REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 36 OF 2013

NAKURU INDUSTRIES LIMITED ..... PLAINTIFF

VERSUS

S. S MEHTA & SONS ..... DEFENDANT

JUDGEMENT

By way of the Plaint dated 23rd April 2013 **NAKURU INDUSTRIES LIMITED** (the Plaintiff herein), which is a limited liability company registered in Nakuru prays for judgment against **S. S MEHTA & SONS** (the Defendant herein) for the following:-

"(a) General damages for Trespass

(b) Mesne profit at the rate of 50% per month from the date that the Defendants started excavating the said pieces of land to the date that they stopped

(c) Special damages amounting to Ksh 19,568,640.00

(d) General damages for Nuisance

(e) Punitive Damages

(f) Costs of this suit

(g) Interest on (a) (b) (c) (d) and (e) above at court rates from the beginning of the suit to judgment and until full payment".

(h) ***Any other relief the court may deem fit to grant.***

This suit was fully heard by **Hon. Lady Justice Hellen Omondi** who was later transferred to Bungoma High court. I then took over the matter for purposes of preparing the judgment. The suit was disposed of by way of vive voce evidence. The plaintiff called two (2) witnesses in support of their case and the Defendant also called two (2) witnesses.

BACKGROUND

The plaintiff relied upon their Plaint filed on 26th April, 2013 in which the plaintiff stated that it was the

registered owner of the properties known as **LR. No 12570/183, L. R No. 12570/184 and L.R No. 12570/189** (hereinafter referred to as the **'suit land'**. The Plaintiff claimed that the Defendant had entered into and trespassed on the suit land and had proceeded to carry out acts of excavation thereon without the authority and/or consent of the plaintiffs.

PW1 RAJ .P. SHAH the Managing Director of the plaintiff company testified in court on 28th January 2014. **PW1** produced in court as evidence of ownership of the suit land the original Title Deeds for the three (3) parcels of land **P. Exh 1, 2 and 3**. He informed the court that the suit land is situated along the Nakuru/Nairobi Highway behind Mediheal Hospital.

PW1 told the court that he was alerted about the activities of the plaintiff by a **'Mr. Chokshi'** who came to his offices and verbally apologized on behalf of the Defendants for having trespassed on the plaintiffs land and excavated murram and stones therefrom: **'Mr. Chokshi'** kept promising to rectify the matter but never paid the promised compensation. The plaintiffs then decided to file this suit.

PW2 MARY WANGUI GICHANGA was a surveyor who was contracted by the Plaintiff to carry out a valuation of the extent of the damage to the suit land. In her evidence **PW2** stated that she found that 24,480 cubic meters of material had been excavated from LR No. 12570/183 and 13,152 cubic meters from LR No. 12570/18... She Valued one cubic metre at Ksh 520/=. Thus the total value of material removed in her assessment was Ksh 19,568,640/=

The Defendant relied upon their defence dated 10th June, 2011. The defendants case was that they had been awarded a tender by the Kenya National Highway Authority to construct the Lanet/Ndundori Road. In order to meet their requirement for murram the defendants hired the properly adjacent to the suit land from one **Mr. William Gakaru M. Wamaru** from which they excavated the murram required for the project. Later in November, that year **'Mr Gakuru'** engaged the defendants to construct a road next to his school, **St. Francis of Assisi Academy** which also neighboured the Plaintiff's properties. The defendant alleged that the Plaintiff's grievance arose not from the fact that their properties had been trespassed on but from the fact that the defendant failed to obtain the Plaintiff's consent before commencing the construction of the road to the Academy.

DW1 HITASH CHOKSHI a Civil Engineer working with the defendant in his testimony insisted that there had been no encroachment into the suit land. In his statement dated 5/6/2013 **DW1** admits having mobilized their machinery but only to build a community road at the request of Mr. Wamaru. He claimed that when the plaintiff complained about their presence on the site the defendant immediately pulled out their machines without doing any work.

The defendant alleged that the suit land are public lands which are utilized by the public as road and as a dumping site for excavating ballast.

DW2 SILAS SALATON was an insurer who was engaged by the defendant to determine how far the defendant had encroached onto the adjacent properties. His findings, contained in his report dated 27/6/2013 were that LR No. 12570/183 had an open road running through it which road was used by the public. There was evidence of excavation of pebbles on that parcel of land. With respect to L.R No 12570/184 there was no evidence of excavation but there was a public road running through it. Finally L.R No. 12580/189 had a public road running through it had evidence of excavation on it and was also used as a dumping site. The defendant thus felt that they ought not to be held liable for trespass in a situation like this where all three properties were already being used by the public.

Upon conclusion of the ***'vive voce'*** hearing the parties were directed by the court to file their written submissions. The Plaintiff submitted that the Defendants actions on their land amounted to both nuisance and trespass. It amounted to nuisance because it interfered with the Plaintiff's ordinary use of the land as commercial property. Here the Plaintiffs relied on the case of **MWITA MERENGO Vs JOSEPH TUNEI MARWA & 2 OTHERS [2012]eKLR.** The defendants actions were said to amount to a trespass because it constituted an **'unjustifiable intrusion by the one person upon the land in the possession of another'** ***(See Clerk & lindel on Torts 7th Edition 17-07).***

The Plaintiff submitted that it had been able to prove the diminution of the value of their property as Ksh 19,568,640/=. This value was based upon the **Institute of Quality Surveyors of Kenya Journal on Constitution Costs of Kenya**, which sets the costs of handcore materials, transport and labour for fixing at the cost of Ksh 980/= per cubic metre. A copy of this report was annexed to the submissions.

The Plaintiff further submitted that as a result of the defendants, unlawful activities on the suit property, it was unable to utilize the land for commercial purposes for the two years that it remained wasteland. The Plaintiff submitted that they were therefore entitled to **'mesne profit'** at the rate of 50% from the date when the defendant commenced excavation up to the time when it ceased.

On their part the Defendant submitted that Section 109 of the **Evidence Act Cap 80 Laws of Kenya** places upon the Plaintiff the burden to prove its case on a balance of probability. The Defendant stated that the plaintiff had failed to meet this threshold by failing to avail cogent evidence in proof of its allegation of trespass.

The Defendant maintained that the suit properly was in actual fact waste land, which was used by the public as access roads and a dumping site. As such there could not be deemed to have been any trespass on that land.

Secondly the Defendant cast doubt on the report prepared by **PW2** quantifying the loss allegedly suffered by the plaintiff maintaining that said report was not credible. They further alleged that the report was inconsistent as it failed to prove that any material had been excavated from the suit land, much less the value of the material excavated (in any).

From the evidence and the submissions on record three main issues arise for determination in this suit.

1. Did the Defendant trespass into the suit land

2.Did the Defendant unlawfully conduct excavation and remove material from the suit land

3. What amount (if any) is payable as damages for such excavation?

1. Did the Defendant Trespass upon the suit land

PW1 the Managing Director of the Plaintiff Company in his evidence stated that he came to learn of the presence of the Defendant on the suit land form a **'Mr. Chokshi' DW1** who was the manager employed by the Defendant Company. **PW1** told the court that when he came to see him, **DW1** apologized for the intrusion onto the plaintiff's land and promised to make amends by way of compensation. After receiving this information from **DW1**, **PW1** went to the suit land where he found the Defendants machinery on site and noted that some excavation had taken place.

The Defendants did not tender any evidence to counter and/or controvert the testimony of **PW1**. All that **DW2** had to offer by way of defence was that the suit land was being used by the public as access roads and that other parties had also excavated pebbles form the same land. **DW1** also claimed that Plot No. 189 was used as a dumping site. He therefore concluded that this was public land which was accessible and available to anyone.

These arguments by the Defendant does not in my view hold any water. The Plaintiff produced as exhibits in court their Title Deeds **P. Exb 1, 2 and 3**, which provided incontrovertible proof that the plaintiff was in fact the registered owner of the suit land. No evidence was put forward to challenge the authenticity and/or the validity of the Title Deeds. Section 26 of the **Registration of Land Act 2012**, makes it clear that a document of Title is prima facie evidence of proprietorship of land.

Secondly the mere fact that the Public had formed a habit of using the suit land did not convert the same into public land. The actions of other members of public in accessing and excavating the plaintiff's land was unlawful. The defendant cannot rely on the unlawful actions of others to legitimize their own

intrusion into the plaintiff's land. Given that the plaintiff have proved that it was the legal and registered owner of the suit land, the Defendant was obliged to obtain the consent and authorization from the Defendant before entering into and excavating murram from the suit properties.

In **Clerk & Lindell on Torts (17th Edition)** para 17-01 Trespass is defined thus

> ***"An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass"***

I therefore find on a balance of probabilities that the Defendants did enter onto the Plaintiff's land without its consent and this action amounted to trespass.

(ii) Did the Defendant unlawfully excavate and remove material from the plaintiffs land

The answer to this question has largely been answered by the discussion in (i) above. There is proof that the suit land belonged to the plaintiff. **PW1** made a visit to the land after being alerted by **DW1** and stated that he found the Defendant machinery on site. He also noted signs of excavation. The Defendant tried to justify their activities on the suit land by arguing that other persons were also excavating soil and pebbles therefrom. This argument has been rejected as two wrongs do not make a right. **PW2** a surveyor engaged by the plaintiff went to the suit land. He confirms that he found that excavation had been conducted on two of the plots. He prepared a report to this effect. I have no doubt that the Defendant were excavating on the suit properties on order to obtain murram to feed the road works they were undertaking in that area. The Defendant had neither sought nor obtained the consent of the Plaintiff to so excavate. Their actions on the suit land were therefore unlawful.

(iii) Is the Plaintiff entitled to damages arising from the Defendants actions on the suit land"

In their Plaint the Plaintiff made a prayer for **'General Damages for Nuisance'**. The Plaintiff contended that the activities of the Defendant upon the suit land amounted to nuisance. In **Clerk and Lindsell on Torts** (supra) page 1354 para 24-01 **'nuisance'** is defined as

> ***"an act or omission which is an interference with, disturbance of or annoyance to, a person's rights used or enjoyed in connection with land. It is caused, usually when the consequences of a person's actions on his land are not confined to the land, but escape to his neighbours' land causing an encroachment and causing physical damage or unduly interfering with the neighbours use and enjoyment of his land"***

The tort of nuisance is distinguishable from that of trespass. This is because trespass is actionable per se without any proof of damage whereas in a claim for nuisance, there must be proof of some damage.

Although as I have found earlier there exists proof that the Defendant did enter upon the suit land and excavated material without the consent of the plaintiff, there exists no evidence or proof that the Defendants actions in any way caused interference with the plaintiff's use or occupation of the suit land.

The Plaintiff was not occupying the land at the material time. No doubt this is why persons other than the Defendant took the liberty to access and excavate that land. There is no evidence that the plaintiff was at the material time utilizing the land for any commercial purpose. The plaintiff failed to demonstrate that the Defendants actions deterred or prevented him from utilizing the suit land in any intended manner. Therefore I find that the tort of nuisance has not been proved and the plaintiff is not entitled to any award of general damages for nuisance.

The plaintiff in this suit has also made a claim of **'mesne profits at the rate of 50% per month from the date the Defendants started excavating on the said pieces of land to the date that they stopped'** The plaintiff also prayed for special damages of Ksh 19,568,640/= as well as punitive damages.

In tort damages are awarded as a way to compensate a plaintiff for the loss he had incurred due to a

wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was in before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.

Halsbury's 4th ed, Vol 45, at para 26, 1503 provides as follows on computation of damages in an action of trespass:

> ***(a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.***
>
> ***(b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.***
>
> ***(c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.***
>
> ***(d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.***
>
> ***(e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.***

In the case of **DUNCAN NDEGWA –Vs- KENYA PIPELINE HCC No 2577 OF 1990** it was held

> ***"The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principles is to put the claimant in the position he was prior to the infliction of the harm"***

In the present case there was actual damage to the plaintiff's land arising from the acts of excavation conducted thereon by the Defendant. The Plaintiff is therefore entitled to compensation for the value of the soil that had been removed from the suit land. The plaintiff's through the report of the quantity surveyor **PW2** claimed Ksh 19,568,640/= as the value of the soil removed.

On their parts the Defendants objected to the report presented by **PW2**. Firstly they argued that it was not clear exactly which property was assessed. In the report **P. Exb 5**, **PW2** stated that she evaluated plots No. LR 12570/188 and 189. However in the body of the report it is indicated that the parcels of land which were valued were L.R Nos 12570/182 and 189. Due to this discrepancy the Defendant submitted that the report was contradictory and ought not to be relied upon by the court.

However whilst giving her evidence in court and under cross-examination **PW2** clarified that her instructions related to the plots L.R No. 12570/188 and 189. She had no instructions to evaluate L. R No. 12570/183. I find that this misquoting of the Plot Numbers was a genuine error which does not affect the validity of her report.

The second objection raised by the Defendant to this report was regarding the manner in which the figure of Ksh 19,568,640/= was arrived at. **PW2** told the court that her computation of Ksh 520/= per cubic metre is based on the standard rates set by the **'Institute of Quantity Surveyors'.** No document authored by this body was annexed to the report to confirm that these were the set rates. Thus the court has no way of knowing if this amount of Ksh 520/= is an established figure or one just picked out of the air by **PW2**. The principle in law is that **'he who alleged must prove'**. The onus thus lay on the plaintiff through its witness to prove that the standard and accepted rate in Kenya was 520/= per cubic metre. This was not a matter of which the court could take judicial notice under Section 60(1) of the Evidence Act, it was a fact

in issue and one which required tangible proof.

The claim for compensation for the soil taken away from the suit land was a claim for special damages which must be specifically proved. This required proof of the exact quantity of material removed and specific proof of the value of the material unlawfully removed. The Defendant failed to prove upon a balance of probability that the **Value** of the material removed was as claimed. The document titled **'Official Journal of the Institute of Quantity Surveyors of Kenya'** which was annexed to the Defendant's submissions cannot be relied upon by the court as it was not produced as an exhibit during the hearing. In any event that document would have provided no clarity on the question of the value of the material because it provided for current construction costs and not the rates for computation of the value of excavated material. I therefore find that this claim for special damages has not been proved satisfactorily as no evidence was availed to support the figure claimed and I disallow the plaintiff's claim for Ksh 19,568,640/=.

The plaintiff also made a prayer for **'mesne profits'**. Mesne profits are also a form of special damages which must be specifically pleaded and proved. In this case the plaintiff did not plead a specific amount as mesne profits. Instead it sought an unspecified amount to be calculated at the rate of 50% from the date when the defendants commenced excavations to the date when said excavations ceased. The dates referred have not been mentioned and are not clear at all. The sum against which the 50% was to be applied was not provided by the plaintiff. Ultimately the exact sum being sought by the plaintiff was not clear. As such this claim for mesne profits must fail.

Finally the Plaintiff made a prayer for **'Aggravated Damages"** in Clerk & Lindesell on Torts (supra) at Page 874 para 17-67, aggravated damages may also be awarded except where the wrong is an oppressive, arbitrary or unconstitutional action by the government, or where the wrongdoer's conduct has calculated on a profit exceeding the compensation payable to the plaintiff. But this latter category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which either he could not obtain at all or obtain except at a price greater than what he wants to put down. On the other hand, it is permissible to award aggravated damages, for example, a trespass accompanied by infliction of injury on the Plaintiff's proper pride and dignity, or where the trespass is accompanied by noise and disturbance. What is not permissible is to punish a trespasser by awarding damages as a mark or retribution for his malice or ill manners.

Maraga, J as he then was held in **ABDULHAMID EBRAHIM AHMED VS MUNICIPAL COUNCIL OF MOMBASA [2004] eKLR:-**

> ***"Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute"***

The plaintiff did not demonstrate that it fell within any of the situations contemplated above to justify an award of punitive damages as against the Defendant. Thus this claim for an award of aggravated damages is also dismissed.

The upshot is that this suit succeeds only in so far as the Plaintiff's claim against the Defendant for Trespass. The tort of Trespass is one which is actionable without proof of any damage. There exist legion authorities in law regarding the amount which a court may award as general damages. In **ANTHONY KOLANI MWANYA 16 Vs MWAKA OMAR ALI [2011]eKLR** the Court awarded a sum of Kshs 50,000/= as general damages for trespass. Similarly in **JAMES NJERU Vs ERICSON KENYA LIMITED [2015]eKLR** the Court found that damages in a case of trespass where trenches had been dug across the plaintiff's land would be assessed at Ksh 50,000/=. Finally on this point in the case of **PHILIP ALUCHIO Vs CRISPINUS NGAYO [2014]eKLR HON. JUSTICE E. OBAGA** held as follows:

"..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less .....

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass...."

The court proceeded to award a nominal figure of Ksh 100,000/= as damages for trespass.

A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However as I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.

Dated in Nakuru this 22nd day of November, 2016.

Maureen A. Odero

Judge