



REPUBLIC OF KENYA



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Thimba & 2 others v County Government of Kiambu (Environment & Land Case 1408 of 2013) [2022] KEELC 15638 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1408 OF 2013
LN MBUGUA, J
DECEMBER 20, 2022**

BETWEEN

HIRAM NGUGI THIMBA 1ST PLAINTIFF

JOHN KAMAU MUNGAI 2ND PLAINTIFF

LEONARD NJOROGE MUNGAI 3RD PLAINTIFF

AND

COUNTY GOVERNMENT OF KIAMBU DEFENDANT

JUDGMENT

1. By a plaint dated 19th November 2013, amended on 14th February 2017 and Further amended on 16th October 2019, the Plaintiffs contend that they are the registered owners of the parcel of land known as Kabete/Kibichiku/1182. It is their case that the Defendant has illegally trespassed on the suit land and dumped garbage thereon.
2. The plaintiffs therefore seek the following orders;
 - a. A permanent injunction restraining the Defendant, its agents, employees, servants or other persons whatsoever from dumping garbage, soil and or otherwise destroying, entering or interfering in any way whatsoever with the parcel of land known as Kabete/Kibichiku/1182.
 - b. A mandatory injunction compelling the Defendant to remove all the garbage and soil that it has dumped on the suit premises at its own costs and further compelling it to restore the suit premises to its original state.
 - c. An order compelling the OCS of Kikuyu Police Station to enforce the restraining order issued by this Honourable court.
 - d. General damages for trespass and costs and interest.



3. The Defendant filed a statement of defence dated 6th December 2013, amended on 7th August 2017 contending that the suit land is under Kabete Sub County and that it has not trespassed on the plaintiffs' land.
4. During the trial, Hiram Ngugi Thimba, the 1st Plaintiff testified as Pw1 and he adopted his witness statement filed on 13th March 2018 as his evidence in chief and he also produced their bundle of documents bearing an even date as P. Exhibits 1-13.
5. PW1 contends that the Defendant not only started dumping garbage on the suit property, but had also allowed garbage from Wangige Market to be dumped on the said land claiming that the same was a road reserve. These activities prompted the plaintiffs to lodge a complaint with the National Environmental and Management Authority (NEMA). In response thereof, the defendant brought soil to cover the garbage and in the process the family gate and trees planted over 40 years ago were destroyed. The garbage was pushed inside the property and it has also been flowing down to the Gitathuru stream.
6. On cross-examination, Pw1 stated that the suit land borders a road. He was present when Defendant's roller Registration No. KBJ 729U pushed the gate, garbage and soil into the suit land.
7. PW1 further stated that the suit land is a subdivision of Kabete/Kibichiku 225 and that the suit parcel is well demarcated though he did not avail a beacon certificate or a survey map. He confirmed that there is a road construction going on at the site at the moment, but it was not there at the time of filing this suit.
8. PW2, Leonard Njoroge Mungai is also a plaintiff. He adopted his witness statement dated 13th March 2018 as his evidence in chief. He is a brother of Pw1. His evidence is more or less similar to that of pw1 adding that the dumping is affecting the neighborhood and the serenity of the area which has become smelly. He pointed out that when the market is swept, the garbage is dumped in front of their gate. He also pointed out that whenever their family complained about the garbage, the defendant would collect the same but this was not constant.
9. On cross-examination, Pw2 stated that they have since fenced the suit land with iron sheets due to garbage dumping and because there was an ongoing construction of the road. They now use another place to access their homes.
10. PW3, Caleb Nyago introduced himself as an Environmental Impact Assessment and Audit expert. He avers that he was commissioned by the Plaintiffs to conduct an Environmental Impact Assessment (EIA) on the suit land and he produced a report to that effect as an exhibit. He had established that there was solid waste at the site which was degraded. The waste had gone all the way to Gitathuru stream where the waste has now degraded meaning it was not a recent phenomenon.
11. When cross-examined, pw3 stated that he visited the site which is next to a petrol station on 27th January 2021 and found that the suit land is not adjacent to a market. He confirmed the acreage on the title but he did not have a surveyors' report to confirm the same.
12. The case for the defence was advanced by DW1, Peter Kinuthia Mugacha, who adopted his witness statement dated 18th June 2018 as his evidence in chief. He introduced himself as an accountant with the defendant, but he had previously worked at the county in various capacities including sub county administration. His testimony is that the portion of land in dispute is a road reserve which is near Wangige Market where members of the public continually dumped garbage. That the area has since been constructed by KENHA as part of the bypass road.



13. He stated that while in charge of administration at Kabete Sub County, he realized that there was encroachment on the road reserve by traders and he decided to fix it by clearing the ground and the road reserve so as to control the dumping. He testified that the boundary to the alleged encroached land is very clear and the Defendant did not at any time enter into private land as it only concentrated on the road reserve.
14. On cross examination, Dw1 stated that the area where there was dumping is a National Government road reserve but he had no map from a government surveyor to confirm that averment. He further stated that he sent a grader to the site for leveling and later did inspection after the work was done. He confirmed that the Defendant is responsible for control of dumping, so when he took over office, he levelled the garbage in order to plant flowers. He further stated that the Defendant did not remove the garbage because it was on a road reserve and by levelling the garbage, it was just employing temporary measures to control further dumping but they did not put a sign to that effect.
15. The Plaintiffs' submissions are dated 27th June 2022, where it is stated that they have owned and have been in possession of their land since the 1970's when the boundary was fixed and marked by live trees, a barbed wire fence and a gate, a part of which was unceremoniously brought down by the Defendant using its excavator registration No. KBJ 729U.
16. It was submitted that there is adequate evidence that the Defendant trespassed on the Plaintiffs' land dumped soil and garbage thereon and destroyed the Plaintiffs' gate and tress and also allowed dumping of garbage on the suit property. The Plaintiffs submitted that after being ordered by NEMA to remove the garbage, the Defendant dumped soil on top of the garbage and in doing so, it pushed the garbage and the soil unto the Plaintiffs' property. It was further submitted that the Defendants' actions amount to pollution of the environment and are interfering with the Plaintiff's rights to a clean and healthy environment, since the site where the garbage is being dumped is not a designated and or approved dumping site as per the provisions of the [Environmental Management and Co-ordination Act](#) (EMCA).
17. The plaintiffs refute that the dispute is a boundary one, contending that the Defendant has never been the registered owner of the land bordering the Plaintiffs' land.
18. The Plaintiffs also submitted that the Defendant did not call an expert witness to controvert what PW3, an EIA and Environmental Audit expert has testified with regard to the pollution on the subject land and the damage to the environment.
19. The Plaintiffs sought general damages of kshs.10 million and relied on the case of [Rboda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited](#) [2019] eKLR, [Augustine Njagi v Diocese of Meru Trustees \(Registered\)](#) Civil Appeal No.14 of 1997 as well as [Nzioka & 2 others v Tiomin Kenya Limited Mombasa](#) Civil Case No.97 of 2001.
20. The defendant did not file any submissions.

Determination

21. The issues falling for determination are;
 - a. Whether the Defendant has trespassed on the suit land and dumped garbage and if the answer is in the affirmative, whether such actions have occasioned damages to the Plaintiffs.
 - b. What reliefs are available to the plaintiffs.



22. The dispute in this matter concerns waste dumping on the property known as Kabete/Kibichiko/1182. The Defendant admitted that there was dumping going on but contended that the said dumping was on a road reserve along Gitaru Road which is adjacent to the Plaintiffs' property. Dw1 even confirms that he sent a grader to work on the site for purposes of levelling. The photographs availed by the plaintiffs clearly indicate that the garbage and soil were pushed unto the property of the plaintiffs beyond the fence.
23. Even though the defendant has admitted to being responsible for control of dumping of waste, it is still important to set out the legal framework where this responsibility is anchored upon. The provisions of Schedule 4 part 2 (2) (g) of the Constitution stipulate that the functions of the County Government includes:
- “County Health Services including,, refuse removal, refuse dumps, and solid waste disposal”.
24. The manner in which solid waste is to be disposed of, or managed, is set out under EMCA, at Sections 87, 88 and 89.
25. There was no evidence that the dumping site bordering the Plaintiffs' land is a designated dumping site, or that the said site is licensed.
26. In the case of Isaiyah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR. (Dandora Dump site case), the court found that the dumpsite at Dandora was causing pollution and affecting the residents of areas like Korogocho and Mukuru as well the rivers known as Nairobi and Athi, hence precautionary measures had to be undertaken. And in the case of African Centre for Rights And Governance (ACRAG) & 3 others v Municipal Council of Naivasha [2017] eKLR, the court recognized that disposal of waste is a global problem, but the governments need to take positive steps to remedy the situation.
27. I find that the dumping which encroached on the suit land was a violation of the Plaintiffs' right to a clean and healthy environment under Article 42 of the Constitution. What more, the dumping of the garbage had also caused pollution right into a nearby Gitathuru river which means that the effects of the pollution were cascading far and wide. It therefore matters not whether the dumping was at a road reserve or not.
28. I am inclined to find that the 1st Defendant's action of pushing soil and garbage into the suit land constitutes trespass. In his report dated January 2021, PW3 observed that there is untreated solid waste discharged onto the suit land. It includes used plastic bags, burnt used tires, used PET bottles and bottle tops and broken glass. All the stated waste has a negative effect to human and natural environment.
29. What I find astounding is the rather nonchalant attitude of the defendant regarding the issue of waste management and its effect unto the environment and human life. From the records, the plaintiffs had raised the issue of the dumping way back in year 2011. However, the action which the defendant deemed fit to undertake in the rectification of the problem was to dump soil on top of the garbage!. That was clearly a violation of the provisions of Article 10 of the Constitution on national values and principles of governance relating to human dignity, social justice, equity, good governance, integrity, transparency, accountability and sustainable development. It is clear that the defendant's actions of dumping the soil only worsened an already bad situation and amounted to a cover up of the defendant's inaction.



30. I find that the Plaintiffs have established a case for an award of general damages. In *Dodd Properties (Kent) Limited and Another v Canterbury City Council and others* [1980] 1 All ER 928 cited in *Miaraho Limited v Synohydro Corporation Limited* [2019] eKLR the court stated that:

“The general object underlying the rules for the assessment of damages is, so far as possible by means of monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of be that wrong a tort or a breach of contract....”.

31. In the case of Rhoda Kiilu vs. Jiangxi Water and Hydro Power Construction Limited (2019), eKLR where I awarded damages for trespass at sh 10 million, I cited the case of *Willesden Investment Limited vs. Kenya Hotels Properties Limited* NBI H.C.C.C. N.367 OF 2000 where it was stated that;

“There is no mathematical or scientific formula in these type of cases and that the guiding factors are the circumstances in each case”.

32. Had the defendants made attempts to reasonably deal with the situation of the dumping, perhaps the court would have been lenient on the issue of damages. As the matter stands, the defendant left the situation of dumping to deteriorate over the decades in total disregard of the precautionary principles of the environment. I proceed to award damages of Ksh. 5 million as against the defendant.

33. In the final analysis, judgment is hereby entered for the plaintiffs against the defendant in the following terms;

1. The plaintiffs are jointly awarded the sum of Ksh.5 million as damages for trespass as against the defendant.
2. A permanent injunction is hereby issued restraining the Defendant, its agents, employees, servants or other persons whatsoever from dumping garbage, soil and or otherwise destroying, entering or interfering in any way whatsoever with the parcel of land known as Kabete/ Kibichiku/1182.
3. A mandatory injunction is hereby issued compelling the Defendant to remove all the garbage and soil that it has dumped on the suit premises at its own costs.
4. The defendant is condemned to meet the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mbugua for Defendant

Court assistant: Eddel

