



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 552 OF 2001

JASWINDER SINGH JABBAL.....PLAINTIFF

VERSUS

MARK JOHN TILBURY.....1ST DEFENDANT

MAGDAELINA MARIA HEMMING.....2ND DEFENDANT

(Being sued on behalf of the Estate of **R.J. TILBURY**)

JUDGMENT

1. Vide a further amended plaint dated 3rd February, 2010, the Plaintiff as the owner of a residential house situated on L.R. No. 7741/306 Kitsuru Road sued the Defendants as the representatives of the estate of the late R.J. Tilbury who was the owner and occupier of the adjoining land at the material time.
2. The Plaintiff's complaint is that the trees growing on the Defendants land have overgrown over the Plaintiff's Land thereby becoming a nuisance and causing damage to the Plaintiff's buildings.
3. That since the year 1997 the Defendants through a generator installed at their premises have released offensive, noxious, unwholesome smoke, fumes, vapour gases and noise to the Plaintiff's property.
4. That due to the aforestated nuisance, the Plaintiff and his family have been unable to occupy the premises and have suffered inconvenience, loss and damage.
5. The Plaintiff prays for the following order:

“(a) A mandatory injunction requiring the Defendants to remove the said trees and end the nuisance.

(b) Special damages in the sum of Ksh.25,000/=.

(c) An injunction to restrain the Defendants by himself/themselves, his/ their servants or agents otherwise howsoever from the continuance or repetition of the nuisance or the commission of any nuisance of a like kind in respect to the same property.

(d) General damages for inconvenience and discomfort.

Leakage to guesthouse walls and roof	Ksh.100,000/=
Damaged celotex panels on the domestic staff quarters	Ksh.130,000/=
Fallen ceiling panels with the guest wing Laundry area	<u>Ksh.100,000/=</u>
	Ksh.1,180,000/=
Professional Fees @ 15%	Ksh.177,000/=
Incidental costs @10%	<u>Ksh.118,000/=</u>
	<u>Ksh.1,475,000/= (i)</u>
ii. <u>Loss of Rental Income</u>	
Loss of rental income	Ksh.13,550,000/=
Less voids (vacancies) outgoings and operation costs @ say 40%	<u>Ksh.5,420,000/=</u>
Total loss of rental income	<u>Ksh.8,130,000/= (ii)</u>
Subtotal	Ksh.9,605,000/=
iii. <u>Incidental costs</u>	
Legal fees – lawyer, court filing costs extra security, guarding services, police services, area chief Miscellaneous costs all @ 10%	Ksh.960,500/=
Subtotal 2	Ksh.10,565,500/=
iv. <u>Other Losses:</u>	
Add 15% compensation for other losses Loss of reputation/Social standing, Psychological stress, disturbance Etc.	<u>Ksh.1,584,825/=</u>
Grand Total	<u>Ksh.12,150,325/=</u>
But say	Ksh.12,000,000/=”

12. The valuer conceded during cross examination that his report did not contain the market rates payable during the period in question but gave the average rent increment as Ksh.50,000/= per year and

professionals fees at 15%. The valuer however conceded that he did not consider the actual market rents payable at the time and nor were there any quotations from the professionals. There were also no documents in support of the security costs.

13. The defence called one witness, DW1 Mark John Tilbury, the representative of the estate of his late father, Mr. R. J. Tilbury who he stated passed away in the year 2003. PW1's evidence was that he was brought up in the Defendants' compound in question and he knew the Plaintiff as a neighbour. That the trees in question were boundary trees that fell on both sides and existed even before the demarcation of the land. That the boundary dispute started in the year 2000, four years before the senior Mr. Tilbury passed away. That the dispute was resolved through the then Provisional Administration and that is when the trees were pruned and the boundary features in question removed.

14. The Defendant blamed the Plaintiff for building the houses too close to the boundary wall and further stated that the trees were in existence when the construction works commenced. That following mediation, the senior Mr. Tilbury was pruning the trees to the Plaintiff's satisfaction and he was shocked that this case had not yet been dropped.

15. The Defendant's further evidence was that the generator has a sound proof cover and the little noise emanating from the same is within legal limits. That the generator usage was about 87 hours a year when there is no electricity in the area which usage is low and therefore not a nuisance. He termed the damage to the Plaintiff's property as due to lack of maintenance.

16. On 24th July, 2003 a statement of agreed issues dated 18th July, 2003 duly signed by the counsel for the respective parties was filed. The issues have been stated as follows:

“1. Whether the Plaintiff's premises adjoin the Defendant's premises.

2. Whether there are growing on the Defendant's land trees some of which are within few feet of the Plaintiff's house.

3. Whether the trees have penetrated and encroached on the land on which the Plaintiff's house is built.

4. Whether the said trees have fallen on the Plaintiff's house causing damage to the roof and a nuisance to the Plaintiff.

5. Whether there are noxious, unwholesome smoke, fumes, vapour gases and noise from the Defendant's premises which are offensive to the Plaintiff.

6. Whether the Plaintiff is entitled to any damages.”

17. From the evidence of both parties it comes out clearly that the Plaintiff's plot adjoins the Defendants'. That has come out from all the witnesses who have testified herein.

18. It is also abundantly clear from the evidence of all the witnesses herein that there are trees growing on the Defendants' land which overhang over the Plaintiff's house. Both the Plaintiff (PW1) and the valuer (PW2) gave corroborative evidence that the trees had overgrown and overhang over the Plaintiff's premises. The valuer in his report on page 5 gave the distance of 30 metres as the area the trees overlapped into the Plaintiff's compound. Although the Defendant blamed the Plaintiff for building the house too close to the boundary features, there was no evidence called from any formal authority to confirm that position. The valuer's professional opinion in that regard remains uncontroverted.

19. The Plaintiff's evidence that the said trees have encroached on his land and the generator emitted noxious fumes is given credence by the Defendant's evidence that the trees were eventually cut down and the generator moved in the year 2003 following mediation.

20. The evidence from the Plaintiff's side has established that the trees in question encroached on his land and caused damage to his house and the boundary wall and that the generator interfered with the environment in his compound. The Plaintiff in this court's view has proved his case on a balance of probabilities.

21. In the case of **Rylands and another v Fletcher (1861-1873) ALL ER**, it was held that:

“ if a person brings or accumulates on his land anything e.g water, or filthy, or noxious fumes - which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been and whatever precautions he may have taken to prevent the damage.”

22. In the case of **Davey v Harrow Corporation (1958) 1 QB 63**

“...it must be taken to be established law that if trees encroach, whether by branches or roots, and cause damage, an action for nuisance will lie...”

23. The next question is what orders is the Plaintiff entitled to. It is evident from the evidence from both sides that the trees were trimmed and the generator moved in the year 2013, therefore prayer No. (a) of the plaint for the removal of the trees and end the nuisance has been overtaken by events. There is no evidence of repetition of the nuisance.

24. Prayer No. (b) for special damages succeeds. The pleaded amount of Ksh.25,000/= is way far below the valuers estimation. Although the valuer went into a lot of details to assess the damages at Ksh.12,000,000/=, parties are bound by their pleadings. As stated by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission and Leonard Okwira & the Respondents Stephen Mutinda Mule, Thomas Malinda Musau, Stephen Ndambuki Muli and John Nthuli Makenzi C.A 219/13**

“...we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”

25. On the prayer for general damages, inconvenience and discomfort, the Plaintiff's evidence has established that the trees and the generator were a nuisance as analysed above. The Plaintiff is entitled to damages. In assessing the quantum of damages, I have looked at the following authorities:

(a) **Tim Mwai & 2 others v Extra Mile Limited [2018] eKLR** where an award of Ksh.1,500,000/= was made as general damages for nuisance caused by diversion of storm water drainage thereby resulting in disruption of peaceful enjoyment of the property.

(b) **Loyford Gitari Leonard v Weru Tea Factory [2017] eKLR** where an award of Ksh.2,000,000/= was made as general damages for nuisance caused by trees, animals, smoke, dust etc.

26. In the case at hand, I assess general damages for the inconvenience and discomfort suffered by the Plaintiff at Ksh.1,000,000/=. Special damages awarded at Ksh.25,000/=. The total comes to Ksh.1,025,000/=.

27. In the upshot, I hereby enter judgment for the Plaintiff against the Defendants for the sum of Ksh.1,025,000/= interest and costs.

Dated, signed and delivered at Nairobi this 28th day of March, 2019.

B. THURANIRA JADEN

JUDGE