



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 806 of 2012

GRACE NYANGWECHI FAY.....PLAINTIFF

-VERSUS-

DAVID ACHANGO.....1ST DEFENDANT

ANTHONY MWANGI.....2ND DEFENDANT

RULING

I have before me the Notice of Motion application by the Plaintiff dated 5th November, 2012 brought under the provisions of order 5, Rule 1, Order 40 Rule 2(1) of the Civil Procedure Act and all enabling provisions of the law. The application inter alia seeks the following orders:

1.
2. That the defendants by themselves, their agents and/or servants be restrained by an order of this court from carrying out quarrying activities on land parcel No. Ngong/Ngong/56558 which activities are directly impacting land parcel No. Ngong/Ngong/49435 till this matter is heard and determined.
3. That the officer commanding Kararapon Police Post do ensure compliance with this order.

The application is supported on the grounds set out on the face of the application and on the grounds set out in the sworn affidavit of Grace Nyangwechi Fay the plaintiff herein in support of the application.

Briefly the plaintiff is the registered proprietor of land parcel Ngong/Ngong/49435 measuring approximately 1.21 Ha and complains that the defendants by themselves or their agents or servants are carrying out quarrying activities on land parcel Ngong/Ngong/56558 that is adjacent to the plaintiffs land and that the defendants have encroached on to the plaintiffs land and that he quarrying activities have adversely affected the plaintiffs land. The plaintiff avers that the quarrying activities by the defendant occasioned damage to her adjacent property resulting in the collapse of her perimeter wall and further that the quarrying has led to encroachment and damage extending about 2 metres along the boundary line. The plaintiff avers that she will suffer irreparable loss and damage unless the defendants are restrained from continuing with the quarrying activities.

The defendants for their part oppose the plaintiff's application and have filed a replying affidavit sworn by David Achango the 1st Defendant. The defendants contend that they are carrying out quarrying activities on Land Parcel Number Ngong/Ngong/56558 with the consent of George Meitamei Nangurai the original proprietor of Land Parcel Number Ngong/Ngong/289 out of which the Plaintiff's land Parcel

Ngong/Ngong/49435 and Ngong/Ngong/56558 were excised.

The defendants aver that before carrying out the quarrying activities they conducted the necessary environmental impact assessment as per the initial environmental audit to the Replying Affidavit of the 1st Defendant and marked 'DA2'. The defendants deny causing any damage and/or encroaching onto the plaintiffs parcel of land as alleged by the plaintiff and state that the plaintiff's fencing was damaged by heavy rains.

The defendants contend they have operated the quarry within the recommendations of the environmental impact, assessment report and that the neighbours were duly consulted before the quarrying was started and they never objected.

As per the lease agreement the defendants commenced the quarrying activities in August 2005 and from the annexures to the 1st Defendants replying affidavit there was some form of public participation in the carrying out of the environmental audit in regard to the quarry as several of the neighbours completed the social impact assessment forms.

Carrying the project of a quarry cannot per se be offensive as indeed there are many such projects being carried out in many parts of the county and the Ngong area cannot be the exception. What would be of concern is whether the project would in the words of Lord Denning in the English Case of **Attorney General vs. P.Y.A Quarries Ltd (1957) 2Q.B 169** be said to constitute public nuisance when he observed:-

“It is a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large”.

In the instant case it is not entirely clear whether the plaintiff is seeking the injunctive relief on the basis of the alleged encroachment of about 2 metres onto her property and the damage to her fence or on the basis of the quarrying being a nuisance. In case the injunctive relief is sought on the basis of the “lost land” and the damaged some wall the plaintiff has clearly ascribed values to these and the report by precision Valuers limited exhibited by the plaintiff is precise in regard to this.

It is not disputed that the defendants are carrying out quarrying activities on land title number Ngong/Ngong/56558 which shares a common boundary with the plaintiffs land title number Ngong/ngong/49435. It is probable that the plaintiff considers the defendants activities to be a nuisance and in some way affecting her enjoyment of her adjacent parcel of land but in my view the test ought to be whether the degree of the private nuisance is of such a degree as to constitute unreasonable user by a person of his land to the detriment of his neighbour. There is always the question of degree whether the interference with the comfort or convenience is sufficiently serious to constitute a nuisance.

The defendants have averred that they are carrying out the quarrying activities as an economic activity and it has not been shown that they have failed to comply with any requirement under the provisions of the Environmental Management and Co-ordination Act of 1999 (NEMA). The plaintiff in the instant application produced a valuation report that indicated that as a result of the quarrying activities upto about 2 metres of her land along the stretch of the boundary has been rendered unusable but there was no suggestion that this was likely to increase.

Although the plaintiff has raised concerns that the defendants quarrying activities are not environmentally friendly and that they pose serious environmental concerns the plaintiff did not adduce any evidence from environmental experts who would have shed light on whether or not the quarrying activity was environmentally hazardous or not.

On the basis of the material placed before the court and upon consideration of the submissions made by the parties I am not persuaded that the plaintiff has made out a prima facie case with a probability of success to enable the court to grant the injunctive relieve sought.

Indeed even if a prima facie case had been established I am not satisfied that the damage suffered by the plaintiff would be such as would not be adequately compensated in damages. The plaintiff has claimed damages of Kshs. 450,000/= for lost land through encroachment and the valuer has assessed the value of the damaged stone fence at Kshs. 550,000/=. There was no evidence tendered to show any cracks in the plaintiffs land was due to use of explosives in the quarrying exercise and at any rate this would have required an environmental expert to relate the cause of the alleged cracks to the defendant activities of quarrying on the adjacent parcel of land. No such evidence was availed by the plaintiff.

In the premises and for all the reasons set out above I find that the plaintiff's application is devoid of merit and I order the same dismissed with costs to the defendant.

The interim order of injunction granted in this matter is ordered discharged.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant