the date the defendant makes "correction" to its development; general and aggravated damages; an order directing the area OCS to ensure compliance with the orders of the court; and costs of the suit.



3. The plaintiffs' case is that they own land parcel number 6181 on which they have erected a block of residential flats for rental. The defendant owns land parcel number 5214 which abuts their land. At all material times, the defendant embarked on construction of residential flats on its parcel of land. The defendant's new development completely blocked part of their development and denied several units any form of light, rendering them completely dark. As a consequence, tenants started vacating their premises, and they faced the risk of not being able to service the loan they took to develop their property. Consequently, they sought the above reliefs.
4. The plaintiffs further contend that the development by the defendant has affected their premises in the following ways: (i) the development has completely blocked part of their premises and has denied several units any form of light, making their apartments completely dark; (ii) the development has invaded into the privacy of their premises because its windows face their side and open right into their space; (iii) the development was poorly supervised, is shoddy, and dangerously leans on the their premises; and the development has caused cracks on their premises, thereby endangering their tenants; and (iv) the development caused curing and rain water to seep into their premises, thereby destroying the floors, walls, paintworks, and tiles of their premises. The plaintiffs claim that as a result of the foregoing, the plaintiffs' tenants vacated at least 6 apartments, causing them to lose Kshs 140,000 per month in rental income. Despite them issuing a demand requiring the defendant to stop the construction, the defendant failed to heed the demand.

#### **Defendant's Case**

5. The defendant filed a statement of defence dated 16/12/2019. Its case is that the development on his parcel of land is in accordance with the architectural approvals from the County Government and any challenges or difficulties experienced by the plaintiffs are a result of their own doing. The defendant avers that it acquired all the necessary architectural approvals from the County Government of Kiambu before it began construction of a block of residential flats on its parcel of land. The defendant further avers that the challenges faced by the plaintiffs on their premises were as a result of their ignorance of the County Architectural Approvals, contending that the plaintiffs failed to keep the required distance between their building and the boundary. The defendant states that it was the plaintiffs who encroached onto its parcel and that the cracks formed on the plaintiffs' building are a result of poor supervision and poor workmanship. The defendant urges the court to dismiss the plaintiffs' suit with costs.

#### **Plaintiffs' Evidence**

6. Mary Atieno Ondoro testified as PW1. She adopted her witness statement filed on 20/11/2019 as part of her sworn evidence-in-chief. She produced the following 10 exhibits: (i) letter of authority dated 20/11/2019; (ii) copy of title for land parcel number Dagoretti/Kinoo/6181; (iii) ; photographs showing the plaintiffs' building (iv) documents showing loans taken by the plaintiffs; (v) an official search relating defendant's parcel of land title number Dagoretti/Kinoo/5214; (vi) copy of area map; (vii) photographs showing the defendant's construction; (viii) photographs showing the impugned construction; (ix) copy of tenancy agreement and deposit slip for rent; and (x) demand letter dated 11/11/2019.
7. It was PW1's testimony that Joel Aduma Ramogo and herself were the registered proprietors of the suit property, having purchased the land in 2016. PW1 added that upon acquiring the land, they built 32 residential flats on the land. Construction works on thier land was completed in 2018. She stated that the defendant purchased land parcel number Dagoretti/Kinoo/5214 in 2018. PW1 added that



the defendant began construction of flats on its property long after they had completed their building and tenants had moved in.

8. PW1 further stated that the defendant's development completely blocked part of their premises and denied several units any form of light, making their flats completely dark, and that the said development invaded into the privacy of their premises because the windows face their side and open into their space. PW1 added that the defendant's building dangerously leans on their premises and has caused cracks on their development. PW1 contended that the defendant's construction caused curing and rain water to seep into their premises and completely destroyed their floors, walls, paintworks and tiles. PW1 further contended that due to the foregoing, at least 6 tenants had moved from their apartments and tenants were not interested in taking up the said apartments, hence loss of rental income of Kshs 140,000 per month. PW1 urged the court to stop the construction by the defendant.

### **Defendant's Evidence**

9. The defendant led evidence by Charles Chiuru Kuria who testified as DW1. He adopted his witness statement filed on 1/12/2021 as part of his sworn evidence-in-chief. He stated that he was a director of the defendant company and the beneficial owner of land parcel number 5214. He further stated that the challenges faced by the plaintiffs in their premises were a result of their own ignorance of the County development approvals and their failure to keep the approved distance between their building and the boundary. He added that the cracks that formed on the plaintiffs' premises were caused by poor supervision and poor construction and that the cracks in the walls were as a result of the modifications which the plaintiffs made to the foundation in an attempt to rid the encroachment onto the defendant's parcel.
10. DW1 admitted that the plaintiffs approached him and raised concerns about the challenges they were facing in relation to his construction, which concerns the defendant addressed. DW1 added that despite the defendant offering to address any inconveniences the plaintiffs might have suffered as a result of the construction, the plaintiffs declined to cooperate. DW1 contended that the defendant adhered to all architectural approvals from the County Government during construction of the building on its parcel of land and that any challenges experienced by the plaintiffs were and are a result of their own doing.
11. DW1 produced the following 5 exhibits: (i) the defendant's building approvals by the County Government; (ii) photographs of the defendant's building and premises; (iii) plaintiffs' premises architectural drawings and approvals; (iv) photograph of the plaintiffs' building; and (v) a copy of the conversation between the plaintiff and himself.

### **Plaintiff Submissions**

12. The plaintiffs filed their submissions through M/s Kinyanjui, Kirimi & Company Advocates. They deciphered the following as the main issues that fell for determination in the suit: (i) Whether an order of permanent injunction should be issued restraining the defendant, its servants, workmen, licencees, agents or any other persons acting on their own behalf or on behalf of the defendant from howsoever continuing any works of building and construction, rebuilding, excavating, renovating, plastering, masonry works, concrete works, finish works, roofing, screeding, installation of windows, doors and or fixtures, and or continuing any forms of construction works whatsoever on title number Dagoretti/Kinoo/5214 and spreading debris or interfering with the plaintiffs' and their tenants' peaceful entitlement, possession and enjoyment of title number Dagoretti/Kinoo/6181; (ii) Whether the defendants negligently carried on construction on its premises, title number Dagoretti/Kinoo/5214 causing damage to the plaintiffs' property title number Dagoretti/Kinoo/6181; (iii)



- Whether an order should be issued directing the defendant to pay the sum of Kshs 140,000 per month from the date of filing this suit or such other appropriate sums until the defendant makes corrections to their building and constructions and makes the plaintiffs premises habitable ; and (iv) Whether general and aggravated damages should issue.
13. On whether an order of permanent injunction should be issued against the defendant, counsel submitted that it was evident from the court proceedings and from the evidence placed before the court that the defendant defied the order of the court, issued on 15/4/2021, stopping construction of the building on parcel number 5214. Counsel added that photographs produced as exhibit 8 showed how the defendant's building had encroached onto the plaintiffs' property.
  14. On whether the defendant negligently carried on construction on its premises thereby causing damage to the plaintiffs' property, counsel submitted that the defendant began construction of the flats on land parcel number 5214 long after the plaintiffs had completed construction on parcel number 6181. Counsel added that the defendant's construction completely blocked sunlight from reaching some parts of the plaintiffs' premises and dangerously leaned on the plaintiffs' premises, thereby causing cracks to form on the building, and caused water to seep into the plaintiffs' compound, completely destroying the floors, walls and paintwork. Counsel added that as a result of the foregoing, the plaintiffs suffered a loss of Kshs 80,000,000 and loss of rental income of Kshs 140,000 due to tenants vacating the premises. Counsel added that the plaintiffs pleaded with the court to halt the construction and as a result, the court issued interim orders to stop construction, which the defendant defied and proceeded to complete construction of the building.
  15. Counsel further submitted that the defendant did not produce an environmental impact assessment report and that during cross-examination, DW1 confessed that the defendant was permitted to build five floors but constructed seven floors in violation of the approval. Counsel argued that the defendant should be held accountable in accordance with the principle of strict liability espoused in the case of *Rylands v Fletcher* [1861-73] ALL ER REP1. Counsel further argued that the defendant's allegation that its activities amounted to reasonable use of land for a lawful purpose was not an automatic defence to strict liability under the *Rylands* rule. Counsel relied on the case of *David M. Ndeti v Orbit Chemical Industries Limited* [2014]eKLR to buttress this point. Counsel submitted that it was proved and confirmed during trial that the defendant had no hoards around his construction site nor did he have a protective net, adding that during construction, the defendant would constantly cause debris to fall into the plaintiffs' property.
  16. On whether an order should be issued directing the defendant to pay the sum of Kshs 140,000 per month from the date of filing the suit, counsel submitted that the defendant's action of constructing its building too close to the plaintiffs' building denied some units in the plaintiffs' building natural light and as a result, some tenants vacated the building. Counsel added that the plaintiffs continue to suffer a loss of Ksh 140,000 per month as a result of tenants refusing to rent the said units. Counsel argued that the plaintiffs produced evidence of the tenancy agreements together with a rent deposit slip from one of their former tenants in relation to one of the affected units. Counsel relied on the cases of *Hurlingham Park Limited v Kings Developers Limited & Another* [2020]eKLR, *Anna Wairimu v Jane Wairimu Mwangi* [2018]eKLR and *Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another* [2013]eKLR.
  17. On whether general and aggravated damages should issue, counsel submitted that an award of general damages of Kshs 2,000,000 would sufficiently compensate the plaintiff for the negligence occasioned by the defendant. Counsel relied on the cases of *Professor David M. Ndeti v Orbit Chemical Industries Ltd*[2014]eKLR and *Kenya Shell Limited v Milkah Kerubo Onkoba* [2010]eKLR to buttress this point.



## Defendant's Submissions

18. The defendant filed its submissions on 5/6/2023 through M/s Kairu Kimani & Company Advocates. They deciphered the following as the main issues that fell for determination in the suit: (i) Whether the plaintiff had demonstrated and proven the conditions for grant of orders of permanent injunction (ii) Whether the defendant is liable to pay a sum of Kshs 140,000 per month from the date of institution of this suit; (iii) Who should bear costs of this suit.
19. On whether the plaintiff had demonstrated and proven the conditions for grant of orders of permanent injunction, counsel submitted that the plaintiffs had not satisfied the conditions for the grant of an injunctive order and that the plaintiffs' case lacked merit. Counsel added that the defendant's building was 95% complete at the time of institution of the suit and was complete and already occupied at the time the orders of temporary injunction were issued. Counsel argued that the purpose of an order of injunction is to preserve or prevent something from taking place, adding that in the present case there was nothing to preserve or prevent, hence issuing the order would be in vain. Counsel further argued that the plaintiffs failed to prove their case. Counsel relied on the cases of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018]eKLR and Moses M Wairimu & 24 Others v Kenya Power & Lighting Co Ltd & Another [2020]eKLR.
20. Counsel submitted that the remedy of injunction is an equitable remedy that is granted to a deserving party, adding that the plaintiffs did not deserve one. Counsel relied on the case of Darad Limited & Another v Kenya Power & Lighting Co Ltd [2002]eKLR.

“I must add that an injunction is an equitable remedy and accordingly it will not issue even if the necessary conditions are satisfied if it is proved to the court that the applicant is undeserving of equitable relief.”
21. Counsel added that it emerged during the trial that the plaintiffs had violated the approval granted to them by the County Government. Counsel contended that the plaintiffs' structure was illegal hence they did not deserve the relief of an injunction.
22. On whether the defendant is liable to pay a monthly sum of Kshs 140,000 from the date of institution of the suit, counsel submitted that the plaintiffs had not discharged the burden of proof to justify an award of the amount. Counsel argued that the lack of sufficient evidence from the plaintiffs left a lot of questions unanswered and that the court should not make a determination based on assumptions.
23. On the issue of costs, counsel relied on Section 27 (1) of the *Civil Procedure Act*, Cap 21 Laws of Kenya and the principle that costs follow the event. Citing the decision in the case of Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others [2013] eKLR, counsel urged the court to award costs to the defendant.

## Analysis and Determination

24. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common statement of issues to be determined by the court.
25. Taking into account the parties' pleadings, evidence and submissions, the following are the key issues that fall for determination in this suit: (i) Whether the defendant's development violates the relevant physical and land use planning and environmental laws; (ii) Whether the plaintiffs' development violates the relevant physical and land use planning and environmental laws. (iii) Whether the relief of



- a permanent injunction is merited by the plaintiffs; (iv) Whether the reliefs of special damages of Kshs 140,000 per month, general and aggravated damages are merited by the plaintiff; and (v) What order should be made in relation to costs of the suit. I will dispose the five issues sequentially in the above order. The first and the second issues raise related questions. They will be disposed simultaneously.
26. The plaintiffs came to court contending that the defendant's development had adversely affected their existing development. They contended that the defendant's development had completely blocked natural light from part of their development and as a consequence, a number of units in their development did not enjoy natural light. They made several other allegations relating to violation of physical, development, land use and environmental requirements. The defendant made counter allegations to the effect that the plaintiffs had violated the relevant development laws by failing to keep the required distance between their development and the beacons hence they were the cause of the problem they were facing. The defendant faulted the plaintiff for exceeding the approved floors in that they were authorized to develop a block of five floors, yet they illegally developed a block of six floors.
  27. The plaintiffs led evidence by one witness [the 2nd plaintiff] who testified as PW1. During cross-examination, she conceded that whereas the approval they were granted was for the erection of a block of five floors, they had erected six floors. There was no evidence of any development approval relating to the six floors. Further, PW1 stated that the distance between the windows of their building to the boundary wall was only one [1] metre.
  28. On his part, the defendant testified during cross-examination that the architectural approval he obtained allowed him to do five floors. He contended that he erected seven floors because the change of user approval allowed eight floors. It clearly emerges from DW1's evidence that there was no development approval for the seven floor block that the defendant erected.
  29. Both parties did not exhibit the environmental impact assessment licences issued to them in relation to the two developments. Neither of them led evidence by relevant experts in relation to the rival allegations of tortious transgressions. That is not all.
  30. It is clear from the evidence of PW1 and DW1 that both developments were erected in violation of the mandatory requirements of the physical, land use planning, and environmental management laws. The plaintiffs were authorized to erect a block of five floors. They, however, erected a block of six floors. The defendant was authorized to erect a block of five floors. It, however, erected a block of seven floors. Both structures are therefore illegal because neither of them has a development approval of the existing structures of six and seven floors respectively. They did not adhere to the requirements for keeping a reasonable distance between the boundary and the developments to allow natural light and air into their developments. Neither of them exhibited NEMA approvals. Both developments were erected in contravention of the law. That is my finding on the first and second issues.
  31. Is the relief of permanent injunction available to the plaintiffs? The plaintiffs came to court to seek redress in relation to a development that they erected in contravention of the relevant laws. Whereas the court does not condone disorder, I do not think the plaintiffs deserve an injunction in the present circumstances. They should first ensure that their development complies with the relevant laws before they seek protection of this court.
  32. The plaintiffs' plea for damages of Kshs 140,000 per month and for general and aggravated damages will fail for two reasons. First, the structure in respect of which they seek damages on account of environmental transgression by the defendant exists as a transgression against the relevant physical planning, land use, and environmental management laws. Secondly, during cross examination, PW1 was categorical that she did not know the quantum of the loss which they had suffered. The court cannot pluck a figure from the air and award the plaintiffs as loss of monthly rental income. For the



above reasons, the plea for damages in the sum of Kshs 140,000 per month and for an award of general and aggravated damages fails wholly.

33. On costs, both parties are in breach of the relevant physical planning, land use planning, and environmental management laws. None of them deserves the award of costs. They are in court because they all chose to disregard the law.
34. In the end, this suit is dismissed for lack of merit. Parties shall bear their respective costs.
35. Lastly, the Kiambu County Executive Committee Member in Charge of Physical and Land Use Planning and the Director General of NEMA shall be given a copy of this Judgment to enable them take necessary steps to protect the general public.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25TH DAY OF SEPTEMBER 2023.**

**B M EBOSO**

**JUDGE**

