



REPUBLIC OF KENYA



**Njoki & another v Njoki (Environment & Land Case 23 of 2021)
[2025] KEELC 3242 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 23 OF 2021**

BM EBOSO, J

APRIL 7, 2025

BETWEEN

SYLVIA WANGECI NJOKI 1ST PLAINTIFF

JOYCE NJOKI WAWERU 2ND PLAINTIFF

AND

JOHN CHEGE NJOKI DEFENDANT

JUDGMENT

1. The dispute in this suit relates to the use of land parcel number Makuyu/Kimorori/ Block III/2136 owned by the defendant. The land is, however, still registered in the name of Loran Wanjiru Nyoike. The plaintiffs are daughter and mother. They allege that, at all material times, the defendant was undertaking excavation works on his land and the said excavation works were causing damage to their abutting properties. Among other reliefs, they want this court to issue a permanent order restraining the defendant against undertaking further excavation works on his land. Before I analyse and dispose the issues that fall for determination in the suit, I will briefly summarize the parties' respective cases, evidence and submissions.

Plaintiffs' Case

2. The plaintiffs initiated this claim at Muranga ELC as Muranga ELC case No. 21 of 2020 through a plaint dated 10/9/2020. The suit was transferred to Thika ELC because one of the plaintiffs worked at Muranga Law Courts. On 6/6/2023, prior to commencement of trial, the plaintiffs made an oral application seeking to amend the plaint in terms of the description of the defendant's parcel of land to read Makuyu/Kimorori/Block III/2136 instead of Makuyu/Kimorori/ Block III/2138. The oral application was not opposed. Consequently, the oral plea for amendment was granted.
3. In summary, the plaintiffs' case is that they own land parcel numbers Makuyu/Kimorori/Block III/1288 and 1287 respectively. Each of the parcels measures approximately 0.2025 hectares. The



defendant's land, Makuyu/Kimorori/Block III/2136, abuts the plaintiffs' parcels. [For convenience, I will refer to the plaintiffs' respective parcels as "parcel number 1288" and "parcel number 1287" respectively]. The defendant's parcel of land will be referred to as "parcel number 2136". The plaintiffs contend that their two parcels are agricultural properties within Muranga County and are extensively developed. It is their case that they have their respective homes on the parcels and that, in addition, they have rental units on the properties. They contend that the defendant undertook deep and extensive excavation works at the boundary between his land and their two parcels and caused damage to their respective properties, including the existing boundary wall and the premises on their parcels. It is their case that the defendant was reckless, negligent, spiteful and indifferent in his actions and conduct.

4. The plaintiffs seek: (i) a permanent injunction restraining the defendant from undertaking the excavation works on his parcel or on its boundary with the plaintiffs' respective parcels; (ii) as an alternative relief, an order decreeing the defendant to compensate the plaintiffs for their parcels of "land and the property" at the current market value "per the filed report"; (iii) an order decreeing the defendant to pay the plaintiffs special damages at Kshs. 40,000 paid for the assessment report; and (iv) an order awarding the plaintiffs costs of the suit.

Defendant's case

5. The defendant filed a statement of defence dated 13/10/2020. He admitted that he owns land parcel number Makuyu/Kimorori/Block III/2136 but denied "being in possession" of the land at any material time. It is his case that he bought the property with the intention of building a residential home on it in the near future. He states that he only visits the land on few occasions, adding that his property is environment-friendly and is not in any way injurious to plants, human life, buildings or the general habitat. He denies negligence, spite and/or recklessness as particularized. He urges the court to reject the plaintiffs' claim.

Plaintiffs' Evidence

6. Peter Gitau Ngugi testified as PW1. He stated that he was a registered land valuer and he had practiced for over 30 years. He added that on instructions from the plaintiffs, he carried out valuation on land parcel numbers Makuyu/Kimorori/Block III/1287 and 1288. He assessed the value of parcel number 1287 together with the developments thereon at Kshs 20,000,000. He assessed the value of parcel number 1288 together with the developments thereon at Kshs 8,500,000. He produced his valuation report as an exhibit. Besides giving the above open market values of the two properties, PW1 stated as follow:

During our inspection the mining was in progress. We noted that John Chege has reserved a buffer of between three and seven meters and had planted trees to mark the boundaries. However, he has started excavating the reserve disturbing the stability of our clients' land.

The excavation is done to mine the stones underneath. A small portion next to parcel 1288 has suffered a slight landslide. If excavation continues this might cause serious destruction to our clients' properties. We recommend stoppage of further excavation and construction of reinforced concrete retention wall.

Parcel 1288 has no such buffer."

7. During cross examination, he stated that part of parcel number 1288 is not suitable for development, adding that there is a buffer zone of between 3 and 7 metres from the common boundary towards the inside of the defendant's land. PW1 added that parcel number 2136 is adjacent to a Government



Quarry but it is reserved for agricultural use. In re-examination, he stated that the Government Quarry neighbours all the three properties.

8. Syliva Wangechi Njoki testified as PW2. She adopted their joint written statement dated 10/9/2020. She produced 13 exhibits. She confirmed that they paid the valuer Kshs. 40,000 as valuation fees. She stated that they sought reliefs in court because the defendant who owns land parcel number 2136 was excavating into their boundaries and had failed to heed their request to him to stop the excavation.
9. During cross-examination, she stated that she owns parcel number 1288 and that she acquired it in 2014. She added that at the time of purchasing it, half of it had been excavated. She did not know who had excavated it. She added that upon purchasing the property, she purchased soil and filled it up to reclaim it. She stated that the property has rental properties and trees. She added that the land slide which happened prior to the inspection by the valuer was caused by a heavy downpour and the fact that there was no support on the adjacent land due to excavation.

Defendant's Evidence

10. Zachariah Makenzie Ndeti testified as DW1. He was a land valuer based in Thika. He received instructions from the defendant's Advocates, to inspect Makuyu Kimorori/Block III/2136 and examine its boundaries with Makuyu/Kimorori/Block III/1287 and 1288. He was required to establish the land use on parcel number 2136 and the effect of its land use on parcel number 1287 and 1288.
11. DW1 stated that he established that parcel number 2136 had a disused quarry, adding that quarrying activities had ceased on the land and that grass and vegetation had started growing on the land. DW1 added that the portion not affected by the quarrying activities was firm and had trees and vegetation. He stated that parcel numbers 1287 and 1288 had a reinforced stone boundary wall which was intact, adding that the two properties had double story permanent structures and there was an ongoing construction.
12. DW1 added that at the time of inspection, one beacon was loose. He attributed this to the fact that the beacon was not deep enough, adding that the top soil had been eroded. He stated that there was no ongoing excavation, adding that properties neighbouring parcel number 2136 had disused quarries. It was his evidence that the buffer zones between the properties had vegetation and had not been interfered with. He emphasized that there was no damage to the properties bordering parcel number 2136. He produced his report.
13. During cross-examination, he stated that he visited the suit properties on 26/10/2021, adding that at that time he did not know there was a pending case in court. He added that he did not involve the plaintiffs during his inspection. He admitted that he did not enter parcel number 1287 and 1288 during his visit, adding that he focused on examining the impact of land use activities on parcel number 2136 on the boundaries of parcel numbers 1287 and 1288.
14. During re-examination, he stated that although he did not enter parcel numbers 1287 and 1288, he was able to see the developments and the features on the two properties and the ongoing construction. He stated that what he prepared and produced was simply a report as opposed to a valuation report.
15. John Chege Njoki [the defendant] testified as DW2. He adopted his undated witness statement. He produced four exhibits, among them, a copy of the title relating to parcel number Makuyu/Kimorori/Block III/2136. His oral evidence-in-chief was that he purchased parcel number 1236 with a view to building a residential house on it.



16. DW2 stated that in June 2020, there was heavy rain in the area and this caused his neighbour's beacon to fall, adding that the beacon was not firm on the ground because "it had not been planted steadily and firmly onto the ground." He stated that it was after the rainfall that the 2nd defendant threatened to report him "for the beacon having fallen". He added that the 2nd defendant claimed that there was excavation happening in his land but he contested this and explained to her that the beacon fell due to the heavy downpour. He further told her that the alleged excavation may have been happening in a different neighbouring property which had an excavation machinery parked there.

Plaintiffs' Submissions

17. The plaintiff filed written submissions dated 7/11/2024 through M/s Kirubi Mwangi Ben & Company Advocates. Counsel for the plaintiffs outlined background to the dispute and cited the principle in *Rylands Vs Fletcher*. Counsel argued that the defendant ought to be mindful of the owners of adjacent land, adding that because the defendant disputed the excavation, this was a manifestation of his regret over his actions, hence the injunctive order sought will not prejudice him.
18. On whether the plaintiffs deserve the reliefs sought in the plaint, counsel submitted that the plaintiffs proved their case on a balance of probabilities. Counsel added that the water in the pits, the water-logging and the landslides were to be blamed on the defendant because they were a result of the illegal excavation by the defendant. Counsel relied on the decision in *Hurlingham Park Ltd Vs Kingsway Developers Ltd & another* [2020] eKLR; and *James Mwangi Ngatia & another Vs China Road & Bridges Corporation (K) Ltd* [2020] eKLR.

Defendant's Submissions

19. The defendant filed written submissions dated 5/11/2024 through Lilian Marion AssociateS. Counsel for the defendant identified the following as the issues that fell for determination in the case: (i) Whether the plaintiff's pleadings are properly drafted; (ii) Whether the plaintiff's joint witness statement is admissible; (iii) Whether the plaintiffs sued the right party; (iv) Whether there was any evidence of excavation; (v) Whether the plaintiffs have established any loss or damages to their property; (vi) Whether the plaintiffs proved the particulars of negligence by the defendant; (vii) Whether the plaintiffs participated in the alleged excavation; and (viii) Whether the plaintiffs face any prejudice if their prayers are not granted.
20. On whether the plaintiffs' pleadings are properly drafted, counsel argued that according to the orders sought, the plaintiffs refer to land parcel number Makuyu/Kimorori/Block III/2136, Makuyu/Kimorori/Block III/1288 and Makuyu/Kimorori/Block III/1287. Counsel submitted that despite having sufficient time to amend their pleadings, the plaintiffs did not do so while the documents produced in court relate to different properties.
21. On whether the plaintiffs' joint witness statement is admissible, counsel submitted that the plaintiffs filed a joint witness statement and purported to rely on the testimony of the 1st plaintiff yet the 2nd plaintiff did not testify.
22. On whether the plaintiffs sued the right party counsel submitted that the plaintiffs sued the defendant yet the defendant is not the registered owner of parcel number 2136. Counsel argued that the actual registered owner is Lorani Wanjiru Nyoike who is deceased. Counsel contended that the plaintiffs should have sued the personal representatives of Lorani Wanjiru Nyoike.



23. Counsel argued that the plaintiffs' expert witness testified that he did not find any excavation happening on parcel number 2136 and that, there was ongoing excavation on parcel number 3796 which is a Government Quarry. Counsel contended that this exonerated the defendant from liability.
24. On whether there was evidence of excavation or water-logging on the suit properties, counsel submitted that there was no evidence of any excavation on the defendant's property, adding that no evidence of either mechanical excavation on parcel number 2136 was attested to by the plaintiffs or their key witness.
25. On whether the plaintiffs established any loss or damage to their properties, counsel submitted that the plaintiffs cannot seek to be compensated for damages since their expert witness reported their building was of sound structural condition. Counsel submitted that any damage to the beacon on parcel number 1288 is attributable to the landslide caused by the heavy downpour which the plaintiffs failed to prevent by placing gabions on the land. Counsel contended that the valuation report dated 2/6/2020 only indicates the property value and does not indicate any damage to any of the properties and thus the plaintiffs failed to prove any damages to warrant compensation.
26. On whether the plaintiffs proved particulars of negligence, counsel submitted that no evidence was tendered to prove negligence, adding that no excavation was seen on the defendant's land. Counsel argued that excavation was found on parcel number 1288 belonging to one of the plaintiffs and bordering parcel number 3793. Counsel further submitted that the valuation costs of Kshs.40,000 were never established during trial.

Analysis and Determination

27. The court has considered the parties' pleadings, evidence and submissions. The three key questions that fall for determination in this Judgment are: (i) Whether exclusion of Lorani Wanjiru Nyoike renders the plaintiffs' suit fatally defective; (ii) Whether, at all material times, the defendant was undertaking injurious and unlicensed excavation on land parcel number Makuyu Kimorori/Block III/2136; and (iii) Whether the reliefs sought in the plaint are available. I will be brief in my analysis of the issues.
28. Does the exclusion of Lorani Wanjiru Nyoike render this suit fatally defective? The defendant takes the view that this suit is fatally defective because Lorani Wanjiru Nyoike, who is still the registered proprietor of land parcel number 2136, was not joined as a party to the case. He contends that because she is still the registered proprietor, she should have been joined as a party to the case. The plaintiffs do not agree.
29. The dispute in this suit revolves around the question of use of parcel number 2136 which is beneficially owned by the defendant. The plaintiffs allege that injurious and unlicensed excavation were taking place on parcel number 2136. The person to answer a claim of this nature is the owner or possessor of the land on which the injurious and unlicensed excavation is alleged to be happening.
30. In paragraph 3 of his statement of defence, the defendant admitted ownership of parcel number 2136 in the following terms:

“The defendant admits the contents of paragraph 4 to the extent that he is the owner of Makuyu/Kimorori/Block III/2136 but denies being in possession of the same at any material time of this suit. He further states that he bought the property with the intention of building a residential home in the near future.”



31. In paragraph 2 of his written witness statement which he adopted during trial as part of his sworn evidence-in-chief, the defendant stated as follows:

“I am the registered owner of Makuyu/Kimorori/Block III/2136 which I bought so as to build a residential house. I was unable to gather finances to facilitate this building project thus the land has stayed bare to date. I visit it once in a while to ensure no interference by strangers or excavation by nearby land owners.”

32. It is clear from his statement of defence and from his sworn evidence that the defendant admitted that he is the beneficial owner of land parcel number Makuyu/Kimorori/Block III/2136. In the circumstances, there was no need to join Lorani Wanjiru Nyoike as a party to this case. Her exclusion does not render the plaintiffs’ suit defective

33. Was the defendant undertaking injurious and unlicensed excavation on land parcel number 2136? The plaintiff contends that the defendant was at all material times engaged in injurious and unlicensed excavation on parcel number 2136. The defendant denies that and states that in June 2020, there was a heavy downpour which caused his “neighbour’s beacon to fall as it had not been planted steadily and firmly onto the ground”. The defendant did not identify the neighbour by name.

34. The defendant added that after the rainfall “the 2nd defendant” (sic) threatened to report him in relation to the fallen beacon. The defendant blamed the heavy downpour for the fallen beacon. He further testified that the excavation was happening on a neighbouring parcel which he did not identify.

35. Besides the evidence of the 1st plaintiff and that of the defendant, the parties to this suit led evidence by their respective land valuers who testified as PW1 and DW1 respectively. PW1 testified that he visited land parcel number 2136 on 27/5/2020 when excavation was still ongoing. He took pictures which form part of his report. He stated as follows at page 6 of his report:

“During our inspection the mining was in progress. We noted that John Chege has reserved a buffer of between three and seven meters and had planted trees to mark the boundaries. However, he has started excavating the reserve disturbing the stability of our clients’ land.

The excavation is done to mine the stones underneath. A small portion next to parcel 1288 has suffered a slight landslide. If excavation continues this might cause serious destruction to our clients’ properties. We recommend stoppage of further excavation and construction of reinforced concrete retention wall.

Parcel 1288 has no such buffer.”

36. DW1 on the other hand visited land parcel number 2136 in October, 2021. His evidence was that there were no ongoing excavation works on the land when he visited it. It is, however, noted that prior to that, the Court (Kemei J) had on 15/10/2020 issued a consent interlocutory order restraining the defendant against carrying on excavation works on land parcel number 2136. It is therefore correct to say that the court had ordered stoppage of excavation works on the land.

37. PW1 was cross-examined and was consisted that excavation works were taking place on parcel number 2136 when he visited the parcel in May 2020. Given the totality of the above evidence, on the balance of probabilities, the court finds that the plaintiffs demonstrated existence of injurious and unlicensed excavation/stone mining as at the time of instituting this suit. That is my find on the second issue.

38. On the availability of the reliefs sought, prayer 1 is a plea for an order restraining the defendant against undertaking injurious excavation works on his land. The plaintiffs have demonstrated that the



impugned excavation works are unlicensed by NEMA. In the circumstances, the court takes the view that the relief is available.

39. Prayer (b) was pleaded as an alternative to prayer (a). In paragraph 11 of their written submissions dated 7/11/2024, the plaintiffs urged the court not to consider the alternative relief. The court will, in the circumstances, not consider it.
40. On the plea for special damages of Kshs 40,000 and costs of the suit, it emerged during trial that unlicensed excavation has been done on the three parcels of land in the past. Indeed, PW1 testified that their parcels are largely reclaimed excavation fields (mines). Put differently, unlicensed excavation on the three parcels has been the norm. Given the above circumstances, the plea for special damages in the sum of Kshs 40,000 and for costs of the suit is unmerited.
41. Lastly, the defendant's advocates submitted that the plaintiffs cited strange parcels of land. I did observe in paragraph 2 of this Judgment that the plaintiffs made an oral application for amendment and the amendments relating to the parcel number of the defendant's land were effected.
42. The defendant also took issue with the joint witness statement of the plaintiffs. A written witness statement becomes a sworn testimony when the witness adopting it takes oath and adopts it. The defendant had the opportunity to object to the adoption of the witness statement. He did not. He instead consented to the adoption. His objection at this point is belated and is rejected.
43. In the end, the court finds that the plaintiffs have proved their claim on a balance of probabilities and partially allows it in the following terms:
 - a. A permanent injunction is hereby issued restraining the defendant against undertaking unlicensed excavation works (mining) on land parcel number Makuyu/Kimorori/Block III/2136 or undertaking any excavation at or near the boundary with the plaintiffs' respective parcels identified as Makuyu/Kimorori/Block III/1288 and Makuyu/Kimorori/Block III/1287.
 - b. Parties shall bear their respective costs of this suit.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF APRIL 2025

B M EBOSO [MR]

JUDGE

In the Presence of

Ms Githinji for the Defendant

Mr Tupet – Court Assistant

