

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 298 of 2005

SYLVIA C. ENDERE.....PLAINTIFF

VERSUS

KAREN ROSES LTD.....DEFENDANT

RULING

The plaintiff filed suit seeking orders of permanent injunction to restrain the defendant by itself or by its agents from excavating, constructing, directing or channeling storm water, waste water, or any other substances into the plaintiff's dam situate in parcel number 599, Eldama Ravine or into the neighbouring dam at Simotwet Primary School. Contemporaneous with filing suit the plaintiff, made an application under the provisions of **Order XXXIX rule 1(a), 2, 2A and 9** of the **Civil Procedure Rules and Section 3A** of the **Civil Procedure Act** seeking the order of this court to restrain the defendant by itself or through its agents from trespassing into, excavating, constructing, alienating or channeling storm water or waste matter or any other substance into the water dam at parcel number 599 or in the grounds inside Simotwet Primary School pending the hearing and determination of the suit. The application is supported by the annexed affidavit of Silvia Endere. She swore a supplementary affidavit in further support of the application. The grounds in support of the application are that the plaintiff contend that the defendant intended to channel waste matter and storm water into the plaintiff's dam which is situate on plot number 599 which activity the plaintiff is apprehensive would pollute her source of water to the detriment of her livestock, poultry and the surrounding environment.

The application is opposed. Joyce Gema, the Human Resource Manager of the defendant company has sworn two affidavits in opposition to the said application. In summary, she has deponed that the defendant has not directed the storm water or any waste water to the dam situated in the parcel of land belonging to the plaintiff. She has deponed that the defendant was requested by members of the local community and particularly the members of Simotwet Primary School community to desilt the dam situated in the school compound which had become heavily silted and therefore was no longer serving as a reservoir for water for use by the community. She deponed that the defendant acceded the request of the local community and had desilted the said dam. She conceded that the storm water from the defendant's green houses were directed at the said dam. She however denied that the said storm water was being directed to the dam which was situated in the parcel of land owned by the plaintiff in that there were waste effluent from the Flower Farm which were being released to the said dam.

At the hearing of the application, I heard the submissions made by Mrs Omwenyo learned counsel for the plaintiff. She submitted that the plaintiff had brought this suit to enforce her proprietary rights over her parcel of land which was in danger of being polluted by the activities of the defendant. She submitted that under **Section 3** of **The Environmental Management and Coordination Act (Act No. 8 of 1999)** the plaintiff was entitled to live in a clean environment without interference by any person. She submitted that the defendant, a commercial farmer had channeled storm and waste water from its farm to the parcel of land owned by the plaintiff and the neighbouring Simotwet Primary School. She submitted that no environmental impact assessment was undertaken as required by **The Environmental Management and Coordination Act** to establish whether it was environmentally safe for the defendant to direct the storm and waste water to the dam at Simotwet Primary School and at the plaintiff's parcel of land. She submitted that the plaintiff had therefore established a prima facie case and should be granted the order of injunction sought pending the hearing and determination of the suit filed herein.

In response, Mr. Koech learned counsel for the defendant submitted that the plaintiff had no case against

the defendant. He submitted that the defendant's parcel of land was about a kilometre away from the defendant's parcels of land. He submitted that the defendant had complied with the law before the said flower farm was established. He submitted that an environmental impact assessment report had been prepared and had been approved by **The National Environmental Management Authority (NEMA)** before the said project was implemented. He further submitted that the dam at Simotwet Primary School was rehabilitated by the defendant after it was requested by the members of the local community. He submitted that the said rehabilitation was undertaken after the local community had been consulted and after they had given their approval. He denied the allegation by the plaintiff that there was effluent which came out of the rose farm and therefore polluted the environment including the plaintiff's parcel of land.

He further submitted that the only discharge that came from the defendant's parcel of land was the storm water which accumulated from the polythene roofs of the green houses. He argued that the said storm water did not have any pollutants. He further submitted that the said storm water accumulated at the dam at Simotwet Primary School and did not spill over to the dam at parcel of land owned by the plaintiff. He argued that the local community living within the vicinity of Simotwet Primary School were happy with the work that the defendant had undertaken in desilting the dam. He therefore submitted that for the reasons given, the plaintiff had not established a prima facie case and therefore the application for injunction should be disallowed.

I have considered the rival arguments made by the parties to this application. I have also read the pleadings that were filed by the parties in this suit. The issue for determination by this court is whether the plaintiff has established a prima facie case to enable this court to grant her the order of injunction sought. Certain facts of this case are not in dispute. It is not disputed that the defendant is the owner of parcel No. 572 where it has erected green houses to grow flowers for export. The plaintiff is the owner of parcel No. 599 which is on the lower side in terms of land gradient and topography to the parcel of land owned by the defendant. The parcel of land of the plaintiff is about a kilometre away from the parcel of land owned by the defendant.

Before the defendant undertook the project on its parcel of land, it complied with the provisions of **The Environmental Management and Coordination Act**. It undertook an environmental impact assessment before the said project was commenced. The said assessment was approved by NEMA. The defendant had no problem with the neighbours until it rehabilitated a dam which is situated in a parcel of land owned by Simotwet Primary School. The plaintiff's parcel of land is next to the said primary school. The plaintiff has also built a dam on her parcel of land. From the affidavit evidence on record, it is apparent that the defendant rehabilitated the dam at Simotwet Primary School after it was requested to do so by the members of the local community. It is also apparent that the defendant did not rehabilitate the dam at Simotwet Primary School as an act of benevolence or philanthropy. The defendant would benefit by having the storm water which would be accumulated by the green houses during the rainy season, directed at the said dam. Also waste water from the defendant's farm would be channeled to the said dam.

The plaintiff's complaint is that the defendant undertook the said rehabilitation of the dam without first conducting an environmental impact assessment. She further complains that the storm water from the defendant's farm has spilled over to the dam in her parcel of land thereby polluting it. Having evaluated the facts of this case, it is clear that no environmental impact assessment report was prepared nor was approval of NEMA sought before the said dam at Simotwet Primary School was desilted by the defendant. Although the defendants submitted that the local community residing within the vicinity of Simotwet Primary School had requested them to undertake the said rehabilitation of the dam and that they had approved the works undertaken by the defendant, it is clear that the defendant undertook the said project before seeking the authority of NEMA as provided by **Sections 58-68 of the Environmental Management and Coordination Act [EMCA]** and the **Second Schedule paragraph 4 of the said Act**. Furthermore the defendant was required in law to consult all the parties likely to be affected by the said dam in coordination with NEMA before it undertook the said rehabilitation of the dam.

In this case, it is evident that the defendant did not consult the plaintiff and as a result of which the plaintiff is aggrieved and has been affected by the spill over from the dam at Simotwet Primary School to

the dam at her parcel of land. As no environmental impact assessment was done, the concern raised by the plaintiff that the storm water and the waste water from the defendant's parcel of land would be channeled to her parcel of land was not therefore addressed. Her complaint that the said storm and waste water were likely to pollute the dam at her parcel of land could well be true. The defendant has submitted that the plaintiff is a busybody who will not be affected by the rehabilitation of the dam at Simotwet Primary School. Having evaluated the facts of this case, it is clear that the plaintiff is not a busybody. She is within her rights as provided for under **Section 3 of The Environmental Management and Coordination Act** to enforce the provisions of the said Act if she was of the view that the defendant was likely to contravene the provisions of the **said Act** and cause harm to the environment.

In the circumstances of this case this court is persuaded that that the plaintiff has established a prima facie case as to entitle her to the order of injunction sought pending the hearing and determination of the suit. The plaintiff has established that the defendant breached the law when it purported to channel the storm water at the dam situated at Simotwet Primary School without first complying with the provisions of the **Environment Management and Co-ordination Act**. No environmental impact Assessment report was prepared before the defendant undertook the said project. The defendant by itself or its agents is hereby restrained by means of a temporary injunction from trespassing onto, excavating, constructing, alienating or channeling storm water or waster matter or any other substance into the dam in the plaintiff's parcel of land (parcel No. 599) or in the dam in the grounds of Simotwet Primary School next to the plaintiff's dam pending the hearing and determination of the suit filed herein. The plaintiff shall have the costs of the application.

DATED at NAKURU this 31st day of March, 2006.

L. KIMARU

JUDGE