REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 495 of 2006

DANIEL NGUMBA KARANJA …….……..
PLAINTIFF

VERSUS

BEATRICE WAMBUI MBOGO …….……
DEFENDANT

RULING

By a plaint filed in court on 15th May, 2006, Daniel Ngumba Karanja sued Beatrice Wambui Mbogo seeking a permanent injunction "**to restrain the defendant by herself, her servants agents etc etc from carrying out quarry blasting operations on Land Parcel No. NGONG/NGONG/7335**." The plaintiff sought a further injunction to restrain the Defendant, "**from repeating or continuing the said nuisance or damage of a like, kind or at all**". The plaintiff further prayed for damages, and costs of the suit.

Filed on the same day as the suit was the application for injunction seeking temporary orders until the hearing of the application *inter partes* and or pending the hearing and determination of the suit.

The plaintiff was not granted any orders when the application was first tabled in court for hearing on 16.5.2006.

The plaintiff's application was supported by an affidavit dated 15th May, 2006. The main complaint in the affidavit according to the plaintiff's averments is,

"**the defendant uses high explosives to blast the rocks for excavation purposes and the blasting causes vibrations loud noise and flying debris which are felt in or fall into my property and which cause a nuisance and pose grave danger to my property and the lives and health of my property.**"

Attached to the affidavit was a map of the area, showing that the 2 plots are adjacent to each other.

There was also the certificate of official search which confirms that the property known as **NGONG/NGONG/7335** is the property of Beatrice Wambui Mbogo, the defendant.

The further annexture was the bundle of photos to show the damage done to the plaintiff's house as a result of the defendants explosives.

The plaintiff caused two further affidavits to be filed on 30th June, 2006at my direction. One was sworn by David Nempasha, the area chief of Nkaimurunya location of Ngong' Division in Kajiado District.

He confirmed that the received "**a stop**" order from the Director of Compliance and Enforcement with NEMA, with instructions to serve it on the defendant Beatrice, an inhabitant of his location, and he served the said Notice on Beatrice on 6th December, 2005 at the quarry. A copy was also served on OCPD Ngong and the Divisional officer, Ngong'.

The second affidavit was sworn by Maurice Mbegera, a Director of the National Environment Management Board, (NEMA) responsible for Compliance and Enforcement.

He confirmed that NEMA received complaint from Daniel Ngumba Karanja, the plaintiff regarding quarrying activities being carried out on land **Ref. No. NGONG/NGONG/7335** which is adjacent to the defendant's land.

According to the affidavit, NEMA sent an environmental officer to the site to investigate the complaint by the plaintiff.

That indeed investigations established that quarrying activities were being carried out without an environmental impact assessment audit having been carried out as required under EMCAct.

Maurice then issued a stop order dated 5.12.2005 requiring the defendant to "**stop all quarry activities forthwith and at least not later than 7 days from the date of the stop order**". A copy of the said order was attached. It is the order which the Chief confirmed in his affidavit that he served on the defendant on 6th December, 2005.

The defendant filed a replying affidavit on 30.5.2006, dated the same day.

In it she denied the averments in the plaintiff's affidavit and at para 17 thereof, she stated,

"**contrary to the allegations set out in para 10 of the plaint, the blasting activities are carried out 70 meters away from the applicant's residence, which is a safe distance".**

The defendant also averred that:

"**the blasting activities carried out on my property are legal as they are properly licenced by the Department of Mines and Geology and can only be revoked by the Commissioner of Mines…"**

The defendant also denied having been served with any order from the National Environment Management Authority (NEMA).

The defendant annexed to the affidavit, "**Authority to Use Blasting Materials on Your Land Plot No. NGONG/NGONG/7335 Gataka".**

She contended further that the said authority was issued on 12.10.2004, by the Ministry of Environment and Natural Resources (Mines and Geology Department).

The plaintiff filed a further affidavit in response to the defendant's replying affidavit. The same is dated 9th June, 2006. In it the plaintiff said that the authority annexed to the defendants affidavit said to have been issued by the Ministry of Environment and Natural Resources (Mines and Geology Department) was issued in error as under the Environmental Management Coordination Act, 1999

"**no quarry and open cast extraction of stone can take place without an environmental impact assessment being carried out and an environmental impact assessment licence granted by National Environmental Management Authority (NEMA)".**

Both advocates representing the parties made oral submissions in court, based on the averments in the various affidavits.

Miss Ngugi for the defendant relied on Section 3(3) of the Environmental Management and Coordinating Act, 1999, on

"**who can sue under the Act**".

She also relied on Section 68 on "**environmental audit**" and the first schedule to the Act, found in Section 148, which provides, *inter alia,* that

"**Where the provisions of any such law conflict with any provisions of this Act, the provisions of this Act shall apply".**

The 1st schedule gives a list of laws that were in force before this Act, and whose provisions if found to be in conflict with this Act, the provisions of the Act, shall prevail. Such laws include Natural Resources.

Miss Ngugi also relied on texts from the 3rd Edition of Halsbury's Laws and another one from Clerks and Lindsell on Torts.

According to Miss Ngugi, reading the authorities, she submitted that a nuisance is actionable in tort and the court has authority to take action, and further that though one has the right to do what they want on their land, that action must not affect the neighbours.

Regarding the averments by the defendant on the authority granted to her by the Ministry of Environment and Natural Resources on 12.10.2004, under the Explosive Act, Cap.115, Miss Ngugi submitted that under Section 24 of the same Act, the Inspectors appointed under the Act have no authority to produce such licences.

Miss Ngugi submitted finally that excavation is being done in contravention of the law as contained in EMCA, and further that excavation is causing substantial damage to the plaintiff's property built in 1990, where he lives with his family. My recent decision in **PETER KINUTHU MWANIKI & OTHERS vs PETER NJUGUNA & OTHERS** (HCCC No. 313 of 2000) was relied on, particularly at page 17 on failure to obtain an environmental impact assessment licence…".

Miss Mitiema for the defendant opposed the application submitting that the plaintiff did not annex a copy of the title deed to the property he lives in, to prove that he is the owner.

She submitted further that the plaintiff must show that he has suffered damage, which is not visible from the photos which were annexed. That further,

the plaintiff's loss can be compensated.

She challenged the service of the "**stop order**" issued by NEMA as being "**not proper**". According to the advocate, the defendant, "**has taken reasonable measures to ensure that the plaintiff's property is not damaged**".

In a rejoinder, Miss Ngugi submitted that the ownership of property by the plaintiff is not an issue in this case as it has not been raised in any of the pleadings.

I have read the pleadings on record so far, and considered the oral submissions by both Learned Counsel, and the averments in the various affidavits.

My reading of the plaint and defence dated 21.6.2006, confirm that the suit is based on negligence and nuisance. The facts are in the pleadings referred to above.

Of concern to me at this stage, is the authority the defendant relies on for continuing to excavate the quarry adjacent to the plaintiff's home.

The authority dated 12.10.2004, was issued under Rule 78 of the Explosives Act, Cap. 115 Laws of Kenya. However, reading the Act, I find that there are only 15 Rules headed, "**THE EXPLOSIVES (FIREWORK) RULES**".

There is no Rule 78. What there is is Section 78 Part X headed "USE". It provides at rule (1)

"**any inspector, verbally or in writing, may prohibit, restrict or regulate the use of explosives in places where in the opinion of an inspector, owing to the close proximity of buildings blasting may appear to endanger life or property".**

And section 78(2) provides,

"**The use of explosives on or in the immediate vicinity of any public thoroughfare is prohibited, except under and in accordance with the written approval of an inspector."**

There being no Rule 78(2) of Cap 115, the authority issued to the defendant to extract building stones by R.O Ragot, Inspector of Explosives vide his letter Ref No. X/5/56/(127) is "**misleading"** and otherwise "**suspect**".

The plaintiff and defendant's plots are adjacent to each other, so by the wording of Section 78(1), the Inspector concerned was supposed to

"**verbally or in writing prohibit or regulate the use of explosives, where it may appear to endanger life or property".**

I have not found anywhere in this authority issued by R.O Ragot, where he addressed himself to the provisions of Rule (1) of Section 78. He instead "rushed" to issue the authority under a non existent Rule, but invoked the wording of Section 78(2). This I find was most "**mischievous**" and "**deceitful**".

With my findings above on the authority issued by R.O Ragot, and relied on by the defendant in "**blasting activities in her plot**" I find further that the defendant has no authority whatsoever to carry on the activities she is currently undertaking in her plot, based on the documents R.O Ragot gave her.

Now turning to the Stop Order produced by the plaintiff, I find that it is valid, the same having been issued under the Section 108 of the Environmental Management and Coordination Act (EMCA) 1999. I am also satisfied from evidence on record that it was served on the defendant.

Paragraph 2 of that Stop Order directed the defendant to,

"**carry out and submit an Environmental Audit of your quarry operations to guide you on good environmental management".**

There was no evidence in the replying affidavit by the defendant that an environmental audit was carried out as directed.

The defendant raised the issue of ownership of the plot by the plaintiff, but the decision of **PETER KINUTHIA MWANIKI vs PETER NJUGUNA GICHEHA** (HCCC No. 313 of 2000), produced and relied on, does show that the court settled the issue of locus to bring suits under EMCA, The Environmental and Management and Coordination Act, 1999, by the provisions of Section 3(3) of the Act.

From the points I have considered in this application, I am satisfied that the plaintiff has made out a prima facie case with a probability of success, and I proceed to grant prayers 2, 3 and 4 of the Chamber Summons application dated 15.5.2006, filed in court the same day.

DATED at NAIROBI this 4th day of August, 2006.

JOYCE ALUOCH

JUDGE